SUPREME COURT OF NEW JERSEY

NEW JERSEY COALITION AGAINST
WAR IN THE MIDDLE EAST, et al.,

Plaintiffs-Appellants,

v.

J.M.B. REALTY CORPORATION, d/b/a
Riverside Square, PRUTAUB JOINT
VENTURE, d/b/a The Mall at Short Hills,
CHERRY HILL CENTER, INC., d/b/a
Cherry Hill Mall, KRAVCO, INC., d/b/a
Hamilton Mall, EQUITY PROPERTIES
& DEVELOPMENT CO.,INC., d/b/a
Monmouth Mall, KRAVCO, INC., d/b/a
Quakerbridge Mall, ROCKAWAY
CENTER ASSOCIATES, d/b/a Rockaway
Townsquare, WOODBRIDGE CENTER,
INC., d/b/a Woodbridge Center, LIVINGSTON
MALL VENTURE, d/b/a Livingston Mall,
HARTZ MOUNTAIN INDUSTRIES, INC.,
d/b/a The Mall at Mill Creek,

Defendants-Respondents.

Majority Decision:

The question in this case is whether the defendant regional and community shopping centers must permit leafletting on societal issues. We hold that they must, subject to reasonable conditions set by them. It is based on our citizens' right of free speech embodied in our State Constitution. N.J. Const. art. I, ¶¶ 6, 18. It follows the course we set in our decision in State v. Schmid, 84 N.J. 535 (1980).

In Schmid we ruled that our State Constitution conferred on our citizens an affirmative right of free speech that was protected not only from governmental restraint -- the extent of First Amendment protection -- but from the restraint of private property owners as well. We noted that those state constitutional protections are "available against unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property." And we set forth the standard to determine what public use will give rise to that constitutional obligation. The standard takes into account the normal use of the property, the extent and nature of the public's invitation to use it, and the purpose of the expressional activity in relation to both its private and public use. This "multi-faceted" standard determines whether private property owners

"may be required to permit, subject to suitable restrictions, the reasonable exercise by individuals of the constitutional freedoms of speech and assembly."

Applying Schmid, we find the existence of the constitutional obligation to allow free speech at these regional and community shopping centers clear. We know of no private property that more closely resembles public property. The public's invitation to use the property -- the second factor of the standard -- is correspondingly broad, its all-inclusive scope suggested by the very few restrictions on the invitation that are claimed, but not advertised, by defendants. As for the third factor of the standard -- the relationship between the purposes of the expressional activity and the use of the property -- the free speech sought to be exercised, plaintiff's leafletting, is wholly consonant with the use of these properties. Conversely, the right sought is no more discordant with defendants' uses of their property than is the leafletting that has been exercised for centuries within downtown business districts discordant with their use.

We hold that Schmid requires that the free speech sought by the plaintiff -- the non-commercial leafletting and its normal accompanying speech (without megaphone, soapbox, speeches, or demonstrations) -- be permitted by defendants subject to such reasonable rules and regulations as may be imposed by them. Given this limited free speech right -- leafletting, given the centers' broad power to regulate it, and given experience elsewhere, we are confident that it is consonant with the commercial purposes of the centers and the varied purposes of their shoppers and non-shoppers.

Without doubt, despite the fact that the speech permitted -- leafletting -- is the least obtrusive and the easiest to regulate, and despite the centers' broad power to regulate, some people will not like it, any more perhaps than they liked free speech at the downtown business districts. Dislike for free speech, however, has never been the determinant of its protection or its benefit. We live with it, we permit it, as we have for more than two hundred years. It is free speech, it is constitutionally protected; it is part of this State, and so are these centers.

In the summer and fall of 1990 our government and our country were debating what action, if any, should be taken in response to Iraq's invasion of Kuwait. The issue eclipsed all others. The primary competing policies were military intervention and economic sanctions. Plaintiff -- a coalition of numerous groups opposed military intervention and sought public support for its views. For that purpose, plaintiff decided to conduct a massive leafletting campaign on November 9 and November 10, urging the public to contact Congress to persuade Senators and Representatives to vote against military intervention.

Defendants presented evidence that issue-oriented free speech, and especially controversial free speech, conflicted with their commercial purpose: that purpose is

to get as many shoppers as possible on the premises and to provide an atmosphere that would encourage buying.

At the plenary trial, plaintiff sought a permanent injunction restraining defendants from preventing or interfering with plaintiff's free speech activities, subject to reasonable conditions. It claimed this substantive right to free speech under New Jersey's Constitution as well as at common law. No claim of right was made under the Federal Constitution. Plaintiff also challenged specific regulations imposed by some of the malls including: 1) content-based regulations prohibiting offensive speech, 2) requirements that the group seeking access to the mall obtain insurance, 3) regulations prohibiting people engaging in expressive activity from approaching mall visitors and 4) arbitrary limitations on mall access.

The trial court entered judgment in favor of defendants, denying all relief. The trial court ruled, in effect, that defendants retained the right to exclude those not invited to its premises to the same extent as any other private property owner. (Given that judgment, the trial court found it unnecessary to rule on defendants' contention that the relief sought by plaintiff, if granted, would constitute a taking of their property without just compensation, would deprive them of their property without due process of law, and would abridge their freedom of speech by forcing them to provide a forum for the speech of others, all in violation of the Federal and State Constitutions.) The Appellate Division affirmed, relying substantially on the trial court's findings and opinion. We reverse, and declare that plaintiff has a State constitutional right to leaflet at defendants' shopping centers, subject to reasonable conditions, and that such right does not infringe on any constitutional right asserted by defendants.

We shall briefly summarize the lengthy history of the law of free speech that underlies this case. The relevant historical starting point is Marsh v. Alabama, 326 U.S. 501 (1946). In Marsh, the United States Supreme Court held that the First Amendment's guarantee of free speech was violated when the private owners of a company town prevented distribution of literature in its downtown business district. Finding that the company town had all the attributes of a municipality, the Court held that the private owner's action was "state action" for constitutional free speech purposes. In a democracy, the Court recognized, citizens "must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored." The paramount right of the citizens to be informed overrode the rights of the property owners in the constitutional balance.

The question whether citizens may exercise a right of free speech at privately-owned shopping centers without permission of the owners has been litigated extensively. The first time the question came before the Supreme Court, the Court upheld the right of free speech at shopping centers. Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968). For First

Amendment purposes that interference constituted "state action." The Court implied, but did not hold, that an unrestricted free speech right existed. Logan Valley was thereafter "limited" by Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), which held that war protesters had no right of free speech at shopping centers. The Court distinguished Logan Valley, confining it to the situation in which the speech was related to shopping center activities -- a labor dispute involving one of the center's tenants -- and in which no alternative was available for the expression of views, id. at 563, such as the public sidewalks that surrounded the center in Lloyd.

The Court in Hudgens v. NLRB, 424 U.S. 507 (1976), reviewing both Logan Valley and Lloyd, concluded not only that the reasoning of the latter amounted to a total rejection of the former, but that even the limited right of free speech (namely, that relating to shopping center activities) approved in Lloyd did not exist. That view was reaffirmed in PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980). Those cases, Hudgens and Pruneyard, essentially held that the First Amendment right found in Marsh was limited to a privately owned factory town, an entity that performed substantially all of the functions of government. Its actions were therefore akin to "state action," thereby triggering First Amendment protection. Not so the actions of shopping centers, whose functional equivalence to a town was limited to the downtown business district.

It is now clear that the Federal Constitution affords no general right to free speech in privately-owned shopping centers, and most State courts facing the issue have ruled the same way when State constitutional rights have been asserted. In most of those decisions, the courts analyzed their state constitutions and concluded that their free speech provisions protected their citizens only against state action. From these cases we learn that the Federal Constitution does not prevent private owners from prohibiting free speech leafletting at their shopping centers because the owners' conduct does not amount to "state action"; that practically every state, when its constitutional free speech provisions have been asserted, has ruled the same way, again on the basis of a legal conclusion that state action was required.

In New Jersey, we have once before discussed the application of our State constitutional right of free speech to private conduct. In State v. Schmid, 84 N.J. 535 (1980), we held that the right conferred by the State Constitution was secure not only from State interference but -- under certain conditions -- from the interference of an owner of private property even when exercised on that private property. Id. at 559. Specifically, we held that Schmid, though lacking permission from Princeton University, had the right to enter the campus, distribute leaflets, and sell political materials. We ruled that the right of free speech could be exercised on the campus subject to the University's reasonable regulations. We thus held that Article I, paragraph 6 of our State Constitution granted substantive free speech rights, and that unlike the First Amendment, those rights were not limited to protection from government interference. the New Jersey Constitution's right of free speech is

broader than the right against governmental abridgement of speech found in the First Amendment.

In this case, we continue to explore the extent of our State Constitutional right of free speech. Applying the standard developed in Schmid to this very different case, we decide today that defendants' rules prohibiting leafletting violate plaintiff's free speech rights.

Schmid set forth "several elements" to be considered in determining the existence and extent of the State free speech right on privately-owned property. This standard must take into account **(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.

In this case, the trial court held that the Schmid standard was not satisfied and, therefore, that the plaintiff had no constitutional right to leaflet at defendants' premises. Specifically, after analyzing the proofs, it found that the common areas were not open to the public generally, but rather that "the public's invitation to each of the defendant malls is for the purpose of the owners' and tenants' business and does not extend to the activities of leafletting or the distribution of literature."

The functional role of the standard and its three elements is to measure the strength of the plaintiff's claim of expressional freedom and the strength of the private property owners' claim of a right to exclude such expression -- all for the ultimate purpose of "achiev[ing] the optimal balance between the protections to be accorded private property and those to be given to expressional freedoms exercised upon such property." The test to determine the existence of the constitutional obligation is multi-faceted; the outcome depends on a consideration of all three factors of the standard and ultimately on a balancing between the protections to be accorded the rights of private property owners and the free speech rights of individuals to leaflet on their property.

We now examine the standard and determine the resulting balance in this case between free speech and private property rights.

The normal use of these properties and the nature and extent of the public's invitation to use them (the first two elements) are best considered together, for in this case they are most closely interrelated. Found at these malls are most of the uses and activities citizens engage in outside their homes. There is space to roam, to sit down, and to talk. The public is invited to exercise by walking through the centers before the retail stores have opened for business. There are theaters, restaurants, professional offices, meeting rooms, and almost always a community

table or booth where various groups can promote causes and different activities taking place within their local area.

The invitation to the public is simple: "Come 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." So people go there just to meet, to talk, to "hang out," and no one stops them; indeed, they are wanted and welcome. The activities and uses, the design of the property, the open spaces, the non-retail activities, the expressive uses, all are designed to make the centers attractive to everyone, for all purposes, to make them a magnet for all people, not just shoppers. The hope is that once there they will spend. The certainty is that if they are not there they will not.

These non-retail uses, expressive and otherwise, underline the all-inclusiveness of defendants' invitation to the people. Not only are there the multiple uses ordinarily found in a downtown business district, and the invitation implied from that alone, but others that may not be found in the downtown business district, all explicitly sponsored by the shopping centers, the sum total amounting to the broadest, indefinable, almost limitless invitation. Speech is included; it is certainly not the goal, but it is inevitably found there, even if in modest portions, along with its inevitable messages, many deemed by most people -- but not all -- as non-controversial because they agree with the message. These uses, combined with the vast open spaces, the benches, the park-like settings, together carry the message that this is the place to be -- this is your community, where you can rest, relax, talk, listen, be entertained and be educated. The multiplicity of uses reflects the intention to bring the entire community -- its citizens and its activities -- into the center. The uses and invitation, in effect, reconstitute the community, conveniently, under one roof.

The almost limitless public use of defendants' property, its inclusion of numerous expressive uses, its total transformation of private property to the mirror image of a downtown business district and beyond that, a replica of the community itself, gives rise to an implied invitation of constitutional dimensions that cannot be obliterated by defendants' attempted denial of that invitation, an implied invitation that includes leafletting on controversial issues. 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. Defendants have taken that old downtown away from its former home and moved all of it, except free speech, to the suburbs. 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.

Thus, the first two elements of the standard -- the normal use of the property, and the nature and extent of the public's invitation to use it -- point strongly in the direction of a constitutional right of speech.

The third factor, the relationship between "the purpose of the expressional activity . . . to both the private and public use of the property," Schmid, *supra*, 84 N.J. at 563, examines the compatibility of the free speech sought to be exercised with the uses of the property. These centers have full power to minimize whatever slight discordance might otherwise exist; full power to adopt rules and regulations concerning the time, place, and manner of such leafletting, regulations that will assure beyond question that the leafletting does not interfere with the shopping center's business while at the same time preserving the effectiveness of plaintiff's exercise of their constitutional right.

Thus, the third element of the standard -- the compatibility between the expressive activity and the purposes of that activity, and the public and private uses of the property -- points in the direction of the existence of the constitutional right.

We find that each of the elements of the standard in Schmid, the use, the invitation, and the suitability of free speech at the centers, supports the existence of a constitutional free speech right in the plaintiff and a corresponding obligation in the defendants.

We decide this case not only on the basis of the three-pronged test in Schmid, but also by the general balancing of expressional rights and private property rights. Private property does not "lose its private character merely because the public is generally invited to use it for designated purposes." Nevertheless, as private property becomes, on a sliding scale, committed either more or less to public use and enjoyment, there is actuated, in effect, a counterbalancing between expressional and property rights. See Lloyd Corp., *supra*. See also, Marsh, "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."

There is no doubt about the outcome of this balance. On one side, the weight of the private property owners' interest in controlling and limiting activities on their property has greatly diminished in view of the uses permitted and invited on that property. The private property owners in this case have intentionally transformed their property into a public square or market, a public gathering place, a downtown business district, a community; they have told this public in every way possible that the property is theirs, to come to, to visit, to do what they please, and hopefully to shop and spend; they have done so in many ways, but mostly through the practically unlimited permitted public uses found and encouraged on their property. The sliding scale cannot slide any farther in the direction of public use and diminished private property interests.

On the other side of the balance, the weight of plaintiff's free speech interest is the most substantial in our constitutional scheme. The weight of the free speech interest is thus composed of a constant and a variable: the constant is the quality of

free speech, here free speech that is the most important to society; the variable is its potential interference with this diminished private property interest of the owner. Given the limited free speech right sought, leafletting accompanied only by that speech normally associated with and necessary for leafletting, and subject to the owners' broad power to regulate, that interference, if any, will be negligible.

We are totally satisfied that on balance plaintiff's expressional rights prevail over defendants' private property interests. We are further satisfied that the interference by defendants with plaintiff's rights constitutes unreasonably restrictive or oppressive conduct.

The principle, as set forth in Marsh and Logan, *supra*, is that the constitutional right of free speech cannot be determined by title to property alone. Thus, where private ownership of property that is the functional counterpart of the downtown business district has effectively monopolized significant opportunities for free speech, the owners cannot eradicate those opportunities by prohibiting it.

Like many constitutional determinations, our decision today applies a constitutional provision written many years ago to a society changed in ways that could not have been foreseen. If constitutional provisions of this magnitude should be interpreted in light of a changed society, and we believe they should, the most important change is the emergence of these centers as the competitors of the downtown business district and to a great extent as the successors to the downtown business district. The significance of the historical path of free speech is unmistakable and compelling: the parks, the squares, and the streets, traditionally the home of free speech, were succeeded by the downtown business districts, often including those areas, the downtown business districts where that free speech followed. Those districts have now been substantially displaced by these centers. If our State constitutional right of free speech has any substance, it must continue to follow that historic path.

We look back and we look ahead in an effort to determine what a constitutional provision means. If free speech is to mean anything in the future, it must be exercised at these centers. Our constitutional right encompasses more than leafletting and associated speech on sidewalks located in empty downtown business districts. It means communicating with the people in the new commercial and social centers; if the people have left for the shopping centers, our constitutional right includes the right to go there too, to follow them, and to talk to them.

Two of the defendants contend that granting plaintiff the constitutional right of free speech deprives them of their property without due process of law, takes their property without just compensation, and infringes on their right of free speech. U.S. Const. amends. I, V; N.J. Const. art. I, ¶¶ 6, 20. Each of those contentions, insofar as the Federal Constitution is concerned, was rejected in PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980). We would add to the United States Supreme Court's response to the private property owners' free speech

concerns that private property owners who have so transformed the life of society for their profit (and in the process, so diminished its free speech) must be held to have relinquished a part of their right of free speech. They have relinquished that part which they would now use to defeat the real and substantial need of society for free speech at their centers; they should not be permitted to claim a theoretically-important right of silence from the multitudes they have invited. No matter how it is analyzed, the right claimed by the property owners is minimal compared to that which their claim would significantly diminish.

We do not interfere lightly with private property rights, but when they are exercised, as in this case, in a way that drastically curtails the right of freedom of speech in order to avoid a relatively minimal interference with private property, the latter must yield to the former. What is involved here is the fundamental speech right of a free society. The flow of free speech in today's society is too important to be cut off simply to enhance the shopping ambience in our state's shopping centers.

Our holding today applies to all regional shopping centers. We are aware of the differences among defendant regional shopping centers regarding the range of non-retail uses. The Mall at Short Hills apparently offers only musical events, visits by Santa and the Easter Bunny, and a fitness walkers' program. The other malls offer numerous public events and generally allow community groups space to promote local activities and causes; expressive uses of various kinds are common. We emphasize, however, that these differences in the degree of public activity are not material and will not exempt a regional mall from the obligation to permit free speech activity.

The inclusion of all regional shopping centers in our holding, justified by the facts before us and their clear application to all regional shopping centers, comports with the nature of the obligation as a constitutional command. We are unable, however, to apply that command to community shopping centers with only one such center before us. (No highway strip mall, no football stadium, no theater, no single huge suburban store, no stand-alone use, and no small to medium shopping center sufficiently satisfies the standard of Schmid to warrant the constitutional extension of free speech to those premises, and we so hold.)

The centers' power to impose regulations concerning the time, place, and manner of exercising the right of free speech is extremely broad. We assume that in most cases malls can limit the time of leafletting to specific days, and a specific number of days. Certainly no individual or group will be entitled to be present any more often than is necessary to convey the message. To the extent leafletting is confined to some limited space, we assume that in addition to normal voice contact with passersby, an appropriately sized sign stating the cause will be permitted. Clearly, access by competing or conflicting groups may be staggered to occur on different days, or the groups may be placed far apart.

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

The judgment of the Appellate Division is reversed; judgment is hereby entered, in favor of plaintiff declaring it has a right to leaflet on defendants' premises as described above.

Dissenting Opinion:

Today the Court holds that the New Jersey Constitution requires that owners of privately-owned-and-operated shopping malls who invite the public onto their property for commercial purposes must allow the public free access to that property to engage in unrestricted expressional activities, including, through the distribution of leaflets and petitions to shoppers, the promotion of various political or social views. To reach that conclusion, the majority dismisses completely the rights of private-property owners to regulate and control the use of their own property.

Under the majority's rudderless standard, whether property is owned privately or publicly is irrelevant. So long as the private property, here a shopping mall, offers an opportunity for many people to congregate, the private-property owners must grant those people free access for expressional activity, regardless of the message or of its disruptive effect.

The United States Supreme Court has held that the First Amendment allows the owners of private shopping malls to bar the distribution of political literature on mall property. See PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). However, the Supreme Court has held that a state's constitution may furnish an independent basis that surpasses the guarantees of the federal constitution in protecting individual rights of free expression and assembly.

Four provisions of Article I of the New Jersey Constitution are at issue: Paragraph l, which concerns the unalienable right to acquire, possess, and protect property; Paragraph 20, which provides that individual persons or private corporations cannot take private property for public use without just compensation; Paragraph 6, which gives the right to speak, write, and publish freely; and Paragraph 18, which guarantees the right to assemble. However, breaking with our decision in Schmid, the majority engages in no balancing of those competing constitutional provisions; instead, the majority relies on only the free-speech and assembly provisions, ignoring completely the private-property provisions.

In Schmid, we established a rational test under the New Jersey Constitution that balanced the rights of private-property owners and the expressional freedom of

others on that private property. The test to be applied to ascertain the parameters of the rights of speech and assembly upon privately owned property and the extent to which such property reasonably can be restricted to accommodate these rights involves several elements. This standard must take into account (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.

Using a test essentially the same as Schmid, the Pennsylvania Supreme Court established, in Commonwealth v. Tate, 432 A.2d 1382 (1981), "a limiting rationale for applying [the Pennsylvania] constitution's rights of speech and assembly to property private in name but used as a forum for public debate." The Tate court overturned a trespass conviction for distributing pamphlets on a college campus. 432 A. 2d at 1391. Yet when the court reviewed a subsequent case concerning an alleged constitutional right of access to a shopping mall, it recognized that unlike a university, the shopping mall was not a public forum for political expression. Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331, 1336 (Pa. 1986). Unlike universities, shopping malls are not public forums dedicated to public use or to the exchange of ideas.

Although the majority alleges that it is adhering to Schmid, its opinion discloses that it is not. Indeed, the majority has forgotten the primary premise of Schmid, that a balance must be found between the rights of private-property owners and the expressional freedom of others on that property.

The first prong of the Schmid test requires a court to take into account the nature, purposes, and primary use of the private property -- its "normal" use. In that regard, the trial court concluded:

> It is this court's opinion that that question may be answered unequivocally. The nature, purpose and primary use of the malls is commercial. The shopping malls are retail establishments, constructed, designed and maintained to do business and make a profit. I did not hear one fact at trial which controverts or contradicts this finding. The plaintiff offered no proofs which will lead this court to any other conclusion.

In respect of the second Schmid factor, the extent and nature of the public's invitation to use the private property, the trial court stated:

> From the credible evidence offered by the defendants, that is, the testimony of mall managers, designers and planners, I find that the public's invitation to each of the defendant malls is for the purpose of

the owners' and tenants' business and does not extend to the activities of leafletting or the distribution of literature.

> "the primary purpose of each and every one of the activities listed [e.g., free concerts, Earth Day celebrations, and Girl Scout Cookie sales] * * * is to draw people to the mall and thereby maximize sales and increase profits."

Under the majority's reasoning, the nature and extent of the invitation is of no moment. By the majority's analysis, any time the public is invited onto large, privately-owned property, it becomes a place to congregate and therefore becomes the functional equivalent of a downtown area. In Lloyd Corp., supra, the United States Supreme Court rejected the "functional equivalent" analysis, finding:

> The invitation is to come to the Center to do business with the tenants. It is true that facilities at the Center are used for certain meetings and for various promotional activities. The obvious purpose, recognized widely as legitimate and responsible business activity, is to bring potential shoppers to the Center, to create a favorable impression, and to generate goodwill. There is no open-ended invitation to the public to use the Center for any and all purposes, however incompatible with the interests of both the stores and the shoppers whom they serve.

Ignoring the trial court's detailed factual findings, the majority rewrites Schmid, lumps the first two factors together into one, and continually misapprehends the test. The majority repeatedly refers to the first factor as the "normal" use, but ignores the language prior to that: "the nature, purposes and primary use of the private property." The primary use of a shopping mall is shopping, an obvious fact that the majority fails to understand.

We should not lose sight of the fact that persons who own and operate shopping malls are merchants. They are in business for business sake. They are not municipalities, states, or villages, and however romantic it may be to believe that the public repair to these galvanic places, of a Saturday morning, for more than bread and salt, they are not yet instruments of the state.

In contrast to the purpose of a shopping mall, the primary purpose of a university is to educate, i.e., to increase the wealth of human knowledge, which can be done only through discourse and discussion, free and open debate. That is the significant difference between Princeton University and The Mall at Short Hills. Shopping can be accomplished even with mouths shut and minds closed.

The majority ignores any distinction between the purpose of Princeton and the purpose of a mall. All that matters is that the property was open to the public, as is a shopping mall or any other large gathering space. An example of a

publicly-accessible place that will become an open forum for expression under the majority's analysis is Great Adventure Theme Park. That result is plainly absurd.

The third prong of the Schmid analysis directs a court to consider the "purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property". That requires determining "whether the expressional activities undertaken * * * are discordant in any sense with both the private and public uses of the [property at issue]." The trial court found that the "plaintiffs have not met their burden of proving that their activities are not discordant with both the public and private uses to which these shopping malls are dedicated."

Obviously, the expressed purpose of plaintiffs' activity was to oppose the war in the Middle East, a purpose totally unrelated to the mall owners' commercial purposes and to their invitation to the public to shop there. Additionally, confrontations between groups advocating opposing views on a controversial political or social topic are likely, and those groups' purposes will clearly be discordant with shopping. The abortion debate is an easily-identifiable issue to consider under the Court's opinion. Clearly, a mall allowing a pro-choice group to distribute pamphlets will face opposition from pro-life groups. Yet under the majority's opinion, a mall owner could not restrict such groups from its private property.

Should the Ku Klux Klan in their flowing white robes or the Black Separatists in their paramilitary gear be permitted on the mall's property? These groups would offend even the most tolerant of shoppers. What shopper does not have an opinion on abortion, so that same question applies to pro-choice and pro-life advocates with their gruesome displays. Should an animal rights group, regardless of its graphic illustrations, be permitted near a pet shop or fur salon? Should the Vietnam Veterans and SANE be permitted to conduct activities on the same day in proximity to each other? What standards should a mall manager use when considering the graphic portrayal on a placard, when measuring the strong language in a leaflet or when evaluating the appropriateness of a costume or clothing? Aside from "controversial" issues, a host of content-based questions arise once politicians, religious groups, charities and "causes" invade the mall.

To circumvent the detailed and meticulous findings of the trial court, the majority departs from the Schmid test and argues that shopping malls are the "functional equivalent" of the traditional downtown business districts or town squares. In support of that theory, the majority relies on "common knowledge" of the Court outside the record, ignoring the factual findings of the trial court and evidence that many of the towns in Essex, Hudson, and Morris Counties around the malls have become more, not less, vibrant.

Under the majority's theory, private property becomes municipal land and private-property owners become the government. The United States Supreme Court discredited that proposition over twenty years ago, Lloyd Corp., *supra*, 407 U.S. 551, and likewise almost every state court that has considered it has discarded it. See, e.g., Fiesta Mall Venture v. Mecham Recall Comm., 767 P.2d 719 (Ariz. Ct. App. 1989); Cologne, 469 A.2d 1201; Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assocs., 392 S.E.2d 8 (Ga. 1990); Woodland v. Michigan Citizens Lobby, 378 N.W.2d 337 (Mich. 1985); SHAD Alliance v. Smith Haven Mall, 488 N.E.2d 1211 (N.Y. 1985); State v. Felmet, 273 S.E.2d 708 (N.C. 1981); Eastwood Mall v. Slanco, 626 N.E.2d 59 (Ohio 1994); Western Pa. Socialist Workers, supra, 515 A.2d 1331; Charleston Joint Venture v. McPherson, 417 S.E 2d 544 (S.C. 1992); Southcenter Joint Venture v. National Democratic Policy Comm., 780 P.2d 1282 (Wash. 1989); Jacobs v. Major, 407 N.W.2d 832 (Wis. 1987).

To reach its conclusion, the Court relies on the long *overruled* statement in Logan Valley that shopping centers are the functional equivalent of downtown areas. The United States Supreme Court effectively rejecting Logan Valley's "functional equivalent" rationale. See Lloyd Corp., *supra*. Further, the Fiesta Mall court reviewed the Lloyd Corp. decision and found that shopping malls are not the functional equivalent of towns. They are simply areas in which a large number of retail businesses is grouped together for convenience and efficiency. Their sole purpose is for shopping, and appellant's argument that they are opened early for joggers and walkers, that large numbers of people are present in them each day, that occasionally non-commercial activities take place in them and that people enjoy air-conditioned comfort in them during Phoenix's scorching summers does not change that basic fact.

The inescapable mission of shopping malls is not to be the successor to downtown business districts; rather, it is to provide a comfortable and conducive atmosphere for shopping, a mission into which mall owners have invested large sums and energy. Common sense also dictates that privately-owned-and operated shopping malls are not the functional equivalent of downtown business districts. They are not "replica[s] of the community itself." Shopping malls do not have housing, town halls, libraries, houses of worship, hospitals, or schools. Nor do they contain the small stores, such as the corner grocer, that used to serve as the forum for exchange of ideas. Indeed, most shopping malls do not allow people even to walk their dogs there.

The shopping mall is not a community. There is no "mayor of the mall." Shoppers do not elect a common council. They do not have a say in the day-to-day affairs of the mall, nor do they expect one. They do not visit the mall to be informed or to inform others of social or political causes; they go to shop. Even though the malls sponsor community events, visits from Santa, and orchestral concerts, visitors do not mistake them for grassroots gathering places, Santa's Workshop, or a mecca of the arts or culture. See, e.g., Southcenter Joint Venture, *supra*, 780 P.2d at 1292

("[S]hopping malls are concerned with just one aspect of their patrons' lives -- shopping."); Jacobs, *supra*, 407 N.W. 2d at 845 ("Opening the mall 'avenues' would be like opening the private businesses in the Marsh community. Since neither has an essentially public nature, we cannot hold them subject to the same constitutional requirements with which public property must comply.").

Plaintiffs, and the majority, also rely on this Court's decision in State v. Shack, 58 N.J. 297 (1971). Like Marsh, Shack is factually inapposite and therefore provides no basis for the Court's opinion. The circumstances of the instant case stand in stark contrast to those in Shack. Here effective alternative means of communication are readily available. Moreover, the people whom the Coalition sought to reach at the malls are far from the disadvantaged, impoverished people of Shack who were subject to the singular authority of the property owner; they are visitors to a mall drawn to that location for commercial purposes. No compelling interest or policy mandates an invasion of the property owner's rights.

I find it axiomatic that the right to speak freely is inextricably linked with a right to a forum in which to express those thoughts and ideas. Without such a forum, the right of free expression would be nugatory. Traditionally, that forum has been on public property. Our decision in Schmid extended that forum onto private property, but only in those limited situations in which the factors outlined in that opinion weighed in favor of extending that right to private property.

The majority's decision today guarantees the right to a forum for free expression not only on public property, or on private property in the limited circumstances as permitted under Schmid, but on all private property -- not just shopping malls -- where a captive audience can readily be found. Like the court in Cologne, I too am unable to "discern any legal basis distinguishing this commercial complex from other places where large numbers of people congregate, affording superior opportunities for political solicitation, such as sport stadiums, convention halls, theaters, county fairs, large office or apartment buildings, factories, supermarkets or department stores." 469 A. 2d at 1209. See also Woodland, supra, 378 N.W. 2d at 353 ("Nor is size alone the controlling factor. The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center.")

The majority attempts to limit its holding to all regional malls and the one community mall involved in this action. That limitation is based on the Court's understanding of a regional shopping center's "essential nature": "The mammoth size of these regional centers, the proliferation of uses, the all-embracing quality of the implied invitation . . .." Yet the facts adduced at trial, the descriptions of each of these malls and the activities that did and did not take place in them reveal vast differences among these properties. Their only commonality is that they attract large numbers of people for commercial gain.

In reaching its result, the majority completely ignores the rights the New Jersey Constitution grants to the owners of private property. See art. I, paras. l, 20. No support exists for the proposition that the majority announces today, that a right to free expression exists anywhere an audience may be found. The constitutional right to free expression does not command such an extreme result. It guarantees a forum, not an audience.

The majority's opinion ignores the basic commercial purpose of these private malls, ascribes to them the downfall of urban business districts, and delegates to them the responsibility to fulfill the role once, and arguably still, played by town squares. The private property owner and ultimately the consumer will have to pay the increased costs that result from the expanded security and other expenses associated with the public's free access to the mall for expressional activities. Unlike the municipalities that the majority thinks the malls have supplanted, malls are not exempt from most tort claims under the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 to 59:12-3.

Plaintiffs predicate their desires to express themselves on the private property of these shopping malls not on some constitutional mandate but rather on considerations of efficiency, cost, and convenience. Yet such factors do not a constitutional right create. Schmid, properly applied, has adequately served this state, both its protesting citizens and its private-property owners, for more than a decade. The majority's departure from Schmid's established standard is unprecedented. It makes neither good sense nor good law, and for those reasons, I respectfully dissent.