PRIVATE RIGHTS VERSUS PUBLIC POWER: THE ROLE OF STATE ACTION IN ALASKA CONSTITUTIONAL JURISPRUDENCE

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> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.
>
> Benjamin N. Cardozo[1]

I. INTRODUCTION

At the threshold of constitutional litigation stands the barrier of "state action." Traditionally, in order for a litigant to wield a constitutional sword he must first demonstrate that his opponent carries the authority of government; that is, that the *State* is acting in contravention of the litigant's constitutional rights. Absent proof of state action, few of the laudatory limitations on government action may be imposed upon the relationships between private parties.[2]

In recent years individuals have sought to impose constitutional limitations upon the actions of other private individuals. In essence,

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1. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921) (quoting 2 F. GENY, METHODE D' INTERPRETATION ET SOUCRES EN DROIT PRIVE POSITIF § 200, at 303 (1919), *translated in* 9 MODERN LEGAL PHILOSOPHY SERIES 45 (1921)).

2. Leudtke v. Nabors Alaska Drilling, 768 P.2d 1123 (Alaska 1989). The one notable federal exception to this generality is the thirteenth amendment to the United States Constitution, which prohibits the institution of slavery, both by government and individuals. *See* Clyatt v. United States, 197 U.S. 207, 216 (1905).

these litigants argue that the rights delineated in the federal and state constitutions provide not only a *shield* against improper government action, but also a *sword* for use in litigation against others.[3]

The purpose of this article is to examine these issues in the context of retail shopping centers. Specifically, may private individuals or organizations constitutionally limit the public's right of free speech and assembly in their *privately* owned shopping centers? We conclude that they can, for the following reasons.

The state action barrier to constitutional litigation is not an end in itself. Compelling arguments have been made that the federal and state constitutions were only intended to impose limitations upon the government's relations with its citizenry, and not upon the relationships between individual citizens.[4] This conclusion, however, only begs the question of *why* state action is a valuable component in Alaska's constitutional framework. The importance of the state action requirement can only be understood through a philosophical approach to the question, firmly grounded in an understanding of the purpose of the Alaska Constitution.

The documentary history of the Alaska Constitution reveals that its framers understood civil rights and individual liberties described in article I to be limitations on government, not individual citizens. By drafting a constitution based upon this premise, the framers joined in a firmly established tradition of constitutional understanding. The framers of the Alaska Constitution thus did not intend to impose constitutional norms on the relations between individual citizens.

Philosophically, the natural rights described in the Alaska Constitution provide a second basis for the state action requirement. Governmental sovereignty originally vested in the people of Alaska.[5] Through the vehicle of their constitution, the Alaska citizenry granted its government the authority to act on its collective behalf.[6] But that authority is limited by the terms of Alaska's constitution: individual citizens retain their inherent "natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry

3. This metaphor is taken from Woodland v. Michigan Citizens Lobby, 423 Mich. 188, 212, 378 N.W.2d 337, 348 (1985) and Alderwood Assoc. v. Washington Envtl. Council, 96 Wash. 2d 230, 250, 635 P.2d 108, 119 (1981) (Dolliver, J., concurring).

4. *See, e.g.*, Johnson v. Tait, 774 P.2d 185, 190 (Alaska 1989); *Leudtke*, 768 P.2d at 1130 (Alaska 1989).

5. ALASKA CONST. art. I, § 2 ("All political power is inherent in the people. All government originates with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole.").

6. *Id.*

. . . ."[7] Here lies the initial philosophical significance of the state action requirement.

Closely connected to the concept of individual liberty as a basis for the state action requirement is the separation of powers doctrine. Alaska's constitution sets forth a structure of government which places lawmaking power in the hands of the legislature.[8] Directly responsive *elected* officials are granted the power to regulate conduct between private individuals. If, however, constitutional rights are viewed as weapons for private litigants, it necessarily falls to the judiciary to regulate the relations between private individuals. The legislature is thus removed from the process. The longer the reach of the constitutional sword in private disputes, the greater the usurpation of legislative power by the judiciary.[9]

In support of these conclusions, the analysis below is divided into three sections. The first section discusses the well-settled, but varied, federal approach to the state action issue.[10] The next section analyzes the disparate conclusions reached by appellate courts in states that have addressed the state action questions presented by modern shopping centers.[11] Then, the current state of Alaska law is examined, evaluating the philosophical foundations of state action in Alaska. Finally, the conclusion proposes some answers to the questions that modern shopping centers present.

II. STATE ACTION UNDER THE FEDERAL CONSTITUTION

The United States Supreme Court has taken inconsistent positions regarding free expression rights in privately-owned shopping centers. In a series of four cases, beginning in 1968 and concluding some eight years later, the Court originally recognized the "public function" doctrine in the shopping center context, but by 1976 had rejected that position entirely.[12] The intellectual source for these four

7. *Id.* art. I, § 1.

8. *Id.* art. II, § 1.

9. *See infra* notes 157 through 167 and accompanying text.

10. The federal approach to state action provides the basis for nearly all state constitutional jurisprudence, even where state courts have reached conflicting conclusions. Therefore, the federal cases must be evaluated first in order to place the state experiences in context. *See infra* Section II.

11. Because the Alaska courts have not yet addressed the issue of free speech within privately-owned shopping centers, a survey of other jurisdictions will provide additional context to the subsequent Alaska law discussion. *See infra* Section III.

12. Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Central Hardware Co. v. NLRB, 407 U.S. 539 (1972); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968). Unquestionably, the changing composition of the Court had much to do with this metamorphosis. *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 584 (1972) (Marshall, J.,

shopping center cases is *Marsh v. Alabama*.[13] A detailed analysis of *Marsh* is essential to a complete understanding of the "public function" approach to state action, both at the federal and state levels.

A. *Marsh v. Alabama:* The Genesis of "Public Function"

Chickasaw was a suburb of Mobile, Alabama, but unlike most traditional suburbs, this small town was wholly-owned and operated by the Gulf Shipbuilding Corporation. It was a classic "company town," developed by Gulf Shipbuilding to provide for the needs of its employees. The property itself consisted of streets, residential buildings, a sewage disposal plant and a "business block" where businesses were located. A deputy sheriff served as Chickasaw's policeman, at company expense. Chickasaw's business district included a United States Post Office from which carriers delivered mail to Chickasaw and adjacent, non-company areas. The town of Chickasaw was in no way distinct from the surrounding non-company property and to the uninformed observer the town looked like any other town in Alabama.[14] The United States Supreme Court observed:

> In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.[15]

A Jehovah's Witness came to the town of Chickasaw, stood on the sidewalk near the post office and began to distribute religious literature. The corporation had a posted policy prohibiting this kind of solicitation. After refusing to leave, the Jehovah's Witness was arrested and charged with criminal trespass. Both the trial court and the Alabama Court of Appeals rejected the defense of the Jehovah's Witness that her distribution of religious literature was protected activity under the first and fourteenth amendments to the United States Constitution.[16]

The Supreme Court rejected the conclusions of the Alabama courts that the private character of the property precluded the imposition of constitutional limitations upon private parties: "Ownership

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dissenting) ("I am aware that the composition of this Court has radically changed in four years.").

13. 326 U.S. 501 (1946).

14. *Id.* at 502-03.

15. *Id.*

16. *Id.* at 503-04. The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. CONST. amend. I. The fourteenth amendment imposes the restrictions of the first amendment upon the individual states. Gitlow v. New York, 268 U.S. 652, 666 (1925).

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."[17] Writing for the Court, Justice Black concluded that Gulf Shipbuilding's property rights were "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."[18]

Marsh established that when a private party maintains a "company town," it also accepts the constitutional limitations imposed upon municipal governments that provide those same services to the public.[19]

B. *Marsh's* Progeny: The Shopping Center Cases

More than twenty years after the decision in *Marsh v. Alabama*, the United States Supreme Court faced its first free expression case in the context of a shopping center. *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*[20] concerned union picketing of a non-union supermarket in a shopping center known as the Logan Valley Mall. At the time of the picketing, Logan Valley Mall was a newly-developed shopping center with only two tenants: a supermarket and a department store. The supermarket had posted a policy outside its building that prohibited trespassing and solicitation by anyone other than its employees in its parcel pickup area or parking lot.[21]

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

18. *Id.* at 509.

19. The *Marsh* decision was reached by a five to three majority. Justice Jackson did not participate. *Id.* at 510.

Justice Reed lodged an articulate dissent. He pointed out the constitutional difficulty that *Marsh* presented by permitting a person to "remain on private property against the will of the owner and contrary to the law of the state so long as the only objection to his presence is that he is exercising an asserted right to spread there his religious views." *Id.* at 512 (Reed, J., dissenting). The dissent notes:

> Such distinctions are of degree and require new arbitrary lines, judicially drawn, instead of those hitherto established by legislation and precedent. . . .
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> . . . The restrictions imposed by the owners upon the occupants are sometimes galling to the employees and may appear unreasonable to outsiders. Unless they fall under the prohibition of some legal rule, however, they are a matter for adjustment between owner and licensee, or by appropriate legislation.

Id. at 512-13. Justice Reed concluded: "The rights of the owner, which the Constitution protects as well as the right of free speech, are not outweighed by the interests of the trespasser, even though he trespasses in behalf of religion or free speech." *Id.* at 516.

20. 391 U.S. 308 (1968).

21. *Id.* at 308-11.

Soon after the supermarket opened, union members — not employees of the supermarket — began picketing in the pickup area and parking lot of the supermarket.[22] At the behest of the supermarket and shopping center management, a Pennsylvania court enjoined union members from picketing on shopping center property.[23] The state court explicitly rejected the union's claim that the first amendment entitled union members to picket within the confines of the shopping center and its parking lots.[24] The Pennsylvania Supreme Court affirmed the lower court injunction[25] and the United States Supreme Court granted certiorari.[26]

In *Logan Valley,* the Supreme Court went to great lengths to point out the similarities between the Logan Valley Mall and the "company town" in *Marsh.*[27] The Court concluded that "[t]he shopping center here is clearly the functional equivalent of the business district of Chickasaw involved in *Marsh.*"[28] As such, the union picketing activity was constitutionally protected.[29]

Justices Black, Harlan, and White penned individual dissents. As the author of the majority opinion in *Marsh,* Justice Black's dissent in *Logan Valley* is particularly poignant. Justice Black rejected the notion that Logan Valley Mall was strikingly similar to the company town of Chickasaw in *Marsh,* noting:

> I think it is fair to say that the basis on which the *Marsh* decision rested was that the property involved encompassed an area that for all practical purposes had been turned into a town; the area had all the attributes of a town and was exactly like any other town in Alabama. I can find very little resemblance between the shopping center involved in this case and Chickasaw, Alabama. There are no

22. *Id.* The picketers charged that the supermarket's employees were not receiving union wages and benefits. The union's picketing was peaceful, although some sporadic congestion occurred in the parcel pickup area. *Id.* at 311-12.

23. *Id.* at 312. In effect, the order required that all picketing be carried on alongside the public roads outside the shopping center and its parking lots.

24. *Id.* at 313.

25. *Logan,* 391 U.S. at 313.

26. *Id.* at 309.

27. *Id.* at 317-19 (characterizing those similarities as "striking").

28. *Id.* at 318.

29. *Id.* at 325. Writing for the Court, Justice Marshall opined that first amendment access in this case was essential for two reasons. First, requiring union members to picket adjacent to public roads — outside of the shopping center and its parking lots — would render the picketers' messages "virtually indecipherable" to those at whom the speech was directed, the supermarket's customers and employees. Second, the union picketers would be "in some danger by being forced to walk along heavily traveled roads along which traffic moves constantly at rates of speed varying from moderate to high." *Id.* at 321-22. The court specifically limited its ruling to speech "directly related in its purpose to the use to which the shopping center property was being put." *Id.* at 320 n.9.

> homes, there is no sewage disposal plant, there is not even a post office on this private property which the court now considers the equivalent of a "town." Indeed, at the time this injunction was issued, there were only two stores on the property. . . . All I can say is that this sounds like a very strange "town" to me.[30]

Black also rejected the Court's suggestion that the grocery pickup zone adjacent to the supermarket had somehow been dedicated to a public purpose.[31] He concluded:

> [P]etitioners cannot, under the guise of exercising First Amendment rights, trespass on respondent Weis' private property for the purpose of picketing. It would be just as sensible for this Court to allow the pickets to stand on the checkout counters, thus interfering with customers who wish to pay for their goods, as it is to approve picketing in the pickup zone which interferes with customers' loading of their cars.[32]

In 1972, the United States Supreme Court decided two companion cases which again addressed the state action question in the context of shopping centers. The first case, *Central Hardware Co. v. NLRB*,[33] concerned union picketing of retail establishment — this time, independent, freestanding hardware stores. In order to solicit union membership from the employees of two hardware stores, the union began picketing in the parking lots. As in previous cases, the hardware stores had rules against solicitation in their stores and parking lots. The stores' owners sought protection from the National Labor Relations Board, alleging that the picketing constituted an unfair labor practice. The National Labor Relations Board struck down the hardware stores' anti-solicitation rules and, citing *Logan Valley,* the Eighth Circuit Court of Appeals concurred.[34]

Writing for the Supreme Court, Justice Powell distinguished the circumstances in *Central Hardware* from those in *Logan Valley*:

> *Logan Valley* involved a large commercial shopping center which the Court found had displaced, in certain relevant respects, the functions of the normal municipal "business block." First and Fourteenth Amendment free-speech rights were deemed infringed

30. *Id.* at 331 (Black, J., dissenting) (footnote omitted).

31. *Id.* at 328 (Black, J., dissenting).

32. *Id.* at 329 (Black, J., dissenting) (footnote omitted). In his dissent, Justice Harlan alluded to the "separation of powers" problem raised by the Court's decision to impose first amendment limitations upon private property owners:

> If it were shown that Congress has thought it necessary to permit picketing on private property, either to further the national labor policy under the Commerce Clause or to implement and enforce the First Amendment, we would have quite a different case. But that is not the basis upon which the Court proceeds, and I therefore dissent.

Id. at 340 (Harlan, J., dissenting).

33. 407 U.S. 539 (1972).

34. *Id.* at 540-42.

> under the facts of that case when the property owner invoked the trespass laws of the State against the pickets.
>
> Before an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use. The First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes.[35]

Justice Powell noted that the only municipal characteristic of the hardware stores' facilities was that their parking lots and buildings were "open to the public."[36] The Court rejected that basis for finding "public function" state action, as "[s]uch an argument could be made with respect to almost every retail and service establishment in the country, regardless of size or location."[37] *Central Hardware* established that an independent, free-standing retail establishment with a parking lot does not take on the characteristics of a "company town" simply by virtue of its commercial operations.

Lloyd Corp. v. Tanner[38] was decided by the Court on the same day as *Central Hardware*. Unlike *Central Hardware*, however, *Lloyd* concerned a shopping center with an interior mall area known as Lloyd Center.[39] Lloyd Center had a strictly enforced policy against solicitation and distribution of handbills on its property. Protestors began distributing handbills in Lloyd Center stating political opposition to the draft and the Vietnam War. Lloyd Center officials informed the protestors that they would be arrested if they continued to distribute the handbills.[40]

The protestors brought an action against Lloyd Center in United States district court seeking injunctive relief to permit distribution of their handbills. The district court found Lloyd Center to be the functional equivalent of a public business district, in the *Logan Valley* tradition.[41] The Ninth Circuit Court of Appeals affirmed.[42]

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35. *Id.* at 547.
36. *Id.*
37. *Id.*
38. 407 U.S. 551 (1972).
39. Lloyd Center covered approximately 50 acres with 20 acres of open and covered parking facilities. It included approximately 60 commercial tenants, ranging from small shops to major department stores. The stores were located in a multi-level building with center sidewalk areas, stairways, escalators, gardens, an auditorium and a skating rink. *Id.* at 553.
40. *Id.* at 555-56.
41. *Id.*
42. *Id.* at 552.

Once again, Justice Powell wrote the opinion for the Court, distinguishing *Lloyd* from *Logan Valley*. The Court reiterated that its ruling in *Logan Valley* was limited to:

> the picketing involved, where the picketing was "directly related in its purpose to the use to which the shopping center property was being put," and where the store was located in the center of a large private enclave with the consequence that no other reasonable opportunities for the pickets to convey their message to their intended audience were available.[43]

The Court noted that, unlike *Logan Valley,* the speech of the protestors in *Lloyd* was unrelated to any "purpose for which the center was built and being used"[44] and the protestors had many alternative ways to exercise their first amendment rights.[45] The Court concluded:

> Nor does property lose its private character merely because the public is generally invited to use it for designated purposes. Few would argue that a free-standing store, with abutting parking space for customers, assumes significant public attributes merely because the public is invited to shop there. Nor is size alone 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.[46]

In *Lloyd*, the Court tenuously retained the *Logan Valley* analysis while erecting a content-based test for determining whether privately-owned shopping centers need respect the first amendment rights of those on their property. First amendment speech related to the center or one of its tenants, as in *Logan Valley*, was protected. However, first amendment speech unrelated to either the shopping center or its tenants, as in *Lloyd*, was not protected.

In *Hudgens v. NLRB,*[47] the United States Supreme Court came full circle on the *Logan Valley* case. Adopting Justice Black's dissent in *Logan Valley*, the Court summarily rejected the notion that the "public function" analysis of *Marsh* should apply to shopping centers.[48]

In *Hudgens,* the Court once again faced the question of whether labor union picketing against a shopping center tenant within the confines of its interior mall was protected first amendment activity. This shopping center was a large building with approximately sixty retail

43. *Id.* at 563 (quoting *Logan Valley,* 391 U.S. at 320 n.9 (1968)).
44. *Id.* at 564 (footnote omitted).
45. *Id.* at 566-67.
46. *Id.* at 569.
47. 424 U.S. 507 (1976).
48. *Id.* at 521. *See Logan Valley,* 391 U.S. at 327-33 (Black, J., dissenting).

stores, one of which was the Butler Shoe Company. Butler's warehouse employees had gone on strike and were picketing the retail outlets of their employer.[49]

The general manager of the shopping center threatened to have the union picketers arrested if they continued to picket the Butler store in the shopping center. The union then filed an unfair labor practice charge against the shopping center's owner, alleging that the picketing was protected first amendment activity pursuant to *Logan Valley*.[50] The National Labor Relations Board agreed, as did the Fifth Circuit Court of Appeals.[51]

Justice Stewart began the opinion of the Court by noting:

> It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state. Thus, while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself.[52]

The Court then discussed the incongruities between the *Logan Valley* and *Lloyd* decisions:

> The Court in its *Lloyd* opinion did not say that it was overruling the *Logan Valley* decision. Indeed a substantial portion of the Court's opinion in *Lloyd* was devoted to pointing out the differences between the two cases, noting particularly that, in contrast to the hand-billing in *Lloyd,* the picketing in *Logan Valley* had been specifically directed to a store in the shopping center and the pickets had had no other reasonable opportunity to reach their intended audience. *But 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.
>
> It matters not that some Members of the Court may continue to believe that the *Logan Valley* case was rightly decided. Our institutional duty is to follow until changed the law as it now is, not as some Members of the Court wish it might be. And in the performance of that duty we make clear now, if it was not clear before, that *the rationale of* Logan Valley *did not survive the Court's decision in the* Lloyd *case.*[53]

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49. *Hudgens,* 424 U.S. at 508-09.
50. *Id.* at 509-10. *See* U.S. CONST. amend. I, *supra* note 16.
51. *Hudgens,* 424 U.S. at 508.
52. *Id.* at 513 (citation omitted).
53. *Id.* at 517-18 (footnotes and citation omitted) (emphasis added).

The Court recognized that its content-based distinction between *Logan Valley* and *Lloyd* was inappropriate.[54] Therefore, with *Logan Valley* now firmly overruled, the picketers of Butler Shoe Company were not protected by the first amendment.[55]

Thus, under the United States Constitution, shopping centers are no longer considered to perform a "public function" such that the mandates of the first amendment may be imposed upon their private owners. State constitutions, however, have provided an independent basis for reaching the *Logan Valley* conclusion.[56] The next section of this article concerns those states that have addressed this issue.

III. State Action in Other State Jurisdictions

Twelve states have specifically addressed the issue of whether privately-owned shopping centers render such a "public function" as to give rise to constitutional protections.[57] Of those twelve jurisdictions, nine have rejected the notion that property rights of private shopping center owners should give way to an alleged constitutional right of expression.[58] Only three jurisdictions — California, Massachusetts, and arguably, Oregon — have imposed the mantle of government upon private shopping center owners.[59]

A. California: The *Pruneyard* Decisions

The genesis of the state constitutional approach to shopping center free speech cases can be found in the California decision of *Robbins v. Pruneyard Shopping Center*.[60] The discussion of the relevant law of other jurisdictions must begin there.

The Pruneyard Shopping Center was privately-owned and occupied approximately twenty-one acres. It contained sixty-five shops, ten restaurants and a cinema. Pruneyard had a policy not to permit its tenants or visitors to engage in expressive activity not directly related to the commercial purposes of its tenants.[61]

One Saturday afternoon a group of high school students set up a card table in Pruneyard's central courtyard. The students opposed the United Nation's resolution against Zionism and solicited support from

54. *Id.* at 520.
55. *Id.* at 521.
56. *See infra* notes 75 through 130 and accompanying text.
57. *See infra* notes 75 through 130 and accompanying text.
58. *See infra* notes 85 through 130 and accompanying text.
59. *See infra* notes 75 through 84 and accompanying text.
60. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 447 U.S. 74 (1980).
61. *Id.* at 902, 592 P.2d at 342, 153 Cal. Rptr. at 855.

Pruneyard shoppers on a petition to that effect. The activity was apparently peaceful and nondisruptive.[62]

Pursuant to Pruneyard's policy against solicitation, the center required the students to leave. They later brought suit against Pruneyard, alleging violations of their free speech rights under the California Constitution. The superior court denied the students' request for an injunction. The students then appealed to the Supreme Court of California.[63]

The first question considered by the California court was whether *Lloyd* recognized federal property rights of shopping center owners to such a degree that the California court was barred from establishing broader free speech rights under the California Constitution than defined under its federal counterpart. Second, assuming that California could establish broader constitutional rights, the question remained whether the California Constitution protected the students' speech in this case.[64]

Initially, the California court held that the decisions of the United States Supreme Court did not prevent the California Constitution from granting broader free speech rights than the federal constitution.[65] The court then discussed the important role that shopping centers had come to play in modern society: "Shopping centers to which the public is invited can provide an essential and invaluable forum for exercising [free speech and petition] rights."[66] The court then concluded: "sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned."[67]

Pruneyard was subsequently appealed to the United States Supreme Court to resolve the following question:

> whether state constitutional provisions, which permit individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited, violate the shopping center owner's property rights under the Fifth and

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62. *Id.*

63. *Id.* at 902-03, 592 P.2d at 341-42, 153 Cal. Rptr. at 854-55.

64. *Id.* at 903, 592 P.2d at 342, 153 Cal. Rptr. at 855.

65. *Id.* at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860.

66. *Id.*

67. *Id.* In his dissent, Justice Richardson argued that granting the high school students constitutional rights of expression beyond the scope of federal law necessarily conflicted with the federally protected property rights of the shopping center owners.

> [T]he owners of defendant Pruneyard Shopping Center possess *federally* protected property rights which do not depend upon the varying and shifting interpretations of state constitutional law for their safeguard and survival.

Id. at 912, 592 P.2d at 348, 153 Cal. Rptr. at 861 (Richardson, J., dissenting) (emphasis in original).

> Fourteenth Amendments or his free speech rights under the First and Fourteenth Amendments.[68]

The Court first noted that *Lloyd* would not necessarily preclude the state of California from "adopt[ing] in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."[69] Next, the Court concluded that the fifth amendment guarantee against the taking of property without just compensation and the fourteenth amendment guarantee against deprivation of property without due process of law were not impinged under these circumstances.[70] Specifically, the Court determined that Pruneyard's property rights were not sufficiently impaired to rise to the level of a "taking."[71] Furthermore, Pruneyard could not establish to the satisfaction of the Court that its due process rights had been violated.[72]

Finally, the Court considered whether Pruneyard's first amendment rights were violated when the California court required shopping center owners to use their property as a "forum for the speech of others."[73] The Court found that (1) the shopping center was not limited to the personal use of its owner, (2) the state had not dictated that specific messages be displayed on the shopping center property, and (3) the shopping center owner could disavow any connection with public messages by simply posting signs of disclaimer. Therefore, it concluded that the first amendment rights of the shopping center owners had not been impaired by the California court.[74]

Pruneyard has challenged courts in other jurisdictions to view their state constitutions expansively. As the discussion below demonstrates, only a few jurisdictions have reached the California result, while the majority have followed federal thinking on this issue.

B. Other States Finding Constitutional Rights in Private Shopping Centers

1. *Massachusetts.* In *Batchelder v. Allied Stores International,*[75] the Supreme Judicial Court of Massachusetts concluded that a citizen's right to solicit signatures in support of a political candidate's nomination outweighed the property interests of the private shopping center owner. The Massachusetts court specifically reserved the issue of whether free speech provisions of the Massachusetts Declaration of

68. Pruneyard Shopping Center v. Robbins, 447 U.S. 74, 76-77 (1980).
69. *Id.* at 81 (citations omitted).
70. *Id.* at 82-85.
71. *Id.* at 84.
72. *Id.* at 84-85.
73. *Id.* at 85 (footnote omitted).
74. *Id.* at 87-88.
75. 388 Mass. 83, 445 N.E.2d 590 (1983).

Rights similarly applied to private shopping centers.[76] The court only concluded that article IX of the Massachusetts Declaration of Rights, relating to free elections, did not require state action and therefore applied to private individuals.[77]

2. *Oregon.* In *Lloyd Corp. v. Whiffen,*[78] the Oregon Supreme Court reached the *Pruneyard* conclusion, but without the *Pruneyard* analysis.[79] Members of the public had solicited signatures on initiative petitions within the confines of a shopping center. The shopping center had posted a policy against solicitation and sought an injunction to preclude the petitioners' activity on its property.[80]

Although the parties made the same constitutional arguments set out in *Pruneyard* and elsewhere, the Oregon Supreme Court refused to deal with the case on a constitutional level.[81] The court instead balanced the public policy in favor of the petitioners' access to the shopping center for soliciting signatures against the property interests of the shopping center owners.[82]

The court concluded that the petitioners could not "be enjoined from entering the Center to express their opinion, so long as they do so reasonably and without interfering with plaintiff's commercial enterprise."[83] While the Oregon court based its decision upon the common law claims of trespass and nuisance, it used much of the same analysis as cases based upon constitutional interpretations.[84]

C. States Rejecting Constitutional Rights in Private Shopping Centers

States that have most recently addressed the issues discussed in this article have rejected the *Pruneyard* analysis and its progeny in

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76. *Id.* at 91-92, 445 N.E.2d at 595. *See* MASS. CONST. art. XVI (relating to free speech).

77. *Batchelder,* 388 Mass. at 89-90, 445 N.E.2d at 593-94. *See* MASS. CONST. art. IX (relating to free elections).

78. 307 Or. 674, 773 P.2d 1294 (1989).

79. *Id.* at 688, 773 P.2d at 1302.

80. *Id.* at 678-79, 773 P.2d at 1296.

81. *Id.* at 679-80, 689, 773 P.2d at 1296-97, 1302.

82. *Id.* at 684-85, 773 P.2d at 1299-1300.

83. *Id.* at 687, 773 P.2d at 1301.

84. *Id.* at 685, 773 P.2d at 1300 ("Shopping malls have become part of American life. Large numbers of the public gather there. Although plaintiff tries to cloak a public mall as a private place, it is the antithesis of a private place."). *See also id.* at 690, 773 P.2d at 1303 (Carson, J., dissenting) ("[A] plain reading of the majority opinion makes it abundantly clear that the majority expressly decides several constitutional issues while swearing allegiance to the rule against premature constitutional adjudication.").

favor of the limited federal approach.[85] The decisions of the nine jurisdictions that now reject the notion of expressive rights in the context of private shopping malls are described below.

1. *Arizona.* In *Fiesta Mall Venture v. Mecham Recall Committee,*[86] the Arizona Court of Appeals reviewed a trial court injunction that precluded individuals from soliciting signatures on recall petitions within the confines of several large shopping malls.[87] The petitioners argued that their freedoms of speech and petition under the Arizona Constitution were infringed by the malls' anti-solicitation policies and the lower court's injunction.[88]

The Arizona court rejected the suggestion that the large shopping malls at issue were akin to the "company-town" in *Marsh.*[89] It concluded after reviewing similar cases from other jurisdictions "that the more persuasive are those in which the courts have determined that their states' constitutions do not require private property owners to permit political activities on their premises."[90] The petitioners' free speech and petition rights were not "intended to restrain private conduct."[91]

2. *Connecticut. Cologne v. Westfarms Associates*[92] concerned the free speech and petition rights of a women's political advocacy group in a large regional shopping mall.[93] The Connecticut Supreme Court rejected the *Pruneyard* approach, suggesting that to do otherwise would infringe upon the legislature's power:

> For the court to assume such a regulatory function, however, would relegate the legislature to a subordinate role in our governmental scheme .... We cannot presume that [the legislature] has any less concern for political liberty than this court.[94]

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85. *See infra* notes 86 through 130 and accompanying text.

86. 159 Ariz. 371, 767 P.2d 719 (Ct. App. 1988).

87. *Id.* at 372, 767 P.2d at 720. Each of the malls had "a policy of prohibiting activities other than shopping or those which promote shopping." *Id.*

88. *Id.* at 372-73, 767 P.2d at 720-21. *See* ARIZ. CONST. art. II, § 6 (relating to free speech); *id.* art. II, § 5 (relating to free assembly and petition).

89. *Fiesta Mall,* 159 Ariz. at 372, 767 P.2d at 724 ("The shopping malls in question here are not the functional equivalent of towns. They are simply areas in which a large number of retail businesses is grouped together for convenience and efficiency.").

90. *Id.* at 375, 767 P.2d at 723.

91. *Id.*

92. 192 Conn. 48, 469 A.2d 1201 (1984).

93. *Id.* at 50-56, 469 A.2d at 1202-05. The trial court had ordered the shopping mall to permit the women's group to distribute literature and solicit signatures on petitions. *Id.* at 52-53, 469 A.2d at 1203-04. *See also* CONN. CONST. art. I, §§ 4, 5, 14 (relating to free speech and petition rights).

94. *Cologne,* 192 Conn. at 65-66, 469 A.2d at 1210.

The court concluded that it could not compel private parties to allow the public exercise of free speech and petition rights on their property.[95]

3. *Georgia.* In a brief decision, the Georgia Supreme Court recently held that a person soliciting signatures in a privately-owned shopping mall had no constitutional right to conduct such activities in contravention of the mall's anti-solicitation policy.[96] The court specifically adopted the reasoning of the United States Supreme Court in *Lloyd*, rejecting the *Pruneyard* analysis of the California court.[97]

4. *Michigan.* In *Woodland v. Michigan Citizens Lobby,*[98] the Michigan Supreme Court considered whether a consumer advocacy group's solicitation of signatures in various shopping malls was protected activity under the Michigan Constitution.[99] The court framed the threshold issue as "whether the provisions of the Michigan Constitution involved reach such private conduct and property at all."[100]

The court analyzed the question in terms of private autonomy and separation of powers, which it asserted as the philosophical underpinnings of the state action requirement,[101] and reviewed the law of other jurisdictions.[102] The court rejected the *Pruneyard* approach and found no state action in the Michigan shopping malls:

> We are aware of the extensive development of large shopping malls and the opportunities for individuals and groups to engage in activities such as the gathering of signatures for initiative petitions therein. But, we cannot in judicial conscience reinterpret our state constitution in a way that is contradictory to its fundamental purposes, its history, the intentions of its authors, the past decisions of

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95. *Id.* The Connecticut court also rejected arguments that the Connecticut Constitution should be read more broadly than its framers had intended:

> This court has never viewed constitutional language as newly descended from the firmament like fresh fallen snow upon which jurists may trace out their individual notions of public policy uninhibited by the history which attended the adoption of the particular phraseology at issue and the intentions of its authors.

Id. at 62, 469 A.2d at 1208.

96. Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assocs., 260 Ga. 245, ___, 392 S.E.2d 8, 10 (1990).

97. *Id.* The Georgia Supreme Court also noted that the trend in other state jurisdictions was away from the *Pruneyard* approach. *Id.* at ___, 392 S.E.2d at 9-10.

98. 423 Mich. 188, 378 N.W.2d 337 (1985).

99. *Id.* at 193-200, 378 N.W.2d at 338-42. *See* MICH. CONST. art. I, §§ 3, 5 (relating to free speech, assembly and petition); *id.* art. II, § 9 (relating to initiative powers).

100. *Woodland,* 423 Mich. at 200, 378 N.W.2d at 342.

101. *Id.* at 210-12, 378 N.W.2d at 347-48.

102. *Id.* at 224-33, 378 N.W.2d at 353-57.

> this Court, and, most importantly, the understanding with which it was adopted by the people of this state.[103]

5. *New York. Shad Alliance v. Smith Haven Mall*[104] concerned the alleged infringement of the free speech rights of anti-nuclear activists in a New York shopping mall.[105] The activists distributed leaflets espousing their viewpoint and urged passersby to attend upcoming anti-nuclear protests, all in violation of the mall's established policies.[106]

The New York court first rejected the suggestion that state action was not a necessary component of constitutional litigation:

> A disciplined perception of the proper role of the judiciary, and, more specifically, discernment of the reach of the mandates of our State Constitution, precludes us from casting aside so fundamental a concept as state action in an effort to achieve what the dissent perceives as a more socially desirable result.[107]

Having upheld the state action requirement, the court then addressed the activists' arguments that state action existed in the private shopping mall.

> Discussion concerning the purportedly unobstructive nature of plaintiffs' activities, the need for inexpensive channels of communication, and the long and rich tradition of free expression in this state begs the question. Such factors are irrelevant to whether State action is present and whether there has been a constitutional infringement. Since there is no State action involved, the provisions of our State Constitution have no role in the resolution of a dispute between private parties.[108]

6. *North Carolina. State v. Felmet*[109] concerned a criminal trespass conviction. The defendant sought signatures on a petition in the parking lot of a large regional shopping mall, contrary to mall policy.[110] The North Carolina Supreme Court adopted the *Lloyd* analysis of the United States Supreme Court and rejected the invitation to extend the parameters of its constitution beyond the federal boundaries.[111] The court upheld the trespass conviction because the

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103. *Id.* at 235, 378 N.W.2d at 358.

104. 66 N.Y.2d 496, 488 N.E.2d 1211, 498 N.Y.S.2d 99 (1985).

105. *Id. See* N.Y. CONST. art. I, § 8 (relating to free speech).

106. *Shad Alliance,* 66 N.Y.2d at 449, 488 N.E.2d at 1212-13, 498 N.Y.S.2d at 101.

107. *Id.* at 505, 488 N.E.2d at 1217, 498 N.Y.S.2d at 105.

108. *Id.* at 506-07, 488 N.E.2d at 1218, 498 N.Y.S.2d at 106 (footnote omitted).

109. 302 N.C. 173, 273 S.E.2d 708 (1981).

110. *Id.* at 177-78, 273 S.E.2d at 711-12. The petitioner refused to leave the parking lot at the behest of a mall security guard and was subsequently arrested by the police for trespass. *Id.*

111. *Id.*

defendant's free speech and petition rights did not apply to private property.[112]

7. *Pennsylvania.* In *Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Insurance Co.,*[113] a political committee sought an injunction to require the owners of a privately-owned shopping mall to permit its representatives to solicit petition signatures on mall property.[114] The Pennsylvania Supreme Court rejected the petitioners' argument that its constitution was the proper tool for resolving disputes between private parties:

> Free people regulate their private affairs through individual adjustment. We should be wary of insulating that development against legislative, judicial, or private change by enshrining a particular position in the text of the constitution.[115]

The court was unswayed by arguments that the modern shopping center had become a societal focal point:

> Law and sociology are not coextensive. Though shopping malls may fulfill some of the societal functions of the traditional main street or town marketplace, we do not believe that this makes them their legal equivalent.[116]

The court found that the private shopping mall was not a state actor.[117]

8. *Washington. Alderwood Associates v. Washington Environmental Council*[118] concerned whether environmental activists had a Washington state constitutional right to solicit signatures for initiative petitions in a privately-owned shopping mall.[119] A four-member panel of the Washington Supreme Court held that Washington's free speech and initiative clauses did not require state action as a prerequisite to

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112. *Id. See* N.C. CONST. art. I, § 14 (relating to free speech).

113. 512 Pa. 23, 515 A.2d 1331 (1986).

114. *Id.* at 27, 515 A.2d at 1333. *See* PA. CONST. art. I, § 2 (relating to free speech); *id.* art. I, § 20 (relating to free assembly and petition).

115. *Socialist Workers,* 512 Pa. at 31-32, 515 A.2d at 1335.

116. *Id.* at 33, 515 A.2d at 1336.

117. *Id.* at 39, 515 A.2d at 1339. One troubling aspect of this decision, however, is that the Pennsylvania court's ruling seems dependent upon the nature of the mall owner's restrictions on political public expression. *Id.* at 32-36, 515 A.2d at 1336-38. Apparently, the mall owner is only free to construct *uniform* barriers to free speech and petition; favoring one political position over the other, arguably, would not be permissible. *Id. Cf.* Hudgens v. NLRB, 424 U.S. 507, 520 (1975) (content-based limits upon free expression are unconstitutional).

118. 96 Wash. 2d 230, 635 P.2d 108 (1981) (en banc). *See* WASH. CONST. art. I, § 5 (relating to free speech); *id.* art. II, § 1 (relating to initiative powers).

119. *Id.* at 232-33, 635 P.2d at 110.

litigation.[120] Although Justice Dolliver concurred in the majority's result, he sharply rejected the reasoning of the plurality, stating only that the constitutional provisions relating to the initiative process did not have such a barrier.[121] For this reason, only the proposition that initiative activities are protected by the Washington Constitution commanded a majority of the court.

In *Southcenter v. National Democratic Policy Committee,*[122] a clear majority of the Washington Supreme Court concluded that while the protection of initiative activities did not require state action,[123] free expression in shopping malls was not similarly unencumbered.[124] The private mall owner in *Southcenter* could constitutionally prevent a political party committee from distributing literature, soliciting members and requesting contributions.[125]

9. *Wisconsin.* In *Jacobs v. Major,*[126] the Wisconsin Supreme Court considered whether the free speech provisions of its constitution require shopping mall owners "to permit non-consensual use of their facilities by others."[127] The case concerned dancing and leafleting by an anti-nuclear group in two malls. Once again, the malls' policies prohibited such activities.[128] The court rejected the group's argument that their constitutional right to free speech placed any limitations on the mall owners:

> We do not accept the proposition that a negative restraint on government creates a positive right assertable against all other persons. . . . To turn what was prohibition of governmental acts into positive rights against other private persons is not logical nor historically established. In fact, it would be contrary to history. Courts would be ill-advised to rewrite history and plain, clear constitutional language to create some new rights contrary to history. To do this courts would become mini-constitutional conventions in individual court cases whenever a new theory or philosophy became appealing. To say that whenever a balancing must be done between free speech and private interests that free speech must prevail is to give vent to one's own choices and to rewrite history and the constitution in personal terms. That is not the right nor privilege of courts or judges.[129]

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120. *Id.* at 243-44, 635 P.2d at 116.
121. *Id.* at 251-52, 635 P.2d at 120 (Dolliver, J., concurring).
122. 113 Wash. 2d 413, 780 P.2d 1282 (1989) (en banc).
123. *Id.* at __, 780 P.2d at 1290.
124. *Id.* at __, 780 P.2d at 1291.
125. *Id.* at __, 780 P.2d at 1292.
126. 139 Wis. 2d 492, 407 N.W.2d 832 (1987).
127. *Id.* at 495-96, 407 N.W.2d at 833. *See* WIS. CONST. art. I, § 30 (relating to free speech).
128. *Jacobs,* 139 Wis. 2d at 497-99, 407 N.W.2d at 834.
129. *Id.* at 512, 407 N.W.2d at 840.

The court concluded that the dancing protestors could not establish that the state acted in the guise of the mall owners. The malls' preclusion of political activity prevailed.[130]

IV. STATE ACTION IN ALASKA

We have now explored the *state* of state action under the federal constitution, as well as in those state jurisdictions that have addressed this issue in the context of shopping center cases. As was noted in the introduction, however, simply asserting the existence of the state action requirement begs the question of *why* it is so integral a component of our constitutional framework. This section analyzes why state action is an important and *uniform* requirement under the Alaska Constitution.

Part A explores the traditional sources for the state action requirement, emphasizing the history that attended the adoption of the Alaska Constitution. Part B then examines the fundamental philosophical source for the state action requirement: that the protection to all persons of the natural right to "life, liberty and the pursuit of happiness"[131] applies only to governmental control, and not other individuals. Part C examines the state action requirement from the perspective of the separation of powers doctrine. This doctrine requires that the judiciary refrain from the resolution of conflicting "constitutional" interests in the absence of state action. Part D then turns to three recent decisions of Alaska appellate courts concerning the state action requirement. Finally, Part E examines the questions presented by the shopping center cases against the backdrop of the Alaska Constitution and proposes some conclusions.

A. Traditional Sources for the State Action Requirement

The Alaska appellate courts have uniformly recognized the state action requirement in constitutional litigation. State action has been required in cases involving search and seizure,[132] due process of

130. *Id.* at 528, 407 N.W.2d at 847.

131. ALASKA CONST. art. I, § 1.

132. Woods & Rohde, Inc. v. State Dept. of Labor, 565 P.2d 138, 148 (Alaska 1977); Bell v. State, 519 P.2d 804, 807 (Alaska 1974); Weltz v. State, 431 P.2d 502, 506 (Alaska 1967).

law,[133] the right to privacy,[134] the right of free expression,[135] equal protection,[136] and civil rights.[137]

In general terms, the Alaska Supreme Court has taken a traditional approach to the state action requirement in constitutional litigation: "The American constitutional theory is that constitutions are a restraining force against the abuse of *governmental power*, not that individual rights are a matter of governmental sufferance."[138] As the court noted in *Alaska Pacific Assurance Co. v. Brown*:[139]

> It is hornbook law that most of the rights secured by the constitution are protected only against governmental infringement. Private parties may sometimes be subjected to suit because they have usurped or assumed functions traditionally exercised only by the government, or because their actions were taken in collaboration with action by the state.[140]

Finally, the court has recently stated:

> Once a fundamental right under the constitution of Alaska has been shown to be involved and it has been further shown that *this constitutionally protected right has been impaired by governmental action*, then the government must come forward and meet its substantial burden of establishing that the abridgment in question was justified by a compelling governmental interest.[141]

The documentary history of the Alaska Constitutional Convention supports these conclusions. In November 1955, the Alaska Statehood Committee submitted a series of three documents entitled *Constitutional Studies* to the delegates to the Alaska Constitution Convention.[142] These documents were prepared by the Public Administration Service, a nonprofit organization devoted to providing research

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133. Ostrow v. Higgins, 722 P.2d 936, 942 (Alaska 1986); Estate of Miner v. Commercial Fisheries Entry Comm'n, 635 P.2d 827, 829 (Alaska 1981); Nichols v. Eckert, 504 P.2d 1359, 1362 (Alaska 1973).

134. Leudtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1130 (Alaska 1989); Messerli v. State, 626 P.2d 81, 84 (Alaska 1981); Woods & Rohde, Inc. v. State Dept. of Labor, 565 P.2d 138, 148 (Alaska 1977); Allred v. State, 554 P.2d 411, 416 (Alaska 1976).

135. Johnson v. Tait, 774 P.2d 185, 190 (Alaska 1989); Messerli v. State, 626 P.2d 81, 84 (Alaska 1981); Fardig v. Municipality of Anchorage, 785 P.2d 911, 914-15 (Alaska Ct. App. 1990).

136. Alaska Pac. Assurance Co. v. Brown, 687 P.2d 264, 275 (Alaska 1984).

137. U.S. Jaycees v. Richardet, 666 P.2d 1008, 1013 (Alaska 1983).

138. Baker v. City of Fairbanks, 471 P.2d 386, 394 (Alaska 1970) (emphasis added).

139. 687 P.2d 264 (Alaska 1984).

140. *Id.* at 275 (citations omitted).

141. Jones v. Jennings, 788 P.2d 732, 739 n.16 (Alaska 1990) (emphasis added) (quoting Breese v. Smith, 501 P.2d 159, 171 (Alaska 1972)).

142. PUBLIC ADMIN. SERV., ALASKA STATEHOOD COMM. FOR THE ALASKA CONSTITUTIONAL CONVENTION, CONSTITUTIONAL STUDIES (1955 & photo. reprint 1969).

and consulting services for governmental jurisdictions and agencies, at the behest of the Alaska Statehood Committee and pursuant to an act of the Alaska Territorial Legislature.[143] *Constitutional Studies* was submitted to the Alaska Constitutional Convention delegates to assist them in drafting Alaska's constitution.[144]

Volume two of *Constitutional Studies* concerned "civil rights and liberties," and explicitly set forth the basis for the state action requirement:

> Traditionally it is government and not the individual citizen which is limited by the Bills of Rights [sic] of the national and state constitutions. The protections afforded by the constitutions are protections against encroachment by government on spheres of citizen activity which are constitutionally declared to be "civil rights and liberties" and therefore beyond the purview of government.
>
> Traditionally, too, bills of rights are negative and restrictive in character rather than positive. The citizens are not compelled to take certain courses of action by the Bills of Rights [sic] of constitutions. Obligations may be enjoined on the citizenry by the pressure of public opinion or even by legislative enactment, but seldom, if ever, is there a *constitutional* compulsion.[145]

At the time of Alaska's constitutional convention, the framers had before them a clear statement of the state action requirement in constitutional litigation and its philosophical underpinnings.[146] The Alaska Supreme Court has consistently followed that approach.

B. Individual Liberty as a Source for the State Action Requirement

The initial philosophical significance of the state action requirement is that it affords individual citizens a wide sphere of liberty. Constitutions traditionally guard against the erosion or impairment of individual liberty by placing restrictions on government power. Other areas of human affairs are thus left to individual choice: "The

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143. *Id. See* Act approved Mar. 25, 1949, ch. 108, § 3(a), 1949 Alaska Sess. Laws 269 (authorizing the Alaska Statehood Committee to "[h]ave ready, in preparation for the Constitutional Convention, fully detailed information and analyses for use by the Convention in preparing the required draft of a constitution for Alaska, to the end that the people may have the opportunity of passing upon an entirely sound and thoroughly prepared document.").

144. *Id.*

145. PUBLIC ADMIN. SERV., ALASKA STATEHOOD COMM. FOR THE ALASKA CONSTITUTIONAL CONVENTION, *Civil Rights and Liberties,* in 1 CONSTITUTIONAL STUDIES 3 (1955 & photo. reprint 1969) (emphasis in original).

146. V. FISCHER, ALASKA'S CONSTITUTIONAL CONVENTION 69 (1975) ("Statehood proponents saw the Constitution as a means to define the powers that would be accrued to the people as well as the limits that would be placed on the powers of government.").

enumeration of rights in this constitution shall not impair or deny others retained by the people."[147]

Why does the Alaska Constitution protect only against government action, as opposed to the actions of individuals? The fundamental source of this conclusion lies in the philosophy of individual rights embodied in article I, section 1 of the Alaska Constitution, which states: "This constitution is dedicated to the principle that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry . . . ."[148] The Alaska Supreme Court has not yet defined the full parameters of this section, but it has concluded that the notion of total immunity from governmental control forms the core of the concept of liberty:[149] "No right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[150] The inherent rights described in article I, section 1 are thus "natural" shields that individuals possess as protection from their government.[151]

The "whole significance of constitutional government"[152] is that it not only locates sovereign power in individuals designated or chosen in some prescribed manner, but also defines "the limit of its exercise so as to protect individual rights, and shield them against the assumption of arbitrary power."[153] It thus follows that the fundamental nature of

147. ALASKA CONST. art. I, § 21.

148. *Id.* art. I, § 1.

149. Breese v. Smith, 501 P.2d 159, 168 (Alaska 1972). As the Alaska Supreme Court recognized in *Leudtke,* traditional constitutional analysis demonstrates that constitutions serve as a check on the power of government. " 'That all lawful power derives from the people and must be held in check to preserve their freedom is the oldest and most central tenet of American constitutionalism.' " Leudtke v. Nabors Alaska Drilling, 768 P.2d 1123, 1129 (Alaska 1989) (quoting L. TRIBE, AMERICAN CONSTITUTIONAL LAW 2 (2d ed. 1988)).

150. *Breese,* 501 P.2d at 168 (quoting Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891)).

151. In expressing a philosophy of "natural rights" as the source of individual liberty, the framers of the Alaska Constitution joined in a tradition reaching as far back as Socrates. For the development of the history of the idea of "natural rights," see L. STRAUSS, NATURAL RIGHT AND HISTORY (1971).

For a contemporary analysis of the role of "natural rights" philosophy and its effect upon the framers of the federal constitution, see R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 8-18 (1985) (discussing Lockean conception of "natural right" as source of federal constitutional framers' intent). *See also* Jaffa, *What Were The "Original Intentions" Of The Framers Of The Constitution Of The United States?,* 10 PUGET SOUND L. REV. 351 (1987) (philosophical treatment of original intent arguments).

152. Southcenter v. National Democratic Policy Comm., 113 Wash. 2d 413, 422, 780 P.2d 1282, 1286 (1989) (en banc).

153. *Id.* (quoting 1 T. COOLEY, CONSTITUTIONAL LIMITATIONS 5 (8th ed. 1927)).

a constitution is to govern the relationship between the people and their government, "not to control the rights of the people vis-a-vis each other."[154] In examining the state action requirement of its constitution, the Michigan Supreme Court framed this point as follows:

> A fundamental philosophical tenet underlying our constitutional system is that the preservation of the personal freedom of the individual is an important function of our federal and state governments and one of the primary reasons for limiting their activity. . . .
>
> > It is at the heart of the American libertarian tradition that the individual be given wide rein in structuring his relationships with other individuals, if only because the alternative of close governmental control threatens liberty itself.[155]

The philosophy of individual liberty described and protected by the Alaska Constitution, combined with the retention of certain political power with the people, requires that private choices and private conduct be exempt from the reach of constitutional prohibitions. Maintaining the proper scope of constitutional protections "stops the Constitution short of preempting individual liberty — of denying to individuals the freedom [which] would be lost if individuals had to conform their conduct to the Constitution's demands."[156]

C. Separation of Powers Doctrine as a Source for the State Action Requirement

In The Federalist No. 78, Alexander Hamilton argued:

> Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution . . . . The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse *but prescribes the rules by which the duties and rights of every citizen are to be regulated.* The judiciary, on the contrary, has no

154. *Id.* The Wisconsin Supreme Court makes this point even more boldly: "Governments were not to be trusted, but rather were controlled by Declarations of Rights from any interference with those rights. This does not mean that these rights needed protection from interference by other persons. To turn what was prohibition of governmental acts into positive rights against other persons is not logical nor historically established." Jacobs v. Major, 139 Wis. 2d 492, 512, 407 N.W.2d 832, 840 (1987).

155. Woodland v. Michigan Citizens Lobby, 423 Mich. 188, 211, 378 N.W.2d 337, 347 (1985) (quoting Burke and Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment,* 46 S. CAL. L. REV. 1003, 1016 (1973)). *Accord, Jacobs,* 139 Wis. 2d at 506, 407 N.W.2d at 837 ("State constitution Bills of Rights set the limit beyond which 'no human legislation should be suffered to conflict with the rights declared to be *inherent and inalienable.*' ") (emphasis in original) (quoting W. BATEMAN, POLITICAL AND CONSTITUTIONAL LAW 14 n.1 (1876)).

156. Southcenter v. National Democratic Policy Comm., 113 Wash. 2d 413, 430, 780 P.2d 1282, 1290-91 (1989) (en banc) (quoting L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1691 (2d ed. 1988)).

> influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, *and can take no active resolution whatsoever.* It may truly be said to have neither FORCE nor WILL but merely judgment . . . .[157]

This is the classic formulation of the separation of powers doctrine, a doctrine which plays a "conceptually central role in the structure of American constitutional government."[158]

Articles II, III and IV of the Alaska Constitution define the powers of the legislative, executive and judicial branches of government respectively.[159] These articles decree a separation of powers among the branches of Alaska's government that prohibits the judiciary from "creating" rather than "interpreting" the law.[160] The framers of the Alaska Constitution followed the traditional federal framework, which incorporated the separation of powers doctrine.[161]

The separation of powers doctrine is relevant to the state action requirement because, in the absence of state action, the judicial branch of government necessarily must formulate rules to resolve "constitutional" disputes between private parties.[162] In the shopping center

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157. THE FEDERALIST No. 78, at 465 (A. Hamilton) (C. Rossiter ed. 1961) (emphasis in original in part and emphasis added in part). *See also* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824) ("Courts are the mere instruments of the law and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law . . . .").

158. Bradner v. Hammond, 553 P.2d 1, 5 (Alaska 1976). *See also* State Motorcycle Dealers Assoc. v. State, 111 Wash. 2d 667, 675, 763 P.2d 442, 446 (1988) ("American courts are constantly wary not to trench upon the prerogatives of other departments of government or to arrogate to themselves any undue powers, lest they disturb the balance of power; and this principle has contributed greatly to the success of the American system of government and to the strength of the judiciary itself.") (quoting 16 AM. JUR. 2D *Constitutional Law* § 309 (1979)).

159. *See* ALASKA CONST. art. II, § 1 ("The legislative power of the State is vested in . . . a legislature . . . ."); *id.* art. III, § 1 ("The executive power of the State is vested in the governor."); *id.* art. IV, § 1 ("The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature.").

160. State v. Campbell, 536 P.2d 105, 111 (Alaska 1975), *overruled on other grounds,* Kimoktoak v. State, 584 P.2d 25, 31 (Alaska 1978).

161. *Bradner,* 553 P.2d at 5.

162. In a rather acidic concurrence, Justice Dolliver, in Alderwood Assoc. v. Washington Envtl. Council, 96 Wash. 2d 230, 635 P.2d 108 (1981), described the role of the judiciary in the absence of a state action requirement:

> The majority opinion represents a determination by the court that it, instead of the legislature, will settle conflicting interests among citizens and that it will accomplish this by what it chooses to call a constitutional basis. This is in marked contrast to what had formerly been the responsibility of the court: the legislature would allocate interests among competing groups and individuals and the court would then decide, if an action were brought, whether in this legislative allocation a constitutional right of a citizen against the state

cases, for instance, the court must balance two conflicting, private interests: those of the would-be constitutional plaintiff against those of the shopping center owner.[163]

As the Washington Supreme Court has recently noted, however, the resolution of such private conflicting interests is properly the function of the legislative branch of government, not the courts:

> Were we to assume the role of weighing competing constitutional interests asserted between private parties . . . we would be violating the separation of powers principles . . . by arrogating to the judicial branch of government powers that properly reside with the legislative branch of government. As the Supreme Court of Connecticut aptly observed in the face of a like invitation in a similar case:
>
> > It is not the role of this court to strike precise balances among the fluctuating interests of competing private groups which then become rigidified in the granite of constitutional adjudication. That function has traditionally been performed by the legislature, which has far greater competence and flexibility to deal with the myriad complications which may arise from the exercise of constitutional rights by some in diminution of those of others. . . . *Statutes would become largely obsolete if courts in every instance of the assertion of conflicting constitutional rights should presume to carve out in the immutable form of constitutional adjudication the precise configuration needed to reconcile the conflict.*[164]

The Alaska Supreme Court has never relied on the separation of powers doctrine as a basis for the state action requirement. Given the "brooding omnipresence"[165] of separation of powers doctrine in Alaska constitutional jurisprudence, however, its relevance to the state action issue cannot be overstated. Without state action, there is "no limit to the range of wrongs which [a] court may right — subject only to the court's notion of balancing interests."[166] If conflicting interests

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had been violated. Now the court will be able to dispense with the inconvenience and cumbersomeness of legislative activity.

Id. at 250, 635 P.2d at 119 (Dolliver, J., concurring).

163. Indeed, there is literally no way for the court, in the absence of a state action requirement, to keep from resolving constitutional disputes. Property rights, such as those of the shopping center owner, are fundamental to liberty itself. "Sometimes courts have not been as sensitive to the protection of property rights as they have been in defense of personal liberty. Personal liberty means very little when one's property rights are invaded . . . ." State v. Norene, 457 P.2d 926, 931 (Alaska 1969).

164. Southcenter v. National Democratic Policy Comm., 113 Wash. 2d 413, 426, 780 P.2d 1282, 1288-89 (1989) (en banc) (emphasis in original) (quoting Cologne v. Westfarms Assoc., 192 Conn. 48, 65, 469 A.2d 1201, 1210 (1984)).

165. *Bradner,* 553 P.2d at 5.

166. Alderwood Assoc. v. Washington Envtl. Council, 96 Wash. 2d 230, 250, 635 P.2d 108, 119 (1981) (Dolliver, J., concurring).

are to be allocated among competing groups, it is the legislature's responsibility to perform that allocation.[167]

D. Recent Decisions Involving State Action Under Alaska Law

1. *The* Crazy Horse *Case.* Anthony Tait was a member of the Hell's Angels Motorcycle Club.[168] One evening Tait went into the Crazy Horse bar in Anchorage wearing his motorcycle jacket which had affixed to it the "colors" of his motorcycle club.[169] The Crazy Horse had a policy prohibiting the members of motorcycle clubs from wearing "colors" on its premises.[170] Tait was informed by a Crazy Horse door attendant that he would have to remove his jacket or leave the bar. Tait chose to leave and subsequently instituted a civil action against the owner of the Crazy Horse.[171]

Tait alleged that the "no-colors" policy at the Crazy Horse violated his right to free expression under article I, section 5 of the Alaska Constitution.[172] Agreeing with Tait's arguments, the superior court permanently enjoined the Crazy Horse from prohibiting the display of motorcycle club "colors" in its tavern.[173]

On appeal, the Alaska Supreme Court characterized the issue before it as "whether [article I, section 5 of the Alaska Constitution] protects the right of free expression against infringement by the owner of private property."[174] The court analyzed the line of federal cases from *Marsh* through *Hudgens,*[175] as well as analogous cases from other states,[176] and concluded:

> We are aware of no case requiring the individual proprietor of a small establishment to provide a forum for the expressive rights of her fellow citizens. To the contrary, several of the cases on which Tait relies emphasize that the property was not a "modest retail

167. It is beyond the scope of this article to assess the pros and cons of such action by the legislature. The discussion in notes 147 through 156, *supra,* states compelling reasons for the legislature *not* to promulgate such "positive" statutory rights. As one commentator has written, "Legitimate government arises solely from a voluntary agreement embodied in laws binding rules and rules by which it is understood that all government exists to secure equally the natural rights of every citizen and happiness of all." Jaffa, *supra* note 151, at 416.

168. Johnson v. Tait, 774 P.2d 185, 186 (Alaska 1989).

169. *Id.* The colors were displayed in the form of a custom leather patch which identified Tait as a member of the Alaska Chapter of the Hell's Angels. *Id.* at n.1.

170. *Id.* at 186.

171. *Id.*

172. *Id.* at 186. *See* ALASKA CONST. art. I, § 5 ("Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.").

173. *Tait,* 774 P.2d at 186.

174. *Id.* at 186-87.

175. *Id.* at 187-88. *See supra* notes 12 through 55 and accompanying text.

176. *Tait,* 774 P.2d at 188-90. *See supra* notes 60 through 130 and accompanying text.

> establishment." *We do not believe that the framers intended article I, section 5 to extend a doctrine which began in the streets of a company town inside the doors of a privately owned tavern.*
>
> We hold that article I, section 5 of the Alaska Constitution does not apply to the proprietor of a small establishment such as the Crazy Horse. Absent such a constitutional limitation, the proprietor of a small establishment such as the Crazy Horse may validly refuse to serve anyone for any reason not prohibited by statute. *As a matter of law, the rationale in the shopping center and university cases does not overcome the private autonomy of a small proprietor in the conduct of its business. Given our conclusion, we leave to a more appropriate case our resolution of the question presented in the shopping center cases.*[177]

The *Crazy Horse* case seemed to turn on the relatively small nature of the business at issue. The court specifically left open the question of whether large retail shopping centers performed a sufficiently "public function" to invoke Alaska constitutional safeguards.[178]

2. *The* Fardig *Case.* The Alaska Court of Appeals recently addressed state action in a criminal trespass case. In *Fardig v. Municipality of Anchorage,*[179] several pro-life protestors were distributing literature in the parking lot of the Alaska Women's Health Services' building. They were arrested and charged with trespass after refusing to leave the premises.[180] Fardig and her codefendants unsuccessfully asserted as a defense, *inter alia,* that the charges of trespass unconstitutionally interfered with their freedom of speech.[181]

On appeal, the Alaska Court of Appeals referred to the line of federal cases emanating from *Marsh* and numerous analogous state cases.[182] Relying upon the Alaska Supreme Court's analysis in *Crazy Horse,* the court concluded that the office building at issue in *Fardig* was not of the size or nature necessary to impose constitutional limitations upon its owners.[183] Accordingly, the court rejected the defendants' free expression defense to their trespass convictions.[184]

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177. *Tait,* 774 P.2d at 190 (citation and footnote omitted) (emphasis added).
178. *Id.*
179. 785 P.2d 911 (Alaska Ct. App. 1990).
180. *Id.*
181. *Id.* at 913. *See* ALASKA CONST. art. I, § 5, *supra* note 172.
182. *Fardig,* 785 P.2d at 915. *See supra* notes 12 through 55 and notes 60 through 130 and accompanying text.
183. *Fardig,* 785 P.2d at 915.
184. *Id.*

3. *The* Leudtke *Anomaly.* The state action doctrine in Alaska took an anomalous turn in the case of *Leudtke v. Nabors Alaska Drilling, Inc.*[185] On its face, *Leudtke* seems to uphold the state action requirement, which has been prevalent in Alaska jurisprudence since statehood.[186] However, the Alaska Supreme Court's desire to reach an equitable result for the individual plaintiffs, the Leudtkes, may have opened a procedural door — just a crack — for private litigants to use constitutional swords absent state action.

Leudtke concerned the termination of two former employees of Nabors Alaska Drilling, Inc., Clarence and Paul Leudtke, who worked on oil drilling rigs on the North Slope of Alaska. Both refused to submit to a urinalysis screening to detect drug use as required by Nabors. When they failed to submit to these drug tests, the Leudtkes were fired.[187]

The Leudtkes alleged, *inter alia*, that Nabors' drug testing program violated their right to privacy under article I, section 22 of the Alaska Constitution and breached the covenant of good faith and fair dealing implicit in their employment contracts with Nabors.[188] The trial court rejected these and other claims asserted by the Leudtkes and an appeal ensued.[189]

The Alaska Supreme Court first considered whether the right to privacy embodied in the Alaska Constitution could be used by the Leudtkes as a basis for refusing drug testing by a private employer.[190] The court recognized that certain constitutional provisions, at least on a federal level, proscribed private conduct.[191] However, the Alaska Supreme Court was unconvinced that "Alaska's constitutional right to privacy was intended to operate as a bar to private action, here Nabors' drug testing program."[192] The court concluded:

> Absent a history demonstrating that the amendment was intended to proscribe private action, or a proscription of private action in the language of the amendment itself, we decline to extend the constitutional right to privacy to the actions of private parties.[193]

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185. 768 P.2d 1123 (Alaska 1989).

186. *See supra* notes 132 through 146 and accompanying text.

187. *Leudtke,* 768 P.2d at 1124-25.

188. *Id. See* ALASKA CONST. art. I, § 22 ("The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.").

189. *Leudtke,* 768 P.2d at 1126-27.

190. *Id.* at 1129-30.

191. *Id.* ("We are aware, however, of constitutional clauses which prohibit private action. The Thirteenth Amendment of the United States Constitution, prohibiting slavery, applies to private action.") The Alaska court also noted constitutional provisions from other states which had been construed to apply to private action. *Id.* at 1130.

192. *Id.*

193. *Id.*

The court thus reached the traditional conclusion on the state action question.

The anomaly of *Leudtke*, however, lies in the portion of the opinion concerning Nabors' alleged breach of the covenant of good faith and fair dealing.[194] In *Mitford v. De LaSala,*[195] the Alaska Supreme Court recognized that all employment contracts in Alaska contained an implied covenant of good faith and fair dealing.[196] The court later concluded that a violation of public policy could give rise to a breach of that covenant.[197] Based upon these prior cases, the court in *Leudtke* concluded that "there is a public policy supporting the protection of employee privacy [and a] [v]iolation of that policy by an employer may rise to the level of a breach of the implied covenant of good faith and fair dealing."[198]

The troubling issue in *Leudtke* is the source of the public policy favoring employee privacy. The court noted that public policy is a very general term and difficult to define.[199] However, it went on to conclude that it would "look to the entire body of law in the State of Alaska for evidence of citizens rights, duties and responsibilities, to determine the public policy with regard to employee privacy."[200]

The court found support for employee privacy rights from three sources.[201] First, certain legislative limitations on employer inquiries of its employees, such as prohibitions on polygraph tests[202] and antidiscrimination provisions,[203] provide evidence of a general legislative intent to "liberally protect employee rights."[204] The difficulty with this analysis is that if the legislature had chosen to place limitations on drug testing by private employers, it could have done so. In the absence of such legislation, the Alaska court has extrapolated from legislation, in essence, to enact its own.

Second, and most troubling, the court relies upon the Alaska Constitution's privacy clause.[205] After having decisively rejected the right to privacy as a basis for independent action owing to the absence

194. *See id.* at 1130-33.
195. 666 P.2d 1000 (Alaska 1983).
196. *Id.* at 1007.
197. Knight v. American Guard & Alert, Inc., 714 P.2d 788, 792 (Alaska 1986).
198. *Leudtke,* 768 P.2d at 1130.
199. *Id.* at 1132 ("There is no precise definition of the term [public policy].") (quoting Palmateer v. International Harvester, 85 Ill. 2d 124, 130, 421 N.E.2d 876, 878 (1981)).
200. *Id.* (citation omitted).
201. *Id.* at 1132-33.
202. ALASKA STAT. § 23.10.037 (Supp. 1989).
203. *Id.* § 18.80.200(a).
204. *Leudtke,* 768 P.2d at 1132.
205. *Id.* at 1132-33. *See* ALASKA CONST. art. I, § 22, *supra* note 188.

of state action, the court then used this very standard against the private employer in the context of a public policy breach of the covenant of good faith and fair dealing:[206] "Certainly the fact that the citizenry has incorporated the right to privacy in the Alaska Constitution strongly supports the contention that this right 'strike[s] at the heart of a citizen's social rights.' "[207] The use of constitutional rights in this context raises the ominous question of how far the public policy breach may intrude into the state action doctrine. Will private employers now be subject to search and seizure limitations,[208] due process of law requirements,[209] religious freedom restrictions,[210] or any other of the panoply of constitutional rights and limitations in the Alaska Constitution? Furthermore, because the covenant of good faith and fair dealing is inherent not just to employment contracts but to many other contracts as well,[211] what prevents this imposition of constitutional rights and limitations upon parties to other types of contracts?

Finally, the court also identified a public policy interest in privacy based upon the common law right to privacy.[212] Of course, since the common law is a judicial creation, using the common law as a source for "public policy" is a rather circular endeavor. Nevertheless, based on these "public policy" sources, the court concluded:

> Thus, the citizens' right to be protected against unwarranted intrusions into their private lives has been recognized in the law of Alaska. The Constitution protects against governmental intrusion, statutes protect against employer intrusion, and the common law protects against intrusions by other private persons. As a result, there is sufficient evidence to support the conclusion that there exists a public policy protecting spheres of employee conduct into which employers may not intrude.[213]

Having found a public policy in favor of employee privacy, the court was left to evaluate whether Nabors' drug testing policy violated that right.[214] After balancing the Leudtkes' privacy rights against the countervailing public policy supporting the health and safety of other workers and even the Leudtkes themselves, the court concluded that

206. *Leudtke,* 768 P.2d at 1132.

207. *Id.* at 1133 (quoting Palmateer v. International Harvester, 85 Ill. 2d 124, 130, 421 N.E.2d 876, 878-79 (1981)).

208. *See* ALASKA CONST. art. I, § 14.

209. *See id.* § 7.

210. *See id.* § 4.

211. *See, e.g.,* ALASKA STAT. § 45.01.203 (1986) (the covenant of good faith and fair dealing in the context of the Uniform Commercial Code).

212. *Leudtke,* 768 P.2d at 1133.

213. *Id.*

214. *Id.* at 1136.

Nabors was justified in conducting drug testing.[215] However, the court noted that Nabors' drug testing program must meet two requirements: "First, the drug test must be conducted at a time reasonably contemporaneous with the employee's work time. . . . Second, an employee must receive notice of the adoption of a drug testing program."[216] The *Leudtke* court not only created a public policy breach of the covenant of good faith and fair dealing based upon unrelated legislative enactments, inapplicable constitutional provisions, and prior judicial pronouncements, but it also went on to set the standards for permissible drug testing by private employers.

Leudtke demonstrates the important role of the state action requirement in constitutional litigation. When the court imposes constitutional limitations upon private litigants, in this case through the implied covenant of good faith and fair dealing, the court chooses to act where the legislature should.[217]

E. Proposed Resolution of the State Action Question Presented by Shopping Centers Under the Alaska Constitution

As noted earlier, *Crazy Horse* expressly left open the question of whether state action is required by the Alaska Constitution in the context of large shopping centers.[218] The first question presented by the shopping center case is whether Alaska's constitutional framers *intended* that private property owners be treated any differently than other citizens. In *Crazy Horse,* the Alaska Supreme Court recognized that the framers did not intend "article I, section 5 to extend a doctrine which began in the streets of a company town inside the doors of a privately owned tavern."[219] The historical documents that influenced the adoption of the Alaska Constitution demonstrate that our framers *intended* a consistent restriction on the power of government.[220] The framers did not distinguish among the owners of private property for the purposes of requiring state action. It is thus fair to conclude that they envisioned nothing less than the uniform application of the state action requirement in constitutional litigation.

The second question presented by the shopping center case is whether the owner of such a center is *at liberty* to make choices that conflict with constitutional norms and, thereby, affect other people. There is no reason to believe that the owners of shopping centers are

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215. *Id.*

216. *Id.* at 1136-37.

217. For the discussion regarding the separation of powers doctrine, see *supra* notes 157 through 167 and accompanying text.

218. Johnson v. Tait, 774 P.2d at 185, 190 (Alaska 1989).

219. *Id.*

220. *See supra* notes 142 through 146 and accompanying text.

any less protected by article I, section 1 of the Alaska Constitution than those who own taverns:

> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right . . . . *[A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.*[221]

Property rights, such as those of shopping center owners, are thus fundamental to liberty itself. "Personal liberty means very little when one's property rights are invaded . . . ."[222] As such, the philosophy of individual rights embodied in the Alaska Constitution must extend to the owners of shopping centers.

The third question presented by the shopping center case is whether the separation of powers doctrine demands state action as well. The shopping center owner and the would-be constitutional plaintiff are, in principle, on the same playing field as the parties in *Crazy Horse.* In both instances, the absence of a state action requirement requires the judiciary to balance conflicting sets of interests, a task not properly within the domain of the courts.[223] The separation of powers doctrine therefore mandates that state action be present in the shopping center context.

Each of these conclusions independently supports the requirement of state action in "constitutional litigation" involving shopping centers in Alaska. There are some, however, who might argue that the sheer *size* of modern shopping centers justifies a result different from that reached by the court in *Crazy Horse.* This argument is without merit. The intentions, the wording and the structure of government provided by the Alaska Constitution cannot accommodate such an exception. Indeed, in the modern age, such an argument has no bounds: "[I]f . . . size were the relevant criteria, it could well be asked how shopping centers could be legally distinguished from places such as sports stadiums, convention halls, theaters, county and state fairs, large office and apartment buildings, supermarkets, department stores or churches."[224]

If Alaska citizens can be convinced that shopping center owners should be forced to conform their conduct to constitutional norms, a means is available for them to do so.[225]

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221. Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) (emphasis added).

222. State v. Norene, 457 P.2d 926, 931 (Alaska 1969).

223. *See supra* notes 157 through 167 and accompanying text.

224. Southcenter v. National Democratic Policy Comm., 113 Wash. 2d 413, 433, 780 P.2d 1282, 1292 (1989) (en banc).

225. ALASKA CONST. art. XIII, § 1 (relating to constitutional amendments).

V. CONCLUSION

Although Alaska courts have consistently required state action as a condition to alleging constitutional claims, these courts have only cursorily examined the foundations of this necessity. State action is *necessary* because those who drafted the Alaska Constitution intended that it be so. Furthermore, the Alaska Constitution requires state action in order to protect the inherent liberty of Alaska citizens to make choices that do not necessarily conform to constitutional norms. Finally, state action is necessitated by the separation of powers doctrine, so integral to the structure of government set forth by the Alaska Constitution.

The pervasive role modern shopping centers play in our everyday lives suggests to some that constitutional liberties should be extended to these seemingly public places. Freedom of expression is so critical to our constitutional form of government that any abridgement of it tends to shock the conscience. Our conscience, however, is not the law.

> In law, the moment of temptation is the moment of choice, when a judge realizes that in the case before him his strongly held view of justice, his political and moral imperative, is not embodied in a statute or any provision of the Constitution. He must then choose between his version of justice and abiding by the American form of government. Yet the desire to do justice, whose nature seems to him obvious, is compelling, while the concept of constitutional process is abstract, rather arid, in the abstinence it counsels unsatisfying. To give in to temptation, just one time, solves an urgent human problem, and a faint crack appears in the American foundation.[226]

The moment of temptation for the Alaska Supreme Court approaches.[227]

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226. R. BORK, THE TEMPTING OF AMERICA 1 (1990).

227. The Alaska Supreme Court may have the opportunity to resolve the issue in Lincoln v. Northway Assoc., No. 3AN-89-9331 (Alaska Super. Ct. 1989), a case in which the plaintiff has sued the owners of a large Anchorage shopping mall, alleging the violation of his rights to free expression. According to his complaint, mall representatives refused to permit the plaintiff to display a small sign protesting an Anchorage visit by representatives of the Soviet Union. The sign — approximately 8-½ inches by 6 inches — stated in Russian and in English that the "Murderer Russkis" should "Go Home." The case is currently pending in the Alaska Superior Court, Third Judicial District, in Anchorage.