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UPROOTING THE *PRUNEYARD*

Gregory C. Sisk[*]

If, in the description of one constitutional scholar, text, history, structure, prudence, and doctrine are the building blocks of constitutional argument, then the California Supreme Court's landmark 1979 decision in Robins v. Pruneyard *constructed a building without a supporting foundation, sturdy walls, or a covering roof. The court invoked the Liberty of Speech Clause in the California Constitution to impose duties upon private landowners, not merely upon government, to facilitate the political speech of others. But* Pruneyard *was a disembodied policy decision, severed from constitutional text, history, context, and developed legal reasoning. In this Article, the author revisits the* Pruneyard *decision, through a scrupulous analysis of the text and the context of the typical state constitutional speech clause, together with a fresh examination of original historical sources in state constitutional drafting. The author further addresses the continuing interplay in constitutional law between freedom of speech and guarantees for private property, insisting that weakening the latter ultimately compromises the former. Because* Pruneyard *has received persistent attention in ongoing constitutional debates for more than two decades, because more than thirty states share a similar text for (and much of the same history of) a constitutional liberty of speech clause, because* Pruneyard *is a period piece from a particular epoch in American constitutionalism, and because the jurisprudence of constitutional interpretation has progressed beyond that stage, the story of* Pruneyard *is a cautionary tale with national resonance.*

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I. INTRODUCTION

We all recognize and cherish the constitutional right of free speech in public forums, such as capitol grounds, municipal plazas, city parks, and public sidewalks. Under the Free Speech Clause of the First Amendment of the United States Constitution[1] and parallel liberty of speech provisions in state constitutions,[2] each person has the freedom to express political and social opinions, even if displeasing to the rest of us, in such public settings, subject only to limitations on time, place, and manner. Through the guarantee of private property rights, we also protect the freedom of individual landowners, various organizations, and private enterprises to control their own homes, meeting places, and commercial sites so as to preserve them as places of sanctuary, association, or commerce. A person may have the constitutional right to say almost anything, but he or she may not insist upon a purported right to say it in someone's living room; in a church, synagogue, or mosque; in a person's private office; or in a merchant's place of business.

And yet, a quarter of a century ago, during the closing days of an era of an expansionist and free-wheeling approach to constitutional interpretation, untethered to the text or history of a founding charter, the California Supreme Court in *Robins v. Pruneyard Shopping Center*[3] discovered a right under the Liberty of Speech Clause of the California Constitution[4] for one private person to intrude upon the property of another private person—in that case, a privately-owned and operated shopping center—for purposes of communicating political opinions to others. This judicially-fashioned free speech right to trespass on private property found no support in the language, structure, or history of the California Constitution.[5] Indeed, other than a perfunctory quotation of the pertinent clause with no further analysis of the language, the California Supreme Court did not pause in its policy-making

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1. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

2. *See, e.g.*, CAL. CONST. art. I, § 2 ("Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."); IOWA CONST. art. I, § 7 ("Every person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech, or of the press."). For more on the language and history of such state constitutional provisions, see *infra* Part III.

3. 592 P.2d 341, 347 (Cal. 1979).

4. CAL. CONST. art. I, § 2.

5. *See infra* Part III.A.

zeal to consider text, context, or history. In sum, *Pruneyard* "appears to be more a decision of desire rather than analytical conviction."[6]

This Article revisits the *Pruneyard* decision, explores its purported foundation in a state constitutional clause, and considers the continuing interplay between constitutional rights and private property. Because the *Pruneyard* decision has received persistent attention in ongoing constitutional debates for more than two decades, because more than thirty states share a similar text for (and much of the same history of) a constitutional liberty of speech clause, because *Pruneyard* is a period piece from a particular epoch in American constitutionalism, and because the jurisprudence of constitutional interpretation has progressed beyond that stage, the following offers a cautionary tale that has national resonance.

The *Pruneyard* decision should be recognized as the anachronistic product of a transitory era in American legal history during which the courts openly assumed powers to advance preferred social policies through the venue of constitutional litigation, untethered to the words of a constitutional charter or the historical setting in which those words were given legal force.[7] By any measure, the California Supreme Court's *Pruneyard* decision was a radical departure from either traditional or modern approaches to constitutional interpretation that give great weight to constitutional text and due consideration to historical context. When primacy is restored in constitutional analysis to the text of and historical background to the archetypal state liberty of speech clause, the Lockean purpose of liberty of speech provisions as a control on state government power and the impossibility of a legitimate interpretation that extrapolates that right against private actors becomes plain.[8]

Although the influence of that California decision fortunately has been limited,[9] the decision has not been without continuing consequence. Whenever and wherever litigants seek to "transport constitutional norms into the private sector,"[10] *Pruneyard* invariably is the case adduced to support the proposition that constitutional rights are not integrally intertwined with state action, that is, the realm and activities of government. So long as *Pruneyard*

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6. Jacobs v. Major, 407 N.W.2d 832, 841 (Wis. 1987) (noting the failure of the California court in *Pruneyard* to carefully analyze the constitutional text at issue).

7. *See infra* Part III.A.

8. *See infra* Part III.B-E.

9. *See infra* Parts II, VI.

10. *See* Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector*: *With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1541 (1998).

endures, the door will remain open, even if only slightly ajar, to a judicial revolution that would turn valued rights that protect us against governmental power into harmful weapons that may be wielded in an internecine constitutional war by one private citizen against another. In addition, because courts understandably would be uncomfortable in imposing the full panoply of free speech protections against an involuntary landowner, stretching constitutional liberty of speech to encompass private actors would dilute the force and substance of that right.[11]

Not every state judiciary has resisted the temptation to indulge in social engineering by removing a state liberty of speech clause from its textual framework and supporting history to transform it into a device to impose governmental duties upon private citizens.[12] At least one of those states, Oregon, has found wisdom in these latter days to reverse the constitutional error of the past.[13] However, another state, New Jersey,[14] apparently did not "get the memo" and has departed from the vast majority of states by fully embracing the *Pruneyard* approach in *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*[15] New Jersey has aggressively enlarged this judicial invention to the point where it now reaches even into the corridors of privately-owned residential buildings. In this escalating process, the New Jersey court has become a self-appointed property manager and event scheduler for an increasing variety of private landowners.[16]

Several years ago, Alan Brownstein and Stephen Hankins called for a "pruning" of "the Pruneyard," so that its seeds would not be scattered into other fields designed to cultivate a different harvest.[17] *Pruneyard* is not, however, an overgrown tree that, if carefully trimmed, may productively be tended in its own orchard. Rather, *Pruneyard* is a weed in the garden of constitutional jurisprudence.[18] *Pruneyard* should be shorn off at the roots, lest its noxious vegetation crowd out the growth of a healthier approach to

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11. *See infra* Part IV.D.
12. *See infra* Part IV.E.
13. *See infra* Part II.
14. *See infra* Part IV.E.
15. 650 A.2d 757, 760 (N.J. 1994).
16. *See infra* Part IV.E.
17. 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, 1137 n.248 (1991) ("The authors support the pruning of *Pruneyard* [such that it does not apply to allow anti-abortion protestors access to private abortion clinics], not the uprooting and overruling of its interpretation of the state constitution.").
18. *See infra* Part III.A.

constitutional interpretation.[19] If not plucked out of the ground, *Pruneyard* may infest even the law of public obligations with the balancing of private interests, thereby withering away the vital substance of free speech rights.[20] Moreover, as long as it stands, *Pruneyard* continues to deprive nutrition and block sunlight from privacy and property rights that deserve protection against the trespass of governmental power.[21]

II. FREE SPEECH, CONSTITUTIONAL RIGHTS, AND PRIVATE PROPERTY: AN OVERVIEW OF THE CASELAW

The United States Supreme Court and the substantial majority of ruling state courts have upheld the freedom of private landowners to determine the proper use of their properties and have rejected the argument that either the federal or state constitutions protect freedom of speech on private property, including large shopping centers. The fundamental division between governmental entities, bound by constitutional limitations, and private citizens, possessing liberty interests, has been recognized as instantiated in the founding charters of the body politic at the federal and state levels.

More than half a century ago, in *Marsh v. Alabama*,[22] the United States Supreme Court held that a "company town"—which although privately organized, nonetheless exhibited all the features of a city and indeed had assumed the civic responsibilities (including law enforcement) normally reserved to a municipality—was concomitantly bound by the constitutional obligations of local government, including the prohibition on suppression of speech that is enshrined in the First Amendment.[23]

The Court briefly expanded this public functions analysis to encompass other large property owners, even in the absence of actual exercise of governmental powers. In *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*,[24] the Court declared a shopping center to be the "functional equivalent of a 'business block'" open to the general public and similarly subject to constitutional duties.[25] However, the *Logan Valley* holding was limited to expressions that were directly related to the operations

19. *See infra* Parts III.A, V.
20. *See infra* Part IV.D.
21. *See infra* Part IV.A.
22. 326 U.S. 501 (1946).
23. *Id.* at 505-08.
24. 391 U.S. 308 (1968), *abrogated by* Hudgens v. NLRB, 424 U.S. 507 (1976).
25. *Id.* at 325.

of the shopping center.[26] And the ruling was subject to incisive dissents[27] that charted the way for a later course correction by the Court. Justice Black's dissent in *Logan Valley* demolished the argument that precedent supported the Court's conversion of the shopping center into public property:

> Under what circumstances can private property be treated as though it were public? The answer that *Marsh* gives is when that property has taken on *all* the attributes of a town, i.e., "residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated." I can find nothing in *Marsh* which indicates that if one of these features is present, e.g., a business district, this is sufficient for the Court to confiscate a part of an owner's private property and give its use to people who want to picket on it.[28]

Justice White, also dissenting in *Logan Valley*, emphasized the non-governmental nature and purpose of the enterprise: "In no sense are any parts of the shopping center dedicated to the public for general purposes or the occupants of the Plaza exercising official powers. The public is invited to the premises but only in order to do business with those who maintain establishments there."[29]

In *Lloyd Corp. v. Tanner*[30] and *Hudgens v. National Labor Relations Board*,[31] the Court returned from its short Logan Valley detour, and once again traveled the well-established highway on which constitutional duties pertain only to public entities and those that assume exclusive governmental functions. Because shopping centers exist on private property and are privately-operated commercial enterprises, such that no state action is involved,[32] the Supreme Court confirmed that constitutional prohibitions on

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26. *Id.* at 320 n.9; *Id.* at 326 (Douglas, J., concurring).
27. *Id.* at 327-33 (Black, J., dissenting); *Id.* at 337-40 (White, J., dissenting).
28. *Id.* at 332 (Black, J., dissenting) (citation omitted).
29. *Id.* at 338 (White, J., dissenting).
30. 407 U.S. 551 (1972).
31. 424 U.S. 507 (1976).
32. For a summary of the "state action" doctrine in United States Supreme Court caselaw, see generally THOMAS E. BAKER & JERRE S. WILLIAMS, CONSTITUTIONAL ANALYSIS IN A NUTSHELL 370-77 (2d ed. 2003); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 6.4, at 486-517 (2d ed. 2002); 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 16.1 to 16.5, at 758-821 (3d ed. 1999). For further discussion of state action aspects of claims regarding access to private property for speech, see *infra* Parts IV.A-B.

governmental conduct simply are inapplicable. In *Lloyd Corp.*, the Court directly refuted the assertions that "property lose[s] its private character merely because the public is generally invited to use it for designated purposes," or that "[t]he essentially private character of a store and its privately owned abutting property [changes] by virtue of being large or clustered with other stores in a modern shopping center."[33] The Court held that the owner of a shopping center had not dedicated that private property to public use so as to entitle others to occupy it for expressive purposes under a claim of right under the First Amendment.[34]

In *Hudgens*, the Court confirmed that *Logan Valley* had been overruled. The Court applied the *Lloyd Corp.* analysis to labor picketing on the private premises of a shopping center, holding that no claim of constitutional rights justified entry onto the private property because the actions of the owner of a private shopping center did not constitute state action.[35] The Court restated the foundational assumption that sets the framework for the analysis, that is, that constitutional rights are to be asserted by citizens against their government and not against each other:

> It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state. Thus, while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself.[36]

The highest courts of seventeen states—the overwhelming majority of the state supreme courts to address the question—likewise have rejected the transplantation of state constitutional liberty of speech provisions from the pastures of the public commons to the alien soil of the private sector.[37] The

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33. *Lloyd Corp.*, 407 U.S. at 569.

34. *Id.* at 570.

35. *Hudgens*, 424 U.S. at 518, 520.

36. *Id.* at 513 (citation omitted). Of course, the application of the free speech guarantee to the states is accomplished, not directly under the First Amendment, but by incorporation through the Fourteenth Amendment. Still "[b]ecause the [Fourteenth] Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as 'state action.'" Lugar v. Edmondson Oil Co., 457 U.S. 922, 924 (1982).

37. Herewith are citations of decisions from each of these seventeen states, listed in alphabetical order by state: Cologne v. Westfarms Assocs., 469 A.2d 1201, 1210 (Conn. 1984); Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assocs., 392 S.E.2d 8, 10 (Ga.

extent of agreement among the states is unsurprising, given that the bills of rights of more than thirty states contain nearly identical language, precluding the restraint or abridging of "the liberty of speech" by any "law."[38]

Then of course there is California. As Julian Eule and Jonathan Varat have pointedly summarized, the "vast majority" of state courts have regarded "the possibility of wielding speech clauses against private parties as a radical departure from constitutional tradition"—with "California and New Jersey [being] the notable exceptions."[39] The "notable exceptions" to which Eule and Varat refer are the aberrant California and New Jersey decisions of *Robins v. Pruneyard Shopping Center*[40] from 1979 and *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*[41] from 1994, each of which is examined below.[42]

1990); State v. Viglielmo, 95 P.3d 952, 966 (Haw. 2004); People v. Sterling, 287 N.E.2d 711, 714 (Ill. 1972); City of W. Des Moines v. Engler, 641 N.W.2d 803, 806 (Iowa 2002); Woodland v. Mich. Citizens Lobby, 378 N.W.2d 337, 347-48 (Mich. 1985); State v. Wicklund, 589 N.W.2d 793, 803 (Minn. 1999); Dossett v. First State Bank, 627 N.W.2d 131, 137-39 (Neb. 2001); S.O.C., Inc. v. Mirage Casino-Hotel, 23 P.3d 243, 250-51 (Nev. 2001); SHAD Alliance v. Smith Haven Mall, 488 N.E.2d 1211, 1218 (N.Y. 1985); State v. Felmet, 273 S.E.2d 708, 712 (N.C. 1981); Eastwood Mall, Inc. v. Slanco, 626 N.E.2d 59, 61-62 (Ohio 1994); W. Pa. Socialist Workers 1982 Campaign v. Conn. Gen. Life Ins. Co., 515 A.2d 1331, 1333 (Pa. 1986); Charleston Joint Venture v. McPherson, 417 S.E.2d 544, 548 (S.C. 1992); Republican Party of Tex. v. Dietz, 940 S.W.2d 86, 89-90 (Tex. 1997); Southcenter Joint Venture v. Nat'l Democratic Policy Comm., 780 P.2d 1282, 1285 (Wash. 1989); Jacobs v. Major, 407 N.W.2d 832, 848 (Wis. 1987); *see also* Fiesta Mall Venture v. Mecham Recall Comm., 767 P.2d 719, 723 (Ariz. Ct. App. 1989) (rejecting purported free speech rights in private shopping center by intermediate appellate court); Wilhoite v. Melvin Simon & Assocs., 640 N.E.2d 382, 386 (Ind. Ct. App. 1994) (rejecting claim of right to enter shopping center, holding there is no liberty interest to be admitted to private property); Kugler v. Ryan, 682 S.W.2d 47, 51 (Mo. Ct. App. 1984) (rejecting purported free speech rights on private property by intermediate appellate court); Reimers v. G.K. Dev., Inc., No. 2:06-CV-97, 2007 WL 2746895, at *2-4 (D.N.D. Sept. 20, 2007) (rejecting claim of right to solicit signatures in private shopping mall under the Liberty of Speech Clause in the North Dakota Constitution).

38. *Engler*, 641 N.W.2d at 805; *Wicklund*, 589 N.W.2d at 799. For more on the text of state liberty of speech clauses, see *infra* Part III.C.

39 . Eule & Varat, *supra* note 10, at 1564-65.

40. 592 P.2d 341 (Cal. 1979); *see infra* Part III.A.

41. 650 A.2d 757 (N.J. 1994); *see infra* Part IV.E.

42. In addition, an intermediate Florida appellate court in an unpublished decision with abbreviated analysis, that has not been endorsed by the Florida Supreme Court, held "that the Florida Constitution grants citizens of this state the right of expression on a shopping mall owner['s] property." Wood v. State, No. 00-0644-MMM-A, 2003 WL 1955433, at *3 (Fla. Cir. Ct. Feb. 26, 2003). Another Florida appellate court ruled in the opposite direction. *See* Publix Super Mkts., Inc. v. Tallahasseans for Practical Law Enforcement, No. 2004 CA 1817, 2005 WL 3673662, at *3 (Fla. Cir. Ct. Dec. 13, 2005) (holding in the context of a large grocery store that, *inter alia*, "Article I, section 4 of the Florida Constitution only protect[s]

The high courts of two other states, Massachusetts and Washington, have held, based upon special state constitutional election or initiative clauses, that the fundamental right to free elections outweighs property rights and thus signatures for initiative or candidate election petitions may be solicited at a private shopping center.[43] Even assuming these anomalous initiative-clause decisions were correct, which is doubtful,[44] these two states have carefully confined that privilege of access to election ballot matters and have not thereby imposed any general duty to permit expression of political or other viewpoints at any private locale.[45] A third state, Oregon, also had judicially-decreed a right to gather ballot petition signatures on private property where the public was invited.[46] Subsequently, in *Stranahan v. Fred Meyer, Inc.*,[47] the Oregon Supreme Court overruled that prior decision as having failed to "adhere to [the] usual methodology of examining the text, history, and case law surrounding an original [state] constitutional provision," none of which suggested a right to solicit signatures on private property over the owner's objection.[48]

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against *governmental* infringement of an individual's right to engage in free speech or similar conduct").

43. *See, e.g.*, Batchelder v. Allied Stores Int'l, Inc., 445 N.E.2d 590, 595-96 (Mass. 1983); Alderwood Assocs. v. Wash. Envtl. Council, 635 P.2d 108, 115-17 (Wash. 1981) (plurality opinion).

44. *See* Waremart, Inc. v. Progressive Campaigns, Inc., 989 P.2d 524, 534, 538 (Wash. 1999) (Madsen, J., concurring) (describing the Washington Supreme Court's earlier ballot initiative decision in *Alderwood* as "an anomalous ruling" without a clear majority and that constituted "a nearly analysis-free holding").

45. *Batchelder*, 445 N.E.2d at 595 (stating that the right to solicit signatures for election petitions in a private shopping center does not give rise to "any claim of a right to exercise free speech rights apart from the question of ballot access"); Southcenter Joint Venture v. Nat'l Democratic Policy Comm., 780 P.2d 1282, 1290-91 (Wash. 1989) (noting that the earlier *Alderwood* decision was that of a mere plurality, explaining that "the holding in *Alderwood* was simply that people have a right under the initiative provision of the Constitution of the State of Washington to solicit signatures for an initiative in a manner that does not violate or unreasonably restrict the rights of private property owners," and confirming that "the free speech provision of our state constitution protects an individual only against actions of the State").

46. Lloyd Corp. v. Whiffen, 849 P.2d 446, 454 (Or. 1993), *abrogated by* Stranahan v. Fred Meyer, Inc., 11 P.3d 228 (Or. 2000).

47. 11 P.3d 228 (Or. 2000).

48. *Id.* at 237-44.

III. CONSTITUTIONAL DESIGN, TEXT, AND DRAFTING HISTORY: PLACING LIBERTY OF SPEECH AND PRIVATE PROPERTY RIGHTS IN CONTEXT

A. Robins v. Pruneyard Shopping Center*: An A-Textual and A-Historical Exercise in Judicial Activism*

If "[t]ext, history, structure, prudence, and doctrine . . . are the basic building blocks of conventional constitutional argument,"[49] then the California Supreme Court's 1979 decision in *Robins v. Pruneyard Shopping Center*[50] constructed a building without supporting foundation, sturdy walls, or a covering roof.

In the *Pruneyard* decision, a bare majority (four-to-three) of the court held that high school students soliciting signatures on a petition opposing a United Nations resolution condemning "Zionism" possessed a free speech right to do so under the California Constitution, notwithstanding the strict and uniformly applied policy of the privately-owned PruneYard Shopping Center against solicitation inside the mall.[51] The court quoted[52] the language of the California Liberty of Speech Clause[53] and noted without elaboration

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49. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 754 (1999).

50. 592 P.2d 341 (Cal. 1979).

51. *Id.* at 341-42, 347-48. In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the United States Supreme Court affirmed the California Supreme Court, upholding "the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution," including adopting "reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision." *Id.* at 81. On the particular facts of the *PruneYard* case, the Court rejected the claims that the owner of the shopping center had suffered a constitutional taking in violation of the Fifth and Fourteenth Amendments or had suffered a deprivation of the owner's free speech rights under the First and Fourteenth Amendments by being required to facilitate the expressions of others. *Id.* at 82-83, 88. In an Article in progress, tentatively titled, *Revisiting the* PruneYard *After a Quarter-Century*: *Preserving the Constitutional Free Speech and Property Rights of Landowners Against Trespass in the Name of Speech* (forthcoming 2008), I submit that the Supreme Court's *PruneYard* decision should not be misread as an open invitation to the states to impose constitutional obligations upon private landowners regardless of the permanence and breadth of the involuntary access to the property or the offensiveness of the speech being expressed on that property. Moreover, I explain that the Court's *PruneYard* decision was subject to important qualifications and that those limitations have become even more important as Free Speech Clause and Takings Clause jurisprudence has developed during the past twenty-five years.

52. *Pruneyard*, 592 P.2d at 346.

53. CAL. CONST. art. I, § 2 ("Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.").

that its wording differs from that of the Free Speech Clause of the First Amendment to the United States Constitution.[54] Beyond asserting without explanation that this variation in language signaled a broader protection of speech under the state provision,[55] the court majority gave no heed to the specific text of the pertinent provision. The actual language of the provision, which links the declaration of freedom of speech in one phrase to state action by law in the next phrase,[56] was subordinated to a dissertation on public policy. In addition, the history of and understandings surrounding the drafting of the California Constitution, or for that matter any subsequent constitutional history in the Empire State, was utterly ignored.[57]

The court majority in *Pruneyard* devoted most of its energies to rebutting the negative argument that private property rights precluded imposition of free speech duties upon private landowners, which rebuttal necessitated overruling prior precedent.[58] As an affirmative rationale, the court offered little more than policy assertions based upon the congregation of citizens at shopping centers to support the conclusion that "the public interest in peaceful speech outweighs the desire of property owners for control over their property."[59] In terms of coherent development of legal doctrine, the court majority neglected to square its approach with the traditional limitation of constitutional obligations to situations involving state action. As a plurality of the California Supreme Court acknowledged many years later, the failure of the *Pruneyard* majority to "address the threshold issue of whether California's free speech clause protects against only state action or also against private conduct" was but one of several "curious omissions" in that opinion.[60] In sum, *Pruneyard* is a disembodied policy decision, severed from constitutional text, context, history, and developed legal reasoning.

The indifference of the *Pruneyard* majority to text, history, and legal analysis was of a piece with the now largely discredited approach to constitutional adjudication that saw its heyday during the period in which Earl Warren was Chief Justice of the United States Supreme Court. To be

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54. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

55. *Pruneyard*, 592 P.2d at 346.

56. *See infra* Part III.C (examining text of liberty of speech clause).

57. *See Pruneyard*, 592 P.2d at 346-48.

58. *Id.* at 342-47 (overruling Diamond v. Bland, 521 P.2d 460 (Cal. 1974)).

59. *See Id.* at 347.

60. Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 29 P.3d 797, 801 (Cal. 2001) (plurality opinion).

sure, vestiges of the Warren Court's audacious style of constitutional construction persisted until the departure of Justice Brennan in 1990 (or perhaps until the retirement of Justice Blackmun in 1994, as he certainly embraced the ethos of the Warren Court though he had never been formally a member of it).[61] Still, given that the main phase of the Warren Court's jurisprudential influence ended with the passing of the 1970s, and that "the conceptual constitutional roots" of the shopping center decision were "grounded" in subsequently overturned Warren Court precedent,[62] the California Supreme Court's *Pruneyard* ruling in 1979 was one of the last gasps of that departed era.

The "'living Constitution' theory of constitutional adaptivity"[63] is well-reflected in the orientation of the majority of the California Supreme Court in *Pruneyard* toward policy questions about supposed societal changes together with the decided subordination of text and history. This interpretive fashion was most closely associated with Justice William Brennan, the liberal lion of the Warren Court. Justice Brennan contended that the Constitution should be read, not in terms of historical meaning, but for the adaptation "of its great principles to cope with current problems and current needs."[64] Yet, reading this passage only two decades later, it already seems quaint and dated.

As G. Edward White explains, the late-twentieth century saw a "reintroduc[tion of] a consciousness of history into constitutional jurisprudence."[65] Today, the leading schools of constitutional theory, despite many substantial differences among them and often "quite different political ramifications," nonetheless share "an estrangement from the idea that modern judicial actors, interpreting the Constitution in light of 'current problems and current needs,' could adequately be constrained only by the interpretive and institutional canons laid down by modern

61. *See* Gregory C. Sisk, *The Willful Judging of Harry Blackmun*, 70 MO. L. REV. 1049 (2005).

62. *See* Brownstein & Hankins, *supra* note 17, at 1079 (saying that "the conceptual constitutional roots of the California Supreme Court's decision in *Pruneyard* are grounded in" the 1968 Warren Court decision of *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), *abrogated by* Hudgens v. NLRB, 424 U.S. 507 (1976)).

63. *See* G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 593 (2002).

64. William J. Brennan, Jr., *The Constitution of the United States*: *Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986).

65. White, *supra* note 63, at 594.

countermajoritarian scholars."[66] As Ronald Krotoszynski says, even those sympathetic to the results produced by the caselaw of that period—

> should have serious misgivings about the Warren Court's willingness to accept and embrace its role as a political institution by reaching results that created new law without much of an effort to ground the result in the text or history of the Constitution or to relate the result back to prior judicial precedents. More often than not, if the end was sufficiently important, the means used to get there did not terribly concern the Warren Court. Arguably, this ends-justify-the-means approach overshadowed—and ultimately betrayed—the Warren Court's institutional obligations to act as a legal and judicial institution.[67]

The era of Platonic philosophers on the Warren Court, revising constitutional directives to fit their perception of societal needs, has most definitely passed.

Although the debate as to how constitutional provisions should be interpreted will persist as long as constitutions endure, the free-wheeling style reflected in the *Pruneyard* decision, in which text, structure, and history were entirely subordinated to public policy preferences, is defended by almost no one today. First, while jurists and scholars differ as to whether constitutional texts should be narrowly construed according to supposedly plain meaning, or more broadly interpreted, when the language appears open-ended, nearly everyone today agrees that the text is a touchstone and sets some boundaries on the scope of a provision.[68] As Laurence Tribe expresses, the consensus about "giving text pride of place," to "treat text as paramount . . . seems all but inevitable if the Constitution is to be seriously regarded as law."[69] Especially when a clause is being evaluated for whether it may be extrapolated to a new context and for a new purpose—such as enlarging a free speech clause to bind private actors—the first step in the court's consideration should be whether the language itself is at least amenable to such a broader interpretation.

Second, and likewise, while judges and commentators argue about the weight to be given to historical context and whether the focus should be

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66. *Id.* at 594-95.

67. Ronald J. Krotoszynski, Jr., *A Remembrance of Things Past?*: *Reflections on the Warren Court and the Struggle for Civil Rights*, 59 WASH. & LEE L. REV. 1055, 1057-58 (2002) (footnotes omitted).

68. BAKER & WILLIAMS, *supra* note 32, at 309-10.

69. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 1-12, at 32 (3d ed. 2000).

narrowly confined to the history of the drafting and ratifying period,[70] almost everyone regards history as central to the task of constitutional interpretation.[71] As Akhil Amar notes, in describing the "mining" of history as an interpretive technique, it should never be forgotten that a founding charter is "embed[ded] in history."[72] While history may not definitively answer every question, nearly all agree today that "historical data can serve to *clarify* [constitutional] issues."[73] Barry Friedman and Scott Smith, while contending for a more expansive historical study in which the founding era is viewed as but the beginning of the temporal narrative, insist that "[c]onstitutionalism without history is not constitutionalism at all, largely because history has shaped our deeper values."[74] Given the modern consensus regarding the importance of historical understanding, Tribe refers to "[t]he inescapability of a moderate originalism" in constitutional interpretation.[75] In sum, nearly all scholars and jurists agree that the historical context surrounding the creation of a constitution sheds important light on the purpose of certain provisions and makes some interpretations more plausible and some constructions less justifiable, even if every question of constitutional scope and application cannot be answered objectively to the satisfaction of every observer.

As confirmation of the substantial degree of consensus as to certain parameters to the interpretive enterprise, no less prominent a progressive constitutional scholar than Ronald Dworkin writes: "An activist justice would ignore the Constitution's text, the history of its enactment, prior decisions of the Supreme Court interpreting it, and long-standing traditions of our political culture."[76] Those words of course precisely capture the analysis (or lack thereof) of the majority of the California Supreme Court in Pruneyard, when it rendered an activist, a-textual, and a-historical opinion that would be untenable in any constitutional court or under a theory of constitutional interpretation today.

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70. *See* Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 5-6 (1998) ("[H]istory is essential to interpretation of the Constitution, but the relevant history is not just that of the Founding, it is that of *all* American constitutional history.").

71. *See* BAKER & WILLIAMS, *supra* note 32, at 336 ("The Rehnquist Court presided over what likely will go down in history as the heyday of originalism. Even nonoriginalist Justices on the Court wrote opinions full of historical references and relied on history and tradition to fill in gaps left by the Framers.").

72. Amar, *supra* note 49, at 748.

73. White, *supra* note 63, at 489.

74. Friedman & Smith, *supra* note 70, at 51-52.

75. TRIBE, *supra* note 69, § 1-14, at 51.

76. RONALD DWORKIN, LAW'S EMPIRE 378 (1986).

Nor does the fact that we are considering state constitutional clauses change the fundamental direction or nature of the interpretive enterprise. As we enter into what the dean of state constitutional law, Robert F. Williams, has called "The Third Stage of the New Judicial Federalism,"[77] state constitutionalism surely has matured beyond the undisciplined and boisterous experiments of its adolescence. We have entered into a period of sober appreciation that a responsibly independent approach to state constitutions necessarily incorporates the same serious attention to text, structure, history, precedent, and prudence that is owed to any written charter. The central question of the day for state constitutionalism may no longer be whether a state judiciary should follow or diverge in its state constitutional decisions from the interpretation given by the United States Supreme Court to parallel provisions in the federal Constitution,[78] but rather whether those who argue and decide state constitutional questions will demonstrate interpretive fidelity to a foundational legal text.

While emphasizing that state constitutions are "distinctive documents," G. Alan Tarr rightly has insisted that "the distinctive traditions of state constitutionalism" must be realized "[t]hrough attention to the text of state provisions, to their generating history, to their place in the state's overall constitutional design, and to their relation to earlier state provisions as well

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77. Robert F. Williams, *Introduction*: *The Third Stage of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211 (2003).

78. *See* Robert F. Williams, *Two Visions of State Constitutional Rights Protections*, 7 SETON HALL CONST. L.J. 833, 833-34 (1997) (describing the competing visions of state constitutional interpretation as being the "relational view," in which the question is "how does the state constitutional provision, or the interpretation of the state constitution relate to the United States Constitution, and the way it has been interpreted by the United States Supreme Court," as contrasted with the "independent state constitutional interpretation" approach, in which the question is not whether to "deviate from a benchmark that has already been put in place by the United States Supreme Court," but rather to ask directly and independently what the state constitution means). For descriptions and critiques of the various approaches taken by state courts in deciding whether or not to follow United States Supreme Court precedents when both the federal and state constitution protect the same or similar rights and for the suggestion of a decision-tree analysis, that gives due regard to text, history, precedential stability, and adequacy of rights protection in making this determination, *see* Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota's Approach to Judicial Federalism*, 70 ALBANY L. REV. 465 (2007).

as provisions in other states."[79] This Article aims to devote that considered attention in full measure to the particular question of freedom of speech and access to private property under state constitutional law.

B. The Purpose and Philosophical Foundation of a Constitutional Declaration of Rights in the American Historical Context

Creating a right to freedom of speech against a private landowner, rather than the government, would entail a radical reinterpretation of constitutional law divorced from the animating purpose of a constitution, generally, and a bill of rights, in particular, within the American historical context. The declaration of constitutional rights was designed to limit the power of the *government* to interfere with our freedoms, *not* to limit the freedom of *private citizens*. As Ronald Rotunda and John Nowak explain, the federal Bill of Rights "has been viewed only to limit the freedom of the government when dealing with individuals."[80] Constitutional guarantees of liberty are not designed to limit the freedom of private individuals in dealing with other private individuals.

The same principle generally animates state constitutional charters of rights, particularly with respect to those basic preserved rights such as liberty of speech. As the Washington Supreme Court observed in rejecting an asserted right to distribute political literature in a privately-owned mall, an entitlement to intrude onto private property for political expression over the objection of the owner would be "*an entirely new* kind of free speech right—one that can be used not only as a shield by private individuals against actions of the state but also as a sword against other private individuals."[81]

The natural rights theory of John Locke, who viewed inalienable individual rights in general and property rights in particular as a bulwark against government power, provided the philosophical foundation for the Bill

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79. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 209 (1998); *see also* G. Alan Tarr, *State Constitutional Interpretation*, 8 TEX. REV. L. & POL. 357, 357 (2004) ("The interpretation of state constitutions, like the interpretation of the federal Constitution, should be rooted in the text and original understanding of the document."). *But see* G. Alan Tarr, *State Constitutionalism and "First Amendment" Rights*, *in* HUMAN RIGHTS IN THE STATES: NEW DIRECTIONS IN CONSTITUTIONAL POLICYMAKING 21, 36-37 (Stanley H. Friedelbaum ed., 1988) [hereinafter Tarr, *State Constitutionalism*] (endorsing *Pruneyard* as a "seminal case" in permitting speakers access to private property).

80. ROTUNDA & NOWAK, *supra* note 32, § 16.1, at 758.

81. Southcenter Joint Venture v. Nat'l Democratic Policy Comm., 780 P.2d 1282, 1286 (Wash. 1989).

of Rights in the United States Constitution.[82] The founders understood,[83] as Locke had written, that "[t]he great and chief end . . . of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property."[84] Given that "[t]he great end of men's entering into society" is for "the enjoyment of their properties in peace and safety,"[85] it thus follows that "[t]he supreme power cannot take from any man any part of his property without his own consent."[86] Under the Lockean thesis of government that suffused the thinking of the founders, "property ownership was closely associated with liberty" and property rights are guaranteed to citizens by natural law before the creation of any political authority.[87]

By contrast, Jean Jacques Rousseau's "social contract" theory relegated the individual to a mere instrumentality of the community who existed in bondage to the sovereign government.[88] Rousseau's philosophy of social order and virtue later proved to be a profound influence, directly or indirectly, upon the tyrannical French Revolution of 1793, which through the Terror of Robespierre gave rise to the first totalitarian government.[89] Consistent with Rousseau's philosophy, this short-lived French regime treated its citizens—not as independent human beings with inalienable and natural rights—but as mere limbs of the body of the state whose rights and

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82. LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 139 (1988); ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789, at 118-20 (1982); ELLIS SANDOZ, A GOVERNMENT OF LAWS: POLITICAL THEORY, RELIGION, AND THE AMERICAN FOUNDING 190-200 (1990); Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California*: *A Rationale for Meaningful Judicial Scrutiny of "Public Use*," 32 SW. U. L. REV. 569, 576-80 (2003).

83. *See* James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, *reprinted in* JAMES MADISON: WRITINGS 515 (Jack N. Rakove ed., 1999) ("Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.").

84. JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION § 124, at 62 (J.W. Gough ed., MacMillan 1947) (1690).

85. *Id.* § 134, at 66.

86. *Id.* § 138, at 69.

87. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 17, 43 (1992).

88. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 62-65 (Maurice Cranston trans., Penguin Books 1968) (1762).

89. *See* CAROL BLUM, ROUSSEAU AND THE REPUBLIC OF VIRTUE: THE LANGUAGE OF POLITICS IN THE FRENCH REVOLUTION 27-36, 153-168 (1986) (discussing varying views on influence of Rousseau on the French Revolution in general and on Maximilien Robespierre, and describing parallels between Rousseau and Robespierre).

even existence were at the sufferance of the Sovereign.[90] Still later, in the bloody century that is only now receding behind us, Rousseau's celebration of the supreme "General Will," was woven together with the collectivist theory of Karl Marx into communist ideology.[91]

Fortunately, Rousseau's social contract approach never took root in American soil.[92] As John McGinnis puts it: "Rousseau's objectives and the goals of the Framers were fundamentally incompatible because Rousseau wanted to celebrate the power of collective decision making whereas the Framers wanted to limit it sharply."[93] The Rousseau thesis that governmental charters not only dispense rights to citizens, but also impose duties upon them, is foreign to American constitutionalism.

In sum, in the distinctly American context, a Constitution is framed for the purpose of establishing the structure of a government, and a Bill of Rights is drafted for the purpose of imposing limitations on that government to protect preexisting natural rights, preeminent among them the right to property.[94] As Thomas Cooley explained in his influential mid-nineteenth century treatise on constitutional law, a declaration of rights is "inserted in the constitution for the express purpose of operating as a restriction upon legislative power."[95]

Accordingly, during the mid- to late-nineteenth century period in which most states were framing or rewriting constitutions, including the adoption of a liberty of speech clause, the state framers were operating under the fundamental and universally-recognized premise that a constitution is "a two-party compact between the people and the state which limits only state restraints upon individual liberties."[96] In its earliest pronouncement on that

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90. ROUSSEAU, *supra* note 88, at 61 ("Each one of us puts into the community his person and all his powers under the supreme direction of the general will; and as a body, we incorporate every member as an indivisible part of the whole.").

91. *See, e.g.*, LOUIS ALTHUSSER, POLITICS AND HISTORY: MONTESQUIEU, ROUSSEAU, HEGEL AND MARX 113-86 (Ben Brewster trans., 1972); ANDREW LEVINE, THE GENERAL WILL: ROUSSEAU, MARX, COMMUNISM (1993).

92. *See* BAKER & WILLIAMS, *supra* note 32, at 34.

93. John O. McGinnis, *The Inevitable Infidelities of Constitutional Translation*: *The Case of the New Deal*, 41 WM. & MARY L. REV. 177, 200 (1999).

94. *See* William Burnett Harvey, *Private Restraint of Expressive Freedom*: *A Post-*PruneYard *Assessment*, 69 B.U. L. REV. 929, 965 (1989) ("The historic role of a constitution in the American tradition is to constitute, structure, empower, and constrain government.").

95. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 176 (1868).

96. James M. Dolliver, *The Washington Constitution and "State Action"*: *The View of the Framers*, 22 WILLAMETTE L. REV. 445, 449-54 (1986).

state's Bill of Rights, for example, the Illinois Supreme Court well expressed the sentiment of the period:

> The prime object of a Bill of Rights is, to place the life, liberty, and property of the citizen beyond the control of legislation, and to prevent either legislatures or courts from any interference with or deprivation of the rights therein declared and guarantied, except upon certain conditions.[97]

However much some might wish as a matter of present-day preference to dissolve the public-private distinction,[98] the framers of constitutional rights generally were concerned, not with private action, "but with the injuries that flowed from the positive employment of the unique power of the state."[99]

C. Restoring Primacy to the Text of the Archetypal State Liberty of Speech Clause

The protection of liberty of speech in the constitutions of most of the various states shares a largely common history and is expressed in the nearly identical language of a textual couplet. The bills of rights in the constitutions of some thirty-four states contain parallel wording precluding the restraint or

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97. People *ex rel.* Decatur & State Line Ry. Co. v. McRoberts, 62 Ill. 38, 41 (1871); *see also* Christian G. Fritz, *The American Constitutional Tradition Revisited*: *Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*, 25 RUTGERS L.J. 945, 965 (1994) ("The central purpose of constitutions as expressed by nineteenth-century delegates is to constrain the powers of the government and the legislature in particular.").

98. *See, e.g.*, Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 507 (1985) ("[T]he next major expansion in the protection of rights must be to limit infringements of rights made by private entities. The Constitution's declaration of personal liberties must be viewed as a code of social morals that may not be violated without a compelling justification."); Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 103-05 (2004) (acknowledging that a proposal for courts to "invoke the First Amendment to enjoin nongovernmental action that undermines public debate on matters of national policy" constitutes "a bold departure from received First Amendment wisdom and fundamentally reconceives the distinction between public and private that sits at the heart of constitutional doctrine").

99. Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENT. 329, 342 (1993); *see also* Jacobs v. Major, 407 N.W.2d 832, 840 (Wis. 1987) ("To turn what was prohibition of governmental acts into positive rights against other private persons is not logical nor historically established.") (addressing Wisconsin Liberty of Speech Clause).

abridging of "the liberty of speech."[100] An examination of the text of three such clauses—from New York, Iowa, and California—illustrates that, even with modern revisions for gender-neutrality, only minor variation in wording and punctuation distinguish these virtually identical provisions:

New York Constitution:[101]	**Iowa Constitution**:[102]	**California Constitution**:[103]
"Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."	"Every person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech, or of the press."	"Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

The two-part format for a liberty of speech clause appears to have had its genesis in the Mississippi Constitution of 1817 and was incorporated into the Connecticut and New York Constitutions shortly thereafter.[104] Subsequently,

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100. City of W. Des Moines v. Engler, 641 N.W.2d 803, 805 (Iowa 2002); State v. Wicklund, 589 N.W.2d 793, 799 (Minn. 1999).

101. N.Y. CONST. art. I, § 8. Following the provision for liberty of speech, this section of the New York Constitution places limitations as well on prosecution by the government of criminal libel:

> In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

Id.

102. IOWA CONST. art. I, § 7. As in New York, the Iowa section also adds language limiting criminal prosecutions for libel: "In all prosecutions or indictments for libel, the truth may be given in evidence to the jury, and if it appears to the jury that the matter charged as libellous was true, and was published with good motives and for justifiable ends, the party shall be acquitted." *Id.*

103. CAL. CONST. art. I, § 2(a). In a separate subsection, added in 1980, California establishes a constitutional news reporter immunity from being held in contempt for refusing to reveal sources. *Id.* § 2(b).

104. *See* Cologne v. Westfarms Assocs., 469 A.2d 1201, 1207 (Conn. 1984); SHAD Alliance v. Smith Haven Mall, 488 N.E.2d 1211, 1214 (N.Y. 1985).

other states, including Iowa and California, borrowed from the same score. The Connecticut Supreme Court, when rejecting imposition of the free speech right against private parties, explained that the first part of the provision apparently was designed to qualify the second part, thus tying the two parts together as a unitary restraint on governmental conduct. Whereas the second part of the provision broadly prohibits the state legislature from passing any law abridging the freedom of speech, the first part—by excepting abuses of the right from protection—clarifies that laws may be enacted (or the common law applied) to provide a remedy for defamation.[105]

By pointing to the absence of a specific reference to a government actor in the opening sentence or phrase of the representative state liberty of speech clause, those advocating imposition of state constitutional obligations on private actors frequently contend that a "state action" requirement was not incorporated into the state version of this constitutional guarantee.[106] Even if there were any force to this argument for implication of new constitutional duties from textual silence, the argument is mistaken as a matter of simple textual exposition because it breaks the standard two-part constitutional provision into isolated fragments and fails to appreciate its internal structure and integrated meaning.

The archetypal state liberty of speech clause is a unitary whole, including two interrelated phrases "with the first expressing the right to free speech *and* the second stating the entity, the state, against whom the right is shielded."[107]

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105. *Cologne,* 469 A.2d at 1209 & n.9 (citing contemporaneous newspaper report on Connecticut Constitutional Convention of 1818).

106. *See, e.g.*, Jennifer Friesen, *Should California's Constitutional Guarantees of Individual Rights Apply Against Private Actors?*, 17 HASTINGS CONST. L.Q. 111, 118-19, 121-22 (1989) (emphasizing that the sentence restraining government in the California Liberty of Speech Clause is separate from the sentence declaring the affirmative right to speak, although acknowledging that, with the addition of that second sentence, "[t]he text plausibly can be read as directed only to government interference"); Michael A. Giudicessi, *Independent State Grounds for Freedom of Speech and of the Press*: *Article I, Section 7 of the Iowa Constitution*, 38 DRAKE L. REV. 9, 16 & n.48 (1988) (arguing that "[u]nlike the first amendment, the Iowa Constitution provides protection beyond the proscription of legislation abridging or restraining freedom of speech or of the press" and referring to the identical California provision as having "two independent clauses, only one of which has an explicit state action limitation"); Tarr, *State Constitutionalism*, *supra* note 79, at 36 (saying that the express protection of free exchange in the first sentence goes "beyond the mere prohibition of governmental infringements on the right to speak").

107. Jacobs v. Major*,* 407 N.W.2d 832, 837 (Wis. 1987) (interpreting meaning of nearly identically-worded clause in Wisconsin Constitution).

- First, the opening sentence or phrase of the clause identifies the nature of the free speech right, that is, one that protects the content of speech and prohibits discrimination on the basis of the viewpoint expressed: "Every person/citizen may [freely] speak, write, and publish his [or her] sentiments on all subjects, being responsible for the abuse of this/that right."[108] However, beyond this basic definition, this first sentence says nothing about how the free speech right is to be enforced.
- Second, the enforcement reference for liberty of speech comes in the second sentence or phrase of the clause: "[N]o law shall be passed to/A law may not restrain or abridge [the] liberty of speech or [of the] press."[109] This language indisputably refers to "state action," by precluding the enactment of legislation that interferes with freedom of speech. In this regard, the state provision directly parallels the Free Speech Clause of the First Amendment of the United States Constitution which directs that "Congress shall make no law . . . abridging the freedom of speech . . . ."[110]

Every state to have adopted one-half of the liberty of speech couplet has combined it with the other half as well, further confirming the textual linkage between the two parts. In sum, the standard state liberty of speech provision must be read as an integrated clause, which defines the freedom of speech as involving the right to speak on any subject and then protects that right by precluding government interference. In this way, the very text of the clause confirms that its target is the abuse of government power to restrain expression.

As mentioned above,[111] the language in the liberty of speech clause qualifying the freedom of speech by stating that persons remain responsible for the "abuse" of the right is an allusion to the permissibility of an action for libel. However, far from suggesting that the free speech right applies regardless of governmental participation, the textual recognition that liberty of speech may be implicated by certain libel actions remains consistent with the focused purpose of a bill of rights in guarding against governmental power. To begin with, when the typical liberty of speech clause was being adopted by the states during the nineteenth century, the constitutional

108. *See, e.g.*, CAL. CONST. art. I, § 2; IOWA CONST. art. I, § 7; N.Y. CONST. art. I, § 8.

109. *See, e.g.*, CAL. CONST. art. I, § 2; IOWA CONST. art. I, § 7; N.Y. CONST. art. I, § 8.

110. U.S. CONST. amend. I; *see* Hudgens v. NLRB, 424 U.S. 507, 513 (1976) ("It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state.").

111. *See supra* note 105 and accompanying text.

drafters were primarily concerned with criminal libel. They feared the abusive prosecution of citizens, and newspaper publishers in particular, for critical commentary about public officials. Criminal prosecution for libel manifestly was an exercise of governmental power. For example, then and now, the Iowa Liberty of Speech Clause contains an additional provision that: "In all prosecutions or indictments for libel, the truth may be given in evidence to the jury, and if it appears to the jury that the matter charged as libellous was true, and was published with good motives and for justifiable ends, the party shall be acquitted."[112] Similarly, as another example, the original California Constitution of 1849, in which the Liberty of Speech Clause first appeared, included this additional language:

> In all criminal prosecutions on indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libellous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.[113]

In the drafting history of both the Iowa and California Constitutions, each of which is addressed in greater detail below,[114] the principal attention given by the delegates to the Liberty of Speech Clause focused upon criminal libel. In Iowa, the archetypal two-part Liberty of Speech Clause was amended on the floor of the Iowa Constitutional Convention of 1844 to add the language that makes truth a defense to prosecution for criminal libel.[115] Although the adoption of the Liberty of Speech Clause occasioned no discussion at the original California Constitutional Convention of 1848,[116] the clause was the subject of considerable attention at the second California Constitutional Convention of 1878-1879, with the topic of controversy being government prosecutions for criminal libel.[117] The Convention debated, and

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112. IOWA CONST. art. I, § 7.

113. CAL. CONST. of 1849, art. I, § 9. The original California Constitution of 1849 may be found as an appendix to J. ROSS BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA, ON THE FORMATION OF THE STATE CONSTITUTION, IN SEPTEMBER AND OCTOBER, 1849, at III-XIII (Washington, John T. Towers 1850).

114. *See infra* Part III.D.

115. FRAGMENTS OF THE DEBATES OF THE IOWA CONSTITUTIONAL CONVENTIONS OF 1844 AND 1846, at 162 (Benjamin F. Shambaugh ed., 1900) [hereinafter FRAGMENTS OF THE IOWA CONVENTIONS OF 1844 AND 1846].

116. *See infra* Part III.D.2.

117. 1 E.B. WILLIS & P.K. STOCKTON, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA, CONVENED AT THE CITY OF

ultimately defeated, a proposal to remove the power of the jury in such cases from determining the law as well as the facts.[118] The delegates who successfully opposed this amendment spoke of the impact of libel prosecutions upon a newspaper editor who "has frequently to stand forth as the champion of the people against concerted wrong in high places,"[119] and argued that restriction of the jury's powers in such cases effectively would resurrect "what were known as seditious libels—libels against the Government, criticisms upon the Government, criticisms upon the members and directors of public institutions."[120] Given that libel was being prosecuted by the government as a crime and that the principal (although not exclusive) concern was with protecting freedom of the press to criticize the government and government officials, the acknowledgment of an action for libel in the Liberty of Speech Clause did not shift the aim of the clause against the government as the target because of the potential of government trespass upon freedom of speech.

Even under the modern understanding, in which a civil action between private parties for damages has become the principal avenue of redress for libel, there remains a distinctive connection between adjudication of libel lawsuits and governmental action implicating freedom of speech. In the seminal defamation decision of New York Times Co. v. Sullivan,[121] the United States Supreme Court began its analysis by confirming that the constitutional right to free speech is "directed against State action and not private action."[122] The Court then explained that judicial action to punish speech by imposition of civil damages *does* constitute state action and that the possible chilling effect upon criticism of official conduct caused by the specter of potential defamation suits creates a burden on freedom of speech.[123] At issue in Sullivan was whether public officials could secure damages from their critics for defamatory falsehood without having to prove actual malice.[124] Thus, with respect to defamation, the invocation of a judicial remedy, combined with the central purpose of protecting the right of citizens to criticize the conduct of public figures, amply demonstrates the

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SACRAMENTO, SATURDAY, SEPTEMBER 28, 1878, at 324-343 (Sacramento, J.D. Young 1880) (proceedings of Nov. 7-8, 1878); 2 *id.* at 1178-79 (proceedings of Jan. 28, 1879).

118. *Id.*

119. 1 *id.* at 324 (remarks of Mr. James J. Ayers, Nov. 7, 1878).

120. *Id.* at 326 (remarks of Mr. William H.L. Barnes, Nov. 7, 1878).

121. 376 U.S. 254 (1964).

122. *Id.* at 265.

123. *Id.* at 265, 279.

124. *Id.* at 279-80, 283.

presence of "state action." Moreover, in sharp contrast with enforcement of a general trespass law or adjudication of a civil action by a private landowner to protect the quintessential property right of exclusion, judicial remedies for defamation—particularly when invoked by public officials—are targeted directly at speech (and indeed the very content of that speech) and thus plainly implicate constitutional rights of free expression.

As discussed, then, the archetypal state liberty of speech clause was by its own terms expressly limited in application to governmental interference with freedom of speech. Even if such affirmative limitation were not explicit in the text, an attempt to infer a broader application of constitutional responsibilities to private parties from the supposed omission of a reference to a governmental entity in the clause would be misguided. To begin with, implication by silence—that is, imposing meaning upon a constitutional or statutory provision by what it does *not* say—is a dangerous and free-wheeling approach to interpretation in any context, especially when it departs so radically from traditional understandings.[125] Here, it turns a bill of rights, carefully-crafted as a protection against government power, on its head:

> It is a 2-foot leap across a 10-foot ditch . . . to seize upon the absence of a reference to the State as the actor limited by the state free speech provision and conclude therefrom that the framers of our state constitution intended to create a bold new right that conflicts with the fundamental premise on which the entire constitution is based.[126]

Moreover, there are other individual provisions in the typical state bill or declaration of rights that do not directly and immediately refer to state government as the target of limitation, and yet the context and purpose of these other provisions within the constitutional framework make clear that point of reference. Consider, for example, representative state constitutional prohibitions on unreasonable searches and seizures:

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125. *See supra* Part III.B.

126. Southcenter Joint Venture v. Nat'l Democratic Policy Comm., 780 P.2d 1282, 1287-88 (Wash. 1989).

New York Constitution:[127]	**Iowa Constitution**:[128]	**California Constitution**:[129]
"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."	"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized."	"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

As with the liberty of speech clause, we find that the search and seizure clause language in the New York, Iowa, and California constitutions are virtually identical. Note that none of the three clauses expressly states that this limitation is directed against government officers.

Likewise, as another example, consider typical state prohibitions on the taking of private property for public use without just compensation:

127. N.Y. CONST. art. I, § 12. This New York section was amended in 1938 to add a paragraph protecting the "right of the people to be secure against unreasonable interception of telephone and telegraph communications," which is parallel in structure to the first part of the clause and which likewise makes no explicit reference to a state actor. *See id.*

128. IOWA CONST. art. I, § 8.

129. CAL. CONST. art. I, § 13.

New York Constitution:[130] "Private property shall not be taken for public use without just compensation."	**Iowa Constitution**:[131] "Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken."	**California Constitution**:[132] "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation."

While the reference to the legislature in the second sentence of the California takings clause confirms that this provision was designed as a limitation on the exercise of government power,[133] the New York and Iowa

130. N.Y. CONST. art. I, § 7(a). The New York section further provides for opening private roads for use by others and for using property for drainage of swamp or agricultural lands, dependent in both cases upon payment of damages or compensation to the owner. *Id.* § 7(c), (d).

131. IOWA CONST. art. I, § 18. In 1908, a paragraph was added to this section governing the use of eminent domain powers by the legislature for drains, ditches and levees for agricultural, sanitary or mining purposes. *See id.*

132. CAL. CONST. art. I, § 19.

133. *See supra* notes 100-110 and accompanying text (explaining that the reference to passage of laws in the second sentence or phrase of the liberty of speech clause likewise confirms that the freedom of speech is guaranteed against transgression by government legal actors).

provisions demand just compensation without directly stating that the guarantee is implicated only when the government does the taking of the property. Moreover, while the modern California version is more prolix, the takings clause in the original 1849 California Constitution—which is the pertinent point in time at which the Liberty of Speech Clause was incorporated into the California Declaration of Rights—stated succinctly that "nor shall private property be taken for public use without just compensation."[134]

If the omission of an express reference to a state actor were to be interpreted as indicating an intent to apply a state constitutional provision expansively to private parties—then a burglar who invaded a house and took property would not only be committing a criminal act but also would be violating the state constitutional provision against unreasonable searches and seizures. Similarly, a thief who stole private property and applied it to some public use (such as charity) would be guilty not only of theft but of a constitutional taking. Of course, reaching either conclusion would be nonsense.[135]

Neither a search and seizure clause nor a takings clause requires a direct reference to the government actor, as the context of these provisions within a state bill of rights is sufficient to clarify that these guarantees are designed to prevent improper government intrusion into private homes and improper government appropriation of private property without compensation. Likewise, by its inclusion in a state bill of rights, the archetypal liberty of speech clause stands plainly revealed as a protection of free speech against the very state government that is being created by the constitutional charter into which the right is incorporated.[136]

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134. CAL. CONST. of 1849, art. I, § 8, *in* BROWNE, *supra* note 113, app. at IV.

135. *Cf.* BAKER & WILLIAMS, *supra* note 32, at 370 ("A private citizen robbing another private citizen is taking property without due process of law, but there is no constitutional violation because the government did not do the taking."); ROTUNDA & NOWAK, *supra* note 32, § 16.1, at 762 ("[W]hen a burglar breaks into a house and takes away property, he is not subject to Fourth Amendment limitations on searches and seizures or Fifth Amendment restrictions on the taking of property, because his actions have absolutely no connection to the government.").

136. *See* People v. DiGuida, 604 N.E.2d 336, 343 (Ill. 1992) (holding that the provisions of the Illinois Bill of Rights "have consistently been interpreted as providing protection only against interference by the government, despite the lack of specific wording to that effect").

D. Appreciating the Historical Context in which the Archetypal State Liberty of Speech Clause was Adopted

In construing a state constitutional liberty of speech clause in the context of a claimed right of a public protest gathering in a private shopping center, the Wisconsin Supreme Court has emphasized:

> To turn what was prohibition of governmental acts into positive rights against other private persons is not logical nor historically established. In fact, it would be contrary to history. Courts would be ill-advised to rewrite history and plain, clear constitutional language to create some new rights contrary to history. To do this courts would become mini-constitutional conventions in individual court cases whenever a new theory or philosophy became appealing.[137]

The general historical context of the period and the particular constitutional drafting and ratifying experiences in each state have unique features that may be crucial for interpreting certain provisions to which that distinctive history or experience is directly pertinent.[138] By contrast, the archetypal state liberty of speech clause evolved during a common period of American history and generally was passed along without substantive change from one state to another during the mid-nineteenth century.[139] The widespread practice of borrowing and sharing constitutional provisions between one state constitutional convention and another, while originality often was eschewed, gave rise to a common mainstream of constitutional consciousness among the states during the middle of the nineteenth century.[140]

Accordingly, we may learn much from a couple of illustrative examples of state constitutional history that can be extrapolated in substantial whole to other states as well. The drafting history of the constitutions of two states—Iowa and California (which followed the Iowa example as a basic template in

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137. Jacobs v. Major, 407 N.W.2d 832, 840 (Wis. 1987).

138. *See* Robert F. Williams, *The Brennan Lecture*: *Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189, 194-207 (2002).

139. *See supra* Part III.C.

140. *See* WILLIAM J. PALMER & PAUL P. SELVIN, THE DEVELOPMENT OF LAW IN CALIFORNIA 14 (1983) ("The lack of originality shown by the [California] Constitutional Convention of 1849 places it in the main stream of American constitutional history in the several states.").

its original constitution)[141]—are explored below as pertinent to the liberty of speech clause for instructive purposes and to provide a general sense of the common themes and understandings of the era.

If the framers of state constitutions during this period intended to upset the fundamental premise of constitutional rights as intended to control the power of government and instead desired to create rights that could be asserted by one individual citizen against another, "[s]uch an aberration surely would have excited the interest and comment of fellow delegates and the press" such that we would expect to find a clear historical record of "this departure from tradition."[142] In other words, the burden of historical proof is firmly upon those who seek to rely upon provisions dating from this period to transport constitutional rights into the private sector. As revealed below, that burden cannot begin to be satisfied.

1. The Drafting History of the Iowa Constitution and the Liberty of Speech Clause

The first-drafted Iowa Constitution was rejected by the citizens of the territory in 1844.[143] Subsequently, a revised Iowa Constitution was ratified in 1846, after which Iowa was admitted to the Union.[144] In early 1857, a new constitutional convention was held, prompted in large part by the concern that restrictions on corporations, in general, and on banking corporations, in particular, were retarding the energies and prosperity of the state.[145] The product of the Constitutional Convention of 1857 was ratified later that year and, with few amendments, continues in effect today.[146]

The Liberty of Speech Clause in the Iowa Constitution originated in the failed Constitution of 1844. The fragmentary reports of the Constitutional Convention of 1844 shed little light on this provision, other than that the Convention added language concerning trial of criminal libel cases to a jury and truth as a defense, as discussed previously.[147] Other than the fact that the

141. *See infra* notes 176-180 and accompanying text.

142. Dolliver, *supra* note 96, at 451-54 (discussing the state action requirement in the context of the drafting of the Washington State Constitution).

143. *See* JAMES ALTON JAMES, CONSTITUTION AND ADMISSION OF IOWA INTO THE UNION 28-30 (1900); BENJ. F. SHAMBAUGH, THE CONSTITUTIONS OF IOWA 178 (1934).

144. SHAMBAUGH, *supra* note 143, at 194-206.

145. JAMES, *supra* note 143, at 39-42; SHAMBAUGH, *supra* note 143, at 228-29, 269.

146. JAMES, *supra* note 143, at 54; SHAMBAUGH, *supra* note 143, at 269-70.

147. FRAGMENTS OF THE IOWA CONVENTIONS OF 1844 AND 1846, *supra* note 115, at 34-42, 162. For further discussion of the criminal libel language, see *supra* note 115 and accompanying text.

Liberty of Speech Clause of the 1846 Iowa Constitution that succeeded in ratification had been carried over from the earlier constitutional draft,[148] the Constitutional Convention in 1857 did not specifically address this particular provision within the Iowa Bill of Rights. However, the Chair of the Committee on the Preamble and Bill of Rights, George W. Ellis, confirmed the animating purpose of the Bill of Rights in guaranteeing the rights of the people against the power of the state government: "[T]he Bill of Rights ought to define the rights of the people, and to place the proper restrictions upon the powers of the Legislature."[149] The framers of the Iowa Constitution, drawing upon natural rights philosophy, incorporated into the Iowa Bill of Rights those provisions that confirm the rights of the people against the government, guarantees that may be recognized and enforced by the courts.[150]

The inclusion of a provision on dueling in the original Iowa Bill of Rights[151] did not turn the focus of declared rights away from the government nor indicate that the Iowa charter was designed to regulate private behavior as well as state government action. The since-repealed provision in article I, section 5 of the Iowa Bill of Rights[152] did *not* prohibit dueling between private parties. Rather, section 5 disqualified those involved in dueling from holding public office in Iowa: "Any citizen of this state who may hereafter be engaged, either directly or indirectly, in a duel, either as principal or accessory before the fact, shall forever be disqualified from holding any office under the constitution and laws of this state."[153] Thus, the provision addressed the character of public officials by excluding from the exercise of governmental powers those who had engaged in what the framers regarded as particularly egregious misconduct.[154] Moreover, by the second half of the

148. 1 THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA 99-104 (Jan. 30, 1857), 118 (Jan. 31, 1857), 201 (Feb. 3, 1857) (W. Blair Lord, Reporter, 1857) [hereinafter 1857 DEBATES].

149. *Id.* at 168 (remarks of Mr. George W. Ellis, Feb. 2, 1857).

150. *Id.* at 100 (remarks of Mr. George W. Ellis, Jan. 20, 1857) ("[The Committee on the Preamble and the Bill of Rights] did desire to put upon record every guarantee that could be legitimately placed there in order that Iowa . . . might . . . have the best and most clearly defined Bill of Rights.").

151. The dueling disqualification was not part of the 1844 draft that was not ratified but was added to the Iowa Bill of Rights in 1846. SHAMBAUGH, *supra* note 143, at 194-95.

152. IOWA CONST. art. I, § 5 (repealed 1992).

153. *Id.*

154. *See* People v. Haug, 37 N.W. 21, 28 (Mich. 1888) ("Duelling and conviction on an impeachment are the only two things in most states which involve civil incapacities of a public nature, and both of these are provided for by the constitution.").

nineteenth century, dueling was no longer regarded as a private matter but rather was classified as a public "breach of the peace."[155]

Nothing in the records of the Constitutional Convention of 1857 evinces any radical intent by the framers to create privileges in individuals that could be used to act against the rights and interests of other citizens, such as private landowners. To the contrary, delegates repeatedly emphasized concern for protection of private property rights.[156] The framers of the Iowa Constitution in 1857 adhered to the Lockean principle that property rights lie at the foundation of a free society and are guaranteed to citizens by natural law before the creation of any political authority.[157] Indeed, the opening words of the Iowa Bill of Rights cite the "inalienable" right to "acquir[e], possess[], and protect[] property."[158] Thus, the suggestion of a right to trespass upon private property and intrude upon the privacy of other citizens would have been anathema to the Iowa framers.

Nor may a counter-example be adduced from the extensive debates during the 1857 drafting convention on the subject of corporate powers. Upon a first and superficial encounter with the debate records, one understandably might wonder whether the framers were expressing concern about accumulation of power by ordinary business corporations and whether the attention to that concern reflected an understanding by the drafters that the Iowa charter would constrain the interests of private citizens or entities as well as limit the powers of state government. However, upon further study, this episode actually confirms the Iowa framers' focus upon governmental powers. To begin with, it would be odd to characterize a convention that was called for the express purpose of expanding the powers of corporations, and especially to establish banks,[159] as designed to impose novel and previously-unknown restrictions on the freedoms of private citizens. Moreover, because a corporation is a creature of the state, the state of course does have considerable discretion in defining the nature of its powers.

In any event, a closer examination of the convention debates demonstrates that what the framers were troubled by was the collusion of special interests with government to obtain unequal privileges, quasi-governmental powers, and unfair advantages over private citizens—in other

155. Bissell v. Starzinger, 83 N.W. 1065, 1067 (Iowa 1900).

156. *See, e.g.*, 1857 DEBATES, *supra* note 148, at 202-07 (Feb. 3, 1857), 412-14 (Feb. 11, 1857), 651-52 (Feb. 23, 1857).

157. *See supra* Part III.B.

158. IOWA CONST. art. I, § 1.

159. *See supra* note 145 and accompanying text.

words, the very essence of "state action."[160] The focus of controversy in 1857 was those corporations that were granted "exclusive" government "franchises" or "privileges"—such as railroads, river navigation companies, plank roads, and other "internal improvements"—thereby surrendering their private character and sharing in the exercise of quintessential governmental powers, including expenditure of public resources and the power of condemnation.[161] Revealing that the concern was with government powers being conferred upon corporate entities, not upon truly private business interests, the leading advocate of greater restrictions on corporations framed "the first and prominent question" as whether the people of Iowa shall "keep the reins of government in our own hands" or "surrender at once, at discretion, that power" into the keeping of "foreign capitalists" who controlled corporations with special privileges.[162] Similarly, another leading delegate explained that he did not intend "to throw obstacles in the way of wholesome legislation in favor of corporations," but rather to prevent abuses by depriving the legislature "of the power to create special corporations," such as "monied institutions" that would assume such powers as the issuance of paper money.[163]

Accordingly, the Committee on Incorporation of the 1857 drafting convention crafted language to ensure that corporations would be taxed in the same manner as other citizens, that the state and local governments would be restricted in investments in corporations, that special corporations could not take private property without paying just compensation, and that exclusive corporate privileges could be withdrawn by the legislature.[164] Importantly, the purpose of these provisions was not to limit private enterprise but rather to restrict the powers of the legislature—that is, the state government—in granting privileges and extending favoritism.

Moreover, as a radiant signal that the framers of the Iowa Constitution wished to carefully preserve the declaration of fundamental rights to its proper purpose in limiting government powers, rather than addressing the private affairs of citizens, the Constitutional Convention of 1857, after considerable debate, refused to insert measures concerning corporations

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160. On state action, see *infra* Parts IV.A-B.

161. *See, e.g.*, 1857 DEBATES, *supra* note 148, at 104-14 (Jan. 30, 1857), 143-172 (Feb. 2, 1857), 407-12 (Feb. 11, 1857).

162. *Id.* at 157 (remarks of Mr. John T. Clark, Feb. 2, 1857).

163. *Id.* at 170 (remarks of Mr. George W. Ellis, Feb. 2, 1857).

164. *Id.* at 97 (Jan. 30, 1857), 288-89 (Feb. 6, 1857), 407-19 (Feb. 11, 1857).

within the Iowa Bill of Rights,[165] leaving these matters to be addressed elsewhere in the Iowa Constitution.[166]

2. The Drafting History of the California Constitution and the Liberty of Speech Clause

More than perhaps any other state, the genesis of the California Constitution was a classic Lockean moment that resonated with the themes of civil government and the centrality of private property espoused by John Locke.[167] In the aftermath of distant and despotic Mexican rule and then acquisition by the United States through military force in 1846, together with the unsettling arrival of thousands of immigrants upon the discovery of gold in 1848, California endured a stage of near anarchy, popularly known as the "No-Government period."[168] An editorial in the Californian newspaper in 1848 described the people as being "extremely anxious that a civil government should take place" so that they might enjoy "the security of person and property, in view of all the sacred rights and privileges secured to us by the fundamental laws of our government."[169] General meetings of the citizens of several communities, such as San Jose, were held in 1849 to urge creation of a territorial government "for the better protection of life and property."[170] After Congress repeatedly failed to make provision for a civil government for the newly acquired territory, the de facto military governor urged Californians to act for themselves and issued a call for a general constitutional convention.[171]

Meeting in September and October of 1849, the delegates to the Constitutional Convention quickly and by an overwhelming margin determined to form a state rather than a territorial government.[172] The California Constitution of 1849 produced by this Convention, and later

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165. *Id.* at 115 (Jan. 31, 1857), 171 (Feb. 2, 1857).

166. *See* IOWA CONST. art. VIII (on corporations).

167. On Lockean themes, see *supra* Part III.B.

168. ROCKWELL DENNIS HUNT, THE GENESIS OF CALIFORNIA'S FIRST CONSTITUTION, 1846-1849, at 24, 32 (1895); PALMER & SELVIN, *supra* note 140, at 12; *see also* JOSEPH R. GRODIN, CALVIN R. MASSEY & RICHARD B. CUNNINGHAM, THE CALIFORNIA STATE CONSTITUTION: A REFERENCE GUIDE 3 (1993) ("The increase in crime during the gold rush [of 1848] helped also to fuel popular demands for an organized civil government.").

169. *Civil Organization*, CALIFORNIAN, Jan. 5, 1848, *quoted in* HUNT, *supra* note 168, at 22 n.1.

170. HUNT, *supra* note 168, at 26.

171. *Id.* at 29.

172. BROWNE, *supra* note 113, at 23 (Sept. 5, 1849); HUNT, *supra* note 168, at 41.

ratified by the people,[173] was hardly original in substance, but rather borrowed heavily from the other states. As William Gwin, a leading delegate (and the future first United States Senator from California)[174] explained, they were "creating from chaos a government" and thus were "free as air to select what is good, from all republican forms of government."[175] The recently-ratified Iowa Constitution, the drafting history of which is discussed above,[176] was proposed as a model and, together with the New York Constitution, served informally as a template for the California charter.[177] Sixty-six of the 137 sections of this original California Constitution appear to have been borrowed from the Iowa Constitution, with another nineteen having been adapted from the New York Constitution.[178]

Included within that original California charter was "a very unoriginal Declaration of Rights."[179] As with the rest of the document, the provisions in this bill of rights were derived, in nearly equal measure, from the constitutions of Iowa and New York.[180] The liberty of speech protection, in

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173. The California Constitution was ratified on November 13, 1849 by the lopsided vote of 12,872 in favor and 811 against. Paul Mason, *Constitutional History of California*, *in* CONSTITUTION OF THE UNITED STATES AND CONSTITUTION OF THE STATE OF CALIFORNIA 276 (Cal. Legis., Sept. 1962). California was formally admitted to the Union in 1850. GRODIN ET AL., *supra* note 168, at 8.

174. GRODIN ET AL., *supra* note 168, at 8; Christian G. Fritz, *More than "Shreds and Patches": California's First Bill of Rights*, 17 HASTINGS CONST. L.Q. 13, 18 (1989).

175. BROWNE, *supra* note 113, at 116 (remarks of Mr. William M. Gwin, Sept. 17, 1849).

176. *See supra* Part III.D.1.

177. BROWNE, *supra* note 113, at 24 (remarks of Mr. William M. Gwin, Sept. 5, 1849); *id.* at 27-28 (remarks of Mr. William M. Gwin, Sept. 6, 1849); HUNT, *supra* note 168, at 55; Fritz, *supra* note 174, at 18-19; Mason, *supra* note 173, at 267.

178. Mason, *supra* note 173, at 269.

179. HUNT, *supra* note 168, at 42.

180. *Id.* at 56. As had the Iowa Constitution, *see supra* notes 152-155 and accompanying text, the original California Constitution disqualified from public office anyone who had participated in a duel and further withdrew the right of suffrage. CAL. CONST. of 1849, art. XI, § 2, *reprinted in* BROWNE, *supra* note 113, app. at X. As with the Iowa provision, this since-repealed California clause (apparently borrowed directly from the Louisiana Constitution) was directed not so much toward what was regarded as private conduct but rather toward the public-regarding breach of the peace entailed by dueling; the provision further imposed public rather than private consequences. BROWNE, *supra* note 113, at 246-55 (Sept. 27, 1849) (focusing upon the disqualification from public service of those participating in a duel, the question of whether a person who engaged in a duel was of the character to participate in public life, and upon the loss of distinguished public servants to duels in the past). Thus, delegates confirmed that the provision "strikes alone at those men who aspire to office," *id.* at 251 (remarks of Mr. Wozencraft, Sept. 27, 1849), and was designed to "disfranchise [sic] any man of his political rights who shall attempt to murder his

the familiar two-part textual format discussed previously,[181] was borrowed from the New York Constitution[182] (and the same language appears in the Iowa Constitution).[183] That liberty of speech provision had been incorporated into the New York Constitution in 1821, having originated in Mississippi some four year earlier.[184] The drafters of the New York Constitution of 1821 had viewed the Bill of Rights in general as "'calculated to restrain useless and improvident legislation'"[185] and to "'restrict[] the power of the legislature,'"[186] and further specifically designed the Liberty of Speech Clause "'to secure the citizens . . . against the arbitrary acts of the legislature.'"[187] As a plurality of the California Supreme Court recently has explained, "the framers of the 1821 New York Constitution viewed the constitution's Bill of Rights, including its free speech clause, as a bulwark against government oppression, not private conduct."[188]

The first phrase of California's state Liberty of Speech Clause then and now focuses upon the citizen's right to "freely speak, write, and publish his or her sentiments on all subjects."[189] Although there is no immediately contemporary explanation of the language to be found in the record of the 1849 debates, the California Supreme Court in what appears to be its first

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fellow man" in a duel, *id.* at 254 (remarks of Mr. M. M. McCarver, Sept. 27, 1849). Further separating this disapproval of dueling from the guarantee of rights as against the government, the California founders removed this provision outside of the Declaration of Rights and deposited it into a separate article of the constitution for "Miscellaneous Provisions." CAL. CONST. of 1849, art. XI, *reprinted in* BROWNE, *supra* note 113, app. at X-XI. *See* BROWNE, *supra* note 113, at 249 (remarks of Mr. M. M. McCarver, Sept. 27, 1849) (explaining objection to duelling provision being placed in bill of rights); *id.* at 252 (remarks of Mr. Rodman M. Price, Sept. 27, 1849) (noting that the duelling disqualification language had been rejected for the California bill of rights).

181. CAL. CONST. of 1849, art. I, § 9, *reprinted in* BROWNE, *supra* note 113, app. at IV. On the two-part text of the archetypal state liberty of speech clause, see *supra* Part III.C.

182. BROWNE, *supra* note 113, at 31 (remarks of Mr. William M. Gwin, Sept. 7, 1849).

183. *See supra* Part III.D.1.

184. *See supra* note 104 and accompanying text.

185. Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 29 P.3d 797, 805 (Cal. 2001) (plurality opinion) (quoting NATHANIEL H. CARTER & WILLIAM L. STONE, REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821, at 163 (1821)). Subsequently, a full majority of the California Supreme Court joined an opinion stating that "the history behind New York's clause is relevant to interpreting California's free speech clause." Edelstein v. City of San Francisco, 56 P.3d 1029, 1039 n.7 (Cal. 2002).

186. *Golden Gateway Ctr.*, 29 P.3d at 805 (quoting CARTER & STONE, *supra* note 185, at 172).

187. *Id.* (quoting CARTER & STONE, *supra* note 185, at 167).

188. *Id.* (citing CARTER & STONE, *supra* note 185, at 59, 163, 171-72 (1821)).

189. CAL. CONST. art. I, § 2(a). On the text of the clause, see *supra* Part III.C.

decision to address the state provision, Dailey v. Superior Court[190] in 1896, viewed the meaning of this wording as "so plain that construction is not needed" and explained that the "purpose of this provision of the constitution was the abolishment of censorship."[191] Accordingly, the court said, the text simply means that the citizen "shall have no censor over him to whom he must apply for permission to speak, write, or publish, but he shall be held accountable to the law for what he speaks, what he writes, and what he publishes."[192] By emphasizing liberty of speech in terms of the "sentiments" of the speaker "on all subjects," the state Liberty of Speech Clause is "broader" than the federal provision and gives the citizen "greater liberty in the exercise of the right granted."[193]

In sum, nothing in the text of the California Liberty of Speech Clause nor in the history surrounding its adoption by the California Constitutional Convention of 1849 suggests that it was designed as a radical innovation that would impress constitutional obligations upon private citizens.[194]

When the California Constitution was submitted to a new convention in 1878-1879, "the Declaration of Rights contained in the initial document survived largely unaltered."[195] During the 1878-1879 Convention, the only attention given to the Liberty of Speech Clause was whether to remove the power of the juries over matters of law as well as fact in deciding guilt or innocence in prosecutions for criminal libel, with the ultimate result being confirmation by the Convention of the existing language of 1849, as discussed previously.[196] Indeed, while the California Constitution of 1879 superseded the Constitution of 1849, "the original bill of rights provisions have largely survived and remain applicable today."[197] In the intervening 125 years, the California Declaration of Rights has been augmented by the

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190. 44 P. 458 (Cal. 1896).

191. *Id.* at 459.

192. *Id.*

193. *Id.*

194. *See* Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 29 P.3d 797, 804 (Cal. 2001) (plurality opinion) ("[T]he debates over the California Constitution do not show an intent to extend the reach of its free speech clause to private actors.").

195. Malcolm M. Lucas (Chief Justice of the California Supreme Court), *Foreword* to GRODIN ET AL., *supra* note 168, at xxvii; *see also* I WILLIS & STOCKTON, *supra* note 117, at 179 (remarks of Mr. Walter Van Dyke, Oct. 24, 1878) (explaining that the Committee on Preamble and Bill of Rights "retained [the liberty of speech clause] as it existed in the old article"); *Id.* at 231 (majority report of the Committee on Preamble and Bill of Rights, Oct. 29, 1878).

196. *See supra* notes 111-120 and accompanying text.

197. Fritz, *supra* note 174, at 13-14.

addition of privacy to the list of inalienable rights, a provision affirming the use of the death penalty, an explicit equal protection clause, and a prohibition on the establishment of religion.[198] The Liberty of Speech Clause, which originally was section 9 of the Declaration of Rights, has been preserved without substantive change, other than the insertion of gender-neutral language, in subsection (a) of section 2 of the present California Declaration of Rights.[199] In 1980, the Liberty of Speech Clause was supplemented by a new subsection (b) that grants protection to news reporters and editors against compelled disclosure of the sources of information.[200]

As had been the case during the drafting and re-drafting of the Iowa Constitution as discussed above,[201] the delegates to the California Convention of 1849 were troubled about what they saw as the corrupting "evils" of corporations and the dangers of "monopolies."[202] The original California Constitution permitted formation of corporations under general laws, although holding shareholders individually liable for their proportion of the corporation's debts, but precluded special charters for any corporation (especially including banks) from the legislature.[203] As with the Iowa episode, however, the primary concern at the California Constitutional Convention was not with ordinary business entities, which the delegates regarded as unobjectionable,[204] but rather those entities that might seek special privileges from the legislature, thereby becoming "the particular favorites of the Legislature."[205] The general intent was to prevent "the

198. GRODIN ET AL., *supra* note 168, at 36; *see also id.* at 20-21.

199. *Compare* CAL. CONST. of 1849, art. I, § 9, *reprinted in* BROWNE, *supra* note 113, app. at IV, *with* CAL. CONST. art. I, § 2(a)*;* s*ee also* GRODIN ET AL., *supra* note 168, at 40.

200. CAL. CONST. art. I, § 2(b); *see also* GRODIN ET AL., *supra* note 168, at 41-42.

201. *See supra* Part III.D.1.

202. Mason, *supra* note 173, at 280-81; *see also* GRODIN ET AL., *supra* note 168, at 4-5.

203. CAL. CONST. of 1849, art. IV, §§ 31, 34, 36, *reprinted in* BROWNE, *supra* note 113, app. at VI-VII.

204. BROWNE, *supra* note 113, at 112 (remarks of Mr. Robert Semple, Sept. 17, 1849) (noting that "corporations must be formed for certain purposes" and that no person could object to formation of corporations by general, rather than special, laws); *id.* at 124-25 (remarks of Mr. Charles T. Botts, Sept. 18, 1849) (saying that, when the legislature is precluded from granting exclusive privileges, corporations are "then not only harmless, but they are useful").

205. *Id.* at 118-19 (remarks of Mr. W. S. Sherwood, Sept. 17, 1849) (contrasting mere deposit associations with special charters for banking entities); *see also id.* at 46 (remarks of Mr. Robert Semple, Sept. 11, 1849) (expressing concern about "[m]onopolies" created by legislative "privileges" that continue from "generation to generation"); *id.* at 108-36 (Sept. 17-18, 1849) (debates on corporations and banking); Fritz, *supra* note 97, at 968 (describing constraints on corporations by the California Convention as a form of "constitutional legislation" that reflects a distrust of the legislature).

Legislature from granting any exclusive privileges to corporations at all, by special act, or any immunities not possessed by the citizens of the State generally."[206] In particular, the delegates strongly resisted creation by corporate charter of private banks that would assume governmental minting powers by creating paper to be circulated as currency.[207]

When the Constitution was revised by the California Constitutional Convention of 1878-1879, anti-corporate sentiment had increased,[208] but nonetheless resulted only in adoption of relatively modest and since-repealed rules limiting corporate indebtedness,[209] regulating the election of corporate officers,[210] and generally prohibiting state government investment in corporate stocks and bonds.[211] The Constitution as ratified in 1879 further limited corporations to conducting that business authorized by the charter and precluded holding real property not used for business purposes for more than five years.[212] Even at this high-water mark of anti-corporate feeling, however, the primary subject of attention was common carriers, and the railroads in particular,[213] which resulted in the creation of an elected railroad commission to set rates[214] and a constitutional prohibition on discrimination

206. BROWNE, *supra* note 113, at 124 (remarks of Mr. C. T. Botts, Sept. 18, 1849)*; see generally* Sandefur, *supra* note 82, at 610 ("The delegates did not oppose all corporations, but were concerned that corporations would demand special legislative privileges such as monopolies.").

207. BROWNE, *supra* note 113, at 109 (remarks of Mr. Myron Norton, Sept. 17, 1849) (discussing consensus of delegates to "prohibit[] banking, and the issuing, and putting into circulation, any bills, checks, promissory notes, or paper to circulate as money"); *id.* at 112 (remarks of Mr. Robert Semple, Sept. 17, 1849) (saying that every delegate agreed with the basic object of avoiding any privilege for banking); *id.* at 130 (remarks of Mr. H. W. Halleck, Sept. 18, 1849) (reporting that the drafting committee members were "unanimous in their desire to prohibit banks for the circulation of bank paper").

208. GRODIN ET AL., *supra* note 168, at 11.

209. CAL. CONST. of 1879, art. XII, § 11. The California Constitution of 1879 was read into the records of the 1878-1879 Convention and may be found at III WILLIS & STOCKTON, *supra* note 117, at 1510-21.

210. CAL. CONST. of 1879, art. XII, § 12, *reprinted in* III WILLIS & STOCKTON, *supra* note 117, at 1517.

211. CAL. CONST. of 1879, art. XII, § 13, *reprinted in* III WILLIS & STOCKTON, *supra* note 117, at 1517.

212. CAL. CONST. of 1879, art. XII, § 9, *reprinted in* III WILLIS & STOCKTON, *supra* note 117, at 1517.

213. GRODIN ET AL., *supra* note 168, at 11.

214. CAL. CONST. of 1879, art. XII, § 22, *reprinted in* III WILLIS & STOCKTON, *supra* note 117, at 1518.

in rates.[215] With respect to the railroads, the delegates appreciated that these common carriers were "quasi-public" in nature, because "they were performing a part of the functions of the State,"[216] and even had been delegated the power of eminent domain, described as "perhaps the highest right exercised by government."[217] In the present text of the California Constitution, the remnants of the anti-corporation sentiments of the late-nineteenth century are even more finely focused upon "private corporations that provide important commodities or services to the public."[218] The pertinent article of the California Constitution, previously titled "Corporations,"[219] is now labeled as "Public Utilities."[220] In sum, throughout California constitutional history, constitutional directives have not been used to impose significant constraints on private entities pursuing purely private interests.

While not unwavering through the decades, the primary line of California constitutionalism as it related to corporate entities was to prevent special privileges and monopolies from being granted by political authorities in a potentially corrupting manner, rather than to significantly inhibit the operation of ordinary business enterprises. Importantly, for present purposes, constitutional constraints on corporations were expressed in terms of limitations on the powers of the legislature in granting privileges and immunities to these state-chartered entities.[221] Nothing suggested the creation of new constitutional rights by private citizens that were enforceable directly against other private citizens or private entities, even corporations, although common-law rights of citizens to hold others accountable for their acts were

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215. CAL. CONST. of 1879, art. XII, § 21, *reprinted in* III WILLIS & STOCKTON, *supra* note 117, at 1518.

216. I WILLIS & STOCKTON, *supra* note 117, at 350 (remarks of Mr. James M. Shafter, Nov. 8, 1878).

217. *Id.* at 351 (remarks of Mr. C.W. Cross, Nov. 8, 1878); *see also id.* at 380 (remarks of Mr. Morris M. Estee, Nov. 12, 1878) (explaining "that there is no such thing as the existence of a railroad anywhere, in any country, except by and through the sovereign will of the State," because the "right of eminent domain has to be invoked everywhere before they can build the road").

218. *See* GRODIN ET AL., *supra* note 168, at 203.

219. CAL. CONST. of 1879, art. XII, *reprinted in* III WILLIS & STOCKTON, *supra* note 117, at 1517-18; *see also* GRODIN ET AL., *supra* note 168, at 203.

220. CAL. CONST. art. XII.

221. *See* CAL. CONST. of 1879, art. XII, § 3 (repealed 1930); CAL. CONST. of 1849, art. IV, § 36, *reprinted in* BROWNE, *supra* note 113, app. at VII (holding stockholders personally liable for debts of corporation) (repealed 1930); *see also* GRODIN ET AL., *supra* note 168, at 11 (expressing concern of 1879 Convention in preventing corporations and their stockholders from "escaping individual responsibility for their acts").

preserved. In sum, even with respect to regulation of corporations, a matter that was carefully removed in textual location and drafting deliberation from the separate placement and consideration of the declaration of constitutional rights, the focus was upon controlling the powers of government.[222]

Finally, a Lockean solicitude by California's founders and framers for the primacy of property rights was interwoven throughout the original constitutional charter for the Golden State.

- First, among the very first words of the California Declaration of Rights then and now, we find confirmation of the Lockean proposition that "acquiring, possessing and protecting property" are among those "inalienable rights" possessed by "[a]ll men."[223]
- Second, in simple but plain language as part of a clause guaranteeing other rights (mostly protecting the accused in criminal cases), the 1849 Constitution prohibits the taking of private property for public use without just compensation.[224] When the California Constitution was revised in 1879, the requirement of compensation for taking of private property was enshrined in a separate clause and the protection was expanded to provide, *inter alia*, for compensation for damage to property as well as taking.[225]
- Third, the 1849 Constitution, in large part out of respect for the preexisting property rights of the Hispanic population from the era of Mexican rule, guaranteed the property rights of foreigners, who became residents of California, to the same extent as native born citizens.[226] Although the history and evolution of this clause later became marred by racism, as it was amended in 1879 to apply only to white or black foreigners (thereby excluding Asians),[227] it

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222. Indeed, in the original California Constitution of 1849, the provisions on corporations were included in Article IV on the legislature. CAL. CONST. of 1849, art. IV, *reprinted in* BROWNE, *supra* note 113, app. at V-VII.

223. CAL. CONST of 1849, art. I, § 1, *reprinted in* BROWNE, *supra* note 113, app. at III. The same language, rendered gender-neutral, remains the foreword to the declaration of rights today. CAL. CONST. art. I, § 1.

224. CAL. CONST of 1849, art. I, § 8, *reprinted in* BROWNE, *supra* note 113, app. at III-IV.

225. CAL. CONST. of 1879, art. I, § 14, *reprinted in* III WILLIS & STOCKTON, *supra* note 117, at 1510. The provision today is found in section 19 of the California Declaration of Rights. CAL. CONST. art. I, § 19.

226. CAL. CONST of 1849, art. I, § 17, *reprinted in* BROWNE, *supra* note 113, app. at IV.

227. CAL. CONST. of 1879, art. I, § 17, *reprinted in* III WILLIS & STOCKTON, *supra* note 117, at 1510; *see also* GRODIN ET AL., *supra* note 168, at 57.

subsequently was revised to its present format of simply and unqualifiedly giving noncitizens the same property rights as citizens.[228] In sum, in its original incarnation and again today, it is a powerful endorsement of equal property rights.

- Fourth, the 1849 Constitution guaranteed to married women the continued ownership of their separate property (that which was owned prior to marriage or received during marriage by gift or inheritance), rather than permitting the legislature perhaps to direct that the husband take control of all property as the head of the marital union.[229] Although one delegate suggested, likely in jest, that this provision would be a great "inducement for women of fortune to come to California,"[230] the primary argument for adoption of this measure was to safeguard existing property rights and expectations under the civil law that had long prevailed in California.[231] In the words of one delegate, the provision was designed to "secure and guaranty the rights of the wife to her separate property" consistent with property expectations that Californians had long held.[232] The convention's action "is believed to be the first time that a section recognizing the wife's separate property was embodied in the fundamental law of any State."[233] In so doing, the convention further highlighted and guaranteed the security of property.[234]

In all of these ways, the drafters of the California Constitution of 1849 ensured that fundamental property rights would not be subject to compromise or trespass by the civil government of the state. In words startlingly pertinent to the dedication of one person's land to the desire of another person for expression of political or social views, one delegate

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228. CAL. CONST. art. I, § 20.

229. CAL. CONST of 1849, art. XI, § 14, *reprinted in* BROWNE, *supra* note 113, app. at XI; *see also* GRODIN ET AL., *supra* note 168, at 6, 58; HUNT, *supra* note 168, at 44-45. The constitutional preservation of separate marital property continues in force today as part of the declaration of rights. CAL. CONST. art. I, § 21.

230. BROWNE, *supra* note 113, at 259 (remarks of Mr. H.W. Halleck, Sept. 27, 1849).

231. *Id.* at 258-67 (Sept. 27, 1849).

232. *Id.* at 258 (remarks of Mr. Henry A. Tefft, Sept. 27, 1849); *see also id.* at 263 (remarks of Mr. Kimball H. Dimmick, Sept. 27, 1849) (explaining purpose of the provision was to "avoid taking away that right of control over her property" that women now possessed in California).

233. HUNT, *supra* note 168, at 45.

234. BROWNE, *supra* note 113, at 265 (remarks of Mr. Myron Norton, Sept. 27, 1849) (stating the question as whether to "provid[e] for the security of property, both real and personal, of the wife").

expressed the concern that "it would be very easy to make a constitution here that would take away one man's property and give it to another";[235] a worst case scenario that was preempted by the very presence of a bill of rights.

Nor was the explicit prohibition of slavery at the beginning of California constitutional history a departure from that theme of property rights, for reasons both of substance and history. After the first draft of the Declaration of Rights for the California Constitution of 1849 had been reported to the Convention, a motion was made—and approved unanimously with little debate[236]—to add a section barring slavery and involuntary servitude, other than when employed as criminal punishment, in the State of California.[237] First, from a theoretical standpoint, it is oxymoronic and contrary to a genuine conception of universal and natural rights to define human beings as the object rather than the subject of property ownership. Indeed, Locke defined property, the centerpiece of natural rights, as consisting not only of things but also that "every man has a property in his own person."[238] Second, since slavery had been abolished in the Republic of Mexico in 1829, slavery had never existed in California and the refusal to recognize a trade in human beings contravened no property expectations in that territory.[239]

In some tension with the generally high regard with which the California founders regarded private property rights, the second constitutional convention of 1878-1879 took place during a period of popular resentment against large landowners and big corporate interests.[240] However, despite heated rhetoric in the convention debates about land monopolies, the actions taken were largely symbolic and never subverted the existing and continuing protections for property ownership, including preservation of the constitutional guarantee of just compensation for the taking of private property.

The populist influences upon the 1878-1879 Convention were manifested in two ways. First, quite consistently with any understanding of natural rights of all people regarding ownership of property, the Convention adopted several measures designed to ensure more equal taxation of land

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235. *Id.* at 52 (remarks of Mr. M. M. McCarver, Sept. 11, 1849).

236. *Id.* at 43-44 (motion of Mr. William E. Shannon unanimously adopted, Sept. 10, 1849).

237. CAL. CONST. of 1849, art. I, § 18, *reprinted in* BROWNE, *supra* note 113, app. at IV; *see also* GRODIN ET AL., *supra* note 168, at 7-8, 45; HUNT, *supra* note 168, at 42. The prohibition, of course, is retained in the modern California Constitution. CAL. CONST. art. I, § 6.

238. LOCKE, *supra* note 84, § 27, at 15.

239. HUNT, *supra* note 168, at 11-12.

240. GRODIN ET AL., *supra* note 168, at 11-12.

between large and small holders.[241] Second, identifying the land monopoly problem as being primarily attributable to the governmental policy of granting title to large tracts of undeveloped land to single holders, the Convention restricted grants of state lands to actual settlers in quantities not to exceed 320 acres.[242] Third, the Convention adopted what commentators have aptly called a "hortatory condemnation of 'land monopoly,'"[243] which declared that "[t]he holding of large tracts of land, . . . by individuals or corporations, is against the public interest and should be discouraged by all means not inconsistent with the rights of private property."[244] In addition to avoiding any concrete direction for implementation of this supposed public policy goal, and certainly not including any formal limitation on the size of land holdings, nothing in this since-repealed constitutional provision suggested that the basic incidents of property ownership, including the fundamental power to exclude others, had been compromised.

While the Lockean candle may have flickered during the Convention of 1878-1879, it never went out. To begin with, the delegation contained many stalwart members who positively affirmed the traditional understanding that "[t]he right of property is before and higher than any constitutional sanction,"[245] is "one of the things that existed before laws were written,"[246] and that the inalienable rights of property are as "true as Holy Writ."[247] Moreover, despite the radical proposals introduced by some,[248] the measures actually adopted were modest in nature and did not unsettle property rights. While large landowners were resented, one leading delegate explained that the compromise provisions ultimately urged by the more radical delegates "propose[d] to take no man's property. . . . There is no communism or

241. CAL. CONST. of 1878, art. XIII, §§ 1-3, 10, *reprinted in* III WILLIS & STOCKTON, *supra* note 117, at 1518; *see generally* GRODIN ET AL., *supra* note 168, at 12.

242. CAL. CONST. of 1879, art. XVII, § 3 (repealed 1972), *reprinted in* III WILLIS & STOCKTON, *supra* note 117, at 1519.

243. GRODIN ET AL., *supra* note 168, at 12.

244. CAL. CONST. of 1879, art. XVII, § 2 (repealed 1976), *reprinted in* III WILLIS & STOCKTON, *supra* note 117, at 1519.

245. II WILLIS & STOCKTON, *supra* note 117, at 1143 (remarks of Mr. Joseph C. Brown, Jan. 24, 1879).

246. *Id.*

247. *Id.* at 1145 (remarks of Mr. Marion Biggs, Jan. 24, 1879).

248. *See, e.g.*, *id.* at 100-01 (proposed amendment of Mr. James O'Sullivan, Oct. 10, 1878) (proposing that no person be permitted to acquire or devise by will more than 640 acres of property); *id.* at 143 (proposed amendment of Mr. Rufus Shoemaker, Oct. 14, 1878) (proposing that individual citizens be granted the right of eminent domain to take private property of others, including the right to demand transfer of lands possessed by railroads, but not necessary to the railroad business, in parcels of 160 acres at market value).

agrarianism about this proposition."[249] Another delegate of the radical Workingman's party likewise assured the Convention that any proposal "to disturb the rights of property" would be a "dangerous precedent" and should be denounced "as unjust and unnatural."[250] Indeed, when a proposal to declare that all railroads and canals would become public property open for free transportation was presented on the floor of the Convention, it quickly ran aground as delegates appreciated that it proposed confiscation of private property and instead was revised to provide for appropriate regulation of rates of common carriers.[251] In the end, as Timothy Sandefur well appraises its final product, "[d]ominated as it was by advocates of wealth redistribution, the Constitutional Convention of 1878 was still not prepared to allow government to redistribute property for private uses or for a general benefit to the public."[252]

In sum, while some Californians at times have resented large landowners, especially those who held undeveloped land for speculation, the constitutional history of California examined in concrete terms provides no support for the radical proposition that any citizen has a constitutional right to dictate the use of another citizen's property to the benefit or preference of the former. Instead, the language, context, and specific history of constitution-drafting in California, quite emphatically in 1849 (when the Declaration of Rights and the Liberty of Speech Clause were adopted) and still unmistakably if less enthusiastically in 1878-1879, makes plain that constitutional rights are intended to curb the power of government and that rights of private property remain among the most sacred of constitutionally protected guarantees.

IV. ADDRESSING THE POLICY ARGUMENTS: FREE SPEECH AND PRIVATE PROPERTY

A. The Mistaken Analogy of a Private Shopping Center to a Public Square

In the debate about imposition of constitutional responsibilities to facilitate free expression upon private landowners, the regional enclosed shopping center has been the initial and central object of attention, at least as

249. III WILLIS & STOCKTON, *supra* note 117, at 1403 (remarks of Mr. Clitus Barbour, Feb. 18, 1879).

250. I WILLIS & STOCKTON, *supra* note 117, at 1144 (remarks of Mr. James M. Barton, Jan. 24, 1879).

251. I WILLIS & STOCKTON, *supra* note 117, at 461-63 (proceedings of Nov. 20, 1878).

252. Sandefur, *supra* note 82, at 652.

the beachhead for the further invasion of constitutional standards into the private realm. The "transporters"—which is Julian Eule's and Jonathan Varat's apt label for "those who would extend constitutional norms to private actors"[253]—justify their proposed detour from the traditional constitutional road by arguing that the modern shopping center has replaced—indeed, they contend, it has *displaced*—the town square or community business district as a public forum.[254] They thus try to analogize a covered shopping mall to a downtown marketplace or an old-style city commons.

Abraham Lincoln was said to have posed a riddle that began by asking someone how many legs does a dog (or a horse or a cow) have, to which the answer of course was four.[255] Lincoln continued by asking how many legs the animal would have if you were to call a tail a leg, to which the typical reply was that the number of legs then added up to five. With that, Lincoln would admonish his interlocutor by insisting, no, that the number of legs on the animal would still be four, because calling a tail a leg doesn't make it a leg. Likewise, saying that a private shopping center constructed and operated for commercial profit on privately-owned property is the equivalent of a public commons or town square does not make it so.

The crucial difference is this: the downtown main street, the town square, the municipal plaza, the public commons, etc., *are* public properties, owned by the government, paid for by the taxpayers, maintained by government employees, and formally dedicated by the community to public use. The private shopping center is *none* of these things. In contrast with the old-style public square, there is no courthouse, town hall, police station, or other government-owned and constructed edifice at the heart of the typical shopping center. Instead, the enclosed shopping mall is operated by a private landowner engaged in commercial enterprise and dependent upon the patronage of customers for its economic survival.

A shopping complex is owned by one or more private citizens (sometimes organized into a corporate form but not always), and is located on private land. Like any other private landowner, the owner typically pays

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253. Eule & Varat, *supra* note 10, at 1542.

254. *See, e.g.*, Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 319 (1968) ("[T]he shopping center serves as the community business block."), *abrogated by* Hudgens v. NLRB, 424 U.S. 507 (1976); N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 768 (N.J. 1994) ("Most legal commentators also have endorsed the view that shopping centers are the functional equivalent of yesterday's downtown business district.").

255. *See, e.g.*, JOHN BARTLETT, FAMILIAR QUOTATIONS 542b (13th ed. 1955); 1 CARL SANDBURG, ABRAHAM LINCOLN: THE WAR YEARS 570 (1939).

property taxes. The shopping center hires its own employees to safeguard the premises, maintain the structure, and keep the common areas clean. When it snows or the wind blows down a tree, city or county work crews do not clear the parking lot; the shopping center pays for this work to be done by private contractors. To guard against liability, the shopping center and its tenant merchants pay premiums out of their own resources for insurance. If encumbered with new constitutional responsibilities, mall owners would be forced to assume the burdens of security for political protests, to allocate limited space to competing special interest groups, to suffer potential liability if patrons are injured by disruptive activists, and to clarify that they do not support extremist groups to which they were forced to open their doors. Again, neither the shopping center nor its tenants would be reimbursed by any government for their additional expenses or their new liabilities.

In New *Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*,[256] the sharply divided New Jersey Supreme Court decision that imposed a duty to accommodate speech on to a private shopping center, the dissent provided a cogent and practically-grounded riposte to this notion of equivalence to a public square:

> 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. . . . 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.[257]

Nor, your author would add, do public squares and downtown districts close off the streets and exclude the public every night, whereas the typical shopping center locks its door each evening after the stores close.

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256. 650 A.2d 757.

257. *Id.* at 794 (Garibaldi, J., dissenting) (alteration in original) (citations omitted).

Finally, and most importantly, private shopping centers do not exercise quintessentially sovereign powers, that is, they do not assume governmental authority over others. As the United States Supreme Court has explained with respect to application of rights under the federal Constitution, state action is implicated by "the exercise by a private entity of powers traditionally exclusively reserved to the State."[258] When we look beyond purported similarities in appearance between a shopping center and a town square to the more pertinent question of exercise of powers by a private landowner versus those of a municipality, the incomparability of the two becomes plain.

While a shopping center employee might briefly detain an individual who engages in misconduct, the formal arrest of that individual for trespass or shoplifting must be made by a government officer. Likewise, the shopping center may conclude that a particular miscreant is unwelcome and will not be admitted to the mall, but cannot impose any sentence of imprisonment or exact any fine from the purported wrongdoer. To my knowledge, no state or municipality has ever delegated to a private shopping center owner the exclusive public functions of law enforcement and adjudication of criminal wrongdoing. In essence, a private shopping center, like any landowner, possesses only the basic power to exclude another, but has no authority to regulate others beyond the property line. Instead, a shopping center is a commercial enterprise that exists for the purpose of turning a profit, which traditionally has been the antithesis of a government function.

Thus, a shopping center remains a tail, no matter how many times or how insistently some might like to redefine such a facility as a leg. Even if advocates for treating private landowners as the equivalent of government entities could overcome the absence of textual or historical support for their constitutional innovation, the argument remains fundamentally misguided as a matter of practical reality.

B. The Special Case (or Really Not) of State Financial Subsidy of Private Enterprises—Determining the Presence of State Action

The argument for imposition of state constitutional duties to accommodate expression might appear at its strongest in the context of

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258. Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974); *see generally* ROTUNDA & NOWAK, *supra* note 32, § 16.2, at 771 ("[O]nly those activities or functions which are traditionally associated with sovereign governments, and which are operated almost exclusively by governmental entities[,] will be deemed public functions" such that a private entity engaged in them will be treated as a state actor).

private enterprises that have received substantial public assistance or been integrated within a municipal structure. Indeed, the Colorado Supreme Court in *Bock v. Westminster Mall Co.*,[259] relied upon the financial and other interrelationships between a shopping center and a city government to categorize that particular shopping mall as effectively a public entity that was bound by state constitutional responsibilities.[260] Among the facts that were persuasive to the Colorado court in concluding that this private entity "bear[s] such a close relationship with governmental entities or public monies that such [an] interest[] [was] affected with a public interest" was the "prominent location" of the shopping center directly across the street from city hall, that the mall was patrolled by city police and contained a police substation including a holding facility, and that the city had issued municipal bonds to finance improvements to the streets and sewers that initially had been paid for by the private developer.[261] Even with receipt of public funding, the Colorado court's conclusion that acceptance of public benefits transformed the recipient unsuspectingly and involuntarily into an appendage of the state was a reach.

Today, nearly everyone, including the individual citizen and the owner of residential real property, is the beneficiary, directly or indirectly, of government largess through public benefit programs or tax abatements, exemptions, and deductions. A rule that constitutional responsibilities follow the trail of government money would convert nearly every person in modern America into an agent of the all-encompassing state. Even if a more nuanced method were formulated, under which the transformation from private to public status were to be measured by the amount of public assistance or by the size of the recipient's assets or property holdings, the power of government to effectively expropriate private enterprises would be greatly expanded, without prior notice and contrary to existing understandings. Moreover, given that public-private partnerships, particularly to revitalize economically-depressed areas, are increasingly common in one form or another, extension of governmental responsibilities to the private side of the partnership certainly would undermine the attraction of such programs.

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259. 819 P.2d 55 (Colo. 1991).
260. *Id.* at 57, 60-63.
261. *Id.*

Absent a "symbiotic relationship"[262] or an "overwhelming entwinement" between the state and a private entity,[263] where the entanglement of benefits and operations is peculiarly inextricable, mere receipt of subsidies or tax abatements for private enterprise does not amount to state action with attendant constitutional responsibilities.[264] For purposes of state action analysis, size of the entity at issue or amount of governmental money involved are of much lesser salience than examination of function or purpose of an entity in terms of delegated governmental powers, which a shopping center is unlikely to receive and exercise.[265]

For good reason, therefore, no other state has followed Colorado's example and imposed constitutional obligations upon private actors that have received some governmental benefit. Consider, for example, the "Mall of America" case. In *State v. Wicklund*,[266] a group of anti-fur protestors gathered in the common area adjacent to a department store inside the Mall of America in Bloomington, Minnesota, where they distributed leaflets and held up placards. After being repeatedly warned by mall security guards to cease their activities, they were arrested for trespass by city police.[267] The defendants moved to dismiss the charges, claiming a right of free speech under the Minnesota Constitution.[268] At a pretrial hearing, evidence was presented that the Mall of America was the largest shopping center in the United States, attracting millions of visitors annually.[269] The Mall of America project had been initiated by a city agency on former municipal property and funding for site preparation was provided by public bonds, with

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262. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 716-25 (1961) (finding a "peculiar relationship" that amounted to state action in the context of a privately-owned restaurant that leased space in a government parking facility, in which the restaurant benefited from patronage by government employees, the municipality's tax exemption, and rental payments paid by the city); *see also* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972) (describing *Burton* as involving a "symbiotic relationship" between the private entity and the municipal government).

263. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 302 (2001) (finding on the particular facts of the case that the "entwinement" between public schools and an interscholastic athletic organization was "overwhelming" in nature).

264. *See* CHEMERINSKY, *supra* note 32, § 6.4.4.3, at 513 (explaining that recent Supreme Court decisions "make it highly doubtful that subsidies, no matter how large, by themselves could justify applying the Constitution" to private entities under the state action doctrine).

265. *See supra* Part IV.A.

266. 589 N.W.2d 793, 795 (Minn. 1999).

267. *Id.*

268. *Id.*

269. *Id.*

the balance of construction financed by a private corporation; indeed, the evidence indicated that public financing constituted some twenty-one percent of the total cost of the mall's development.[270] Based upon this evidence, the trial court declared the Mall of America as having been "born of a union with government," characterized its interior "as public as any city thoroughfare," and therefore concluded the protesting speech on shopping center property was constitutionally protected.[271]

In *Wicklund*, both the Minnesota Court of Appeals and the Minnesota Supreme Court unanimously reversed the trial court.[272] The Minnesota Supreme Court emphasized that state constitutional protections, such as freedom of speech, apply only to the government; they do "not accord affirmative rights to citizens against each other."[273] The court also rejected the argument that the Mall of America should be considered as a "state actor" because public financing was used in its development or because of the "public nature" of the mall's interior.[274] The court noted that no governmental functions had been delegated to any private entity and that the Mall of America pays for public services in the same manner as any other private business.[275] Accordingly, the court concluded that "neither the presence of public financing alone nor the public financing coupled with an invitation to the public to come onto the property is sufficient to transform privately-owned property into public property for purposes of state action."[276]

Determining "where the governmental sphere ends and the private sphere begins"[277] obviously cannot ever be a scientifically objective inquiry. When public-private partnerships are arranged, debate is inevitable regarding the point at which the government and its private partner become sufficiently entwined that the latter should be regarded as the equivalent of the former.[278] That one thing shades into another does not support the proposition that the two things always or even mostly are one and the same. The earth's life-

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270. *Id.* at 795-96.

271. *Id.* at 796 (internal quotations omitted).

272. State v. Wicklund, 576 N.W.2d 753, 754 (Minn. Ct. App. 1998), *rev'g*, No. 96 042987, 1997 WL 426209 (Minn. Dist. Ct. Jul. 24, 1997), *aff'd*, 589 N.W.2d 793 (Minn. 1999).

273. *Wicklund*, 589 N.W.2d at 801.

274. *Id.* at 801-03.

275. *Id.* at 802.

276. *Id.*

277. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991).

278. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) (adopting an "entwinement" test for state action).

giving atmosphere and the sterile vacuum of space are hardly indistinguishable nor is the difference between them rendered insubstantial simply because the actual boundary between these two environments—the Karman Separation Line—cannot be precisely measured and for that reason has been positioned by consensus at one-hundred kilometers above mean sea level.[279] Likewise, the realms of government and private activity remain fundamentally different, even if the line between them may be blurred at the edges and the doctrinal determination of that point of separation has been less than perfectly articulated.

For the most part, however, the question of when governmental interaction with a private entity crosses the "state action" line is but a distraction from the subject of imposing liberty of speech obligations on private parties through invocation of state constitutional guarantees. The typical case in which the claim for free speech rights on private property arises does not involve any plausible assertion that significant public financing supported a private development and thereby transformed it into a public entity.[280] Instead, claimants generally argue, not that the private actor itself should be recognized as a direct alter ego of the state, but rather that state constitutional obligations extend beyond the public arena to certain classes of private property owners. Indeed, in this view, the governmental nature of the actor is irrelevant, or at least dispensable in some circumstances, rather than being a threshold element in determining whether to impose constitutional liberty of speech obligations.

C. The Ample Availability of Other Public Fora and the Growth of New Forms of Media for Expression

In tandem with the argument that the modern shopping center is the equivalent of the public town square, advocates regularly plead that, without access to the shopping center and other large private facilities for political rallies or literature distribution, citizens will be left unable to effectively communicate their views to other citizens. In fact, a healthy respect for private landowners and property rights does not significantly limit the opportunities for expression of political and social views. People have ample

279. The Karman Separation Line was set as 100 kilometers above mean sea level by the Fédération Aéronautique Internationale and that conventional point has also been accepted by the International Astronautical Federation. Posting of S. Sanz Fernández de Córdoba, FAI Astronautic Records Commission, *100 km Altitude Boundary for Astronautics* (June 6, 2004), http://www.fai.org/astronautics/100km.asp (last visited Nov. 17, 2007).

280. *See supra* Part II (discussing state cases).

and meaningful alternatives for communicating their messages—without trespassing upon private property. Indeed, in the present era of mass communication and especially the internet, the social movement that depends upon distribution of leaflets to invariably annoyed or indifferent shoppers passing through a shopping mall likely is doomed to political obsolescence.[281]

Various public fora are available throughout the typical metropolitan area, ranging from state capitol grounds and the state fairgrounds to downtown public plazas, publicly-owned pedestrian walking malls, entertainment districts flanked by public walkways and streets, public parks, and public sidewalks, as well as the continuing existence of traditional business districts and town squares. In terms of effectiveness, the rally at the state capitol that attracts a respectable turn-out of compatriots and, more importantly, the attention of the newspapers and the television news will achieve a substantial impact, quite regardless of whether very many ordinary citizens or politicians actually are present to witness the gathering. Moreover, people remain free to express views by holding up signs alongside public streets and highways, including those avenues leading into private commercial complexes, which likely would reach more people than any attempt at leafleting in a shopping mall.

In addition, promoters of a cause may distribute leaflets door-to-door throughout most urban and suburban residential areas. While such a door-to-door canvass may require greater effort and continued dedication to the cause than a one-time raid into a shopping mall for a political rally, it ultimately would be more effective and reach many more people than the haphazard handing out of leaflets to the few customers willing both to accept the leaflet and to pause to read it while engaged in shopping. Especially given the large numbers of roving teenagers and pre-teenagers at many malls—such that one is tempted to say that it is more accurate to describe the shopping mall as the modern equivalent of the playground than of the old-style town square—a political campaign that focuses its energies upon distributing leaflets to shopping center customers will be sadly misdirected in most cases.

While some still might maintain that more people are likely to patronize a private shopping center than the old town square or capitol ground (and be more conveniently reached at the mall than through a door-to-door canvass), the right to freedom of expression hardly entitles one to guaranteed entry to

281. Direct contact between a speaker and an audience may remain of greater persuasive value for communications regarding discretely local matters, for which multiple alternative public fora remain available, as outlined next in the text.

every popular locale. To be sure, many malls have become popular places for socializing, shopping centers frequently attract large crowds, and some commercial complexes host special events for sizeable audiences. Large groups similarly congregate as well in theaters, office buildings, apartment complexes, and churches, synagogues, and other places of worship. Should these areas also be forced open to the rough and tumble of political protests in the street?

Moreover, while the town square evolved in an era in which the primary means of communication was oral and most interaction was face-to-face, the opportunities for expression of ideas have expanded in number—and changed in nature—tremendously in the past several decades. The development of inexpensive access to a broad audience through internet technology promises to further revolutionize and democratize wide-ranging public debate in the future. During the last presidential campaign, one of the most effective means of reaching and organizing large numbers of people proved to be the internet, which at its basic level is largely free and unencumbered, both as a matter of economic expense and government regulation. In addition, the impact on the campaign from webloggers ("bloggers"), who constantly challenged the integrity of both the candidates and the traditional news media before a growing national audience, further demonstrates that the future belongs not to those with access to real estate and large bankrolls but rather to those with creative talent who are willing to invest time, energy, and commitment.

Twenty years ago, in *Woodland v. Michigan Citizens Lobby*,[282] the Michigan Supreme Court noted that while the traditional town square or public market may have declined, other changes were occurring simultaneously:

> The development of shopping centers has not occurred in a vacuum. While the ability to communicate may have been largely restricted to the public market place many years ago in a less technological era, it is clearly not so inhibited any longer. Today, there are radios and television, newspapers, telephones, numerous other public forums and other alternative means of expression.[283]

In addition, as noted, and understandably not anticipated by the Michigan Supreme Court in 1986, the internet has empowered average citizens in ways

282. 378 N.W.2d 337 (Mich. 1985).
283. *Id.* at 357 n.47.

never before imagined, expanding opportunities for exchange of ideas far beyond the geographically-fixed and temporal limitations of the traditional public market or town square.[284] People may send electronic messages at little cost, join multiple discussion groups on a plethora of issues, post messages on the issues of the day, create web pages, plan public events, raise funds from interested people, rapidly respond to messages by others, and organize electronic mailing or other campaigns directed at public officials or even the traditional news media.

There has been an explosive growth in alternative means of expression made possible through technology during the last two decades. A campaign in the name of freedom of speech for a constitutional revolution to force private landowners to permit rallies or distribution of flyers is about as relevant and timely today as would be a call in the name of public health for the March of Dimes to return to its original purpose in raising funds to support the scientific search for a vaccine against polio. Without compromising private property rights, political and social activists and ordinary citizens "can voice their opinions today more readily and more accessibly in more places and in more formats than ever before in human history."[285]

D. Stretching Liberty of Speech to Cover Private Actors Would Dilute the Potency of a Constitutional Right

When identifying what Richard Kay calls the "special sphere" of constitutional law, the defining theme has been "the idea that the Constitution is especially concerned with the limitation of 'public' power and, by the same token, that it is not ordinarily concerned with the regulation of other, 'private,' sources of power."[286] By squeezing disputes among

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284. *See* John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 57-58 (2004) ("The growth of cyberspace—the medium replacing the traditional press and television as the primary medium of communication—promises infinitely expandable opportunities for the transmission of ideas, opinions, promises, and commitments."); Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1667-68 (1998) ("Information that is globally disseminated in digital form is not confined to a street corner, a metropolitan daily newspaper's [subscription] area, a radius of a radio transmitter, the mailboxes of a single [congressional] district, or any other spatially bounded audience definition to which other media might be limited.").

285. N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 796 (N.J. 1994) (Garibaldi, J., dissenting).

286. Kay, *supra* note 99, at 329-30.

private citizens into ill-fitting constitutional clothes, we risk not only diminishing reverence for constitutional law as a special category of jurisprudence,[287] but tearing the very seam of constitutional rights. Beyond the troubling imposition of free speech norms upon private actors, expanding the scope of free speech rights to encompass non-governmental action may have the parallel effect of contracting the substance of those rights as applied to governmental agents.

Nonetheless, there are those who advocate the dissolution of the public-private distinction so as to regulate the actions of private actors that they see as unjustly infringing upon the expression of other private parties. These advocates seek to assuage fears about oppressive and unduly intrusive results by asking us to trust that the courts would fairly balance the opposing interests of all disputing parties:

> Often there might be justifications for private behavior that would not sanction governmental conduct. For example, individuals might claim freedom of association or privacy to excuse their actions, while the government, obviously, cannot claim such rights. If the state action requirement were abolished, the courts in each instance would determine whether the infringer's freedom adequately justified permitting the alleged violation.[288]

Thus, Erwin Chemerinsky concludes, "applying constitutional principles to private conduct does not mean that all individual conduct must meet the

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287. *See* William P. Marshall, *Diluting Constitutional Rights*: *Rethinking "Rethinking State Action*," 80 NW. U. L. REV. 558, 569 (1985) ("The strength of our constitutional liberty rests with the notion that it is something quite extraordinary.").

288. Chemerinsky, *supra* note 98, at 506; *see also* Friesen, *supra* note 106, at 115 (saying that, if California's Liberty of Speech Clause were applied to private actors, the courts would have to determine whether the justifications offered were valid, such that "the question in each case will be whose autonomy—the defendant's or the plaintiff's—most merits protection"). *But see* Marshall, *supra* note 287, at 563 (observing the problems with a balancing approach to disputes among private actors, given the incomparable nature of the interests being balanced, such that judges are forced "to make impossible decisions" that amount to little more than impressionistic reactions); Cologne v. Westfarms Assocs., 469 A.2d 1201, 1210 (Conn. 1984) ("It is not the role of this court to strike precise balances among the fluctuating interests of competing private groups which then become rigidified in the granite of constitutional adjudication."); Jacobs v. Major, 407 N.W.2d 832, 844 (Wis. 1987) ("It is not the role of this court to set exact balances between the temporal and changing interests of conflicting private groups which then become inflexible as chiseled in the marble tablets of constitutional adjudication.").

same standard as that required of the government."[289] To quote the Bard, "ay, there's the rub."[290]

As William Marshall predicted should the state action line be crossed, "the means required to assure that 'private constitutional law' becomes a workable doctrine necessarily limit the stringency of constitutional protection."[291] By increasing the number and types of justifications that may be offered to justify the deprivation of a constitutional right, which necessarily would attend the extension of those rights to cover private actors with private interests, the shield of constitutional protection for those rights against government infringement also would be pierced with additional holes. To be sure, those advocating imposition of constitutional duties against private entities insist that different standards would be adopted for evaluating the constitutional responsibilities of private actors, while public actors would remain subject to more stringent and less qualified rules. However, if we were to deal a fatal blow to the public-private distinction by eliminating the fundamental state action line of separation for determining who is the subject of constitutional duties, we should not assume that we later might conveniently resurrect the same distinguishing concept for the purpose of applying those duties variably on a case-by-case basis. Either the public-private dichotomy is a meaningful concept in constitutional law or it is not.

If new interests may be asserted by private actors to excuse an infringement of a constitutional right by private action, many of those factors or similar ones almost surely by process of osmosis will come to be successfully asserted by governmental actors as well, resulting in the further erosion of freedom of speech. As Scott Sunby warns:

> [I]t does not seem far-fetched to suggest that if constitutional protections are extended to private actions as well as government-citizen matters, a court will tend to err on the side of restricting the scope of the right rather than give an expansive reading. This tendency would seem particularly likely given the existing perception that the courts are already overburdened by a litigation explosion. Consequently, although abandoning state action might

289. Chemerinsky, *supra* note 98, at 551; *see also* Friesen, *supra* note 106, at 115 ("To say that the [California] Declaration of Rights may limit private conduct does not mean that standards developed for government actors can be automatically applied with full strength to private actors.").

290. WILLIAM SHAKESPEARE, HAMLET, act 3, sc. 1, line 64.

291. Marshall, *supra* note 287, at 560.

> expand the range of remedies against private actors, ultimately such a move might lead to a watered down version of constitutional rights.[292]

In other words, we likely would experience a leveling-down of constitutional liberties. The lower level of constitutional obligation that courts likely would settle upon as appropriate for private actors would gradually but inexorably result in reduced expectations of constitutional responsibility for government entities as well.

The risk of such dilution of free speech rights is particularly apparent in the context of establishing a public forum upon privately-owned land. In adopting a standard for imposition of liberty of speech obligations on certain private landowners, including private universities, private shopping centers, and private residential areas,[293] the New Jersey courts consider three factors in determining the existence and extent of the state free speech right on private property:

> (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.[294]

Given that shopping centers exist in a highly-competitive environment, especially with the growth of internet shopping, and must maintain profitability to survive, the courts likely would mitigate the burden of constitutional obligations by giving a fair degree of weight to matters of economic efficiency and order. Not surprisingly, then, the New Jersey courts have shown some solicitude (although obviously not the same amount as the private landowners in these cases might prefer) for the impact of speech on the commercial and profit-seeking purpose of shopping centers.[295] Sanford Levinson, in advocating a right of access for speech on private property (including shopping centers, private universities, private residential communities, and nursing homes), would limit the free speech right on private property to "issues of direct political import," and private property

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292. Scott E. Sundby, *Is Abandoning State Action Asking Too Much of the Constitution?*, 17 HASTINGS CONST. L.Q. 139, 149-50 (1989) (citations omitted).

293. For more on the "New Jersey Experience," see *infra* Part IV.E.

294. N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 771 (N.J. 1994); State v. Schmid, 423 A.2d 615, 630 (N.J. 1980).

295. *N.J. Coal.*, 650 A.2d at 780.

owners also would be entitled to enforce rules of decorum in political discourse and supress vulgar speech or epithets.[296]

By contrast, under the traditional understanding and deliberate design of government in our Republic, we are reluctant to elevate efficiency and order, much less good etiquette, above liberty in the constitutional hierarchy of values. If efficiency, commercial profit, order, and decorum were to be adopted by the courts as routine factors that justify constraints on constitutional freedom of speech in the private sector, it is likely that such modes of analysis would infect judicial evaluation of the public sphere as well.[297] Once free speech caselaw, presently calibrated toward the government as the target of constitutional control, were modified to incorporate a whole new set of actors with different interests, it is unlikely that the standards that evolved in the new context would remain hermetically sealed into a separate category. The emergence of a unified approach is especially likely given that the very existence of truly separate categories—the public regime and the private sector—would have been affirmatively denied at the threshold stage of extending constitutional duties across the state action line.

Should free speech rights be transplanted into the private sector, courts understandably would be more sympathetic to the objections of private landowners when the speech involved is particularly abhorrent in content, such as that presented by extremist or hate groups. In recognition of the need for a shopping center to attract paying customers, the courts are unlikely to insist that a private commercial landowner stand by silently if a speaker offends and outrages the consuming public.[298] The "emotional effect" of the expression likely would be recognized as a legitimate basis for control by the

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296. Sanford Levinson, *Freedom of Speech and the Right of Access to Private Property Under State Constitutional Law*, DEVELOPMENTS IN STATE CONSTITUTIONAL LAW (Bradley D. McGraw ed., 1985), *reprinted in* STATE CONSTITUTIONAL LAW: CASES AND MATERIALS 139 (Robert F. Williams ed., 1988).

297. Even outside of the transportation of constitutional free speech rights into the private sector, one might fairly contend that the courts already have given undue weight to efficiency and order interests in permitting exclusion of speech from certain publicly-owned areas by government entities. *See, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 682 (1992) (holding that a public airport terminal was designed for the purpose of facilitating air travel, rather than expression, and thus was not a public forum). If private entities are made the subject of constitutional evaluation, the drip-drip of government efficiency and order justifications may become a flood against freedom of speech even in public places.

298. *Cf.* Brownstein & Hankins, *supra* note 17, at 1139 (suggesting, as a "less extreme position," that a court protecting free speech on private property would permit "content-based restrictions on expression intended to discourage patronage of the owner's business").

private owner.[299] It is difficult to imagine, for example, that any court would force a shopping center owner to tolerate the burning—or even the desecration other than by flame—of the American flag. When expression is offensive, odious, or inflammatory in content or form, the commercial-viability of the conscripted venue would be severely threatened.

Under the Free Speech Clause of the First Amendment, there is no exception for content-based suppression of speech that is particularly unsettling. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[300] In *Hustler Magazine v. Falwell*,[301] the Supreme Court rejected a standard of extreme offensiveness for judging the protection of speech, saying, "'[o]utrageousness' in the area of political and social discourse has an inherent subjectiveness about it" which would allow the adjudicator to regulate speech "on the basis of [personal] tastes or views, or perhaps on the basis of their dislike of a particular expression."[302] Similarly, in the flag-burning case of *Texas v. Johnson*,[303] the Supreme Court rejected the "claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis."

Yet, if the disturbing nature of the opinions being expressed were to become a legitimate part of the analysis when free speech rights are transported into the private sector, as surely would be the case, the fundamental constitutional redoubt that speech may not be regulated on the basis of content would be breached.[304] If the door is broken open to allow regulation of speech on the basis of its content, which almost surely would follow if liberty of speech obligations were imposed upon private landowners, it would be difficult to securely shut that splintered door when governmental agents later seek to constrain expression based upon its

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299. *See id.* at 1139-40 (arguing that, even under a legal regime in which free speech rights apply on private property, the "more pronounced emotional effect" on abortion clinic patients from being subjected to anti-abortion protestors would justify exclusion of "such undesired expression in the area in question").

300. Texas v. Johnson, 491 U.S. 397, 414 (1989).

301. 485 U.S. 46 (1988).

302. *Id.* at 55.

303. *Johnson*, 491 U.S. at 408.

304. *Cf.* Frederick F. Schauer, Hudgens v. NLRB *and the Problem of State Action in First Amendment Adjudication*, 61 MINN. L. REV. 433, 460 (1977) (discussing administration of a right of speech access to private property as including the danger of allocation according to the content of speech, a consideration forbidden under free speech analysis).

potential for offense and outrage. Sanford Levinson would take content-based distinctions a step further, limiting protected speech on private property to those matters that implicate democratic self-governance, while allowing exclusion of cultural expression and propagation of religious views.[305] If the precedent is set that cultural and religious speech fall lower on the hierarchy of protected expression, the pressure will increase to limit such expression in certain public venues as well.

In sum, a bloated constitutional right to free speech that consumes at least part of the private sector is unlikely to maintain the fitness necessary for robust protection against the peculiar harm of governmental suppression of expression. A constitutional right that is "made safe" for application against private and commercial enterprises is unlikely to remain a solid bulwark against governmental power.

E. Opening the Door to Ever-Expanding and Dangerous Intrusions on Privacy and Property Rights: The New Jersey Experience

The greatest rebuttal to the policy advocates of transplanting free speech rights into the foreign soil of the private sector lies in the impossibility of carefully controlling the spread of this alien vegetation into new fields of private human endeavor once it has taken root. Sadly, we have an actual case study on point from which to learn. Over the past quarter-century, California's *Pruneyard* decision, imposing constitutional obligations upon private landowners based upon a state liberty of speech clause, has attracted but a single full-fledged acolyte.[306] But once New Jersey had been fully recruited into this constitutional cultural revolution, the student became a much more zealous disciple than the teacher.[307]

Within a year of California's *Pruneyard* decision, New Jersey's initial foray into re-direction of constitutional rights from a shield against government power into a force for imposing public duties upon private actors

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305. Levinson, *supra* note 296, at 139.

306. *See* N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 769 (N.J. 1994) (acknowledging that "only California has held that its free speech clause protects citizens from private action as well as state action"). *But see* Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 29 P.3d 797, 803 (Cal. 2001) (plurality opinion) (holding that California's free speech clause protects only against state action).

307. *See* Eule & Varat, *supra* note 10, at 1570 ("*PruneYard*'s most zealous follower is the New Jersey Supreme Court."). For a defense of New Jersey's approach, see Jennifer A. Klear, *Comparison of the Federal Courts' and the New Jersey Supreme Court's Treatments of Free Speech on Private Property*: *Where Won't We Have the Freedom to Speak Next?*, 33 RUTGERS L.J. 589 (2002).

came in the context of a private university. In *State v. Schmid*,[308] decided in 1980, the New Jersey Supreme Court held that a political activist was entitled to enter onto the campus of Princeton University and distribute political literature, despite the University's decision not to permit outsiders to enter campus unless invited and sponsored by a university or student group.[309] The court relied upon the New Jersey Constitution's Liberty of Speech Clause, which is identical in wording and genesis to those of most other states,[310] in holding that, beyond constraining abusive exercise of government power, such rights applied as well "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."[311] Arrogating to itself the determination that "a public presence" on campus was "entirely consonant" with the University's educational mission (and thus dismissing the University's own and contrary conclusion about the appropriateness of uninvited solicitors gaining access to its grounds), the court adjudged the University guilty as having violated the activist's state constitutional rights of expression.[312] But then, despite the revolutionary nature of the *Schmid* decision, it appeared to fade away, having no impact on constitutional jurisprudence in New Jersey or elsewhere for more than a decade afterward.[313]

Fifteen years later, in 1994, after most state courts facing the issue had rejected California's *Pruneyard* departure,[314] New Jersey reinvigorated the transformation of constitutional rights into private obligations. In *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*,[315] the New Jersey Supreme Court imposed state constitutional obligations to respect private expression upon privately-owned shopping centers, requiring that large regional shopping centers permit the distribution of leaflets on social

308. 423 A.2d 615 (N.J. 1980).

309. *Id.* at 631-33.

310. The New Jersey liberty of speech provision was derived from a similar New York provision. *Id.* at 626-27. On the origin of this standard two-part clause, see *supra* notes 104-105 and accompanying text.

311. *Schmid*, 423 A.2d at 628.

312. *Id.* at 631-33.

313. *See* Harvey, *supra* note 94, at 937 (noting, as of 1989, that while *Schmid* remained the law in New Jersey, "its ambiguity of theory and consequent indeterminate reach seemingly have precluded a significant influence on later decisions in New Jersey").

314. On the rulings of the various states with respect to imposition of liberty of speech obligations upon private landowners, see *supra* Part II.

315. 650 A.2d 757 (N.J. 1994).

issues (in that particular case, flyers expressing opposition to American military action after the invasion of Kuwait by Iraq), subject only to reasonable time, place, and manner limitations. Based upon the size of a regional or community shopping center—such that the court believed this private property "closely resembled public property"—as well as the owner's general invitation to the public to enter upon the property, the court found "the existence of a constitutional obligation to permit the leafletting" and ruled that the denial of such permission by the shopping center was "unreasonably restrictive and oppressive of free speech."[316]

Ultimately, then, the New Jersey Supreme Court's analysis resolved into an argument based upon *size*, either of the property or of the numbers of people who are attracted to that site.[317] As an argument based upon size, it has no logical stopping place other than one also based upon size. As the dissenting opinion said, quoting the Connecticut Supreme Court, it is impossible "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.'"[318] To be sure, the New Jersey majority insisted that "[n]o highway strip mall, no football stadium, no theater, no single huge suburban store, no stand-alone use, and no small to medium shopping center" would satisfy its standards so as "to warrant the constitutional extension of free speech to those premises."[319] Given the court majority's conspicuous omission of convention halls, large office buildings,[320] apartment complexes, and factories from its ad hoc

316. *Id.* at 760-62.

317. *See Id.* at 767 ("[M]alls are where the people can be found today.").

318. *Id.* at 795 (Garibaldi, J., dissenting) (quoting Cologne v. Westfarms Assocs., 469 A.2d 1201, 1209 (Conn. 1984)).

319. *Id.* at 781 (majority opinion).

320. In two cases that preceded the *New Jersey Coalition* opinion by about a decade, lower New Jersey courts held that the particular multibusiness office buildings at issue in those cases were not sufficiently dedicated to public use and had not extended a sufficiently open invitation to the public so as to assume constitutional obligations. *See* Brown v. Davis, 495 A.2d 900, 903 (N.J. Super. Ct. Ch. Div. 1984), *aff'd sub nom.* State v. Brown, 513 A.2d 974, 976-77 (N.J. Super. Ct. App. Div. 1986); Bellemead Dev. Corp. v. Schneider, 472 A.2d 170, 174-77 (N.J. Super. Ct. Ch. Div. 1983), *aff'd*, 483 A.2d 830, 831-33 (N.J. Super. Ct. App. Div. 1984). Whether these two decisions rejecting constitutional duties for private office complexes will stand under the reinvigorated and expansive *New Jersey Coalition* rule remains to be seen. Moreover, whether other large office buildings might be held on a case-by-case basis to have permitted sufficient public access to have assumed constitutional duties under New Jersey's approach also remains uncertain. *See* Klear, *supra* note 307, at 611-12

dispensation of other private facilities from constitutional duties, however, the court's words offered only limited comfort. Moreover, private colleges, hospitals and nursing homes, separate residential communities, and many houses of worship are also large property owners that generally open their property to the public and not always for a single and discrete purpose. The New Jersey court would exclude from constitutional obligation some of the private places that invite the public to visit—such as individual merchants, restaurants, and at least smaller churches or synagogues—as being different from a shopping center in size and perhaps purpose, although if one broadly invites the public there remains the possibility that such generosity will be seized upon by the New Jersey courts as sufficiently open-ended and "all-embracing" in nature to trigger constitutional duties.[321] In the end, the New Jersey innovation could mean that any private property owner of any substantial size that invites the public for general commercial or other purposes must accept as well those who choose to abuse that invitation as an excuse to turn another's property into a political platform.

Lest this "parade of horribles" seem exaggerated or hyperbolic, the New Jersey example continues to prove the point. In the zealous crusade to expand free expression, the transportation of governmental duties into the private context in New Jersey hardly has stopped inside the entrance to a shopping mall. As noted above, even before the *New Jersey Coalition* shopping center case, the New Jersey Supreme Court in *State v. Schmid*[322] had deprived private colleges and universities of the right to reserve their property to the educational mission of their faculty and students. The court held instead that institutions of higher education, private and public—or at least those colleges and universities that in a court's judgment have opened themselves up to the public[323]—must allow outside protestors and political solicitors access to their campuses.[324] Nor has the *Schmid* approach been limited to large spaces like a college campus. In an earlier decision, a New

(arguing that New Jersey should impose free speech duties in office complexes by analogy to shopping centers).

321. *See N.J. Coal.*, 650 A.2d at 761 ("Although the ultimate purpose of these shopping centers is commercial, their normal use is all-embracing, almost without limit . . . .").

322. 423 A.2d 615 (N.J. 1980).

323. *See* State v. Guice, 621 A.2d 553, 555-56 (N.J. Super. Ct. Law Div. 1993) (holding that an institute of technology did not encourage open access and only invited the public for certain events and thus was not required to recognize a constitutional right of free speech).

324. *Schmid*, 423 A.2d at 633.

Jersey court applied the same theory to require a private retirement village to allow political solicitors past the gates.[325]

In *Guttenberg Taxpayers and Rentpayers Ass'n v. Galaxy Towers Condominium Ass'n*,[326] New Jersey trial and intermediate appellate courts also forced open the doors of a condominium building to outside political solicitors wishing both to campaign in the lobby and go door-to-door through the floors of building, over the objection of the condominium association representing the owners. This remarkable intrusion into the corridors of a private residential building was justified in substantial part by the court's reasoning that the condominium association, by endorsing a candidate and circulating flyers to all residents, had made a "significant dedication of this property from private to political and thus public use."[327] By this judicial sleight of hand in *Guttenberg*—transforming political activity by a private landowner on its own property into "public use" that invites public duties—private landowners in New Jersey now exercise their rights of political expression at some considerable risk that they thereby will be held obliged to open their doors to counter-expressions by those of opposing political views.

Nor does the latest foray by the highest court in New Jersey into the state constitutional duties of private actors appear to undermine the *Guttenberg* judicial authorization of trespass into a private residential complex in the name of free speech. In *Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*,[328] the New Jersey Supreme Court refused to set aside the rules and regulations of a homeowners' association that restricted the posting of signs in the community, regulated the use of a community room, and prevented a group from expressing its dissident views in the association's newsletter.[329] But even as the court rejected a state constitutional challenge to these private rules, the court reiterated that state constitutional rights to free speech and assembly did extend to the residents of this private residential community.[330] Rather than turning aside the claims of constitutional obligations on the simple basis that they were misdirected toward a private entity, the New Jersey Supreme Court held in *Twin Rivers* that the private association's rules passed muster after a constitutional scrutiny involving "the general balancing of expressional rights and private

325. State v. Kolcz, 276 A.2d 595, 599-600 (N.J. Super. Ct. Law Div. 1971).

326. 688 A.2d 156 (N.J. Super. Ct. Ch. Div. 1996), *aff'd*, 688 A.2d 108 (N.J. Super. Ct. App. Div. 1996).

327. *Guttenberg*, 688 A.2d at 158.

328. 929 A.2d 1060 (N.J. 2007).

329. *Id.* at 1063.

330. *Id.*

property interests."[331] Under that balancing test, given that the primary use of the association's property was for private purposes, that any invitation to the public to use the property was limited, and that the homeowners had contractually agreed to abide by the association's rules and regulations, the court found that "the minor restrictions on plaintiffs' expressional activities are not unreasonable or oppressive."[332]

Lest there be any doubt about the New Jersey Supreme Court's continued insistence on constitutional supervision of private actors, the *Twin Rivers* court emphasized that its ruling "does not suggest . . . that residents of a homeowners' association may never successfully seek constitutional redress against a governing association that unreasonably infringes their free speech rights."[333] The court never questions (or even mentions) the prior *Guttenberg* ruling in the lower New Jersey courts. Indeed, the analysis in *Twin Rivers*, focusing as it does on the limited nature of the restrictions and the contractual waiver of free speech rights by association members, raises the most peculiar possibility that complete outsiders who are locked out altogether may have a stronger expressive claim to invade a private residential building or community (as in *Guttenberg*) than would those people who are actually members of the community (as in *Twin Rivers*).

Moreover, in New Jersey, once there has been a judicial declaration that a private landowner has assumed constitutional duties, that owner then becomes perpetually subject to judicial second-guessing of the owner's personal or business management of the property. In *New Jersey Coalition*, the New Jersey Supreme Court stated that the shopping "centers' power to impose regulations concerning the time, place, and manner of exercising the right of free speech is extremely broad."[334] However, any suggestion of meaningful deference to the private property owners in establishing regulations for use of their own properties was taken away in the next breath of the *New Jersey Coalition* opinion, when the court offered a list of what

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331. *Id.* at 1072 ("We conclude that the three-pronged test in *Schmid* and the general balancing of expressional rights and private property interests in *Coalition* are the appropriate standards to decide this case.").

332. *Id.* at 1074.

333. *Id.* By contrast, as discussed below, *see infra* Part V, the California Supreme Court has reconsidered the underlying rationale of *Pruneyard* and, while declining to overturn it as applied to shopping centers, specifically rejected a constitutional right of access by a tenant's association to a large apartment building to distribute newsletters as not involving the required state action that implicates constitutional duties, thus at least sheering off the slippery slope down which New Jersey is still sliding. *See generally* Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 29 P.3d 797 (Cal. 2001).

334. *N.J. Coal.*, 650 A.2d at 783.

measures could and could not be adopted by the owners, for example, indicating that limiting access on certain days may be unreasonable under certain circumstances, that leafleting to be effective may demand access to the inside and enclosed area of the mall, that appropriately sized signs should be allowed, etc.[335] Confirming that deference to the property owner is considerably constrained in New Jersey, the court urged the owner to negotiate about the property management rules with the people who seek access to the shopping center, with the not-so-veiled threat that attempts by property owners to accommodate demands by political activists for entry, "if unsuccessful, [will] then [be] resolved by courts and counsel."[336]

The *New Jersey Coalition* court's warning that the courts have the final word on management of shopping center properties in the new age of constitutionalization of private property proved to be no empty threat. In a subsequent case, the New Jersey Supreme Court rejected the deferential measure of "reasonable business judgment" for evaluating the mall's regulation of expressive activities in the shopping center and further overturned both the owner's limitation of access to a few days a year and his requirement that the groups seeking access provide liability insurance and sign a "hold harmless" agreement.[337] In this way, not only have the owners of large commercial properties in New Jersey lost the dignity of being able to manage their own properties, but the courts have been reduced to the level of commercial property supervisors, a role to which they are not accustomed and a business task that they are not competent to perform.

In sum, once the state action line for constitutional adjudication had been crossed by the New Jersey courts, the persistent question in each new case "is what forum will next be labeled quasi-public" with the owner thus being subjected to judicial supervision of property management?[338] Given the growing intrusiveness of the supposed constitutional right created by the New Jersey courts and its ever-more-alarming invasion into the private lives of more people and property owners, the overwhelming majority of states have been confirmed in their wisdom in refusing to enter into the Brave New World being formed in New Jersey. As the New Jersey counter-example

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335. *Id.*

336. *Id.*

337. Green Party of N.J. v. Hartz Mountain Indus., Inc., 752 A.2d 315, 325-32 (N.J. 2000).

338. Maurice F. Kirchofer III, Note, *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., 27 SETON HALL L. REV. 289, 318 (1996).

demonstrates, the traditional division between the government and the private sector for purposes of applying constitutional limitations remains a bulwark of freedom, a guarantee of private property rights, and a vital protection of privacy.

V. CONCLUSION

In its 1979 decision in *Robins v. Pruneyard Shopping Center*,[339] the California Supreme Court transformed a private shopping center into a public forum, without careful attention to text and history,[340] without the consent of the shopping center owners who pay property taxes and who have the responsibility to maintain the property and provide security for visitors,[341] without the knowledge or consent of the merchants who lease business space in the mall, without purchase of the property by the city or state, and without any amendment to the federal or state constitutions that altered the fundamental division between the public realm and the private sector.[342] The *Pruneyard* court's expropriation of private land for use as a public forum to express political or social opinions over the objection of the property owners has been rejected by nearly every other state court to address the issue,[343] with one major exception, that of New Jersey, in which the purported right to trespass on to private property for political reasons has been zealously expanded well beyond large shopping centers to include private universities and to reach even into the corridors of private residential buildings.[344]

In 2001, in *Golden Gateway Center v. Golden Gateway Tenants Ass'n*,[345] a plurality of the California Supreme Court retreated from a broad application of the *Pruneyard* precedent and effectively confined it to the shopping center context.[346] In rejecting the imposition of governmental duties upon the owner of an apartment complex, the plurality opinion acknowledged that the *Pruneyard* decision has been severely criticized by commentators, has been rejected by most other states, and has proven

339. 592 P.2d 341 (Cal. 1979).
340. *See supra* Part III.
341. *See supra* Part IV.A.
342. *See supra* Part III.B.
343. *See supra* notes 37-38 and accompanying text.
344. *See supra* Part IV.E.
345. 29 P.3d 797 (Cal. 2001) (plurality opinion).
346. *See Id.* at 802-03.

unmanageable in its scope.[347] While declining to overrule *Pruneyard* for reasons of stare decisis,[348] the *Golden Gateway Center* plurality nonetheless undermined the argument for transportation of constitutional rights to the private sector by holding that California's constitutional Liberty of Speech Clause indeed does protect against only state action.[349] Moreover, in sharp institutional and methodological contrast with *Pruneyard*, the *Golden Gateway Center* court carefully examined the text, history, and structure of the California Constitution, finding no basis for imposing constitutional obligations upon private citizens.[350] While the obsolete *Pruneyard* decision thus has been deprived of much of its precedential[351] and all of whatever analytical support it ever had,[352] the shattered ruin nonetheless remains a jurisprudential attractive nuisance for deformed constitutional interpretation.

A quarter of a century ago, California's then-Attorney General George Deukmejian and Deputy Attorney General Clifford Thompson characterized the California Supreme Court's approach to state constitutional interpretation

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347. *Id.* at 801-03.

348. Shortly before publication of this Article, the California Supreme Court by a one vote margin declined the opportunity to overrule *Pruneyard*. In *Fashion Valley Mall v. Nat'l Labor Relations Bd.*, 2007 WL 4472241 (Cal. Dec. 24, 2007), which authorized union picketers to enter a shopping center to urge customers to boycott a store, the court majority rehearsed the *Pruneyard* line of cases, without adding to or reevaluating the abbreviated *Pruneyard* reasoning, and restated that "[a] shopping mall is a public forum in which persons may reasonably exercise their right to free speech guaranteed by article I, section 2 of the California Constitution." *Id*. at *3-12. Three justices dissented, arguing that "*Pruneyard* was wrong when decided," that "jurisdictions throughout the nation have overwhelmingly rejected it," and that "[t]he time has come to recognize that we are virtually alone, and that *Pruneyard* was ill-conceived." *Id*. at *12, *17 (Chin, J., dissenting). The dissent observed that "the *Pruneyard* court made no effort to find anything in the text of article I, section 2, subdivision (a) of the California Constitution, its historical sources, or the process that led to its adoption, that suggests any intent to extend its terms to private property." *Id*. at *18.

349. *Golden Gateway Center*, 29 P.3d. at 802-03.

350. *Id.* at 803-06.

351. *But see id.* at 806-07, 809-10 (saying that the "refusal to abandon the state action requirement is fully consonant" with *Pruneyard*, because *Pruneyard* relied upon earlier and since overruled decisions that had stretched the state action concept to cover private shopping centers as functionally similar to public districts).

352. *Cf.* Stranahan v. Fred Meyer, Inc., 11 P.3d 228, 237-44 (Or. 2000) (similarly finding that a prior decision imposing upon private property owners a duty to facilitate speech had failed to "adhere to [the] usual methodology of examining the text, history, and case law surrounding an original [state] constitutional provision," none of which suggested a right to solicit signatures on private property over the owner's objection, and determining that the earlier decision must be overruled).

as "all sail and no anchor."[353] Whether or not that pejorative label was appropriately attached to the court's general jurisprudential method during that period, it certainly was descriptive of the *Pruneyard* decision. In that case, the court cut itself loose from the anchor of constitutional text, context, history, and prudence and sailed out into an open and uncharted sea of constitutional obligations transported from the public realm to the private sector. It is long past time to bring the ship back into the harbor, navigating once again by the fixed stars of text, structure, history, and precedent. In the meantime, other states should continue to heed the naval travel advisory, carefully avoid the judicial odyssey of California (and even more so of New Jersey), and instead chart a different constitutional course.

353. George Deukmejian & Clifford K. Thompson, Jr., *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 1010 (1979).