CONSTITUTIONAL LAW—FREEDOM OF SPEECH—STATE CONSTITUTION CREATES RIGHT OF ACCESS TO PRIVATE PROPERTY INDEPENDENT OF FEDERAL CONSTITUTION—*State v. Schmid*, 84 N.J. 535, 423 A.2d 615 (1980), *appeal granted sub nom. Princeton University v. Schmid*, 101 S. Ct. 2312 (1981).

The explicitly guaranteed right of free speech[1] and its corollary right of freedom of association[2] have achieved a sacrosanct position in constitutional law. Close behind in the order of ikons is the bundle of rights attendant upon the ownership of private property.[3] In *State v. Schmid*,[4] the Supreme Court of New Jersey resolved a clash between these conflicting rights and created a special right of access to private property for the expression of rights associated with speech.[5] The *Schmid* court relied upon the principle[6] espoused by the California Supreme Court in *Robins v. Prune Yard Shopping Center*[7] and upheld by the United States Supreme Court in *Prune Yard Shopping Center v. Robins*[8]: a state constitution may provide individual freedoms of speech and petitioning greater than those guaranteed by the first amendment of the Federal Constitution.[9] Additionally, the state

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[1] U.S. CONST. amends. I, XIV; N.J. CONST. art. I, para. 6.

[2] *See, e.g.*, Healey v. James, 408 U.S. 169, 181 (1972) (state college may not deny student association campus privileges based upon parental organization activities); NAACP v. Button, 371 U.S. 415, 429-30 (1963) (state may not prevent organizational aid to members); NAACP v. Alabama, 357 U.S. 449, 460-61 (1958) (State of Alabama could not compel NAACP to release membership lists, for to do so would impinge upon "the close nexus between the freedoms of speech and assembly" which devolve into the "freedom to engage in association").

[3] *See* Kaiser Aetna v. United States, 444 U.S. 164 (1980); note 74 *infra* and accompanying text.

[4] 84 N.J. 535, 423 A.2d 615 (1980), *appeal granted sub nom.* Princeton Univ. v. Schmid, 101 S. Ct. 2312 (1981).

[5] *Id.* at 562, 423 A.2d at 629.

[6] *Id.* at 550, 552-53, 561-62, 423 A.2d at 624, 629.

[7] 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979).

[8] 447 U.S. 74 (1980).

[9] *Id.* at 80-81; 23 Cal. 3d at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860. The *Prune Yard* principle evolved through a series of California decisions. *See Prune Yard*, *id.* at 903, 592 P.2d at 342, 153 Cal. Rptr. at 856. *Prune Yard* overruled Diamond v. Bland, 11 Cal. 3d 331, 521 P.2d 460, 113 Cal. Rptr. 468 (1974) (*Diamond II*), which had in turn reversed Diamond v. Bland, 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970) (*Diamond I*). The facts of *Prune Yard* were quite similar to those of the *Diamond* case. 23 Cal. 3d at 903, 592 P.2d at 342, 153 Cal. Rptr. at 855. In each instance, private parties seeking to utilize privately owned shopping centers for dissemination of political materials were prevented from so doing by the shopping center owners. *Id.* Prior to *Prune Yard*, the California court, relying on Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), which held that a shopping center owner could prohibit distribution of leaflets when they communicated no information relating to the center's business and when there was an adequate, alternate means of communication, *id.* at 569-70, utilized a federal analysis to preclude private parties from use of shopping centers for dissemination of political materials and solicitation of petition signatures. 11 Cal. 3d at 335 n.4, 521 P.2d at 463 n.4, 113 Cal. Rptr. at

may impose reasonable restrictions on private property under its police power if such restrictions do not constitute "a taking without just compensation."[10] Applying the *Prune Yard* principle, which was developed in the commercial setting of a shopping center,[11] to a private university, the New Jersey court held that private property held open to the public for a particular use consonant with its normal private use may not be subjected to unreasonable restrictions upon that use. A right of access by the public, if granted at all, may not be limited except by reasonable time, place, and manner restrictions.[12]

On April 5, 1978, Chris Schmid[13] was arrested on criminal trespass charges[14] while distributing and selling political materials for the United States Labor Party on the main campus of Princeton University in New Jersey.[15] Schmid was not a student at Princeton University,[16] but a member of the Labor Party[17] which was not "a

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471 n.4. In *Prune Yard*, however, the California court honed its analysis so that federally protected property rights would no longer, without inquiry, be considered to subsume state protected speech rights. The court concluded that in light of the growing social and economic significance of shopping centers, 23 Cal. 3d at 907, 592 P.2d at 345, 153 Cal. Rptr. at 858, a restrictive reading of *Lloyd* would reveal no proscription on California's providing greater protection than that provided by the first amendment. Accordingly, the court held that the California constitution protected speech and petitioning reasonably exercised in privately owned shopping centers. *Id.* at 909, 592 P.2d at 347, 153 Cal. Rptr. at 860.

[10] 23 Cal. 3d at 909, 592 P.2d at 347, 153 Cal. Rptr. at 860; 447 U.S. at 81.

[11] *Id.* at 902, 592 P.2d at 342, 152 Cal. Rptr. at 855.

[12] 84 N.J. at 563, 423 A.2d at 629.

[13] *Id.* at 538, 423 A.2d at 616. Steven Komm, another member of the Labor Party was also arrested on April 5, 1978, for assisting in the distribution of political materials. *Id.* at 538 n.1, 423 A.2d at 616 n.1. At trial, however, the charges against him were dismissed on the state's motion. *Id. See* State v. Schmid, No. SC53264 (Princeton Mun. Ct., Oct. 30, 1978).

[14] 84 N.J. at 541, 423 A.2d at 618. Schmid was charged as a disorderly person under N.J. STAT. ANN. § 2A:170-31 (West 1971 & Cum. Supp. 1981-1982), which provided in part:

> Any person who trespasses on any lands, . . . forbidden so to trespass by the owner, occupant, lessee or licensee thereof, or after public notice on the part of the owner, occupant, lessee or licensee forbidding such trespassing, . . . is a disorderly person and shall be punished by a fine of not more than $50.

Id. The offense covered by that statute was repealed in 1979 and is now contained in N.J. STAT. ANN. § 2C:18-3(b) (West 1980).

[15] 84 N.J. at 538-39, 423 A.2d at 616. The materials being distributed included literature directly related to the Newark, New Jersey, mayoral campaign, endorsing the candidacy of a member of the United States Labor Party. *Id.* at 539, 423 A.2d at 616. The materials offered for sale were position papers of the United States Labor Party, as well as general informational Party leaflets. *Id.* at 538, 423 A.2d at 617.

[16] *Id.* at 539, 423 A.2d at 618. Of special relevance in this context was the difference in standards applied to non-students distributing political materials on campus. No permission was required for students, but non-students had to obtain permission from university officials prior to such distribution. *Id.*

[17] *Id.* at 538, 423 A.2d at 617.

university-affiliated or campus-based organization."[18] The Party on several occasions had sought and been denied permission to distribute political literature on campus.[19] The April 5, 1978, incident was not preceded by any request for use of the campus either to distribute political materials or to solicit contributions.[20] Schmid's activities resulted in his arrest and charge as a defiant trespasser under section 2A:170-31 of the New Jersey Statutes Annotated.[21] He was convicted in Princeton Borough municipal court and fined $15 plus $10 costs.[22] Schmid appealed and at the trial *de novo*[23] Judge Schoch[24] found him

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[18] *Id.* at 539, 423 A.2d at 618. University regulations in effect at the time precluded any unpermitted on-campus distribution of materials by off-campus organizations, but no such regulation existed as to university affiliated organizations. *Id.* While expressly providing that permission was a prerequisite for solicitation of sales, contributions, and distribution of materials on campus, as well as on a door-to-door basis, the regulations further stated: "on the same grounds, the campus is open to speakers whom students, faculty, or staff wish to hear, and to recruiters for agencies and organizations in whom students or faculty have an interest." COUNCIL OF THE PRINCETON UNIVERSITY COMMUNITY, UNIVERSITY REGULATIONS (1975) (amended 1976).

These regulations were revised subsequent to the commencement of *Schmid*, but prior to its conclusion. The 1979 revisions, although allowing "individuals acting on behalf of candidates for public office or of bona fide political or religious organizations" to "obtain permission to sell or distribute [their] political or religious literature" subject to reasonable guidelines detailing time, place and manner restrictions, continued the university policy of regulating such activities. 84 N.J. at 540 n.2, 423 A.2d at 617 n.2. *See* COUNCIL OF THE PRINCETON UNIVERSITY COMMUNITY, UNIVERSITY REGULATIONS (1975) (amended 1979).

[19] 84 N.J. at 539, 423 A.2d at 618.

[20] *Id.* Schmid had attempted to utilize the Princeton campus on a prior occasion for distributing political literature, likewise without having sought permission to do so through official Princeton channels. *Id.* at 541, 423 A.2d at 619. At that time his activities were terminated by a university proctor who informed Schmid that both his presence and his activity were "forbidden." *Id.* Schmid was warned that he "was subject to arrest for trespassing if he entered on campus to solicit again without university permission." *Id.*

[21] 84 N.J. at 539, 423 A.2d at 618.

[22] N.J. STAT. ANN. § 2A:170-31 (West 1971) (repealed 1978). 84 N.J. at 539, 423 A.2d at 618. At this juncture it was already evident that *State v. Schmid* was not a routine trespass case. Judge Carchman, sitting in the Municipal Court for the Borough of Princeton, felt compelled to take the unusual step of delivering his judgment in a twenty-four page opinion in which he noted:

> The *novel issue* presented is whether N.J.S.A. 2A:170-31 can be used to impose criminal sanctions on persons engaged in activity while on the grounds of a private residential university when such activity, if conducted on public property, would be protected by the First and Fourteenth Amendments to the United States Constitution.

State v. Schmid, No. SC53264, Slip op. at 14 (Princeton Mun. Ct., Oct. 30, 1978) (emphasis in original). A further indication of the unique nature of the case was Schmid's legal representation. Jerrold Kamensky of the American Civil Liberties Union and Sanford Levinson, then a member of the Princeton faculty, counselled the defendant. *Id.*

[23] 84 N.J. at 541, 423 A.2d at 619. *See* N.J. CT. R. 3:23-8.

[24] *See* State v. Schmid, No. C138 (N.J. Super. Ct., Law Div., March 12, 1979).

guilty of criminal trespass.[25] He again appealed, but while his case was pending in the appellate division the supreme court certified it *sua sponte*,[26] and reversed the conviction.[27]

The Supreme Court of New Jersey utilized a multi-tiered analysis in *Schmid* to resolve the conflict between the speech and associational rights of the defendant and the property and speech rights of Princeton. First, the court considered Schmid's federal claims for first amendment protection under two separate state action theses in light of relevant constitutional doctrine.[28] Next, the court considered whether the New Jersey Constitution could protect Schmid's expressional rights even without a clear indication that federal protection would suffice.[29] Last, the court faced the question whether these independent state grounds could provide protection against the conduct of private parties that infringed upon an individual's expressional freedoms.[30]

In pursuing the first phase of its analysis, the court recognized that "the First Amendment was designed . . . to foster unfettered discussion and free dissemination of opinion dealing with matters of public interest and governmental affairs."[31] It is, however, from governmental interference and not from similar private intrusions that the first amendment protects the rights of free speech and assembly.[32] Concluding that public universities by definition connote state action and involvement,[33] the court viewed the possible nexus between the state and a private university as less readily apparent.[34]

The court then examined alternate state action rationales under which the first amendment could be invoked against non-governmental or private entities.[35] It considered the "symbiotic relationship"

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[25] 84 N.J. at 541, 423 A.2d at 619.

[26] *Id.* at 541, 423 A.2d at 619. *See* N.J. Ct. R. 2:12-1. At this point, upon invitation of the court, Princeton University intervened in the appeal. 84 N.J. at 541, 423 A.2d at 618. The Association of Independent Colleges and Universities in New Jersey also filed an *amicus curiae* brief. *Id.*

[27] 84 N.J. at 569, 423 A.2d at 632.

[28] *Id.* at 542, 423 A.2d at 619.

[29] *Id.* at 553, 423 A.2d at 623.

[30] *Id.* at 560, 423 A.2d at 628.

[31] *Id.* at 542, 423 A.2d at 618-19.

[32] *Id.* at 543, 423 A.2d at 619.

[33] *Id.* at 535, 423 A.2d at 619. *See also* Healy v. James, 408 U.S. 169, 180 (1972).

[34] 84 N.J. at 543, 423 A.2d at 619. For an extensive analysis of school and university related rights with reference to the special doctrines of *in loco parentis*, public function, and access to facilities, see Claypool, *Public Forum Theory in the Educational Setting: The First Amendment and The Student Press*, 1 U. Ill. L.F. 879 (1979).

[35] 84 N.J. at 544-53, 423 A.2d at 620-25.

test of *Burton v. Wilmington Parking Authority*,[36] which provides that private parties in a mutually beneficial relationship with the state may not act in a manner that impermissibly interferes with the federally granted individual rights of others.[37] The court also examined the "extent of direct state regulation" thesis embodied in *Jackson v. Metropolitan Edison Co.*,[38] which is based upon the interplay of regulation, control, and affirmative assistance between the private entity and the state.[39] It noted that both of these approaches have been utilized in first amendment challenges to the actions of private universities,[40] but have failed for the most part to result in a finding of state action.[41] The court nonetheless concluded that "the interface between the university and the State [was] not so extensive as to demonstrate a joint and mutual participation in higher education or to establish an interdependent or symbiotic relationship between the two in the field of education."[42] Similarly, the court rejected the "close nexus" approach of *Moose Lodge No. 107 v. Irvis*,[43] finding the degree of state regulation insufficient concerning "the public's access

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[36] 365 U.S. 715 (1961).

[37] *Id.* at 723-26; 84 N.J. at 544, 423 A.2d at 619-20. In *Burton*, a privately owned restaurant leasing premises within a government owned and operated parking garage was held subject to the equal protection clause of the fourteenth amendment via state action analysis. 365 U.S. at 723-26. Specifically, the restaurant's refusal to serve blacks was deemed a denial of equal protection. *Id.*

[38] 419 U.S. 345 (1974).

[39] *Id.* at 351, 357; 84 N.J. at 544, 423 A.2d at 620. Application of this standard has produced results difficult to reconcile. In Public Util. Comm'n v. Pollak, 342 U.S. 451 (1952), policy decisions of a private transit company requiring governmental approval formed the basis for a finding of state action. *Id.* at 463. Conversely, in *Jackson*, governmental approval of a request from a regulated public utility "d[id] not transmute a practice initiated by the utility and approved by the utility commission into 'state action.' " 419 U.S. at 357. Although it has been suggested that the "extent of regulation" test has replaced the "symbiotic relationship" test of *Burton*, Greene v. Johns Hopkins Univ., 469 F. Supp. 187, 194-95 (D. Md. 1979), the distinction is still viable. Flagg Bros. Inc. v. Brooks, 436 U.S. 149, 164 (1978).

[40] 84 N.J. at 545, 423 A.2d at 620. *See, e.g.*, Blackburn v. Fisk Univ., 443 F.2d 121, 122-24 (6th Cir. 1971); Greene v. Johns Hopkins Univ., 469 F. Supp. 187, 196-98 (D. Md. 1979).

[41] 84 N.J. at 545-46, 423 A.2d at 620. The court suggested that since most of the private university state action cases have involved the "internal affairs of the particular institution," a different result might be had where the conduct of the "general public *vis-a-vis* the institutions" was at issue. *Id.* at 546 n.5, 423 A.2d at 621 n.5.

[42] *Id.* at 548, 423 A.2d at 621.

[43] 407 U.S. 163 (1972). The "close nexus" approach requires that before state action can be found based upon the relationship between the parties, the state must do more than merely acquiesce in the actions of the private party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970). Absent a "sufficiently close nexus" between the regulatory or ministerial function exercised by the state and the impermissible acts of the private party, state action cannot exist. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164 (1978). *See also Jackson*, 419 U.S. at 357; *Moose Lodge*, 407 U.S. at 190.

to the university campus"[44] and, "the distribution of political literature or other expressional activities."[45]

Turning to the public function doctrine, the *Schmid* court once again analyzed Princeton's activities to determine if they constituted state action.[46] Under this theory, if a private entity is devoted to a large extent to public uses, then it may be necessary for the entity to honor first amendment rights.[47] The court examined two instances in which sufficient devotion to public use has been found—the so-called "company-town" cases[48] and the "shopping center" cases[49]—and then attempted to apply the rationales of those decisions to the facts of *Schmid*. In *Marsh v. Alabama*,[50] the United States Supreme Court held that where a company-owned town provides the services and benefits generally associated with a municipality it is "subject to the strictures of the first amendment."[51] Although the company-town rationale was extended for a short period of time to privately owned shopping malls,[52] the Supreme Court in *Lloyd Corp. v. Tanner*[53] held that distribution of anti-war handbills could be barred.[54] The *Lloyd* Court stressed that alternative means of communication existed and that the expressional activities at issue were unrelated to the shopping center's business.[55] Moreover, the invitation for public use of the shopping center was not "open-ended" or for "any and all purposes."[56] Subsequent decisions reinforced the *Lloyd* Court's determi-

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[44] 84 N.J. at 548, 423 A.2d at 621-22.

[45] *Id.*, 423 A.2d at 622.

[46] *Id.* at 549, 423 A.2d at 622.

[47] *Id.*; *see* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 158 (1978); Marsh v. Alabama, 326 U.S. 501, 506 (1946).

[48] 84 N.J. at 549, 551-52, 423 A.2d at 622-24; *e.g.*, Marsh v. Alabama, 326 U.S. 501 (1946).

[49] 84 N.J. at 549-52, 423 A.2d at 622-24; *e.g.*, Hudgens v. N.L.R.B., 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

[50] 326 U.S. 501 (1946).

[51] 84 N.J. at 549, 423 A.2d at 622; *see Marsh*, 326 U.S. at 503, 508-09.

[52] *See* Hudgens v. N.L.R.B., 424 U.S. 507, 524 (1976) (supporting view that *Lloyd* effectively overruled *Logan Valley* and, thus, expressional activities in private mall were not protected by first amendment); Lloyd Corp. v. Tanner, 407 U.S. 551, 564-65 (1972) (distinguishing *Logan Valley* on grounds that subject of handbills distributed in *Lloyd* were unrelated to business of shopping mall); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 317, 322-23 (1968) (privately owned shopping mall held to be strikingly similar to company-owned town, and therefore subject to union members' first amendment rights to picket non-unionized store in mall).

[53] 407 U.S. 551 (1972).

[54] *Id.* at 566-67.

[55] *Id.* at 564-67.

[56] *Id.* at 565.

nation that expressional activities taking place in private shopping malls are not protected by the first amendment.[57]

Assessing the validity of Schmid's federal claim under the *Lloyd* rationale, the Supreme Court of New Jersey concluded that "it would be difficult to [find] under the circumstances . . . that Princeton University is directly subject to First Amendment strictures."[58] The court noted that readily available public streets and public facilities for promulgation of and discourse on political and societal affairs would fulfill the alternative means of communication exception.[59] Furthermore, recognizing that public uses and expressional activities are subordinate to Princeton's overall educational policies, the *Schmid* court concluded that the university's invitation to the public, as in *Lloyd*, though broad was neither "open-ended" nor "for any and all purposes."[60] Similarly, although "the public's invitation to use the college facilities is incident to the educational life at the institution," Princeton could not be considered "the functional equivalent of a 'company town.' "[61] Upon completion of its thorough odyssey through the stormy seas of state action,[62] the court concluded that the

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[57] *E.g.*, Prune Yard Shopping Center v. Robins, 447 U.S. 74 (1980); Hudgens v. N.L.R.B., 424 U.S. 507 (1967).

[58] 84 N.J. at 550-51, 423 A.2d at 623.

[59] *Id.* at 551, 423 A.2d at 623; *see Lloyd*, 407 U.S. at 566-67.

[60] 84 N.J. at 551, 423 A.2d at 623. Therefore, even though Princeton's educational purposes were more closely related to expressional freedoms than a shopping center's purposes might be, "attachment of First Amendment requirements to the University by virtue of the general public's permitted access to its property would still be problematic." *Id.* at 551, 423 A.2d at 623.

[61] *Id.* at 552, 423 A.2d at 624.

[62] *Id.* at 553, 423 A.2d at 624. The court, in its analysis of the ability of state action theory to reach the actions of private parties or private interests, relegated the potentially most powerful "process of court" theory of Shelley v. Kraemer, 334 U.S. 1 (1968), to a footnote. 84 N.J. at 548 n.6, 423 A.2d at 622 n.6. *Shelley* held that the judicial enforcement of private rights, in itself, constitutes state action. 334 U.S. at 19. If the holding in *Shelley* were strictly applied, any resort to judicial process to enforce a private right would constitute state action, effectively eliminating any distinction between state and private action. As the *Schmid* court noted, however, application of the process of court theory is delimited by the nature of the rights asserted. 84 N.J. at 548 n.6, 423 A.2d at 622 n.6. Thus, the inherent weakness of state action analysis becomes clear; the nature of the substantive question dictates the efficacy of the jurisdictional tool. *See generally* Note, *State Action: Theories For Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 672-80 (1974). *See also* Runyan v. McCrary, 427 U.S. 100, 161, 172-75 (1975); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 417 n.5 (1968).

Surprisingly, the court did not consider the most far reaching, albeit ephemeral, application of state action in Reitman v. Mulkey, 387 U.S. 369 (1967). In that case, the United States Supreme Court upheld the decision of the California Supreme Court that an amendment added to the state constitution by initiative impermissibly impinged upon the guarantees of equal protection of the fourteenth amendment; the amendment effectively created a private right to discriminate in the sale and rental of housing space. *Id.* at 374. The *Reitman* Court held that the existence and application of the constitutional provision would directly involve the state "in

contrapuntal nature of the policy concerns, combined with the clash in constitutional values at stake, required forebearance in extension of the first amendment to protect Schmid from Princeton.[63]

Analysis of Schmid's assertion of alternate protection of his rights on state constitutional grounds required the court to review recent decisions of the United States Supreme Court that upheld extensions of individual rights by states beyond the federal guarantees of the United States Constitution.[64] The court also reviewed the recent history of its own extensions of such rights in holdings that liberally construed the state constitution.[65] In view of both the decisional law[66] and the more expansive language of New Jersey's Constitution,[67] the court determined that the state constitution imposed an affirmative burden on the state to protect fundamental personal rights through action, not merely to avoid abridging such rights.[68]

Although recognizing that the constraints of federalism and the fourteenth amendment's requirement of state action are absent in the enforcement of state-based constitutional rights,[69] the court suggested

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private racial discrimination to an unconstitutional degree." *Id.* at 380. Had the *Schmid* court considered the rationale of *Reitman*, it might have struck down the application of its criminal trespass law as overbroad under a state action theory.

[63] 84 N.J. at 553, 423 A.2d at 624.

[64] *Id.* Again the *Schmid* court relied on *Prune Yard*, in this instance, for the broadly held and little disputed proposition that "state constitutional guarantees of . . . rights may surpass . . . federal." *Id. See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495-98 (1977) (viability of trend to expand guarantees of Bill of Rights lies in state court decisions). *See also* Mosk, *The New States Rights*, 10 CAL. L. ENFORCEMENT J. 81 (1976).

[65] 84 N.J. at 555-57, 423 A.2d at 625. *See also* Brennan, *supra* note 64, at 499-501.

[66] 84 N.J. at 556-57, 423 A.2d at 625-26 (citing recent instances of state court extended protection to rights either within or closely associated with first amendment—freedom of press and associational rights).

[67] *Id.* The relevant sections of New Jersey's constitution may be found in article one. Paragraph six provides: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press . . . ." N.J. CONST. art. I, para. 6. In addition, paragraph eighteen provides: "The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances." *Id.*, para. 18.

The federal provision, however, is less expansive: "Congress shall make no law . . . abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for redress of grievances." U.S. CONST. amend. I.

[68] 84 N.J. at 559, 423 A.2d at 628. The principle may also be stated as a prohibition upon the state from asserting interests contrary to those of the individual. Although it is uncontested that the state does have an affirmative duty "to protect fundamental rights," *id.*, the *Schmid* court neglected to provide an analytical framework to supply the missing "from whom." *See In re* Quinlan, 70 N.J. 10, 30, 355 A.2d 647, 657 (1976) (suggesting that affirmative obligation of state is to protect individual from state).

[69] 84 N.J. at 559-60, 423 A.2d at 628-29.

meaningful parallels might exist between the federal and state constitutions "especially in the areas where constitutional values are shared, such as speech and assembly."[70] Through this parallel analysis, the court broadened the reach of the state constitution to actions of private parties who have "assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property."[71]

The *Schmid* court also acknowledged the need to strike a delicate balance between expressional rights and property rights, coupled with the need and mandate to protect private property "from untoward interference with or confiscatory restrictions upon its reasonable use" that would amount to an unjust taking under the state constitution.[72] The court made it clear that public policy, public welfare, and the paramount nature of the rights embodied within the guarantee of free speech could delimit the bounds of the rights devolved to the owner of private property.[73] The state constitutional grounds for upholding Schmid's right of access to a private university for expressional purposes were founded upon the *Prune Yard* principle that the more private property is dedicated to public use, the more it must "accommodate" individual rights.[74] The court also "look[ed] to [New Jersey's] own strong traditions which prize the exercise of individual rights and stress the societal obligations that are concomitant to public enjoyment of private property."[75]

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[70] *Id.* at 560, 423 A.2d at 628. The court noted that both the federal and state constitutions protect expressional values, and somewhat enigmatically pointed out that even absent application of the federal constitution's fourteenth amendment the state may not abridge "the liberty of speech." *Id.*, 423 A.2d at 629.

[71] *Id.* When a private property owner permits public use of his property, he may assume a constitutional obligation to protect expressional activities. *Id.* at 560-62, 423 A.2d at 628-29. In view of this novel type of "adverse user" doctrine, Princeton University's trespass action may be the only effective means to foreclose the defense of acquiescence.

[72] *Id.* at 561, 423 A.2d at 628-29. *See* Kaiser Aetna v. United States, 444 U.S. 164 (1980) (an enforced right of access that either actually or theoretically alters the owner's right to exclude public falls within category of property interests which government could not take without compensation).

[73] 84 N.J. at 561, 423 A.2d at 629.

[74] *Id.* at 562, 423 A.2d at 629.

[75] *Id.*, 423 A.2d at 429. *See also* State v. Shack, 58 N.J. 297, 305-08, 277 A.2d 369, 371-72 (1971); Zelenka v. Benevolent & Protective Order of Elks, 129 N.J. Super. 379, 386-87, 324 A.2d 35, 38-39 (App. Div. 1974), *certif. denied*, 66 N.J. 317, 331 A.2d 17 (1974). *But cf.* State v. Miller, 83 N.J. 402, 411, 416 A.2d 821, 826 (1980) ("[p]olitical speech . . . occupies a preferred position in our system of constitutionally-protected interests").

The *Schmid* court's analogies drawn from *Shack*, *Miller*, and *Zelenka* may be viewed as obverse rather than parallel. The court stated that "to protect free speech and petitioning is a goal that surely matches the protecting of . . . property values and other societal goals that have

Under the state constitution, the decisional criteria used by the *Schmid* court embodied a multi-faceted balancing test to weigh competing interests of private property rights against expressional values.[76] The "normal" use of private property and the extent of the owner's invitation to the public to use the private property were viewed in light of the similarity between private use of the specific property and the attempted public use.[77] According to this test, an owner of private property who is required "to honor" speech and assembly rights of others may fashion reasonable time, place, and manner restrictions to limit expressional activity.[78] Moreover, courts evaluating the reasonableness of the restrictions may consider the existence of "alternate means of communication."[79]

In applying its test, the court determined that Princeton's primary purpose was education and all it encompasses,[80] that the campus was held open for public use,[81] and that Schmid's "attempt to disseminate political material was not incompatible with either Princeton University's professed educational goals or the University's overall use of its property for educational purposes."[82] The court recognized the importance of institutional integrity as well as the independence of private educational institutions, and the concomitant

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been held to justify reasonable restrictions on private property rights." 84 N.J. at 562, 423 A.2d at 629 (citing *Prune Yard*, 23 Cal. 3d at 908, 592 P.2d at 346, 153 Cal. Rptr. at 859). Yet the issue in *Schmid* was whether the state could impose access to private property by private parties, not whether the owner of such property may violate local statutes by speaking, for example, through signage as in *Miller*. A more appropriate parallel, unused by the court, would be to ask whether the state may impose upon the owners of property an unwanted expression of speech. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705 (1977) (striking down New Hampshire's requirement that motorists use license plates carrying motto "Live Free or Die").

[76] 84 N.J. at 563, 423 A.2d at 628.

[77] *Id.* at 563, 423 A.2d at 630. The court, however, did not determine whether Schmid's activities truly constituted "public use." Schmid never attempted to make any showing that either university affiliated individuals or townspeople wished to hear him. Although doctrinally proper, reference to Schmid's use as public is factually incorrect; he was a private party seeking to use private property for private purposes.

[78] 84 N.J. at 564, 423 A.2d at 630-31. *Cf.* Adderly v. Florida, 385 U.S. 39, 47 (1966) (public may be prohibited from demonstrating on grounds of county jail); American Future Syss. Inc. v. Pennsylvania State Univ., 618 F.2d 252, 255 (3d Cir. 1980) (state university regulation forbidding sales demonstrations and solicitation in university owned and operated residence halls is constitutional); Wolin v. Port of N.Y. Auth., 392 F.2d 83, 94 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968) (regulations may limit public's use of public property for expressional activity to ensure that activity does not interfere with the use to which property is dedicated).

[79] 84 N.J. at 563, 423 A.2d at 630.

[80] *Id.* at 564, 423 A.2d at 630.

[81] *Id.* at 564-65, 423 A.2d at 631.

[82] *Id.* at 565, 423 A.2d at 631.

need to control those who seek to enter the institutional domain.[83] It nevertheless found that the University's regulations governing public use of the campus were devoid of standards concerning "the actual exercise of expressional freedom" except "the requirement for invitation and permission," and, therefore, they were unreasonable.[84]

Accordingly, the court held that Schmid's expressional rights required Princeton's accommodation of his presence on campus and that such state enforced access did not constitute an unconstitutional abridgement of the university's property rights.[85] The court reversed Schmid's conviction,[86] because no reasonable regulatory scheme was provided as a basis to either evict Schmid or secure his arrest for criminally defiant trespass.[87] The nature of Schmid's activities raised them to a level protected by the state constitution; the unreasonable impairment of those rights was held unconstitutional.[88]

Had the Supreme Court of New Jersey validated an enforceable right of access to the private property of Princeton based upon Schmid's claim of a federal right, the result, although somewhat novel, would be less than startling.[89] It might be viewed as recognition of another high priority interest of a magnitude and importance, such as racial discrimination, that requires or allows a strict extension of state action theory to reach the acts of private parties.[90] The court specifi-

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[83] *Id.* at 566-67, 423 A.2d at 632. The court further related the need for controlling access to "implicat[ions] [of] academic freedom and development." *Id.* at 566, 423 A.2d at 631. After acknowledging precedents that allowed regulation of activities that affect the achievement of educational goals within public education facilities, *id.* at 567, 423 A.2d at 632, the court suggested that a broader standard might apply in a private context: "[H]ence, private colleges and universities must be accorded a generous measure of autonomy and self-government if they are to fulfill their paramount role as vehicles of education and enlightenment." *Id.* at 567, 423 A.2d at 632. *See also* Healy v. James, 408 U.S. 169, 180 (1972).

[84] 84 N.J. at 567-68, 423 A.2d at 732-33. Although the court suggested that "there were no standards extant regulating the granting or withholding of" access to and use of university property, *id.* at 567, 423 A.2d at 632, there was in effect at the time of Schmid's arrest a rather unrestrictive, if not prosaic standard, that anyone may utilize the campus for political or charitable solicitation unless no one at Princeton wished to hear him or wished others to hear him. For the text of the regulations from which this standard could be derived, see note 18 *supra.*

[85] 84 N.J. at 568, 423 A.2d at 632.

[86] *Id.* at 569, 423 A.2d at 632.

[87] *Ids* at 568, 423 A.2d at 632.

[88] *Id.* at 568-69, 423 A.2d at 633.

[89] *See id.* at 544-48, 423 A.2d at 619-22. *See* notes 35-45 *supra* and accompanying text.

[90] Interests that tend to trigger application of state action doctrine quite readily are racial discrimination, 84 N.J. at 548 n.6, 423 A.2d at 620 n.6, and violation of the "establishment of religion" clause of the first amendment. State v. Celmar, 80 N.J. 405, 413-14, 404 A.2d 1, 6 (1979) (striking down state's grant of secular authority to Ocean Grove Camp Authority). *See*

cally declined to reach that conclusion, which suggests that the protected interests associated with the first amendment are not sufficiently important to extend federal guarantees of access to private university property by virtue of state action doctrine.[91] Prior decisions indicate a denial of the reach of state action to the private university setting in the substantive contexts of admissions policy,[92] faculty employment, student discipline,[93] and internal institutional affairs.[94] Although the circumstances and substantive rights involved differed, in each instance the overriding decisional criteria was the private character of the institution involved, not the nature of the claim of right or the source of the right.[95] For the *Schmid* court to base its decision on federal grounds, it merely would have been required to find sufficient involvement between the university and the state to hold the campus public rather than private property.[96] Such a finding would have precluded the necessity of looking to independent state grounds,[97] thereby avoiding the creation of a state rule of decision involving forced rights of access and use by private parties of the private property of another.[98]

The state grounds approach is disarmingly simple at first glance. The court noted in great detail the prior history of the extension of

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Torasco v. Watkins, 367 U.S. 488, 492-95 (1960) (declaration of belief in God improper requirement for holding state office); Martin v. City of Struthers, 319 U.S. 141, 150 (1943) ("freedom of religion has a higher dignity under the Constitution than municipal or personal convenience").

[91] 84 N.J. at 548, 423 A.2d at 621-22. In view of the test ultimately developed by the court to establish New Jersey state constitutional power to enforce a right of access, *see* notes 76-79 *supra* and accompanying text, the earliest federal test would also seem apropos: "Ownership 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 rights . . . of those who use it." *Marsh*, 326 U.S. at 506.

[92] *See* Williams v. Howard Univ., 528 F.2d 658, 660 (D.C. Cir.), *cert. denied*, 429 U.S. 850 (1976); Spark v. Catholic Univ. of America, 510 F.2d 1277, 1281-82 (D.C. Cir. 1975) (per curiam). *See also* Dickey v. Alabama, 273 F.Supp. 613 (M.D. Ala. 1967), *dismissed as moot sub nom.* Troy State Univ. v. Dickey, 402 F.2d 515 (5th Cir. 1968).

[93] *See* cases collected by the *Schmid* court at 84 N.J. at 546, 423 A.2d at 620. *See generally* Claypool, *supra* note 34.

[94] 84 N.J. at 546 n.5, 423 A.2d at 62 n.5.

[95] *See* note 41 *supra*.

[96] Such a holding automatically would have involved state action analysis. *See Burton*, 365 U.S. at 715. Princeton, then nominally acting as the state, could not have precluded Schmid from carrying out his activities on what constituted public property. Clearly, citizens may use public grounds to convey their ideas about the body politic, subject only to reasonable restrictions. *See* Gregory v. City of Chicago, 394 U.S. 111 (1969); Hague v. CIO, 307 U.S. 496 (1939).

[97] 84 N.J. at 546, 423 A.2d at 621.

[98] 84 N.J. at 563, 423 A.2d at 630.

guarantees under state constitutions in New Jersey and elsewhere beyond those of the Federal Constitution.[99] Further, emphasis was placed upon the special significance of the legislative history of New Jersey's constitutional provisions "with respect to individual rights of speech and assembly"[100] and its variation in source and language from the first amendment.[101] The court, in its analysis, also stressed the historical precedents it had established in extending guarantees of liberty, especially in the area of fundamental individual rights.[102] Against this background, the court concluded that "the state constitution imposes upon the state government an affirmative obligation to protect [those] . . . rights."[103]

Review of the decisions protecting individual rights,[104] however, suggests that the court's analogies are imperfect. For example, in examining the state guarantee of freedom of speech and its corollary freedom of press the court did not distinguish between freedom from the power of the court as an arm of the state, and freedom from the acts of a private party.[105] Despite its failure to provide a logical springboard in New Jersey precedent, the court concluded that "rights of speech and assembly guaranteed by the state constitution are protectable . . . against government bodies . . . [and] private persons as well."[106] Further support for this conclusion was found by the court

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[99] *Id.* at 553-54, 423 A.2d at 624. Again citing *Prune Yard*, the *Schmid* court pointed to the breadth and depth of the issues resolved and the trend foreshadowed by the private writings of court members. *Id.* For a discussion of New Jersey's early role in enhancing individual rights under state constitutional construction, see Brennan, *supra* note 64, at 499.

[100] 84 N.J. at 557-58, 423 A.2d at 626-27.

[101] *Id.* at 557, 423 A.2d at 626. The court pointed to two separate provisions of the New Jersey constitution protecting speech and expressional freedoms. *Id. See* note 67 *supra*. Furthermore, in the opinion of the court, the state constitution could be viewed as an independent source of rights "even if the language . . . [were] identical [with the] . . . federal," 84 N.J. at 557 n.8, 423 A.2d at 628 n.8, because its source was the early constitution of New York which predated the federal constitution. *Id.* at 557, 423 A.2d at 626-27.

[102] 84 N.J. at 556, 559, 423 A.2d at 626, 628.

[103] *Id.* at 559, 423 A.2d at 628.

[104] *Id.* at 555, 556, 559, 423 A.2d at 626-28.

[105] *Id.* at 556, 423 A.2d at 626. Arguably, the criminal law as expressed in the defiant trespasser statute constituted the arm of the state in this context. *See* note 14 *supra* and accompanying text.

[106] 84 N.J. at 556, 423 A.2d at 626. The *Schmid* court's survey of state decisional and statutory law, however, did not support its conclusion. In State v. Shack, 58 N.J. 297, 277 A.2d 369 (1971), for example, the court vacated trespass convictions of Office of Economic Opportunity workers for entering onto private farms. *Id.* at 308, 277 A.2d at 375. The decisional basis was posited on state law barring the property owner from precluding administrative inspections, not on constitutional grounds. *Id.* at 302, 277 A.2d at 371-72. Similarly, in State v. Kolcz, 114 N.J.

in the parallel drawn between the first amendment prohibition against government interference with individual rights of speech and a similar provision in the New Jersey Constitution.[107] Thus, the court, without either precedential or statutory authority that would logically confer such power, adopted a rule of decision that elevated the guarantees of one private party at the expense of another.

Within the framework of the *Schmid* court's analysis of the independent state grounds, the Princeton campus was implicitly treated as public not private property.[108] Failing to find state action by virtue of either public function or integral government function analyses,[109] the court retraced its steps to rely upon the extent of the private property's dedication to public use in order to determine the nature of the restrictions that may be placed upon the private owner's enjoyment of the incidents of ownership.[110] The court recognized that a public invitation to use private property would not necessarily convert that property into public property;[111] it also took note of proscriptions against any undue restraint, interference, or confiscatory use that would result in an "unjust taking" of private property.[112] The analysis centered strictly upon an evaluation of Schmid's expressional rights in relation to Princeton's property rights; Princeton's expressional rights were not evaluated. Nevertheless, relying on the *Prune Yard*[113] principle, the court concluded that a linchpin of its decisional

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Super. 408, 276 A.2d 595 (Essex County Ct. 1971), the court reversed trespass convictions of individuals conducting political solicitation at the retirement village of Rossmoor. There, the holding hinged upon a "*Marsh*-like" rationale, not state constitutional grounds. *Id.* at 413-16, 276 A.2d at 598-99.

[107] 84 N.J. at 559, 423 A.2d at 628.

[108] *See id.* at 561-63, 423 A.2d at 629-30. The court made a quantum leap from the proposition that "private property may be subjected by the state . . . to reasonable restrictions upon its use," *id.* at 561, 423 A.2d at 628, to the conclusion that such restriction includes private "use of such property for speech and assembly." *Id.* at 562, 423 A.2d at 628.

[109] *Id.* at 549, 550, 423 A.2d at 621, 622.

[110] *Id.* at 551, 423 A.2d at 622. The court reviewed the secondary aspects of *Lloyd*, and disregarded *Lloyd*'s primary holding that it would be an "unwarranted infringement of property rights to require them to yield to the exercise of first amendment rights . . . where adequate alternative avenues of communication exist." 407 U.S. at 567. Despite acknowledgement of the lessened viability of *Lloyd*'s secondary premise, 84 N.J. at 551, 423 A.2d at 623, the court concentrated its analysis on the suggestion in *Lloyd* that state action analysis might yield to a state-based definition of property rights depending upon the purposes to which the private property is dedicated. *Id.* at 551, 423 A.2d at 623.

[111] *Id.* at 551, 423 A.2d at 623.

[112] *Id.* at 561, 423 A.2d at 628-29.

[113] 447 U.S. at 82-83; 23 Cal. 3d at 908, 592 P.2d at 346, 153 Cal. Rptr. at 859; 84 N.J. at 562, 423 A.2d at 629. The *Schmid* court's reference to *Prune Yard* stressed only the clash of property and speech rights, and disregarded the expressional rights of the private property

criteria should be that the "more a property is devoted to public use, the more it must accommodate the rights . . . of the general public."[114]

This interpretation of the *Prune Yard* rationale, however, fails to effectively distinguish the facts of these cases. In sharp contrast to *Schmid*'s private university setting,[115] *Prune Yard* considered attempts by the owners of a private shopping mall to prevent plaintiffs from engaging in peaceful signature solicitation for a political cause.[116] The California court was not unmindful of the continuous nature of a shopping center's open invitation to public use,[117] yet the basis for its decision was the overwhelming significance of the shopping center in the economic, social, and familial life of the Californian.[118] Thus, the *Prune Yard–Schmid* distinction is not solely between the commercial nature of a shopping center and the non-commercial nature of the university, but between a type of entity that fulfills a modest, albeit important role in the life of individual citizens and an economic institution that colors the life of the entire citizenry of the state.

The New Jersey court, in equating its standards in *Schmid* with the rationales of the California Supreme Court in *Prune Yard*,[119] failed to recognize that it was not the nature of the shopping center that required such a decision, but the nature of life in Southern California. The concern of the California court was as much for the rights of the listeners as it was for the rights of the speakers.[120] For in *Prune Yard*, the court's conclusions embodied the concern that if shopping center premises were unreasonably denied to political speakers, the general public might be effectively denied significant opportunities to hear "important discussion of items of social and

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owner. *Id.* *See* notes 6, 7 & 8 *supra* and accompanying text. The court's reliance on *Prune Yard* emphasized the possible exercise of the state police powers to allow restriction on private property use as an analogy to State v. Miller, 83 N.J. 402, 415, 416 A.2d 821, 826 (1980) (striking down zoning ordinance that forbade erection of political signs by homeowners as violative of first amendment interests of property owners). This too would seem to be an imperfect comparison. In *Miller*, the property owners were protected from the state. *Id.* at 413, 416 A.2d at 827. The principle cited in *Prune Yard*, however, is one which would allow the state to impose restrictions on the property owner. 447 U.S. at 82-83.

[114] 84 N.J. at 562, 423 A.2d at 629. The court reached this conclusion despite its previous acknowledgement that the devotion to use holding was the secondary and since diminished holding of *Lloyd*. *Id.* at 551, 423 A.2d at 623. *See* note 110 *supra*.

[115] 84 N.J. at 538-41, 423 A.2d at 616-18.

[116] 23 Cal. 3d at 902, 592 P.2d at 342, 153 Cal. Rptr. at 855.

[117] *Id.* at 906, 592 P.2d at 342, 153 Cal. Rptr. at 855.

[118] *Id.*, 592 P.2d at 350, 153 Cal. Rptr. at 858.

[119] 84 N.J. at 562-63, 423 A.2d at 629.

[120] 23 Cal. 3d at 906, 592 P.2d at 350, 153 Cal. Rptr. at 858.

political importance."[121] No such risk existed at Princeton.[122] The *Schmid* court did not address this issue, but focused instead upon the expressional rights of Schmid balanced against the property rights of Princeton[123] without evaluation of the extrinsic circumstances that dictated the holding in *Prune Yard*.[124] The court buttressed its argument with references to cases that dealt strictly with publicly owned and operated property or facilities[125] but eschewed its own decisions that required findings of either company-town analogies[126] or public function usurpation.[127] Absent *Prune Yard*-type findings,[128] the court's decisional theory was merely a self-created state action rule of decision.[129] It implicitly deemed Princeton's campus to be public property.[130] Moreover, even if one accepts the validity of the *Schmid* test for determining the nature and extent to which private property may be subjected to an enforced right of access for expressional activities,[131] the court's application of the test to Princeton University must

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[121] *Id.* at 907, 592 P.2d at 345, 153 Cal. Rptr. at 858.

[122] 84 N.J. at 551, 423 A.2d at 623. Public streets, public areas, and public access ways provided numerous readily used places in which to speak, meet, listen, and exchange ideas. *Id.*

[123] *Id.* at 551, 423 A.2d 623. In its reasoning, the *Schmid* court noted that it was "constrained to . . . balance between . . . private property and expressional freedom in that property." *Id.* at 562, 423 A.2d at 630.

[124] The *Schmid* court never suggested that Princeton played a societal role analogous to the shopping center in California culture. *See* notes 114 & 118 *supra* and accompanying text.

[125] 84 N.J. at 561, 423 A.2d at 629.

[126] *E.g.*, State v. Kolcz, 114 N.J. Super. 408, 276 A.2d 95 (App. Div. 1971) (upholding right to petition in *Rossmoor* based upon rationale of *Marsh*).

[127] *E.g.*, State v. Celmer, 80 N.J. 405, 404 A.2d 1 (1979) (invalidating statutory scheme that permitted grant of municipal powers to Ocean Grove Camp Meeting Association of United Methodist Church).

[128] *See* notes 118 & 120-21 *supra* and accompanying text.

[129] For a discussion of state action rationales, see notes 31-39, 43, 47-57, & 62 *supra* and accompanying text.

[130] *See* 84 N.J. at 568, 423 A.2d at 632-33. Public status of the Princeton campus can be inferred from the court's suggestion that "activity reasonably exercised on private property devoted to public use is protectable . . . and does not constitute impermissible infringement upon private property rights." 84 N.J. at 568, 423 A.2d at 632-33. *See Prune Yard*, 447 U.S. at 82-84.

[131] 84 N.J. at 563, 423 A.2d at 630. *See* notes 76-79 *supra* and accompanying text. The *Schmid* court essentially adopted the criteria used by the California Supreme Court in *Prune Yard*. *See* 84 N.J. at 563, 423 A.2d at 629; 23 Cal. 3d at 903, 905-06, 909, 592 P.2d at 347, 153 Cal. Rptr. at 860. Before applying its test to the case at hand, the court routinely acknowledged the requisites of reasonable time, place, and manner restrictions allowed to limit expressional activity. 84 N.J. at 564, 423 A.2d at 630-31. After rejecting both the public invitation and alternative means of communication standards of *Lloyd* in its first amendment analysis, *id.* at 551, 423 A.2d at 623, the court stepped back and superimposed those policy considerations on its own state level test. *Id.* at 563, 423 A.2d at 630.

be questioned. The breadth of Princeton's educational purpose[132] suggests that any expressional activity could constitute a protected purpose under the court's analysis. Surely a band of travelling thespians could demand access to the university with as strong an educational rationale as exists to promote a candidacy for municipal office in a city some fifty miles distant.[133] There is conceivably almost no expressional activity that cannot in some way be construed as having educational value or purpose.

A further difficulty revolves around the paucity of evidence used to support the conclusion that Princeton was held open for public use.[134] Noting that public presence is not, *per se*, discordant with general goals of education,[135] the court determined, in circular fashion, that if Princeton regulated the public's use of its facilities, the regulation itself was conclusive of an invitation to use the facilities.[136] Consequently, limited invitation for public use, coupled with regulation of that use, subjects an owner of private property to a court construction requiring unlimited invitation and regulation by court approval and definition, thus creating a paradox. The dysfunctional consequence is that private property owners would be well advised to deny access to all. The cloistered hall may properly remain so, but a private university had best not allow limited regulated visits or public use for fear its invitation will be held general[137] and its regulations unreasonable.[138]

The court based its determination of the extent of Princeton's invitation to public use of its campus upon equally sparse evi-

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[132] 84 N.J. at 564-65, 423 A.2d at 631-32.

[133] Although it was stipulated that Schmid had distributed literature to support the United States Labor Party candidate for Mayor of Newark, New Jersey, *id.* at 539, 423 A.2d at 616, no showing was made that any eligible voters were among his prospective audience.

[134] *Id.* at 564-65, 423 A.2d at 631. Aside from a recitation of the court's general views on education, and the relationship between the world of ideas and the province of education, the record is exceedingly sparse. *Id.* Excessive dependence was placed upon rather general and somewhat banal platitudes in two writings. *Id.* at 565 nn.10 & 11, 423 A.2d at 631 nn.10 & 11. *C.f. Prune Yard*, 447 U.S. at 78 (stressing that "positive force of advertising" and "lure of a congenial environment" attract 25,000 people per day to shopping center).

[135] 84 N.J. at 564, 423 A.2d at 632.

[136] *Id.* at 565 nn. 10 & 11, 423 A.2d at 630-31 nn. 10 & 11. The *Schmid* court's extension of Princeton's regulation of particularized uses of university facilities, *id.*, into an open invitation for unlimited use and access is a logical nullity.

[137] *Id.* at 565, 423 A.2d at 631.

[138] *Id.* at 567, 423 A.2d at 632.

dence.[139] Recasting its positioning of the burden of persuasion,[140] the court inferred that absent a showing by Princeton that Schmid's activities were contrary to the university's "overall uses of its property," Schmid's use was by implied invitation.[141] The court relied upon a speech by Princeton's President Bowen as the basis for its conclusion.[142] Bowen's speech typified declarations of purpose and hopes for community involvement espoused universally by leaders of educational, civic, fraternal, religious, and charitable institutions. To suggest that an institution's generalized desire to participate in community life and to seek input from that community is indicative of an open-ended invitation to utilize institutional property tests one's credulity. Application of the *Schmid* rationale raises several questions and suggests that new clashes of individual rights will arise. If the court has developed a "mini-state action" tool to protect substantive individual rights from actions of private parties, can the test withstand more pointed conflicts? Concededly, Schmid's intrusion on Princeton was minimal.[143] However, the same sequential test would, upon a declaration of ecumenism by an official representative of a house of worship, require a finding of an invitation to public use consistent with the pursuit of religious ideals. Similarly, other private educational institutions would be subject to the strictures of *Schmid*.[144] Defining the public's rights of access to private property by virtue of the use to which the owner dedicates his property places

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[139] *Id.* at 565-66, 565 n.11, 423 A.2d at 631-632, 631 n.11. The general remarks of Princeton's president that "the University has a responsibility to expose students and faculty members to a wide variety of views," *id.* at 565 n.11, 423 A.2d at 631 n.11, coupled with Emerson's comment that "freedom of expression is [both] an essential process of advancing knowledge and discovering truth," *id.*, were presented by the court as useful in ascertaining the nature of the public's invitation to use the campus. *Id.*

[140] Princeton was under no burden to overcome the lack of a record indicating that "Schmid was evicted" because he "offended the University'[s] educational policies." *Id.* at 565, 423 A.2d at 631. Princeton and Schmid stipulated to facts that made the case against Schmid a conclusive one. *Id.* at 538-41, 423 A.2d at 618. *See* notes 14 & 18 *supra* and accompanying text.

[141] 84 N.J. at 565-66, 423 A.2d at 631-32.

[142] *Id.* at 565, 565-66 nn.10 & 11, 423 A.2d at 631-32, 631 nn. 10 & 11. *See* note 139 *supra* and accompanying text.

[143] 84 N.J. at 566, 423 A.2d at 632.

[144] Justices Powell and White suggest further examples in their concurrence in *Prune Yard*:

> A property owner also may be faced with speakers who wish to use his premises as a platform for views that he finds morally repugnant. A minority-owned business confronted with leaflets from the American Nazi Party or the Ku Klux Klan, a church-operated enterprise asked to host demonstrations in favor of abortions, or a union compelled to supply a forum to right to work advocates could be placed in an

sharp limits on the owner.[145] It may be inferred from the *Schmid* decision that the more a private owner seeks to use and enjoy his property, the less likely he may be able to continue to do so free from judicially forged fetters.[146] Logical extension of the court's reasoning to other settings suggest that results counter-productive to the desire of the court will occur.[147] If increased offers of public use are ultimately to subject private property to public use limited only by reasonable time, place, and manner standards, the prudent private owner would be wise to curtail any and all such public use.[148]

The New Jersey supreme court, by extending the *Prune Yard* principle to the non-commercial private university setting, without considering the socio-demographic foundations of *Prune Yard*,[149] has made a logically questionable quantum leap in its extension of state judicial power. Without either statutory or decisional authority, and in the absence of compelling social or economic policy, the court constructed and applied a radical thesis of enforced access to private property that impinges not only on the owner's rights to exclude trespassers but also on his expressional freedoms from unwarranted intrusion by unsought messages.[150] The court's thesis is grounded upon facts so general that they admit of universal application, creating extreme risk of adverse consequences. Although further decisions are required to determine the full sweep of its rationales, if *Schmid* is

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intolerable position if state law requires it to make its private property available to anyone who wishes to speak.

447 U.S. at 99 (Powell, J., concurring in part and in the judgment).

[145] Forced access to private property impinges on expressional as well as property rights. Guaranteeing the expressional freedom to actively espouse political and religious causes must also allow the right to decline to do so. *See* Wooley v. Maynard, 430 U.S. 705, 714 (1977); Miami Herald v. Tornillo, 418 U.S. 241, 256 (1974).

[146] 84 N.J. at 563, 423 A.2d at 630.

[147] *See* notes 135-38 & 144 *supra* and accompanying text.

[148] *See* 84 N.J. at 566-68, 423 A.2d at 622-33.

[149] *See* notes 118, 120-21 *supra* and accompanying text.

[150] Even within the state action context the United States Supreme Court recently stressed the significance of both the availability of alternative means of access to listeners and listeners' readiness to accept communication as important first amendment decisional criteria. In Heffron v. International Soc'y for Krishna Consciousness, Inc., 49 U.S.L.W. 4762 (U.S. June 22, 1981), upholding the validity of a Minnesota Public Corporation rule limiting means of soliciting contributions on State Fair Grounds, the Court stated: "[W]e are unwilling to say that [the] rule . . . does not provide ISKCON . . . with an adequate means to . . . solicit. . . . The first amendment protects the right of every citizen to 'reach the minds of *willing listeners* and to do so there must be *opportunity* to win their attention' " *Id.* at 4766 (quoting Kovacs v. Cooper, 336 U.S. 77, 87 (1948) (emphasis added)).

upheld,[151] the court may soon be faced with a less salutary application of its new theories. It is not uncommon for a particularly sympathetic set of facts to color a decision to the detriment of the legal principles involved.

Particularized findings tailored to redress unique wrongs are to be welcomed if issues of equity are involved.[152] Constitutional standards that will be utilized as the basis of present and future holdings, however, stand on a different footing. A court's conclusion that a great educational institution, public or private, cannot and should not bar the exercise of expressional freedom within its confines is apparently justifiable.[153] Viewed from another perspective, the response is less facile. The courts should not have the power to force a right of access to private property so that unwilling owners and occupiers must be exposed to messages they neither seek nor wish to hear.

Theodore D. Moskowitz

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[151] The United States Supreme Court took the appeal on May 18, 1981, in Princeton Univ. v. Schmid, 101 S. Ct. 2312 (1981).

[152] A more immediate response to the facts of the case is exemplified by Aryeh Neier's comments: "[t]he university is uncomfortable with thinking of itself as a company town. But Princeton should derive even less comfort from being classified with shopping centers as a place where goods may be acquired but where free trade in ideas is off-limits." Neir, *Princeton v. Free Speech: Forbid Us Our Trespasses*, 230 NATION 336, 336-37 (1980).

[153] 84 N.J. at 564, 523 A.2d at 630.