CONSTITUTIONAL LAW—FREEDOM OF SPEECH—NEW JERSEY STATE CONSTITUTION REQUIRES PRIVATELY OWNED SHOPPING MALLS TO ALLOW ACCESS FOR EXPRESSIONAL LEAFLETTING, SUBJECT TO THE OWNER'S REASONABLE TIME, PLACE, AND MANNER RESTRICTIONS—*New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 138 N.J. 326, 650 A.2d 757 (1994).

The First Amendment, which mandates that government shall not abridge speech,[1] is considered to embody one of the most fundamental American principles.[2] Given the importance of free speech in a democratic society, speakers must have access to a public forum where people congregate to guarantee the meaningful exercise of this freedom.[3] When extending this right to private

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[1] *See* U.S. CONST. amend. I. The First Amendment of the United States Constitution reads in relevant part that "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble." *Id.*

See JOHN R. VILE, A COMPANION TO THE UNITED STATES CONSTITUTION AND ITS AMENDMENTS 113-31 (1993) (explaining that the first three amendments of the Bill of Rights were a means of balancing individual rights without compromising the strength of the federal government). The Bill of Rights was a vital compromise leading to ratification of the Constitution in a nation split into two factions. *See id.* at 113-14. The Federalists, including James Madison, declared that a federal government would not be oppressive and could only grant power bestowed upon it by the Constitution. *See id.* at 113. Antifederalists, including Thomas Jefferson, expressed trepidation that a central government would lead to potential abuse against personal rights. *See id.* Antifederalists were also concerned with protecting individual state powers but used individual rights as a means to further their cause. *See id.* at 114.

[2] *See* WARREN FREEDMAN, FREEDOM OF SPEECH ON PRIVATE PROPERTY 2-3 (1988) (discussing the philosophy of Alexander Meiklejohn, who found the Constitutional guarantee of freedom of speech as a means of empowering the people with a final check on political control of the government); *see also* Cohen v. California, 403 U.S. 15, 24 (1971) (holding that a state may not criminalize the public display of an expletive because it violates the First Amendment). Justice John Harlan stated that:

> The Constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Cohen, 403 U.S. at 24. Justification for freedom of speech was discussed in John Stuart Mill's essay "On Liberty," which suggested that speech could not only extrapolate truth, but also allow individuals to clarify their own beliefs. *See* VILE, *supra* note 1, at 122.

[3] *See* FREEDMAN, *supra* note 2, at 3. Use of streets, parks, and other public places were made available for speech through United States Supreme Court cases. *See id.* (citing Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc. 391 U.S. 308, 319 (1968); Hague v. Congress of Indus. Org., 319 U.S. 141, 149 (1943)). *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12, at 576-736 (discussing an individual's rights of expression and communication). Public

fora, however, courts must also accommodate the private interests of property owners.[4]

Individual state constitutions also protect freedom of expression and may do so in a more expansive fashion, encompassing greater freedom of speech protection than granted by the First Amendment.[5] New Jersey's Constitution provides for freedom of speech.[6] In a recent case, *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*,[7] the New Jersey Supreme Court examined the state's constitutional freedom of expression rights in a private property context, specifically in regional and community shopping centers.[8] The New Jersey Supreme Court, over a strong

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places, given their role as important avenues for people unable to access more costly methods of communication, led to the granting of a special legal status of "public forum" to public venues such as parks, streets, and sidewalks. *See* TRIBE, *supra*, at 689. Such places must allow First Amendment activities and cannot prohibit expression to spare public cost or inconvenience. *See id.* Other sites trigger "public forum" status based upon the deliberate use and placement for the exchange of ideas between members of the public. *See id.* at 690; *see also* Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 552 (1976) (recognizing municipal theater as public forum designed to be expressive; thus the municipality could not refuse to allow a production of the play "Hair").

4 *See* TRIBE, *supra* note 3, at 694. Homeowners may exclusively prevent unwanted speech on their property, thus placing a homeowner's right to exclude above the speaker's right to intrude. *See id.* The outcome may be different where greater access is expected. *See id.* at 694-95. Given the tension between property rights and speech, often times one right will be granted a superior status at the expense of the other. *See* FREEDMAN, *supra* note 2, at 37. With societal changes altering the historical places of congregation and formally supplanting very active public forums, private property rights will not afford a strict denial of free expression rights in today's society. *See id.*

5 *See* FREEDMAN, *supra* note 2, at 75 (interpreting numerous state constitutions involving free speech access on private property).

6 *See* N.J. CONST. art. I, ¶ 6. The New Jersey Constitution states that "[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right [and that] [n]o law shall be passed to restrain or abridge the liberty of speech or of the press." *Id.*

7 138 N.J. 326, 650 A.2d 757 (1994).

8 *See id.* at 332, 650 A.2d at 760. A regional shopping center is defined by the industry as one that:

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

Id. at 339, 650 A.2d at 764 (citation omitted). Community shopping centers lack the variety of its regional mall counterpart. *See id.* Often built around a smaller store, a community center, as defined by the industry, commonly possesses gross leasable area of 150,000 square feet but may range from between 100,000 to 300,000 square feet. *See id.*

dissent which emphasized the constitutional rights of private property owners,[9] held that the expression sought by the plaintiff—noncommercial leafletting—must be allowed by regional shopping mall owners, subject to reasonable time, place, and manner restrictions.[10]

The New Jersey Coalition Against War in the Middle East (the Coalition) was a group formed to publicly oppose President Bush's plan of military intervention in the Persian Gulf.[11] In an effort to gain support for its views, the Coalition targeted ten shopping malls for a large scale leafletting campaign on two days in November 1990.[12] Representatives of the Coalition initially sought permission to leaflet, which was denied outright by six of the centers.[13] Of the four centers that did not deny permission, three conditioned approval upon a showing of liability insurance coverage.[14]

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9 *See id.* at 390, 650 A.2d at 789 (Garibaldi, J., dissenting).

10 *See id.* at 344, 650 A.2d at 766.

11 *See id.* at 336 n.2, 650 A.2d at 762 n.2. The Coalition included:

> New Jersey SANE/FREEZE, New Jersey Citizen Action, Monmouth County Pax Christi, New Jersey Council of Churches, The New Jersey Rainbow Coalition, The Baptist Peace Fellowship, The Coalition for Nuclear Disarmament, Vietnam Veterans Against the War, Drew University Peacemakers, The Monmouth County Coalition for the Homeless, The Jersey Cape Coalition for Peace and Justice, The New Jersey Peace Mission, The New Jersey Pledge of Resistance, The South Jersey Campaign for Peace and Justice, and The Women's International League for Peace and Freedom.

Id. The objectives of the Coalition were:

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

Id.

12 *See J.M.B. Realty*, 138 N.J. at 336, 650 A.2d at 762. The 10 centers that constituted the defendants were Cherry Hill Center, Woodbridge Center, Livingston Mall, Rockaway Townsquare, Monmouth Mall, The Mall at Mill Creek, Riverside Square Shopping Center, The Mall at Short Hills, Quakerbridge Mall, and Hamilton Mall. *See id.* at 379-90, 650 A.2d at 784-89. November 10, 1990, was part of the Veterans Day holiday weekend, thus deliberately chosen due to an increase in expected shoppers. *See id.* at 338, 650 A.2d at 763.

13 *See id.* at 337, 650 A.2d at 762. The four centers that did not outright deny access were the Monmouth Mall, The Mall at Mill Creek, Cherry Hill Center, and Woodbridge Center. *See id.*

14 *See id.*, 650 A.2d at 763. The Mall at Mill Creek, Cherry Hill Mall, and Woodbridge Center sought liability coverage of $1,000,000 for bodily injury and between $50,000-$1,000,000 in property damage coverage. *See id.*; *see also* Eric Neisser, *Charging for Free Speech: Insurance and Police Fees in the Marketplace of Ideas*, N.J. LAW., Aug./Sept. 1994, at 39. (discussing the costs inherent in exercising free speech activities). Neisser explained the difficulties involved in obtaining these types of one-day policies: the insurers risk assessment must be considered and the group's message may be disap-

The Coalition brought suit in the Superior Court of New Jersey, Chancery Division, seeking an injunctive order that would grant access for leafletting in the ten defendant shopping centers.[15] Relying on *State v. Schmid*,[16] which created a three-prong test to determine the appropriate level of protection for free speech on private property, the chancery division upheld the defendants' private property rights.[17] Finding that the plaintiff failed to demonstrate that members' activity would not be in discord with the public and private uses for which these malls were created, the court denied injunctive relief.[18]

On appeal, the Superior Court of New Jersey, Appellate Division, affirmed the decision of the chancery court.[19] In a per curiam opinion, the appellate court concluded that the chancery court's findings were completely supported by the record.[20] The court utilized the three-pronged analysis established in *Schmid* and stressed that the mall's predominant purpose and invitation to the public was of a commercial nature.[21]

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proved. *See* Neisser, *supra*, at 40. While acknowledging the broad expression rights found in some state constitutions, the author noted that there are six problems with insurance and police fee requirements. *See id.* The problems include the "lack of precise standards to guide administrative discretion, charging sponsors for the costs of controlling opponents, [ ] discriminating against expressive activities, lack of an exception for indigents, failure to establish a significant risk of government liability and failure to consider less burdensome alternatives." *Id.* Neisser concluded that the costs of these requirements are borne by the taxpayer and society as a whole; thus, the community is forced to fund the free exchange of ideas. *See id.* at 41.

15 *See* New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 266 N.J. Super. 195, 197, 628 A.2d 1094, 1095 (Ch. Div. 1991).

16 84 N.J. 535, 423 A.2d 615 (1980). For a full discussion of *Schmid*, see *infra* notes 49-61 and accompanying text.

17 *See J.M.B. Realty*, 266 N.J. Super. at 204, 628 A.2d at 1099.

18 *See id.* Using a factor analysis method created in *Schmid*, the court clearly accepted the normal purpose of these shopping centers to be commercial, rejecting the testimony that malls had become the functional equivalent of pre-World War II business districts. *See id.* at 201, 628 A.2d at 1097. As to the public's invitation, the trial court accepted a general invitation for non-shopping purposes (e.g., walking, promotional activity, dining) but surmised the ultimate goal of this invitation was to increase customer count, sales, and profits. *See id.* at 202, 628 A.2d at 1098. Lastly, upon examination of the mall owners' policy toward leafletting, the court again ascertained that prior activities that were promotional in nature were done to establish community goodwill and subsequently an increase in sales for its retailers. *See id.* at 203, 628 A.2d at 1099. The court continued by noting that activities deemed controversial by mall management were not permitted, and since all the malls were not homogeneous a uniform treatment should be rejected. *See id.* at 204, 628 A.2d at 1099.

19 *See* New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 266 N.J. Super. 159, 161, 628 A.2d 1075, 1076 (App. Div. 1993) (per curiam).

20 *See id.*

21 *See id.* The court declined to address defendants' assertion that permitting leafletting would constitute a taking of property for public use without just compensa-

The New Jersey Supreme Court granted certification.[22] In reversing the appellate division, Chief Justice Wilentz, writing for the majority,[23] applied the *State v. Schmid* balancing test.[24] The majority determined that in weighing free speech rights of public groups against the rights of private property owners, the outcome must favor the right to leaflet in regional shopping centers.[25] Additionally, the majority found that in balancing free speech and private property rights, the latter should yield to the former in light of mall owners' intentional transformation of the property into a modern public square.[26] Finally, the majority declared that leafletting constitutes neither a taking of private property nor an abridgment of property owners' free speech rights under the Federal and New Jersey Constitutions.[27]

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tion and a denial of the defendants' freedom of speech rights. *See id.* at 162, 628 A.2d at 1076. Additionally, in light of the decision, the appellate division did not address plaintiff's challenge to the reasonableness of the restrictions imposed by the shopping malls. *See id.*

22 *See* New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 134 N.J. 564, 636 A.2d 522 (1993).

23 *See* New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 138 N.J. 326, 404, 650 A.2d 757, 796 (1994). Justices Handler, O'Hern, and Stein joined the chief justice. *Id.*

24 *See id.* at 362, 650 A.2d at 775.

25 *See id.* at 357-62, 650 A.2d at 773. Factually, the majority found the first two factors to bode in favor of the right to leaflet. *See id.* at 361, 650 A.2d at 775. Constitutionally, the majority emphasized that the inclusiveness of the facility, including places to walk, talk, dine, meet, or just "hang out" tended to favor a public invitation to bring the entire community into its center. *See id.* at 358, 650 A.2d at 773. The majority made special mention of the community booths prevalent in some of the centers that invite political and community organizations to distribute circulars and other information to the shoppers. *See id.* at 359, 650 A.2d at 774. Thus, the majority determined in most cases it was not the constitutionality of leafletting at issue, but rather the extent of regulation that should be granted to defendants. *See id.* at 360, 650 A.2d at 774. According to the majority, the third factor—compatibility between the speech and the use of the private property—was also favorable to the leaflets. *See id.* at 362, 650 A.2d at 775. The chief justice emphasized that the activity had taken place in downtown districts for years without negative results, and the property owners' claim that leafletting could be damaging to profits was inconsistent with the four centers granting permission to the plaintiff. *See id.* at 361, 650 A.2d at 775. Finally, the majority reiterated that regulations will ensure that leafletting will not interfere with business to a damaging extent. *See id.* at 362, 650 A.2d at 775.

26 *See id.* at 363-64, 650 A.2d at 776. Chief Justice Wilentz declared free speech interest to be "the most substantial in our constitutional scheme," and opined that these activities could be exercised without any detriment to owners' profits and shoppers' enjoyment, especially given the mall's power to implement reasonable regulations. *See id.* The chief justice also determined that by opening up their facilities as a public gathering place and encouraging vast public use of their property, mall owners have themselves tipped the scales toward the public use and diminished the private property interest. *See id.* at 363, 650 A.2d at 776.

27 *See id.* at 370-71, 650 A.2d at 779. In rejecting the federal claims, the majority

The United States Supreme Court considered these free speech concerns early on in *Marsh v. Alabama*,[28] which involved a conflict between expressive and private property rights.[29] The Supreme Court determined that an owner's property rights must increasingly surrender to the constitutional rights of the public users as the owner allows greater public access to his property for his advantage.[30] In balancing the rights of free press and religion against the rights of these property owners, the Supreme Court held that First Amendment liberties occupied an elevated position.[31]

In 1968, the Supreme Court extended protection to picketers of a private shopping center in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*[32] Drawing from its decision in *Marsh*, the Court noted that privately owned property could, in some instances, be subject to the public's First Amendment rights.[33] The Court therefore held that the shopping center was

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relied upon *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980). *See id.* The majority weighed free speech against the minimal interference these rights would cause mall owners and determined that deference must be given to the expressive conduct. *See id.* at 371, 650 A.2d at 780.

28 326 U.S. 501 (1946).

29 *See id.* at 502-03. Marsh, a Jehovah's Witness, attempted to distribute religious leaflets on the property of a company-owned town. *See id.* The town, owned by the Gulf Shipbuilding Company, resembled many American towns and could not be distinguished without knowledge of property lines. *See id.* Standing near the post office on the business block, Marsh tried to distribute religious literature in spite of a posted public notice prohibiting such action. *See id.* at 503. When warned to stop the activity, Marsh declined and subsequently was arrested for violating an Alabama law that criminalized remaining on private premises after being warned to leave. *See id.* at 503-04.

30 *See id.* at 506.

31 *See id.* at 509. Justice Black stated that "the right to exercise the liberties safeguarded by the First Amendment 'lies at the foundation of free government by free men' and we must in all cases 'weigh the circumstances and . . . appraise the . . . reasons . . . in support of the regulation . . . of [those] rights.'" *Id.* (citing Schneider v. State, 308 U.S. 147, 161 (1939).

32 391 U.S. 308 (1968). On December 17, 1965, Amalgamated Food Employees Union Local 590 picketed a supermarket in a shopping center, displaying disapproval of its nonunion status. *See id.* at 311. This peaceful picketing was limited almost entirely to a parcel pickup area and adjacent parking area, and was carried out by employees of competing stores who disregarded signs prohibiting "trespass or solicitation." *See id.* at 311-12. Weis Markets, the mall owner, sought an injunction that was granted by the trial court. *See id.* at 312-13. The Pennsylvania Supreme Court affirmed the injunction on the basis that the picketer's actions constituted trespass. *See id.*

33 *See id.* at 325. Comparing a shopping center to the business center of a municipality, the Court focused on the historical access granted to First Amendment rights in generally public places and reiterated that picketers could not be completely barred from a public business center on the premise that ownership of the property

required to extend First Amendment rights to the union picketers.[34]

Four years later, in *Lloyd Corp. v. Tanner*,[35] the Supreme Court tackled the issue reserved in *Logan Valley*: whether it is constitutionally permissible for private shopping center owners to prohibit leafletting on their property that is unrelated to its operations.[36] In this action for injunctive relief brought by individuals seeking to distribute handbills regarding the Vietnam War, the issue reserved in *Logan Valley*—whether it is constitutionally permissible for a private shopping center owner to prohibit leafletting—the Court held that there was no public dedication of the owner's property that would entitle leafletters to exert their First Amendment rights.[37]

In distinguishing *Lloyd*, the Court declared that the war protest was in no way related to the purpose and function of the mall and noted that because the message was directed to the public in general, the leafletting could have been carried out at any public venue.[38] The Court stressed that property should not lose its private status merely because the general public uses the property for specific purposes.[39]

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was in the municipality. *See id.* at 315. The Court further stated that the similarities between the forum in *Marsh*, i.e., business block, and this case, emphasized the general public's complete access to the center's property. *See id.* at 317-18.

34 *See id.* at 325. The Court likewise extended this right to leaflet distribution, pointing out that restraints imposed upon the picketers were geared toward the conduct more than the speech. *See id.* at 322 n.11. The Court concluded that the fact that speech may be accompanied by conduct will not allow for the suppression of speech under the guise of eliminating the conduct. *See id.* at 323.

35 407 U.S. 551 (1972).

36 *See id.* at 552.

37 *See id.* at 569. An attempt to pass out handbills protesting the Vietnam War inside a privately owned mall resulted in the mall management's request that the participants conduct their efforts on public sidewalks near the mall but outside the center. *See id.* at 556. The leafletters complied but later filed an action seeking declaratory and injunctive relief. *See id.*

The Court, in holding for the defendants, declared that the private property owner's rights under the Due Process Clauses of the Fifth and Fourteenth Amendments prevailed because "[no] person shall . . . be deprived of life, liberty, or property, without due process of law." *Id.* at 567. The Court further noted that the Fifth Amendment proscribes "the taking of private property . . . for public use without just compensation." *Id.* In balancing First, Fifth, and Fourteenth Amendment rights, the Court indicated that there was no public dedication of the shopping center for public use to entitle protesters to First Amendment protection. *See id.* at 570.

38 *See id.* at 564. The Court emphasized that the holding in *Logan Valley* was to be limited to the involved activity—picketing a non-union supermarket—and the relationship between the protest and the use of the shopping center. *See id.* at 563-64. The Court further noted that no other location afforded the picketers a reasonable forum to convey their message. *See id.* at 563.

39 *See id.* at 569.

In *Hudgens v. National Labor Relations Board*,[40] the Court revisited the issue of picketing a retail store in a shopping center.[41] The majority declared that the holding in *Logan Valley* was rejected by the *Lloyd* Court[42] and thus concluded that the picketers did not have a right to protest inside the center.[43] The Court emphasized the First and Fourteenth Amendments' protection against "state action" but found none in the private property owners' restrictions on picketing.[44]

Most recently, the Supreme Court decided *Pruneyard Shopping Center v. Robins*,[45] which analyzed a state's ability, through its constitution, to allow free speech access in a private shopping center.[46] The Supreme Court held that California's Constitution, which allowed its citizens to exercise free speech rights in a private shopping center open to the public, did not infringe upon the property

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40 424 U.S. 507 (1976).

41 *See id.* at 508. Union members picketed a shoe store located inside a privately owned shopping center to protest a shoe company's refusal to agree to demands during contract negotiations. *See id.* at 509. The owner of the center, through his agent, threatened to have the picketers arrested for criminal trespass. *See id.* The picketers filed an unfair labor practice charge with the National Labor Relations Board (NLRB) claiming that the threat violated the National Labor Relations Act. *See id.* at 509-10. The NLRB entered a "cease-and-desist order" against the mall owner, holding that the threat of arrest violated 29 U.S.C. § 158(a)(1), and that the issue must be measured by a "First Amendment standard." *See id.* at 510.

42 *See id.* at 518. The Court reiterated that the First and Fourteenth Amendments protect free speech rights against "state action" and not against a private owner using his property in a nondiscriminatory manner. *See id.* at 519.

43 *See id.* at 521. Constitutional free expression, according to the Court, had no relevance in the case and the picketers' rights were dependent exclusively upon the National Labor Relations Act. *See id.* The Court remanded the case to the NLRB for reconsideration under the criteria set forth in the National Labor Relations Act. *See id.* at 523.

44 *See id.* at 519.

45 447 U.S. 74 (1980).

46 *See id.* at 76-77. Pruneyard was a privately owned shopping mall in Campbell, California. *See id.* at 77. Local high school students set up a table in the central courtyard to distribute leaflets and solicit petitions to be sent to Congress protesting a resolution by the United Nations against "Zionism." *See id.*

Mall security requested that the students stop their activity and leave the premises. *See id.* The students complied with the mall's request but later filed a lawsuit to enjoin the center from denying access to the center for their expressive activities. *See id.*

The California Supreme Court held that the California Constitution protected reasonably exercised expressive activity even on some privately owned property. *See id.* at 78. The United States Supreme Court cited to the California Constitution, which provided that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right [and that a] law may not restrain or abridge liberty of speech or press." *Id.* at 79-80 n.2 (quoting CAL. CONST. art. 1, § 2).

owners' First, Fifth, or Fourteenth Amendment rights.[47] Thus, the Court proclaimed that states were free to grant greater free speech protection in their state constitutions than the federal counterpart.[48]

Against this federal backdrop, the Supreme Court of New

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[47] *See id.* at 82-88. The Court initially asserted that its reasoning in *Lloyd* did not limit a state from exercising its own police power and that states could provide for more expansive liberties in their own constitutions. *See id.* at 81. Using this rationale, the Court then examined whether denying a property owner a right to exclude others in this context would constitute a "taking of property without just compensation" in violation of the Fifth Amendment and a "deprivation of property without due process" in violation of the Fourteenth Amendment. *See id.* at 82. Deeming the "right to exclude" a vital property right, the Court nevertheless noted that the expressive activity would not reduce the value or the viable use of the property. *See id.* at 83. Thus, the Court found no violation of the Takings Clause. *See id.* Likewise, the Supreme Court upheld the California court's ruling that the decision was neither arbitrary nor unreasonable in its placement and it was not unrelated to the promotion of more expansive free speech rights in California. *See id.* at 85. The asserted argument that a property owner should not be forced to use his property as a forum for another's speech was rejected by the Court on the grounds that the views of leafletters will typically not be identified with the property's owner, no specific message is demanded by the state for display on private property, and the owner could post signs disclaiming any connection with the speakers. *See id.* at 87.

[48] *See id.* at 81. The *Pruneyard* Court discussed that states have the ability to exercise their own police power through appropriate state law and constitutional measures. *See id.* In distinguishing this case from *Lloyd*, the Court emphasized that the key element in favor of the leafletters was California's constitutional and statutory provisions that created rights in the use of this property—state law provisions that did not exist in *Lloyd*. *See id.*; *see also* John A. Ragosta, *Free Speech Access to Shopping Malls Under State Constitutions: Analysis and Rejection*, 37 SYRACUSE L. REV. 1, 1-2 (1986) (discussing the conflict between the First Amendment, which does not guarantee free speech access in shopping centers, and state constitutions, which may interpret this access as a right under their provisions). A second concern dealt with defining the "state action" doctrine, a premise that guarantees freedom of speech from governmental authorities, not private persons. *See id.* at 2.

See also Curtis J. Berger, Pruneyard *Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. REV. 633, 634 (1991), where the author notes that since *Pruneyard*, the struggle between free speech rights and private property rights has moved into other areas related by some form of public access like university campuses, office parks, and residential communities. *See id.* The key to resolving these issues is to define what a public forum is, what its importance to our political process is, and an indication of why land should or should not be classified as a public forum. *See id.* at 635. These diametric issues must be balanced against information that has historically been vital to the political process. *See id.* at 635-36.

See also Alan E. Brownstein & Stephen M. Hankins, *Pruning* Pruneyard*: Limiting Free Speech Rights Under State Constitutions on the Property of Private Medical Clinics Providing Abortion Services*, 24 U.C. DAVIS L. REV. 1073, 1092 (1991), where the authors stated that the fundamental question after Pruneyard was whether free speech rights could be asserted on private property other than shopping centers. *See id.* The authors note that this question has left the door open for an array of conflict between private property owners and individuals desiring to use their property for expressive purposes. *See id.*

Jersey had the opportunity to strike a balance between free speech access and private property rights in *State v. Schmid*.[49] At issue in *Schmid* was the constitutionality of a trespass conviction of a distributor of political materials on the campus of Princeton University.[50] The defendant argued that the conviction violated his constitutional liberties of free speech and assembly under both the Federal and State Constitutions.[51] The New Jersey Supreme Court unanimously reversed the trespassing conviction.[52] Holding that the private university was not subject to First Amendment obligations under the "state action" doctrine,[53] the court nevertheless required that the university guarantee expressive freedom in this case.[54] The court noted that constitutional protection of free speech extends not only to state action but also to oppressive conduct by private entities that, due to their public use, have assumed a similar constitutional obligation.[55]

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49 84 N.J. 535, 423 A.2d 615 (1980).

50 *See id.* at 538, 423 A.2d at 616. Defendant, a member of the United States Labor Party, distributed political leaflets on the main campus of a private institution in New Jersey, Princeton University. *See id.* at 538-39, 423 A.2d at 616. Defendant was not a student at the University but had full knowledge of the University's regulations, which required permission for the distribution of materials by off-campus organizations. *See id.* at 539, 541, 423 A.2d at 616, 618.

51 *See id.* at 542, 423 A.2d at 618. Specifically, the defendant asserted that his conduct in distributing political literature was an exercise of both his freedoms of speech and assembly and that Princeton University had a constitutional obligation to allow his activity on campus. *See id.*

52 *See id.* at 569, 423 A.2d at 633.

53 *See id.* at 544, 423 A.2d at 619. The court determined that a private university does not act on behalf of state government, nor is there a connection to deem it a state actor; thus, given its autonomy, Princeton University is not subject to First Amendment obligations under the state action doctrine. *See id.* at 547-48, 423 A.2d at 621. The court determined that although Princeton University had an ongoing relationship with the state through accreditation and various state educational programs, these did not equate to state action. *See id.* at 547, 423 A.2d at 621. The court determined that Princeton University was predominantly private and largely autonomous in its function. *See id.* at 548, 423 A.2d at 621. Without this joint and interdependent relationship, the court was unable to find the University to be engaging in state action. *See id.*, 423 A.2d at 621-22. The court decided not to determine if Princeton University devoted its property for the use of the public in such a manner as to necessitate First Amendment freedoms, choosing instead to base its holding on more compelling state constitutional grounds. *See id.* at 553, 423 A.2d at 624.

54 *See Schmid*, 84 N.J. at 569, 423 A.2d at 633; *see also* N.J. CONST. art. I, ¶ 6 (providing in part that "[e]very person may freely speak, write and publish his sentiments on all subjects being responsible for the abuse of that right [and that] [n]o law shall be passed to restrain or abridge the liberty of speech or of the press"); N.J. CONST. art. I, ¶ 18 (providing that "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").

55 *See Schmid*, 84 N.J. at 560, 423 A.2d at 628.

The *Schmid* court created a three-prong test to determine the degree of protection that should be accorded to speech and assembly on private property.[56] The New Jersey Supreme Court declared that courts must balance "(1) the nature, purposes, and primary use of such private property, generally its 'normal' use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property."[57] Applying the test, the court determined that (1) a university's primary use was the pursuit of truth and knowledge;[58] (2) as an institute of higher learning, Princeton sought a diverse range of political ideas and endorsed an open campus policy to the public;[59] and (3) the information sought to be disseminated by the defendant was not in conflict with the goals of the University.[60] The court vacated the conviction but stressed that the property owner could implement reasonable time, place, and manner restrictions to protect the legitimate interests of the University.[61]

The New Jersey Supreme Court relied on this public accommodation policy in *Uston v. Resorts International Hotel, Inc.*[62] The court found that without a rule from the Casino Control Commission,[63] the hotel could not preclude a professional cardcounter[64]

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56 *See id.* at 563, 423 A.2d at 630.

57 *Id.*

58 *See id.* at 564, 423 A.2d at 630. The court noted that free expression was necessary to achieve the goal of knowledge and the development of students. *See id.*

59 *See id.* at 565, 423 A.2d at 631. Noting that the University had endorsed a policy of full exposure to the "outside world," the court cited to Princeton's own regulations as an invitation for public use of its facilities. *See id.* at 565 n.10, 423 A.2d at 631 n.10.

60 *See id.* at 555-56, 423 A.2d at 631.

61 *See id.* at 567, 423 A.2d at 632. With the holding in *Schmid*, New Jersey became the first state to address the conflict between free speech and private property and created a balancing approach followed by other states. *See* Brownstein & Hankins, *supra* note 48, at 1107-12; *see also* Alderwood Assocs. v. Washington Envtl. Council, 635 P.2d 108, 116-17 (Wash. 1981) (holding that courts must evaluate the nature of the subject property, the nature of the speech, and the potential for the regulation of speech in soliciting signatures in shopping center cases); Commonwealth v. Tate, 432 A.2d 1382, 1390 (Pa. 1981) (promulgating a test that balanced a college's right to protect and possess its property against the leafletter's freedom of expression).

62 89 N.J. 163, 445 A.2d 370 (1982).

63 *See generally* N.J. STAT. ANN. § 5:12-1 to -152 (West 1988) (codifying the New Jersey Casino Control Act).

64 *See Uston*, 89 N.J. at 166, 445 A.2d at 371. Uston was a renowned blackjack player who was able to tilt the odds slightly in his favor by incorporating specific betting strategies with the tracking of cards previously dealt. *See id.* This "cardcounting" method increased the probability of a profitable session at the casino over a period of time. *See id.*

from playing blackjack in its casino.[65] Noting the purposeful invitation to the public, for the casino's benefit the court reiterated that as private premises were more expansively open to the public, owners had a greater duty not to unreasonably exclude people.[66]

The Superior Court, Appellate Division, case of *Bellemead Development Corp. v. Schneider*[67] involved a landlord seeking an injunction against union members leafletting non-managerial office workers in front of a private office building.[68] The court noted that a balance must be struck between free speech and private property rights only when the owner held out the property for some public use.[69] In upholding the injunction, the court held that because the owner did not invite the general public to use the property, the defendants' free speech claim must be denied.[70]

Similarly, *Brown v. Davis*[71] pitted an anti-abortion citizens' group attempting to leaflet cars on a private parking lot against the landlord-owner of a multi-business office complex housing a facility that performed abortions.[72] Applying the three-factor *Schmid*

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65 *See id.* at 175, 445 A.2d at 376. After writing the Casino Commissioner on January 30, 1979, and receiving a response that no statute or regulation prevented the exclusion of card counters from a casino, Resorts banned Uston from its blackjack tables and instituted a policy to ban all other players that met Resorts' "cardcounters" standards. *See id.* at 167, 445 A.2d at 372.

66 *See id.* at 173, 445 A.2d at 375. The court ultimately held that without a Casino Commission regulation banning card counters, Resorts had no power to deny Uston access to its facility. *See id.* at 175, 445 A.2d at 376. The court granted a 90-day order against Uston during which time the Commission could act on the matter. *See id.* The court declined to consider whether a Commission rule would pass constitutional muster, but instead suggested that the legislature's public policy concerns would rest in the public's confidence that casinos were run in a credible and fair fashion. *See id.* at 174-75, 445 A.2d at 375- 76.

67 196 N.J. Super. 571, 483 A.2d 830 (App. Div. 1984).

68 *See id.* at 571, 483 A.2d at 830. Union members distributed leaflets on private sidewalks in front of five office buildings that comprised the "Meadowlands Corporate Center." *See id.* at 574, 483 A.2d at 831-32.

69 *See id.*, 483 A.2d at 832. The court stated that public use is a threshold issue that must be reached before analyzing whether the expressive activity should be permitted. *See id.* at 575, 483 A.2d at 832. According to the court, even though the speech was related to the normal use of the property, the *Schmid* balancing test would not apply because the threshold issue could not be met. *See id.*

70 *See id.* at 576, 483 A.2d at 833.

71 203 N.J. Super. 41, 495 A.2d 900 (Ch. Div. 1984).

72 *See id.* at 43, 495 A.2d at 901. Plaintiff's actions consisted of carrying signs, calling and shouting to prospective patients, and other expressive activities along a public right of way 45-100 feet from the entrance to the center. *See id.* at 44, 495 A.2d at 902. The defendants did not contest that action but instead challenged the demonstrators' right to enter a private parking lot to distribute their literature. *See id.* at 44-45, 495 A.2d at 902. After refusing to leave at the owner's request, Brown, a member of the anti-abortion protesters, was charged with criminal trespass under N.J. STAT. ANN. § 2C:18-3. *See id.* at 45, 495 A.2d at 902.

test, the chancery division declared that the office complex did not have to allow members of the citizens' group to enter the property to leaflet.[73] In denying injunctive relief to the plaintiff, the court emphasized that in weighing the factors, all three tilted in favor of the private owner excluding the expressional activity.[74]

In the criminal trespass case involving the same defendant, *State v. Brown*,[75] the appellate division upheld the trespass conviction.[76] Reluctant to apply the *Schmid* test, the court held that access to the property in question clearly was by invitation only, and the property was not devoted to any public use.[77] Alternatively, the appellate division proffered that if the *Schmid* test was applicable, the defendant still would not be granted relief under the test's factor analysis.[78]

The appellate division examined the trespass conviction of two campaigners leafletting automobiles at the Bergen Mall in *State v. Gerstmann & Chuman*.[79] The appellate division, based upon

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Defendant, Davis Enterprises, owned two acres of land that housed the buildings identified as "Avenues of Commerce." *See id.* at 43, 495 A.2d at 901. Cherry Hill Women's Center, a tenant of the center and a private medical facility, was also joined as a defendant. *See id.* The Center's services included gynecological consultations and procedures, pregnancy tests, and abortions. *See id.* Patients were normally admitted by appointment, but one was not necessary for a pregnancy test. *See id.* Other tenants in the complex included general business offices, storage facilities, and warehouses. *See id.* at 43-44, 495 A.2d at 901.

73 *See id.* at 49, 495 A.2d at 904.

74 *See id.* at 47-49, 495 A.2d at 903-04. The court noted that in assessing the first prong of the *Schmid* test, the normal use of the property was for employees, tenants, and prospective customers of limited services and was therefore not equivalent to a shopping center. *See id.* at 47, 495 A.2d at 903. Likewise, in weighing the second prong the court did not interpret advertisements and signs to express a "general invitation to the public." *See id.* In examining the third prong, the court noted that the expressive activity was incompatible with the operation of the Women's Center and thus weighed in favor of the property owner. *See id.* at 47-48, 495 A.2d at 903-04.

75 212 N.J. Super. 61, 513 A.2d 974 (App. Div. 1986).

76 *See id.* at 67-68, 513 A.2d at 978.

77 *See id.* at 65-66, 513 A.2d at 976-77. The court distinguished this case from *Planned Parenthood v. Cannizzaro*, 204 N.J. Super. 531, 499 A.2d 535 (Ch. Div. 1985). *See id.* In distinguishing the case the court found that the premises in the present action were not the recipient of public funds, nor was the complex used only by the facility that performed abortions. *See id.* at 65, 513 A.2d at 976.

78 *See id.* at 66, 513 A.2d at 977. The appellate division, examining the first two factors of the *Schmid* test, noted that the office complex was not the equivalent of a downtown shopping center and that the invitation to the general public was for private purposes. *See id.* Applying the third factor of the test, the appellate division followed the opinion of Judge Lowengrub in *Bellemead Development Corp. v. Schneider*, 196 N.J. Super. 571, 483 A.2d 830 (App. Div. 1984), finding the intrusion to be incompatible with the tenants' expectation of quiet enjoyment of the premises. *See id.* at 67-68, 513 A.2d at 977-78.

79 198 N.J. Super. 175, 177, 486 A.2d 912, 913 (App. Div. 1985). The defendants,

double jeopardy, dismissed a state appeal of the trespass acquittal.[80] Although the defendants desired to waive any double jeopardy claim and to seek an advisory opinion, the appellate court concluded this would undermine public policy.[81]

Similar to *Brown v. Davis*,[82] *Planned Parenthood of Monmouth County, Inc. v. Cannizzaro*[83] also examined the free speech rights of anti-abortion picketers on private property.[84] In upholding a permanent injunction against the picketers, the chancery division clarified the considerations the court must examine in classifying property as a public facility.[85] Using the *Schmid* analysis, the court

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candidates in a Bergen County freeholder election, placed campaign literature on cars parked at the Bergen Mall, a large enclosed shopping center. *See id.* After being requested to stop, the defendants continued the activity and were subsequently charged with criminal trespass pursuant to N.J. STAT ANN. § 2C:18-3. *See id.* at 177-78, 486 A.2d at 913.

80 *See id.* at 177, 486 A.2d at 913. In municipal court, the defendants asserted their Article I, paragraph 6 rights under the New Jersey Constitution. *See id.* The municipal court judge found the defendants guilty of trespass and held that the criteria of the *Schmid* test did not affect the leafletting. *See id.* at 179, 486 A.2d at 914. On appeal, the Superior Court, Law Division, through a de novo review, noted that the leafletters had met the *Schmid* criteria and reversed the convictions. *See id.*

81 *See id.* at 182, 486 A.2d at 916. The appellate division emphasized that proceedings against the defendants were completed with the acquittal and the leafletters' request to allow an appeal just to receive a reported judicial statement was inappropriate. *See id.* The appellate division set forth other methods available to the defendants, including a declaratory judgment or an injunction. *See id.* at 183, 486 A.2d at 916.

82 203 N.J. Super. 41, 495 A.2d 900 (Ch. Div. 1984). For an in-depth discussion of *Brown*, see *supra* notes 71-74 and accompanying text.

83 204 N.J. Super. 531, 499 A.2d 535 (Ch. Div. 1985).

84 *See id.* at 535, 499 A.2d at 537. The picketing took place on the property of a facility of Planned Parenthood, a nonprofit agency which performed numerous pregnancy and gynecological services including abortions. *See id.* at 533, 499 A.2d at 536. Planned Parenthood of Monmouth County received half of its funding through public grants that were earmarked for contraceptive services and community education. *See id.* at 533-34, 499 A.2d at 536. The Monmouth County division of Planned Parenthood also received a preferred tax rate based on its not-for-profit status. *See id.* at 534, 499 A.2d at 536. The court found that most of the picketing was conducted at the rear of the building until the June 1, 1984, temporary restraining order was issued. *See id.* at 534-35, 499 A.2d at 537. Planned Parenthood of Monmouth County sought to receive permanent injunctive relief based on its private status, while the defendants asserted that through its financial support and open invitation Planned Parenthood was in reality a public facility. *See id.* at 535, 499 A.2d at 537.

85 *See id.* at 541, 499 A.2d at 540. While finding the plaintiff to be a private entity, the court distinguished the case from the holding in *Bellemead Development Corp. v. Schneider*, 196 N.J. Super. 571, 483 A.2d 830 (App. Div. 1984). *See id. at* 538, 499 A.2d at 538-39. For a discussion of *Bellemead*, see *supra* notes 67-70 and accompanying text. The court opined that by receiving public funds, the facility was not exclusively private; therefore, the *Schmid* analysis must apply. *See id. at* 538, 499 A.2d at 539. The court also made note of *Brown v. Davis*, 203 N.J. Super. 41, 495 A.2d 900 (Ch. Div. 1984), which still applied the *Schmid* three-prong analysis in ruling that the property

explained that the quality of the factors, not just the quantity, must be balanced, and in this case all the factors weighed in favor of the injunction.[86]

A private college campus was the setting for *State v. Guice*,[87] the New Jersey Superior Court, Law Division, decision involving a trespass violation stemming from political leafletting at Stevens Institute of Technology.[88] In upholding the violation, the court distinguished the case from *Schmid*, finding that Stevens Institute was not an "open campus."[89] Unlike Princeton University, the court found that Stevens's geographic location and deliberate policy to keep its facilities private were essential factors in declaring that the school was not subject to public use constitutional obligations.[90] In applying the three-prong test, the court placed heavy emphasis on

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"'owner ha[d] not *sufficiently* dedicated the property to public use so as to entitle individuals to access for First Amendment activity.'" *Id.*

86 *See id.* at 541, 499 A.2d at 540. While noting that the first two prongs—the normal use of the property was private and there was no invitation to the public to use the facility—were in favor of Planned Parenthood, the court established that the third element—the purpose of expression in relation to the private and public use of property—favored the defendant. *See id.* In balancing the factors, the court articulated that the total number of factors on each side would not be outcome determinative but that the quality of each factor should be weighed in formulating the result. *See id.* The court continued by stating that the defendant's actions, including shouting and verbally abusing the personnel, infringed too greatly on the private property owner's rights. *See id.* at 543, 499 A.2d at 542.

87 262 N.J. Super. 607, 621 A.2d 553 (Law Div. 1993).

88 *See id.* at 609, 621 A.2d at 554. Stevens Institute of Technology (SIT) is a private college located in Hoboken, New Jersey. *See* THE YALE DAILY NEWS, THE INSIDER'S GUIDE TO THE COLLEGES, 396-98 (1995). In 1995, the school offered seven fields of study including computer science, engineering, humanities, pre-dentistry, pre-law, pre-med, and the sciences. *See id.* at 396. Undergraduate enrollment at SIT in 1995 was 1274, while total enrollment at the school equaled 2876 students. *See id.*

On October 22, 1990, the defendants set up a table on campus intending to speak with students and distribute political literature. *See Guice*, 262 N.J. Super. at 609, 621 A.2d. at 554. After refusing to leave after being requested to do so, the defendants were arrested and charged with criminal trespass pursuant to N.J. STAT. ANN. § 2C:18-3. *See id.*

New Jersey's current criminal trespass statute states in relevant part that:

> [a] person commits a petty disorderly persons offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by: (1) [a]ctual communication to the actor; or (2) [p]osting in a manner prescribed by law or reasonably likely to come to the attention of intruders; or (3) [f]encing or other enclosure manifestly designed to exclude intruders.

N.J. STAT. ANN. § 2C:18-3(b) (West 1995).

89 *See Guice*, 262 N.J. Super. at 611-12, 621 A.2d at 555.

90 *See id.* at 612 , 621 A.2d at 555-56. Important to the court's holding was SIT's deliberate policy to maintain a private status. *See id.* The court determined that SIT was a closed facility and, unlike Princeton, was not integrated with parts of the town. *See id.* Additionally, the court saw that there were only a limited amount of public

the nature and extent of the invitation to the public.[91] The court concluded that not all universities were public fora.[92]

Most recently, the New Jersey Supreme Court, in *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*,[93] addressed whether denial of access to private shopping malls for political and societal leafletting abridged freedom of expression rights granted by the New Jersey Constitution.[94] Chief Justice Wilentz, writing for a four-justice majority,[95] initially established that the societal phenomenon of migration from cities to suburbs resulted in a displacement of downtown business centers, formally the meccas of commercial and social activity.[96] The chief justice emphasized the replacement of these fora with the modern shopping mall.[97] Applying federal law, the majority declared that the Federal Constitution did not provide for free speech in privately owned shopping centers and that most state courts interpreted the issue the same way.[98] The majority then acknowledged that the

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uses and therefore found invitations to the public to be minimal. *See id.*, 621 A.2d at 556.

91 *See id.* at 611, 621 A.2d at 555.

92 *See id.* Although agreeing that the first element of the test could be met by the leafletters if the goal of the university was to foster expression and knowledge, the court countered this by putting more emphasis on the invitation to the public. *See id.* The court therefore found it unnecessary to reach the third factor of the test. *See id.* at 613-14, 621 A.2d at 556.

93 138 N.J. 326, 650 A.2d 757 (1994).

94 *See id.* at 332, 650 A.2d at 760.

95 *See id.* at 404, 650 A.2d at 796. Justices Handler, O'Hern, and Stein joined the chief justice. *See id.*

96 *J.M.B. Realty*, 138 N.J. at 346, 650 A.2d at 767.

97 *See id.*; James M. McCauley, *Transforming the Privately Owned Shopping Center into a Public Forum:* Pruneyard Shopping Center v. Robins, 15 U. RICH. L. REV. 699, 721 (1981) (recognizing that downtown centers, where business once was rampant, have been debased by the privately owned shopping center, thus spawning a necessary new outlook toward these modern centers); Note, *Private Abridgment of Speech and the State Constitutions*, 90 YALE L.J. 165, 168 (1980) (discussing the increase in numbers of shopping centers from the time public forum definitions were created in the 1930s and 1940s).

According to the chief justice, these shopping centers, with their vast variety of functions, have become the "new downtowns" and posture an open door policy to the public for business purposes. *See J.M.B. Realty*, 138 N.J. at 346, 650 A.2d at 767. In many instances, the shopping mall is the most viable forum for public expression, especially in the field of politics. *See* Note, *supra*, at 169.

98 *See J.M.B. Realty*, 138 N.J. at 349, 650 A.2d at 769. The majority noted that decisions in Arizona, Connecticut, Georgia, Michigan, New York, Ohio, Pennsylvania, South Carolina, Washington, and Wisconsin have not allowed for free speech expression in privately owned shopping malls. *See id.* These states, according to the majority, often based their holdings on the Federal Constitution or state action doctrines. *See id.*

The court did note that some states allowed leafletting under their own constitu-

scope of free expression rights on private property was addressed in *State v. Schmid*,[99] finding that the New Jersey Constitution grants greater free speech protection than its federal counterpart.[100]

In addressing the lower court's opinion, which held that the constitutional grant should not apply because of a lack of dedication of the malls to the public,[101] the majority emphasized the all-encompassing nature of these establishments, including an implied invitation to the public to leaflet.[102] Applying the three-factor balancing test, the majority determined what rights should be granted to an individual's free expression, and what protection should be given to private property owners.[103] Chief Justice Wilentz strongly suggested that the all-inclusiveness of shopping malls weighed heavily in favor of a constitutional right to leaflet.[104] The majority opined that these open and multiple uses attract all types of people, inviting them to enjoy the non-commercial aspects of the centers with hope that some impulsive shopping may result.[105]

The majority specifically mentioned the many speech-oriented, non-retail, non-commercial events that took place in these

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tional or statutory provisions. *See id.*; *see also* Robins v. Pruneyard Shopping Ctr., 592 P.2d 341 (Cal. 1979) (holding that the California free speech clause protects citizens from both private and state action); Bock v. Westminster Mall Co., 819 P.2d 55 (Colo. 1991) (relying on the state's free speech provision while also finding that a mall seeking to prohibit political literature was a state actor); Batchelder v. Allied Stores Int'l, Inc., 445 N.E.2d 590 (Mass. 1983) (applying the state constitution's "free and equal elections" provision); Lloyd Corp. v. Whiffen, 849 P.2d 446 (Or. 1993) (relying on the state constitution's referendum provision).

99 *See J.M.B. Realty*, 138 N.J. at 352, 650 A.2d at 770; *supra* notes 50-61 and accompanying text.

100 *See J.M.B. Realty*, 138 N.J. at 353, 650 A.2d at 770-71; *see also* State v. Hunt, 91 N.J. 338, 358-68, 450 A.2d 952, 962-68 (1982) (explaining the principles for interpreting state constitutional provisions).

101 *See J.M.B. Realty*, 138 N.J. at 355, 650 A.2d at 772.

102 *See id.*, 650 A.2d at 771-72. The majority stated that the focus should not be limited to a stated purpose by the owner, but to the overall invitation to the public. *See id.*

103 *See id.* at 356, 650 A.2d at 772.

104 *See id.* at 357, 650 A.2d at 772-73. The chief justice dismissed the argument that the mall's primary purpose was commercial and for profit and focused instead on the large open spaces, areas to sit and talk, the invitation to exercise, the theaters, restaurants, meeting rooms, and the prevalence of community booths. *See id.* The chief justice believed that these permitted uses said to the public, "'[c]ome here, that's all we ask. We hope you will buy, but you do not have to, and you need not intend to. All we ask is that you come here. You can do *whatever* you want so long as you do not interfere with other visitors.'" *Id.*

105 *See id.* at 358, 650 A.2d at 773. The majority noted the certainty that without people present, regardless of the mall's stated purpose, no shopping would occur. *See id.*

centers.[106] The court found these uses not only to be similar to invitations found in downtown business districts, but in some cases to exceed that invitation, given the open spaces, park-like settings, and benches found in the malls.[107] The majority determined that the intent of the malls was to bring the entire community into their structures.[108]

Discussing the pervasiveness and breadth of issue-oriented speech already permitted at the malls, the majority focused on the power of mall owners to regulate leafletting.[109] Dismissing the defendants' claim that prohibiting leafletting was essential for mall owners to protect their market, the majority declared that the intentional transformation of downtown shopping districts into a facility that invited the public for varied uses acted as an implied invitation to leaflet.[110] The centers, according to Chief Justice Wilentz, attempted to take away the business of the downtown business districts without accepting the accompanying free speech responsibility.[111] The chief justice concluded that the initial two factors, those relating to the normal use of the property and the

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106 *See J.M.B. Realty*, 138 N.J. at 358-59, 650 A.2d at 773; *see also id.* at 379-90, 650 A.2d at 784-89 (listing permitted activities at the malls). Some examples of the permitted activities included: spring fashion shows, Easter Bunny arrival, Bugs Bunny 50th Anniversary Show, Trick or Treat at the Mall, Breakfast with Santa, Toys for Tots, voter registration campaign, St. Elizabeth's Hospital cholesterol screening, Baby Fest, Muppet Traffic Safety Show, bridal fairs, child ID day, Juvenile Diabetes Walk-a-Thon, World Gym Aerobics presentation, St. Patrick's Day 5k run at the mall, Berlin Wall exhibit, an appearance by soap opera character Jackson Montgomery of "All My Children," American Cancer Society daffodil sale, Bradley for U.S. Senate Voter Registration Drive, Fairleigh Dickinson University information, U.S. Army Recruiting information, business and finance show, 5th annual Dell New Jersey crossword open, "Riverside Rapids" speed chess tournament, musical concerts, and the MDA telethon. *See id.* at 379-90, 650 A.2d at 784-89. Some malls permitted access to their facilities during non-business hours for walkers or for the use of meeting rooms. *See id.*

107 *See id.* at 359, 650 A.2d at 773.

108 *See id.*, 650 A.2d at 773-74.

109 *See id.* at 360, 650 A.2d at 774. The court noted that some malls' policies allowed community desks and booths to address a variety of issues. *See id.* at 359, 650 A.2d at 774. By discussing Woodbridge Center's policy, which enabled political and community groups to distribute literature subject to regulation and permitted voter registration drives that often involved walking through the mall and distributing leaflets, the court narrowed the issue before them to regulation. *See id.*

110 *See id.* at 360-61, 650 A.2d at 774. The chief justice stated:

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

Id. at 361, 650 A.2d at 774.

111 *See J.M.B. Realty*, 138 N.J. at 361, 650 A.2d at 775.

extent of the invitation to the public, weighed strongly in favor of the right to leaflet.[112]

In analyzing the third factor, the majority established that because expressive activity was permitted and compatible with the malls' use, leafletting should be as well.[113] Drawing from tradition and history, the chief justice noted that leafletting and downtown business districts had co-existed for more than two centuries.[114] Further, the court found that the record did not substantiate the mall owners' contention that distributing pamphlets would negatively affect their profits.[115] Any conflict arising between the objectives of profit and free expression, the majority opined, could be offset by appropriate time, place, and manner restrictions on the leafletting.[116] Thus, the majority concluded, the element of compatibility favored the constitutional right to expression.[117]

In finding that all three factors favored the plaintiffs, the court held that regional and community shopping centers must allow individuals the reasonable exercise of expressive freedom, as granted by the New Jersey Constitution, subject to the property owners' appropriate time, place, and manner restrictions.[118] To further support the court's decision, the chief justice also determined that the case would be decided on a general balancing of private property rights with free speech rights.[119] Using a "functional equivalence" analysis, the majority determined that malls constitute quasi-public fora.[120] In relying on several federal decisions, the majority employed a sliding scale and found that the more a private property owner opened up the property for public use, the greater the free

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112 *See id.*

113 *See id.*

114 *See id.*

115 *See id.* The majority suggested that downtown business centers were not damaged by free speech and leafletting. *See id.* The court explained that although some shoppers may find the leafletting to be an imposition, that fact did not bolster the assertion that business would be lost. *See id.* The chief justice then reemphasized that four malls had already permitted the leafletting in question. *See id.*

116 *See J.M.B. Realty*, 138 N.J. at 362, 650 A.2d at 775.

117 *See id.*

118 *See id.*

119 *See id.*

120 *See id.* at 363, 650 A.2d at 776. *See also* James Podgers, *Free Speech in the New Downtowns*, 81 A.B.A. J. 54 (1995) (identifying the concerns over considering what constitutes a public forum in an era where traditional downtown and public square districts are giving way to more privatized venues). Podgers addressed the decisions in *J.M.B. Realty* as well as a Seventh Circuit opinion holding that public display cases in O'Hare Airport were public fora and that the City of Chicago could not refuse advertising because that would violate the First Amendment. *See* Air Line Pilots Ass'n Int'l v. Department of Aviation, 45 F.3d 1144 (7th Cir. 1995).

speech rights the owner must permit to those using the property.[121] The court remarked that constitutional free speech rights must prevail over the property rights in this case, given the ability to conduct this speech with little cost to the mall owners.[122]

The majority bolstered its reasoning by addressing the methods of communication in our changing society.[123] Chief Justice Wilentz noted that although television had become a pervasive medium in today's world, the viability of this type of information dissemination was not dependent upon alternatives.[124] In fact, according to the chief justice, television would have a negative impact on these types of groups, which often express minority viewpoints not likely to be addressed by limited press coverage.[125] Therefore, Chief Justice Wilentz deduced that leafletting represented one of the only cost-effective methods of reaching the public in New Jersey.[126] The chief justice surmised that as society has changed and business districts have given way to regional shopping centers, the rights of free speech must follow the same path.[127]

Having established the right to leaflet in these centers, the majority next addressed two defendants' assertions that this mandate

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121 *See J.M.B. Realty*, 138 N.J. at 363, 650 A.2d at 775.

122 *See id.* at 363-64, 650 A.2d at 776. The majority noted that the reasonable regulations on the expression, combined with the limited application of the expression, would allow property owners the power to reduce any interference to shoppers and profits to negligible amounts. *See id.* The court, although not using federal doctrine in its decision, nonetheless noted that the United States Supreme Court had previously declared that a right to free speech granted by the Constitution shall not "be determined by title to property alone." *See id.* at 366, 650 A.2d at 777.

The New Jersey court cited to its opinion in *State v. Shack* as support for its decision. *See id.* at 365, 650 A.2d at 777 (citing State v. Shack, 58 N.J. 297, 277 A.2d 369 (1971)). In *Shack*, the court declared that two federal employees could enter private property to give migrant workers information about federal assistance programs. 58 N.J. at 307-08, 277 A.2d at 374-75. The *Shack* court noted that in certain circumstances private property rights must retreat against those rights held by society. *See id.* at 303, 277 A.2d at 372.

123 *See J.M.B. Realty*, 138 N.J. at 366-67, 650 A.2d at 777.

124 *See id.* at 367, 650 A.2d at 777-78. Free speech, Chief Justice Wilentz declared, never has and never should be dependent on the means of any other type of communication. *See id.* Additionally, the chief justice found the expense of television, costing between $23,000-$155,000 for a 30-second advertisement, made it an impractical alternative for this group. *See id.* 650 A.2d at 778.

125 *See id.*

126 *See id.* at 368, 650 A.2d at 778.

127 *See id.* The chief justice opined that the New Jersey constitutional provision dealing with free speech was not created with an expectation of its diminishment as society changed. *See id.* at 370, 650 A.2d at 779. Chief Justice Wilentz noted that free speech should not cease with a new method of business, but rather the right of free speech should move with society and include a right to leaflet at these centers. *See id.*

was a deprivation of property without due process of law,[128] a taking without just compensation,[129] and an infringement upon the mall owners' right to free speech.[130] Under the Federal Constitution, the majority noted, the Supreme Court struck down these same contentions in *Pruneyard Shopping Center v. Robins*.[131] In analyzing the New Jersey Constitution, the majority likewise rejected these arguments, adding that when property rights drastically curtail free speech in an effort to avoid minimal interference with the property, property rights must yield to those of free speech.[132] While the New Jersey Constitution assures compensation for property taken, the court reiterated that it does not provide for compensation for actions bearing little or no impact on the profitability of the centers.[133]

Lastly, the majority clarified the application and limitations of the holding.[134] The chief justice applied this holding to all regional shopping centers and the one community shopping center.[135] In accepting the differences in degree of public activity from center to center, the majority perceived these differences as immaterial in allowing free speech activity.[136] Addressing the defendants' contention that this disregard of the degree of public activity would lead to future litigation, the supreme court specifically

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128 *See J.M.B. Realty*, 138 N.J. at 370, 650 A.2d at 779; U.S. CONST. amend. I (stating in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); U.S. CONST. amend V (stating in relevant part that ". . . nor shall private property be taken for public use without just compensation."); N.J. CONST. art. I, ¶ 6 (stating in relevant part that "[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right [and that] [n]o law shall be passed to restrain or abridge the liberty of speech or of the press."); N.J. CONST. art. I, ¶ 20 (stating that "[p]rivate property shall not be taken for public use without just compensation [and that] [i]ndividuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners.").

129 *See J.M.B. Realty*, 138 N.J. at 370, 650 A.2d at 779; U.S. CONST. amend. V.

130 *See J.M.B. Realty*, 138 N.J. at 370, 650 A.2d at 779; U.S. CONST. amend. I.

131 *See J.M.B. Realty*, 138 N.J. at 370, 650 A.2d at 779. For an in-depth discussion on the United States Supreme Court's decision in *Pruneyard*, see *supra* notes 45-48 and accompanying text.

132 *See J.M.B. Realty*, 138 N.J. at 371, 650 A.2d at 780. The majority explained, "[t]hat does not mean that one is fundamentally more important than the other, although we believe it is, but rather that here the correct resolution of the conflict between these rights is self-evident." *Id.*

133 *See id.* at 372, 650 A.2d at 780.

134 *See id.* at 372-78, 650 A.2d at 780-83.

135 *See id.* at 372 n.16, 650 A.2d at 780 n.16. The majority declared that its holding did not pertain to all community shopping centers and stated that more information would be necessary to make that determination. *See id.*

136 *See id.* at 372-73, 650 A.2d at 780.

and prospectively limited the holding to certain private property venues.[137]

The majority limited free expression rights in the shopping centers to passive leafletting concerning political and societal free speech.[138] Chief Justice Wilentz noted that commercial free speech would be in great disharmony with the use of the malls and thus could not garner constitutional protection.[139] Additionally, the majority limited free expression to leafletting and emphasized that the holding only included normal speech necessary for effective leafletting.[140] Regarding the property owners' concern that potential violence between opposing groups may arise,[141] the majority declared that free speech by its nature has always allowed for this possibility, but that the control mechanisms possessed by the mall owners would make disturbance unlikely.[142]

In reversing the appellate division, the New Jersey Supreme

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137 *See J.M.B. Realty*, 138 N.J. at 373, 650 A.2d at 781. Property on which the court would not extend permission to leaflet included highway strip malls, football stadiums, theaters, single suburban stores, stand alone uses, and small to medium shopping centers. *See id.* The invitations in these venues, according to the majority, did not draw near the multitude of uses found at the regional shopping centers. *See id.* at 374, 650 A.2d at 781. The limited activity at each of the above places, the chief justice concluded, may be substantially interfered with by this exercise of free speech. *See id.*

138 *See id.*

139 *See id.* at 375, 650 A.2d at 781-82. The majority found commercial speech to be a substantial intrusion on the property rights of shopping center owners insofar as leafletting could be distributed suggesting that customers shop elsewhere. *See id.*

140 *See id.* at 375-76, 650 A.2d at 782. The majority did not include in its holding bullhorns, megaphones, soapboxes, placards, pickets, parades, or demonstrations. *See id.* Likewise, the court noted that free speech would be limited only to what was needed to attract passers-by "without pressure, harassment, following, [or] pestering, of any kind." *Id.* at 376, 650 A.2d at 782. Also, the court noted that the "sale of literature and the solicitation of funds on the spot" would not be protected. *Id.*

141 *See id.* at 377 n.18, 650 A.2d 782 n.18. The court acknowledged a 1983 disturbance in a Connecticut mall where the National Organization of Women was allowed to solicit signatures, but the Ku Klux Klan was denied similar access. *See id.* When the members of the Ku Klux Klan arrived, a counter demonstration arose and outside police forces, including swat teams from two counties, were called to calm the disturbance, causing several stores to close for the day. *See id.*; *see also* Scott G. Bullock, *The Mall's In Their Court*, REASON, Aug. 18, 1995, at 47 (stating that in the months following this riot, sales declined 35% at the mall).

142 *See J.M.B. Realty*, 138 N.J. at 377-78, 650 A.2d at 782-83. The majority, finding the property owners' regulatory powers to be broad, stated that malls could limit leafletting to certain days and a certain quantity of days, as long as these restrictions were reasonable and not a blanket restriction on a viable day. *See id.* Leafletting could also be confined to designated places such as parking lots outside the mall or different wings of the centers in order to avoid conflicts between groups. *See id.* at 378, 650 A.2d at 783. The supreme court cautioned, however, that some leafletting would require an indoor forum to be effective. *See id.* The majority expected that other problems could be worked out between the parties involved. *See id.*

Court gave the malls sixty days to enact reasonable regulations that would satisfy both the interests of the malls and the leafletting rights of the Coalition.[143] Chief Justice Wilentz concluded that this holding would assure New Jersey citizens of their right to be heard.[144] The chief justice expected this expressive right to be as effective as it had been when downtown business centers represented the community gathering place.[145]

A vigorous dissent,[146] authored by Justice Garibaldi, denounced the majority for twisting the factors established in *State v. Schmid*.[147] Justice Garibaldi also declared that the majority had neglected consideration of private property owners' rights, given little credence to the findings of fact at the trial court level, and relied upon outdated, rejected federal holdings in lieu of current federal and state constitutional applications. [148] Justice Garibaldi believed that the majority's holding would only cloud the issue of free expression on private property, spawning more problems than solutions.[149]

In acknowledging the state's ability to expand federal individual rights under state constitutions, the dissent emphasized that access to private shopping malls' property for leafletting had been rejected by most states.[150] Asserting that the majority's holding neglected to balance all the provisions of Article I of the New Jersey Constitution, the dissent claimed that the decision only addressed free speech and assembly provisions.[151] The dissent urged that for

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143 *See id.* at 379, 650 A.2d at 783-84.

144 *See id.* at 378, 650 A.2d at 783.

145 *See id.*

146 *See* Russ Bleemer, *Leafletters Now Await Rules—and a Possible Appeal*, N.J. L.J., Dec. 26, 1994, at 17. Justice Robert Clifford and Appellate division Judge Herman Michels joined Justice Garibaldi. *See id.* Justice Pollack did not participate in this case due to a conflict; his son-in-law was a partner at the firm representing two of the defendant malls, Cherry Hill Center, and Woodbridge Center. *See id.*

147 *See J.M.B. Realty*, 138 N.J. at 390, 650 A.2d at 789 (Garibaldi, J., dissenting).

148 *See id.* at 390-92, 650 A.2d at 789-90 (Garibaldi, J., dissenting). Justice Garibaldi contrasted the majority holding with that of two similar cases in Pennsylvania. *See id.* at 392, 650 A.2d at 790 (Garibaldi, J., dissenting) (citing Commonwealth v. Tate, 432 A.2d 1382, 1391 (Pa. 1981) (overturning a trespass conviction against distributors of leaflets on a college campus); Western Pa. Socialist Workers v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331, 1336-37 (Pa. 1986) (holding that an invitee to a shopping mall has no right to engage in activities undesirable to the landlord and that malls are not considered to be public fora because they exchange goods and services, not ideas)).

149 *See J.M.B. Realty*, 138 N.J. at 390, 650 A.2d at 789 (Garibaldi, J., dissenting).

150 *See id.* at 391, 650 A.2d at 789 (Garibaldi, J., dissenting).

151 *See id.*; N.J. CONST. Art. I, ¶ 6 (stating in relevant part that "[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right [and that] [n]o law shall be passed to restrain or abridge the

the analysis to be correct, the paragraphs based on private property rights and just compensation should also be considered.[152] The dissent argued that omitting consideration of the private property provisions of the constitution would yield an inappropriate factor analysis under *State v. Schmid.*[153]

Accepting the trial court's finding of fact, the dissent stated that the only conclusion that could be drawn was the primary use of the malls was commercial.[154] Profits, the dissent noted, drive the malls to attempt to draw people to their facility to spend money, not to do whatever they please once inside the building.[155] Justice Garibaldi, in rejecting the finding that mall owners issued a general invitation to the public to use the malls for all things, questioned the accuracy of the majority's analogy to downtown business districts.[156]

In distinguishing *Schmid* from the present situation, the dissent found that the different purposes of malls and universities is a vital and distinctive factor.[157] The dissent noted that while an open discourse and free flow of ideas enhanced education, this discourse did not have the same effect on shopping.[158] Finding that the ma-

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liberty of speech or of the press"); N.J. CONST. Art. I, ¶ 18 (stating in relevant part that "[t]he 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").

152 *See J.M.B. Realty*, 138 N.J. at 391, 650 A.2d at 789 (Garibaldi, J., dissenting); N.J. CONST. Art. I, ¶ 1 (stating that "[a]ll persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness"); N.J. CONST. Art. I, ¶ 20 (stating that "[p]rivate property shall not be taken for public use without just compensation [and that] [i]ndividuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners"). Justice Garibaldi noted that the right to free speech does not exist whenever an audience can be found and that only a forum, not an audience, is guaranteed by the constitution. *See J.M.B. Realty*, 138 N.J. at 402, 650 A.2d at 796 (Garibaldi, J., dissenting).

153 *See J.M.B. Realty*, 138 N.J. at 391, 650 A.2d at 789 (Garibaldi, J., dissenting).

154 *See id.* at 393, 650 A.2d at 790 (Garibaldi, J., dissenting). The dissent lamented that the first element of *Schmid* should weigh in favor of the mall owners. *See id.* Justice Garibaldi criticized the majority's application of the first factor, finding that they ignored the "nature, purpose and primary use" language used in *Schmid*, inserting the term "normal use" instead. *See id.* at 394, 650 A.2d at 791 (Garibaldi, J., dissenting).

155 *See id.* at 393, 650 A.2d at 791 (Garibaldi, J., dissenting).

156 *See id.* at 394, 650 A.2d at 791 (Garibaldi, J., dissenting) (citing Lloyd Corp. v. Tanner, 407 U.S. 551, 570 (1972) (finding that the general invitation was for shoppers to do business with the merchants and promotional activity attempted to bring in these people to benefit the entire center)).

157 *See id.* at 395, 650 A.2d at 791 (Garibaldi, J., dissenting).

158 *See J.M.B. Realty*, 138 N.J. at 395, 650 A.2d at 791 (Garibaldi, J., dissenting). Jus-

jority disregarded the commercial purpose of malls, the justice commented that in the future all large spaces open to the public might be declared public fora, subject to all freedom of expression rights.[159]

Justice Garibaldi next examined the final prong of the *Schmid* test—the purpose of the expressive activity and its relationship to the public and private use of the malls.[160] Finding opposition to the Gulf War incompatible with the commercial purpose of the mall owners, the dissent stated that allowing politically-oriented groups to leaflet would only lead to burdensome decisions for mall owners and a future filled with litigation over the appropriateness of standards.[161] Problems of this caliber may be acceptable for public officials, but the justice objected to private property owners having to decide such value-based questions, noting that time, place, and manner restrictions were problematic in other contexts.[162]

Rejecting the majority's determination that regional shopping centers—the functional equivalent of the former business districts—had decimated these former free speech hotbeds, the dissent countered by noting that many business districts have actually shown improvement.[163] Additionally, the dissent concluded, the majority's functional equivalence standard was premised on the reasoning of discredited federal decisions, such as *Marsh* and *Logan Valley*, and could not be relied upon in favoring expressive

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tice Garibaldi noted that "[s]hopping can be accomplished even with mouths shut and minds closed." *Id.*

159 *See id.*, 650 A.2d at 792 (Garibaldi, J., dissenting).

160 *See id.*

161 *See id.* at 396-97, 650 A.2d at 792-93 (Garibaldi, J., dissenting). The dissent acknowledged the dangers associated with allowing unpopular political groups access to the mall. *See id.* (citing Cologne v. Westfarm Assocs., 469 A.2d 1201, 1205 (Conn. 1984)). Addressing the dilemma mall owners may face, Justice Garibaldi questioned how mall owners should handle pro-choice and pro-life groups, animal rights groups, or opposition groups wishing to leaflet on the same day. *See id.* at 396, 650 A.2d at 792 (Garibaldi, J., dissenting).

162 *See id.* at 397, 650 A.2d at 793 (Garibaldi, J., dissenting). Specifically troubling, Justice Garibaldi stated, are the repercussions that had been demonstrated when public officials have had to make time, place, and manner restrictions. *See id.* (citing National Socialist Party of Am. v. Village of Skokie, 432 U.S. 43, 43 (1977) (scheduling Nazi parade outside village hall led to outrage in community)). For a complete discussion of the incident in *Skokie*, see generally DONALD ALEXANDER DOWNS, NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT (1985) (discussing in depth the *Skokie* controversy and interviewing key figures in the case).

163 *See J.M.B. Realty*, 138 N.J. at 397, 650 A.2d at 793 (Garibaldi, J., dissenting). Justice Garibaldi noted that towns located in Essex, Hudson, and Morris counties had actually undergone a revitalization in the areas surrounding the malls. *See id.*

rights.[164]

Distinguishing the shopping malls from downtown business districts, the dissent expressed that these centers in no way resembled a community.[165] Justice Garibaldi specifically found that the malls lacked the locations that generate an exchange of ideas in communities, such as libraries, schools, town halls, and even the corner grocery.[166] The dissent also noted the lack of a political body elected by the people, leading Justice Garibaldi to note that shoppers do not have, or expect to have, any say in the daily affairs of the mall.[167] The justice proclaimed that shoppers primarily visit the mall to shop, not to engage in political discourse.[168]

Similarly, the dissent denounced the majority's reliance on *State v. Shack*, finding the Coalition's situation amenable to alternative means of communication that were not present in the common law ruling of that case.[169] Most notable, according to the dissent, was the status of the impoverished workers under the control of a single property owner that compelled the invasion of private property rights in *Shack*.[170] The dissent urged that the Coalition's target audience, mall patrons, hardly reached such a disadvantaged status as to require such an invasion of the mall owners' rights.[171]

The dissent asserted that the majority's holding lacked any foundation to distinguish malls from other public gathering places and opened a "Pandora's Box" of potential future claims.[172] Justice Garibaldi addressed concern that the majority, by limiting the holding to regional malls, had actually limited nothing based on its disregard for the identity of the party preventing the speech.[173] The result, according to the justice, would lead to no restrictions on expressive activity, contrary to the purpose established in the

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164 *See J.M.B. Realty*, 138 N.J. at 398-99, 650 A.2d at 793-94 (Garibaldi, J., dissenting). The dissent argued that the majority's holding was based only on functional equivalence and that it circumvented the factor analysis required by *Schmid*. *See id.* at 399, 650 A.2d at 793 (Garibaldi, J., dissenting).

165 *See id.* at 400, 650 A.2d at 794 (Garibaldi, J., dissenting).

166 *See id.*

167 *See id.*

168 *See id.*

169 *See J.M.B. Realty*, 138 N.J. 400-01, 650 A.2d at 795 (Garibaldi, J., dissenting).

170 *See id.* at 401, 650 A.2d at 795 (Garibaldi, J., dissenting).

171 *See id.*

172 *See id.* Justice Garibaldi pondered the question of whether sports stadiums, county fairs, theaters, large office buildings, apartment houses, and department stores would be subject to the holding in this case where the commercial aspect of their enterprise is disregarded. *See id.*

173 *See id.* at 402, 650 A.2d at 795 (Garibaldi, J., dissenting).

New Jersey Constitution.[174]

Justice Garibaldi concluded the dissent's analysis with a pragmatic look at the economic realities of the holding.[175] The dissent suggested that the costs of protecting speech in the malls will be filtered through to the consumer in the guise of expanded security and infrastructure.[176] Justice Garibaldi noted that malls, unlike municipalities, would not be protected by the New Jersey Tort Claims Act[177] and, therefore, would bear the potential costs of free access in the future.[178] Given the availability of other fora,[179] Justice Garibaldi found the majority's holding to be a convenience to the leafletters.[180] Convenience, the justice opined, should not compel free speech protection under the New Jersey Constitution.[181]

In *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, the New Jersey Supreme Court was called upon to balance the free speech rights of leafletters with the private property rights of the owners. By favoring leafletting, the majority circumvented established precedent and the firmly incorporated application of the unanimously created factor analysis test in *Schmid.* As noted in the dissent, the majority distorted the factor analysis, placing extreme emphasis on the vast activities permitted in the malls.[182] The analysis, however, required an examination of the

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174 *See J.M.B. Realty*, 138 N.J. at 402, 650 A.2d at 795 (Garibaldi, J., dissenting).

175 *See id.* at 403, 650 A.2d at 795 (Garibaldi, J., dissenting).

176 *See id.*; *see also* Neisser, *supra* note 14, at 41 (discussing the costs to consumers of free speech).

177 *See J.M.B. Realty*, 138 N.J. at 403, 650 A.2d at 795 (Garibaldi, J., dissenting). The New Jersey Tort Claims Act essentially declares it to be public policy that "public entities" shall only be liable in negligence within the limitations of the Act. *See* N.J. STAT. ANN. § 59:1-1 to 12-3 (West 1992).

178 *See J.M.B. Realty*, 138 N.J. at 403, 650 A.2d at 795 (Garibaldi, J., dissenting). Following the law of economics, the dissent deduced that the extra burden placed upon the private mall owners in the form of security and devices necessary to control expressional activity would be passed on to the consumer. *See id.*

179 *See id.* at 404, 650 A.2d at 796 (Garibaldi, J., dissenting). The dissent listed train stations, bus stops, parks, outside supermarkets, post offices, and current downtown shopping districts, coupled with the availability of the media, as methods of access to audiences for the Coalition. *See id.*

180 *See id.* at 403, 650 A.2d at 796 (Garibaldi, J., dissenting).

181 *See id.*

182 *See id.* at 390, 650 A.2d at 789 (Garibaldi, J., dissenting); Kathy Barrett Carter, *Malls, ACLU Clash Before High Court Over Access for Advocacy Groups*, STAR-LEDGER, Mar. 15, 1994, at 9. At oral argument, Justice Stein challenged the assertion that these activities were to promote shopping, stating, "it makes one scratch his head" to find the link between crossword and chess tournaments and shopping. *See* Carter, *supra*, at 9. Justice Handler expressed that some of the groups already in the malls could be considered an annoyance. *See id.*

nature and primary use of the facility, as well as the relationship between the expression and the use of the property. While the court may weigh each factor individually, it is difficult to reconcile the court's approach with the factor analysis, a difficulty evidenced by the shift from a unanimous holding in *Schmid,* to a four-justice majority opinion when applying the same test in the context of a shopping mall.

Furthermore, bringing into question the majority's factor analysis is the reliance upon a general balancing between competing rights of property and speech. This balancing, coupled with a fallback to cases such as *Marsh* and *Logan Valley,* which have been rejected by the federal courts, lends credence to the majority's functional equivalence standard; but it does so on faulty grounds. The backbone of the majority's opinion emphasized the malls' deliberate destruction of the former downtown business districts. That analysis, however, truly fails to fathom the private nature of the malls. While the majority harkens back to yesteryear to recant the co-existence of expression in the old town squares, it completely ignored the property owner's constitutionally protected right of exclusion. The majority likewise ignores the investment and designing that went into the formation of these establishments, intending only to attract shoppers and create profits.

Further, the supreme court disregarded the primary users of the malls—shoppers. The majority dismissed the possibility that consumers have chosen malls as an alternative to the business districts in an effort to get away from political activity and focus on shopping.[183] In general, consumers go to malls to shop.[184] Shop-

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183 *See* Bullock, *supra* note 141, at 46 (noting that consumers ultimately choose where they desire to shop and in this instance, malls have been chosen to avoid the city-like atmosphere of downtown districts including the crime, noise, protests, litter, and panhandling that take place).

184 *See* ROPER CENTER FOR PUBLIC OPINION, Roper Poll, June 1, 1987, *available in* WESTLAW, POLL-C Database [hereinafter Roper Poll]. A 1987 Roper Poll surveying 1980 adults asked respondents if the following factors were reasons for their going to a shopping mall:

It's a pleasant place to go to just look around, see people, etc.
- Is a reason 52%
- Is not a reason 47%
- Don't know 1%

I know a lot of people who go there and I'm likely to run into people I know and can spend time with.
- Is a reason 14%
- Is not a reason 84%
- Don't know 1%

There are things to do for entertainment in the mall.
- Is a reason 22%

pers tend to favor the mall owners' rights to exclude many activities that interfere with shopping.[185] Additionally, consumers will be

Is not a reason	76%
Don't know	2%
There are one or two really good restaurants in the mall.	
Is a reason	22%
Is not a reason	76%
Don't know	2%
There are a number of eating places to chose from in the mall.	
Is a reason	30%
Is not a reason	69%
Don't know	1%
There are specialty stores in the mall, like shoe stores, clothing stores, record stores, etc.	
Is a reason	70%
Is not a reason	29%
Don't know	1%
It has a particular store or two that I need or like.	
Is a reason	80%
Is not a reason	19%
Don't know	1%
There are one or two really good department stores.	
Is a reason	70%
Is not a reason	29%
Don't know	2%
It is a comfortable way to go to a number of stores on one shopping trip.	
Is a reason	85%
Is not a reason	14%
Don't know	1%

Id.

185 *See id.* A 1986 Roper Poll surveying 1998 adults asked respondents if the following should be allowed regardless of mall owner's feelings, or should be prohibited if the mall owner chooses to prohibit it?

Soliciting money for charities.	
Allowed regardless	30%
Prohibited if mall owner wants	65%
Don' t know	5%
Soliciting signatures for petitions.	
Allowed regardless	33%
Prohibited if mall owner wants	62%
Don't know	5%
Soliciting money for religious groups.	
Allowed regardless	18%
Prohibited if mall owner wants	77%
Don't know	5%
Soliciting money for political causes.	
Allowed regardless	15%
Prohibited if mall owner wants	80%
Don't know	5%
Passing out literature for political causes.	
Allowed regardless	30%
Prohibited if mall owner wants	65%
Don't know	5%

the ones to foot the bill for the activity in the form of higher costs stemming from increased security, requirements of more insurance, and potential litigation deriving from restrictions placed on expressional groups.[186]

Thus, the New Jersey Supreme Court, in joining California as the only other state to require that its constitutional free speech clause mandate access to shopping malls for expressional activity, has struck a blow to private property rights.[187] Still unknown is the cost to society of requiring access to shopping centers for expressional activity. The *J.M.B. Realty* decision will likely spawn a wave of confusion and potential litigation, and in its wake leave property owners and consumers holding the bag. Leafletting, a recognized part of our democratic history, would not perish had the court denied the Coalition access to the private malls, because many viable public fora still exist to allow groups to disseminate their messages. Moreover, in side-stepping *Schmid,* the question that remains is what forum will next be labeled quasi-public? Evidenced by its restrictive and narrow holding, the majority has blurred the distinction between public and private fora, subjecting its citizens to a grave disservice, while passing over the established rights of property owners. The discount of private property rights is a sale that no mall owner chose to purchase, and a bargain that in the end will only result in consumers, left out of the process, footing the bill.

Maurice F. Kirchofer III

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186 *See* Bleemer, *supra* note 146, at 17. Defense attorneys believe insurance coverage may become a sticking point for litigation and is an issue that has not been clearly resolved by the decision. *See id.* at 19. Ronald Wiss, who argued the case for Rockaway Townsquare and Livingston Mall, when discussing the rules malls would implement, stated that the costs of maintenance and risk may have to be passed on, but the fact that these costs may prevent small groups from access may result in litigation. *See id.*

187 *See* Robins v. Pruneyard Shopping Ctr., 592 P.2d 341 (Cal. 1979) (allowing high school students to solicit petitions in the mall under state constitutional right to free speech).