

Pruning *Pruneyard*: Limiting Free Speech Rights Under State Constitutions on the Property of Private Medical Clinics Providing Abortion Services

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INTRODUCTION

In communities in California and throughout the United States a woman seeking medical treatment at a clinic that provides abortion services will park her car in the clinic's parking lot and walk to the door of her physician's office. En route she will be approached by uninvited third parties who are on the clinic's grounds solely for the purpose of dissuading women from having abortions. These intruders may identify themselves as antiabortion protestors or as sidewalk counselors. They may inquire as to the patient's purpose for visiting the clinic. If she is there for an abortion, they will use verbal argument, pictures on signs, or written material to try to convince her not to have one. Occasionally, a physical interaction may occur.¹

¹ The initial impetus for writing this Article developed out of the events occurring at one medical facility providing abortion services in Davis, California. While the scenario described in the text reflects accounts of the protests at that facility, the Davis experience is hardly unique. For accounts of the Davis protests, see Dodge, *Abortion Dispute Back to Square One?*, Davis Enterprise, Oct. 25, 1990, at A1, col. 4; Dodge, *DA Agrees to Prosecute Trespassers*, Davis Enterprise, Sept. 19, 1990, at A1, col. 4; Dodge, *Attorney General Revises Opinion on Arrest of Sidewalk Protestors*, Davis Enterprise, Sept. 6, 1990, at A1, col. 4; Dodge, *Protestors Back at Clinic Door*, Davis Enterprise, Aug. 21, 1990, at A1, col. 2; Dodge, *Protestors Move Vigil to Sidewalk*, Davis Enterprise, Aug. 14, 1990, at A1, col. 1; Dodge, *Abortion Rights Activists Vow to Pressure DA*, Davis Enterprise, Aug. 12, 1990, at A1, col. 1; Dodge, *Abortion Protestors Can Be Prosecuted*, Davis Enterprise, Aug. 8, 1990, at A1, col. 1; McIntyre, *Protests, Vandalism at Clinic*, Davis Enterprise, Jan. 23, 1990, at A1, col. 1; see also YOLO COUNTY REPRODUCTIVE RIGHTS TASK FORCE, FACTS,

Patients often experience such expressive activities as emotionally trying.² Clinic operators confirm this reaction and seek to have antiabortion activists removed from the clinic's property under threat of prosecution pursuant to state trespass laws.³ In

DECLARATIONS AND ARGUMENT IN SUPPORT OF THE PRO-CHOICE RESOLUTION (1990) [hereafter REPRODUCTIVE RIGHTS TASK FORCE] (compiling witness statements concerning Davis protests) (copy on file with U.C. Davis Law Review). Witnesses to the events at the Davis clinic alleged that antiabortion protestors engaged in tactics which included saying to patients that "You're killing your child," and that "You just murdered your baby," *id.* Exhibit C, at 1, 2, displaying large photographs of still-born fetuses in a garbage can next to the clinic's door, *id.* at 2, showing photographs of aborted fetuses to patients, *id.* at 2-3, touching patients as they entered the clinic (to "pray for" them), *id.* Exhibit C, at 3, and distributing antiabortion literature, *id.* Exhibit B, at 1.

Similar and also more extreme antiabortion protests have occurred in the San Francisco Bay Area and Los Angeles. See Fimrite, *Rally Becomes a Raucous Abortion Confrontation*, San Francisco Chron., Oct. 8, 1990, at A3, col. 5 (reporting tense confrontations); Hallissy, *Concord Man Jailed in Abortion Clinic Fire*, San Francisco Chron., Oct. 2, 1990, at A4, col. 5 (reporting setting clinic on fire); Sylvester, *Student Acquitted of Battery at Anti-Abortion Protest*, San Francisco Chron., June 15, 1990, at A2, col. 1 (reporting scuffles). Protests in Alameda County led to a request by Elihu Harris, California Assemblyman, for an Opinion by the California Attorney General addressing the constitutionality of antiabortion protests on clinic grounds. The Davis City Council asked Assemblyman Thomas Hannigan to seek a similar Opinion. See Dodge, *Abortion Protestors Can Be Prosecuted*, Davis Enterprise, Aug. 8, 1990, at A1, col. 1; Letter from Davis Mayor Michael Corbett to Assemblyman Thomas Hannigan (Feb. 21, 1990) (copy on file with U.C. Davis Law Review); see also 73 Op. Att'y Gen. 213 (1990) (responding to Harris' request and finding that California trespass laws may be constitutionally applied to protestors).

In addition, numerous cases from other jurisdictions, discussing the alleged rights of antiabortion protestors to engage in expressive activity on clinic grounds, recount in detail the interaction between patients and protestors. See *infra* notes 175, 255-58 and accompanying text.

² Many witnesses to the Davis, California protests recounted the effects of the protests on clinic patients. See REPRODUCTIVE RIGHTS TASK FORCE, *supra* note 1, Exhibit A, at 1 (stating that about 100 patients expressed anger, sadness or dismay at protests, some patients "sobbing"); *id.* Exhibit C, at 1 (noting that patient was so severely shaken that she was unable to drive home); *id.* Exhibit E, at 4 (describing patient as very upset, accompanying friend "infuriated"); *id.* Exhibit H, at 2 (stating patient very upset and agitated).

³ In Davis, California clinic operators and their supporters sought to force the protestors to leave the clinic's grounds by invoking § 602(n) of the Penal Code, providing that a refusal to leave private property after a request by an owner or a peace officer is a misdemeanor, and § 602(j), providing

California the protestors respond that their expressive activities are protected by the free speech provision of article I, section 2 of the California Constitution.⁴ More specifically, they cite the California Supreme Court decision of *Robins v. Pruneyard Shopping Center*⁵ as establishing that free speech rights in California extend to private property opened to the public for business purposes. Thus, the antiabortion protestors argue that they essentially have a constitutional easement for expressive activities that permits them to patrol the walkways of private clinics in an attempt to discourage women from carrying through with their plans to have abortions.

The validity of the protestors' claim, however, is uncertain. It is clear that no such right of expression on private property is recognized by the federal courts in interpreting the first amendment.⁶ Moreover, while *Pruneyard* emphatically extends free

that it is a misdemeanor to enter on lands with the intention of interfering with or obstructing any lawful business being conducted on the property. CAL. PENAL CODE §§ 602(j), 602(n) (West Supp. 1991). See Dodge, *Abortion Rights Activists Vow to Pressure DA*, Davis Enterprise, Aug. 12, 1990, at A1, col. 1.

⁴ CAL. CONST. art I, § 2. The California Constitution provides that "Every person may freely speak, write and publish his or her sentiments on all subjects . . ." *Id.* § 2(a). While there is no record that the Davis, California protestors relied on this provision, the Yolo County District Attorney cited it as his primary authority for refusing to prosecute the protestors. See Dodge, *Henderson Calls AG's Opinion on Protestors 'Bunk'*, Davis Enterprise, Aug. 20, 1990, at A1, col. 5. Protestors in other jurisdictions have used state constitutional provisions similar to California's as support for their argument that they have a constitutional right to protest on private property. See *infra* notes 145-47, 227.

⁵ 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979); see Letter from Yolo County District Attorney David Henderson to Jack Winkler of the Opinion Unit of the Office of the Attorney General (Aug. 14, 1990) (arguing that in *Pruneyard* and *In Re Lane*, 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969), California Supreme Court approved extension of free speech rights to shopping centers and even to "a small isolated business") (copy on file with U.C. Davis Law Review). But see *infra* note 6 and accompanying text (noting rejection of this position by California Attorney General).

Protestors in other jurisdictions regularly refer to the upholding of the California Supreme Court's decision in *Pruneyard* by the United States Supreme Court, 447 U.S. 74 (1980), to support their arguments that state constitutions may protect free speech rights on medical clinic grounds. See *infra* notes 89-110 and accompanying text (describing *Pruneyard*); *infra* note 227 (discussing state free speech decisions).

⁶ See 73 Op. Att'y Gen. 213, 215-16 (1990) (citing numerous state and federal court decisions concluding first amendment does not protect

speech rights under the California Constitution beyond the protection provided by the first amendment,⁷ the scope of that extension has not been explicitly delineated by the California courts.⁸ The California Attorney General has issued an opinion on the question, in response to requests for clarification by local communities, which concluded that abortion protestors may be constitutionally prosecuted for trespass.⁹ That opinion, however, does not have the force of law¹⁰ and at least one county district attorney has initially refused to accept it.¹¹

The purpose of this Article is to determine the appropriate justification for, scope of, and limitations on *Pruneyard* free speech rights on private property. While providing free speech rights to uninvited speakers in public areas such as shopping malls raises limited but important issues regarding the reconciliation of conflicting property and speech rights, that debate has been resolved in California in an appropriate fashion that appears to have stood the test of time.¹² Extending rights of expression in more complex property contexts, such as that of abortion clinics, however,

antiabortion expressive activity on grounds of clinics providing abortion services); see generally *infra* notes 17-51 and accompanying text.

⁷ See *infra* notes 89-92, 104-08 and accompanying text.

⁸ See *infra* text accompanying notes 260-74.

⁹ See 73 Op. Att'y Gen. 213 (1990).

¹⁰ See *People v. Vallerga*, 67 Cal. App. 3d 847, 870, 136 Cal. Rptr. 429, 441 (1977).

¹¹ Specifically, the District Attorney for Yolo County, California initially refused to prosecute the protestors on the grounds that the Attorney General Opinion was inadequate. Dodge, *Henderson Calls AG Opinion on Protestors 'Bunk'*, Davis Enterprise, Aug. 20, 1990, at A1, col. 5; see also Dodge, *Protestors Back at Clinic Door*, Davis Enterprise, Aug. 21, 1990, at A1, col. 2; Dodge, *Abortion Rights Protestors Vow to Pressure DA*, Davis Enterprise, Aug. 12, 1990, at A1, col. 1. The Attorney General modified the reasoning but not the conclusion of the first draft of the Opinion one month after its issuance; thereafter the District Attorney apparently agreed to prosecute the alleged trespassers. The antiabortion protests subsided at that time, however, and no arrests or prosecutions occurred. See Dodge, *Abortion Dispute Back to Square One?*, Davis Enterprise, Oct. 25, 1990, at A1, col. 4 (stating that police were "in a quandary" because DA had failed to issue cease and desist order); Dodge, *Anti-Abortion Protest Furor Fades Away*, Davis Enterprise, Jan. 30, 1991, at A1, col. 1 (noting sole remaining protestor moved off clinic grounds to public street).

¹² Since *Pruneyard* there have been very few cases in California even addressing the issue of free speech rights on private property. See *infra* notes 260-74 and accompanying text. None of the few cases that do exist overrule or substantially modify *Pruneyard*.

presents much more dramatic problems that require a careful re-evaluation of the competing interests at stake.

Part I of this Article examines the history of the *Pruneyard* decision, its roots in first amendment jurisprudence, analogous case law in other jurisdictions, and *Pruneyard's* subsequent interpretation by California courts. While *Pruneyard's* scope in California remains dismally unclear, other jurisdictions struggling with similar questions have made significant contributions to resolving the problem of free speech claims on private property.¹³ Building on that foundation, Part I argues that free speech rights should be allowed on private property if the use to which the property is being put is consistent with open and vigorous expressive activity and if the property owner's invitation to third parties extends to the general public at large.¹⁴ In the abortion clinic context neither of these criteria are satisfied.

Part II discusses federal constitutional prohibitions that limit the extent to which a state may subordinate one person's property, privacy, and autonomy rights to maximize another individual's opportunities for expression. If a court were to interpret its state constitution to reject the limitations imposed by other jurisdictions on free speech rights on private property, a property owner might challenge that determination by arguing that such state protection of third party expressive activity on private property violates the owner's federal rights under the fifth and first amendments.¹⁵ Moreover, in the medical clinic context, owners could also contend this extension of free speech rights, in practice, unconstitutionally burdens the rights of clinic patients to choose to have abortions.¹⁶

The Article concludes that California courts must reject the claim that antiabortion protestors have substantial rights of expression on the grounds of private clinics that provide abortion services. While *Pruneyard* expands the protection of free speech rights to private property, it cannot be applied in the medical clinic context. Those jurisdictions that also recognize free speech rights on private property have unanimously reached this result. Moreover, to conclude otherwise, a California court would risk violating federal constitutional guarantees.

¹³ See *infra* text accompanying notes 128-218.

¹⁴ See *infra* text accompanying notes 228-59.

¹⁵ See *infra* text accompanying notes 300-420.

¹⁶ See *infra* text accompanying notes 421-59.

I. THE EVOLUTION OF PRUNEYARD

A. *The Short Life of Free Speech Rights on Private Property Under the First Amendment*

For all practical purposes, the conceptual constitutional roots of the California Supreme Court's decision in *Pruneyard* are grounded in the 1968 first amendment case of *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*¹⁷ *Logan Valley* held that states could not constitutionally enforce the decisions of shopping center owners to prohibit third parties (in this case non-employee union picketers) from engaging in expressive activity on the shopping center's grounds.¹⁸ Justice Marshall's majority opinion reached this conclusion by analogizing picketing on the walkways of a shopping center with the distribution of handbills on the sidewalk of a company town,¹⁹ an activity protected by the first amendment in *Marsh v. Alabama*²⁰ some twenty-two years earlier.

Although there is some language in *Marsh* and *Logan Valley* suggesting that property and free speech rights vary inversely on private property according to the degree to which the owner has opened up the property for public access,²¹ the clear thrust of both opinions rejects the idea that speech rights incrementally accrue to the public in this manner. Under the Court's reasoning, the first amendment applies to the regulations of the company

¹⁷ 391 U.S. 308 (1968).

¹⁸ *Id.* at 319-20. The Court stated:

All we decide here is that because the shopping center serves as the community business block "and is freely accessible and open to the people in the area and those passing through," the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their first amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.

Id. at 319 (quoting *Marsh v. Alabama*, 326 U.S. 501, 508 (1946)).

¹⁹ *Id.* at 316-19 (noting "[t]he similarities between the business block in *Marsh* and the shopping center in the present case are striking" and should be treated similarly for first amendment purposes).

²⁰ 326 U.S. 501 (1946).

²¹ The *Logan Valley* Court stated that, "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Logan Valley*, 391 U.S. at 325 (quoting *Marsh*, 326 U.S. at 506).

town in *Marsh* because the sidewalks in its shopping district are virtually indistinguishable in their use from the sidewalks of more traditional communities which are organized as governmental subdivisions of the state.²² Similarly, free speech rights are protected on the shopping center's grounds in *Logan Valley* because shopping malls are "the functional equivalent of the business district" in *Marsh*.²³ Thus, the historic role of access to the streets, sidewalks, and parks of communities in facilitating first amendment rights justified the extension of constitutional protection to privately owned property that served the same basic functions as the traditional public forum.²⁴

Wary that its decision could be too broadly construed, the majority opinion in *Logan Valley* carefully explained the limitations implicit in its analysis. For free speech rights to apply, the general public must be given unrestricted access to the property in question.²⁵ Moreover, expressive activities must be exercised "on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put."²⁶ As an example, the Court explicitly approved its decision in *Cox v. Louisiana*,²⁷ which recognized that even on public sidewalks "persons could be constitutionally prohibited from picketing 'in or near' a court 'with the intent of interfering with, obstructing, or impeding the administration of justice.'"²⁸ Finally, by distinguishing the shopping center context from others in which a different result would apply, the Court emphasized that the varying importance of property rights in different circumstances provided a basis for limiting freedom of expression. The Court noted that "unlike a situation involving a person's home, no meaningful claim to protection of a right of privacy can be advanced" in the shopping center context.²⁹

Despite these restrictive admonitions, the dissenting Justices in *Logan Valley* expressed alarm at the dangerous track along which the Court seemed to be proceeding. They argued that the criti-

²² *Marsh*, 326 U.S. at 507-09.

²³ *Logan Valley*, 391 U.S. at 318.

²⁴ *Marsh*, 326 U.S. at 507-09.

²⁵ *Logan Valley*, 391 U.S. at 319-20; see also *supra* note 18 (quoting *Logan Valley*).

²⁶ *Logan Valley*, 391 U.S. at 319-20.

²⁷ 379 U.S. 559 (1965).

²⁸ *Logan Valley*, 391 U.S. at 320 (citing *Cox*, 379 U.S. 559).

²⁹ *Id.* at 324.

cal, limiting element in *Marsh* which justified subordinating the interests of the property owner to the expressive rights of the public was that the property in question had *all* of the attributes of a municipal town.³⁰ Accordingly, the sidewalks in *Marsh* “were as available and as dedicated to public purposes as the streets of an ordinary town.”³¹ The parking lots and walkways of a shopping center, however, involve a more limited invitation for the public to use those premises for the purpose of patronizing the stores therein and for no other purpose.³² If this invitation to commercial patrons was conditionally broadened to permit expressive activity on the exterior grounds of a shopping center, it could also be argued that organized expressive activity must be protected on the grounds of a single store or even within a store itself.³³ To the dissenters, no principled basis for limiting the scope of this new and very slippery interpretation of freedom of speech could be clearly inferred from *Logan Valley’s* reasoning.³⁴

Four years later the Court began to retreat from *Logan Valley*, although it travelled divergent paths before expressly overruling that precedent. The more principled and coherent approach was reflected in *Central Hardware Co. v. NLRB*,³⁵ a case involving union solicitation as part of an organizing campaign at two large hardware stores that were housed separately from other retail businesses.³⁶ The Court succinctly rejected the contention that the free speech rights protected in *Logan Valley* were applicable to the facts of this case. Unlike *Logan Valley*, where the large shopping center had been found to serve the function of the normal municipal “business block,” the only similarity between these single stores and municipal facilities was their common quality of being open to the public for business.³⁷ To hold that this single characteristic transformed private property into a public forum would “cut *Logan Valley* entirely away from its roots in *Marsh*”³⁸ and would “constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth

³⁰ *Id.* at 331 (Black, J., dissenting), 337 (White, J., dissenting).

³¹ *Id.* at 332 (Black, J., dissenting), 337 (White, J., dissenting).

³² *Id.* at 338 (White, J., dissenting).

³³ *Id.* at 329 (Black, J., dissenting), 339 (White, J., dissenting).

³⁴ *Id.* at 329 (Black, J., dissenting), 339-40 (White, J., dissenting).

³⁵ 407 U.S. 539 (1972).

³⁶ *Id.* at 540.

³⁷ *Id.* at 547.

³⁸ *Id.*

Amendments.”³⁹

Lloyd Corp. v. Tanner,⁴⁰ decided the same term as *Central Hardware*, attempted to resolve the question of whether the free speech rights protected under *Logan Valley* included expressive activity that was unrelated to a shopping center's operation. This issue, explicitly left open in *Logan Valley*,⁴¹ was squarely raised by protestors to the Vietnam war who sought to distribute leaflets at appellant's shopping center.⁴² The Court ruled that *Logan Valley* did not protect such expression. Justice Powell insisted that *Logan Valley* was not grounded on the premise that shopping centers were the functional equivalent of a downtown business district,⁴³ ignoring the clear meaning of the prior precedent.⁴⁴ Instead, Powell argued, constitutionally mandated access to shopping centers for expressive purposes was predicated upon the lack of any alternative means of communication available to the speaker to reach the specific audience she was attempting to address.⁴⁵ That justification, in turn, would only be applicable to a shopping center in those cases where the speaker's message was directly related to the use to which the shopping center property was being put.⁴⁶ In all other situations, ample alternative avenues of communication were likely to be available to a speaker trying to communicate with the general public.⁴⁷

The opinion in *Lloyd* demonstrated the Court's uneasiness with the *Logan Valley* precedent, but it did little to clarify the scope of free speech rights on private property. The problem was emphatically resolved, however, in *Hudgens v. NLRB*.⁴⁸ The Court over-

³⁹ *Id.*

⁴⁰ 407 U.S. 551 (1972).

⁴¹ The *Logan Valley* Court stated that “[w]e are . . . not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put.” *Logan Valley*, 391 U.S. at 320 n.9.

⁴² *Lloyd*, 407 U.S. at 552-56.

⁴³ *Id.* at 563 (citing *Logan Valley*, 391 U.S. at 320 n.9).

⁴⁴ See *supra* notes 19-23 and accompanying text.

⁴⁵ *Lloyd*, 407 U.S. at 563.

⁴⁶ *Id.* at 564.

⁴⁷ Because the message being distributed was unrelated to the shopping center's operation, “[r]espondents could have distributed these handbills on any public street, on any public sidewalk, in any public park, or in any public building in the city of Portland.” *Id.*

⁴⁸ 424 U.S. 507 (1976).

ruled *Logan Valley* retroactively by concluding that *Lloyd* had actually accomplished that result despite its apparent claim to the contrary.⁴⁹ The arguments of the dissent in *Logan Valley* were now recognized as the correct constitutional analysis after all.⁵⁰ Except in the limited circumstances of a company town, free speech rights did not extend to private property. Indeed, unless the property owner was serving the public function of managing a municipality, the application of trespass laws to protestors on the grounds of shopping centers did not constitute state action prohibited by the first amendment.⁵¹ Only this limited exception to a formal state action requirement could constitutionalize a dispute between private parties asserting competing speech and property rights.

B. Free Speech Rights on Private Property — The California Precedent

1. Under the First Amendment Umbrella

The California Supreme Court had determined that free speech rights existed on private property prior to the *Logan Valley* decision. In *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers Union Local No. 31*,⁵² a 1964 case, the court upheld the right of non-employee union members to picket a non-union bakery located in a shopping center.⁵³ The *Schwartz-Torrance* decision focused on the balancing of two critical factors: the importance of labor picketing as both a state interest and a constitutionally protected activity on the one hand,⁵⁴ and, on the other hand, the very limited impairment of property rights which resulted from permitting picketers access to a shopping center where thousands of shoppers congregated weekly.⁵⁵

Three years later in *In re Hoffman*,⁵⁶ the California Supreme

⁴⁹ *Id.* at 518.

⁵⁰ *Id.* at 518-19 & 518 nn.5-7. In *Lloyd Powell* had also noted the *Logan Valley* dissent's arguments with approval. *Lloyd*, 407 U.S. at 562-63.

⁵¹ *Hudgens*, 424 U.S. at 518-20 (citing *Lloyd*, 407 U.S. at 567-69, as holding that unless private property owner "was performing the full spectrum of municipal powers and stood in the shoes of the state," first amendment did not apply to owner's decision to exclude speakers from his grounds).

⁵² 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964).

⁵³ *Id.* at 768-72, 394 P.2d at 922-24, 40 Cal. Rptr. at 234-36.

⁵⁴ *Id.* at 768-71, 394 P.2d at 922-24, 40 Cal. Rptr. at 234-36.

⁵⁵ *Id.* at 771, 394 P.2d at 924, 40 Cal. Rptr. at 236.

⁵⁶ 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).

Court reversed the trespass convictions of antiwar protestors arrested for distributing leaflets and discussing the war in Union Station, a private railroad terminal in Los Angeles.⁵⁷ In an opinion grounded entirely on federal precedent, including *Marsh v. Alabama*,⁵⁸ the court suggested that the protection provided for expressive activities on public sidewalks by the first amendment applied with equal force to privately-owned property in at least one significant situation. There had to be some reason other than the mere assertion of title by the property owner to justify the application of state trespass laws against persons communicating with the public in areas where the public was generally invited to congregate.⁵⁹

The search for countervailing interests beyond the assertion of title, however, proved unavailing in *Hoffman*. The protestors' presence, the court determined, did not "violate any legitimate interest of the railroads, their patrons, or employees. [The protestors] invaded no right of privacy. In this respect, a railway station is like a public street or park. . . . The railroads seek neither privacy within nor exclusive possession of their station."⁶⁰ The court also found that the leafletters had not interfered with the operation of the terminal, although the court was less than clear in suggesting what would constitute objectionable behavior. The court noted that the protesters did not harass or pester people that did not want to hear what they had to say.⁶¹ Moreover, the court explained that "[t]he fact that some people did not like petitioners' ideas does not mean that the way they communicated those ideas was disorderly."⁶² Still, the constitutional enforcement of trespass laws did not require the actual obstruction of business activities because "any appreciable interference with the orderly carrying on of business may suffice."⁶³

Thus, by the time the United States Supreme Court decided *Logan Valley*, the California Supreme Court had already concluded that the first amendment protected the right of the public to engage in expressive activities on the walkways of shopping cen-

⁵⁷ *Id.* at 846-51, 854, 434 P.2d at 353-56, 358, 64 Cal. Rptr. at 97-100, 102.

⁵⁸ *Id.* at 850, 434 P.2d at 356, 64 Cal. Rptr. at 100.

⁵⁹ *Id.* at 849-50, 434 P.2d at 355-56, 64 Cal. Rptr. at 99-100.

⁶⁰ *Id.* at 851, 434 P.2d at 356, 64 Cal. Rptr. at 100 (citation omitted).

⁶¹ *Id.* at 851, 434 P.2d at 357, 64 Cal. Rptr. at 101.

⁶² *Id.* at 851 n.5, 434 P.2d at 357 n.5, 64 Cal. Rptr. at 101 n.5.

⁶³ *Id.* at 852 n.6, 434 P.2d at 357 n.6, 64 Cal. Rptr. at 101 n.6.

ters. *Logan Valley* merely affirmed its prescience. Accordingly, it is not surprising to discover that the first post-*Logan Valley* case decided by the California Supreme Court substantially extended federal precedent. *In re Lane*⁶⁴ upheld the right of a non-employee union official to stand in front of a single supermarket and urge potential customers not to patronize that establishment.⁶⁵ The court found that the distinction between permitting expressive activities in a shopping center and permitting expressive activities on the grounds of a single store was not dispositive for two reasons. First, the court revised its evaluation of the privacy concerns it had considered in previous cases. In *Hoffman*, the court had viewed the privacy interests of the property owner and its invitees as a relevant limit on the expressive rights of the public, but determined that in the loud, open, and tumultuous environment of a railroad terminal, no real privacy interest could be found to exist.⁶⁶ The *Lane* analysis, on the other hand, examined the private nature of the owner's property in formal, as opposed to functional, terms. The sidewalk in front of the grocery store was "not private" because it was open to members of the public who were invited to use it. Hence, it served as a public forum in which first amendment rights must be enforced.⁶⁷

The second reason for ignoring the distinction between single stores and shopping centers was that the court viewed the first amendment rights of the public as personal shields that traveled along with the individual. By opening her store to the public, the owner must recognize that people carried their first amendment rights with them when they accepted her invitation. Indeed, the mere "fact of private ownership of the sidewalk" at the entrance of the supermarket could not "strip the members of the public of their rights to exercise First Amendment privileges [in that location]."⁶⁸

The California Supreme Court predated its federal counterpart

⁶⁴ 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969).

⁶⁵ The union was involved in a labor dispute with a publisher whose newspaper contained advertisements for the store. The union official appeared at the "super-market-type" grocery store for the purpose of distributing handbills urging customers not to patronize the supermarket because it advertised with an anti-union paper. *Id.* at 873, 457 P.2d at 561-62, 79 Cal. Rptr. at 729-30.

⁶⁶ *Hoffman*, 67 Cal. 2d at 851, 434 P.2d at 356, 64 Cal. Rptr. at 100.

⁶⁷ *Lane*, 71 Cal. 2d at 878, 457 P.2d at 565, 79 Cal. Rptr. at 733.

⁶⁸ *Id.*

once again in *Diamond v. Bland*⁶⁹ (*Diamond I*), a case that decided the same issue the United States Supreme Court would later resolve in *Lloyd Corp. v. Tanner*.⁷⁰ The issue was whether the first amendment protected the right of persons to use a shopping center's grounds for expressive purposes that are unrelated to any business operating in the center.⁷¹ The California court found that it did, even though the first amendment rights of speakers in this circumstance were "less compelling" than those the court had recognized in prior cases.⁷² When a speaker's expression is directly related to the activities of a business operating in a shopping center, access to shopping center property may be especially useful to the speaker in reaching the appropriate audience.⁷³ No alternative location would be as effective a site for communicating with customers or employees. This site specific advantage obviously does not apply, however, when speech is unrelated to the shopping center's activities.⁷⁴ Because of the role played by shopping centers in the commercial life of contemporary society, however, access to these locations is still important for people who are trying to communicate with the general public. Such access might not be critical, but it is still valuable.⁷⁵

Despite the reduced weight assigned to first amendment interests under this analysis, the supreme court refused to tip the balance in favor of property rights. The first amendment interests of the speaker continued to be significant; the countervailing inter-

⁶⁹ 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970).

⁷⁰ See *supra* notes 40-47 and accompanying text (discussing *Lloyd*).

⁷¹ Plaintiffs wanted to set up a table in the shopping mall to distribute leaflets and collect signatures for a local antipollution initiative campaign. *Id.* at 656, 477 P.2d at 734, 91 Cal. Rptr. at 502.

⁷² *Id.* at 663, 477 P.2d at 739, 91 Cal. Rptr. at 507 (referring back to *Schwartz-Torrance, Logan, and Lane*)

⁷³ The court stated:

When the activity to be protected is the right to picket an employer, the location of the employer's business is often the only effective locus; alternative locations do not call attention to the problem which is the subject of the picketing and may fail to apply the desired economic pressure.

Id. at 662, 477 P.2d at 738, 91 Cal. Rptr. at 506.

⁷⁴ The advantage does not apply because "[p]laintiffs in the instant case cannot claim that effective alternative sites for their First Amendment activities are unavailable. . . . [T]hey are free [to circulate their initiative petitions] on the public streets and sidewalks in the surrounding community." *Id.*

⁷⁵ *Id.*

ests of the property owner, as in all the other cases, remained largely illusory. As in *Hoffman*, the court insisted that the property owner was asserting nothing more than the discretionary authority inherent in the "naked title" of ownership.⁷⁶ Any legitimate interest the owner might have in the particular use of his property could be protected by imposing reasonable time, place, and manner regulations on the expressive activities at issue.⁷⁷ While the court conceded that a shopping center might not be "as noisy, crowded, or active as the railway station in *Hoffman*," this difference was "one only of degree."⁷⁸ Shopping centers are certainly sufficiently loud and open environments that they can accommodate some expressive activity without disrupting their commercial functions.

Four years later in *Diamond v. Bland II*⁷⁹ (*Diamond II*), the supreme court overruled the expansive free speech analysis of *Diamond I*.⁸⁰ *Lloyd* had been decided in the interim.⁸¹ The California court determined that this precedent required that, as a matter of federal constitutional law, the private property interests of shopping center owners must outweigh the first amendment rights of members of the public when the expression at issue is unrelated to the shopping center's operations.⁸² Justice Mosk argued in dissent that the holding of *Diamond I* should be affirmed under the California Constitution's free speech provisions, but his arguments failed to persuade the majority.⁸³ It is important to

⁷⁶ *Id.* at 662-63, 477 P.2d at 739, 91 Cal. Rptr. at 507 (citing *In re Lane*, 71 Cal. 2d 872, 878, 457 P.2d 561, 565, 79 Cal. Rptr. 729, 733 (1969) and *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 324 (1968)). See *supra* text accompanying notes 56-63 (discussing *Hoffman*).

⁷⁷ *Id.* at 665, 477 P.2d at 741, 91 Cal. Rptr. at 509.

⁷⁸ *Id.* at 664, 477 P.2d at 740, 91 Cal. Rptr. at 508.

⁷⁹ 11 Cal. 3d 331, 521 P.2d 460, 113 Cal. Rptr. 468 (1974).

⁸⁰ *Id.* at 332, 335, 521 P.2d at 461, 463, 113 Cal. Rptr. at 469, 471.

⁸¹ See *supra* text accompanying notes 40-47 (discussing *Lloyd*).

⁸² *Diamond II*, 11 Cal. 3d at 334-35, 521 P.2d at 463, 113 Cal. Rptr. at 471.

⁸³ Justice Mosk argued:

Defendants contend that *Lloyd* precludes us from applying California law to vindicate plaintiff's right to carry out its activities at [defendants' shopping mall]. They interpret *Lloyd* as standing for the proposition that the property rights of the owner of the shopping center would be violated, contrary to the Fifth and Fourteenth Amendments to the United States Constitution if he were compelled to allow persons in plaintiff's

note, however, that *Diamond II* did not directly disturb the Court's prior holdings in *Schwartz-Torrance* and *Lane*. Those cases involved expressive activities that were directly related to the shopping centers business operations.⁸⁴ In that circumstance the balance between property and first amendment rights continued to weigh in favor of the speech interest.⁸⁵

Further, it is important to note that the *Diamond II* court seemed to treat this balance of competing speech and property rights as a zero-sum game at the federal constitutional level. The due process clause of the United States Constitution protected private property rights except in those situations in which it was subordinated to first amendment guarantees.⁸⁶ Therefore, the state constitution's free speech provisions were irrelevant to the issue because any modification of the balance ultimately struck by the United States Supreme Court would undermine either federally protected speech rights or property rights.⁸⁷ Accordingly, following the approach of *Diamond II*, it must be assumed that *Lane* would have to be overruled as well if a proper case reached the California Supreme Court after *Hudgens v. NLRB* had made it clear that first amendment rights did not extend to private commercial property even in those situations where expressive activity *was* directly related to the use to which the property was being put.⁸⁸

position to exercise their constitutional rights on his private property. *Lloyd* should not be read as placing such a broad and sweeping restriction upon a state's implementation of its own laws and policies. Although the *Lloyd* opinion mentions the property rights of the shopping center owner, the overall thrust of the opinion imposes a restriction on the First Amendment rights of the handbill distributor only under the circumstances there involved and the opinion recognizes that the size and diversity of activities of a shopping center might warrant a different result in another context.

Id. at 340 n.1, 521 P.2d at 467 n.1, 113 Cal. Rptr. at 475 n.1 (Mosk, J., dissenting) (citation omitted).

⁸⁴ The court noted that "in both [*Schwartz-Torrance* and *Lane*] labor unions had a labor dispute with, and were picketing, businesses located within the shopping centers." *Id.* at 334 n.3, 521 P.2d at 462 n.3, 113 Cal. Rptr. at 470 n.3. See *supra* text accompanying notes 52-68 (discussing *Schwartz-Torrance* and *Lane*).

⁸⁵ *Id.*

⁸⁶ *Id.* at 335 n.4, 521 P.2d at 463 n.4, 113 Cal. Rptr. at 471 n.4.

⁸⁷ *Id.*

⁸⁸ See *supra* text accompanying notes 48-51 (discussing *Hudgens*).

2. The Shift to State Constitutional Protection: *Robins v. Pruneyard Shopping Center*

No such case reached the California court, however, until *Robins v. Pruneyard Shopping Center*⁸⁹ was decided in 1979 and by that time the court's composition had changed. The Mosk dissent in *Diamond II* now commanded a majority.⁹⁰ The new court recognized that neither *Lloyd* nor *Hudgens* had determined that federal constitutional protection of property rights *precludes* either the state or the federal government from permitting at least some expressive activities on commercial property. Those cases had only determined that the first amendment does not *require* the subordinating of the owner's property interests to the expressive activities of third parties.⁹¹ Therefore, the California Constitution's free speech provision could be read expansively to provide rights of expression on private property even if the first amendment did not recognize such rights.⁹²

Having reached the conclusion that free speech rights under the California Constitution could be extended beyond the protection provided by the first amendment, the supreme court said very little to justify its determination that speakers had a right to express themselves on the grounds of private shopping centers. The analytic basis for that decision had apparently evolved through prior precedent from *Schwartz-Torrance* through *Diamond I*.⁹³ Now that it was clear that the United States Constitution did

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

⁹⁰ Justices Burke, Wright, McComb, and Clark joined the majority opinion in *Diamond v. Bland*, 11 Cal. 3d at 332, 335, 521 P.2d at 461, 463, 113 Cal. Rptr. at 469, 471, while Justices Mosk, Tobriner, and Sullivan dissented. *Id.* at 335, 346, 521 P.2d at 463, 470, 113 Cal. Rptr. at 471, 478. Justices Newman, Bird, Tobriner, and Mosk formed the majority in *Pruneyard*, 23 Cal. 3d at 902, 911, 592 P.2d at 342, 348, 153 Cal. Rptr. at 855, 861, while Justices Richardson, Clark, and Manuel dissented. *Id.* at 911, 916, 592 P.2d at 348, 351, 153 Cal. Rptr. at 861, 864.

⁹¹ *Pruneyard*, 23 Cal. 3d at 904-05, 592 P.2d at 343-44, 153 Cal. Rptr. at 856-57. The court based its conclusion in part on the recognition by the United States Supreme Court in *Hudgens* that the National Labor Relations Act might constitutionally permit the same picketing that was found in *Hudgens* to be unprotected under the first amendment. That determination must demonstrate that neither *Lloyd* nor *Hudgens* were based on the owner's federal right not to have expression occur on her property.

⁹² *Id.* at 908-10, 592 P.2d at 346-47, 153 Cal. Rptr. at 859-60, (stating that *Lloyd* "does not prevent California's providing greater protection than the First Amendment now seems to provide").

⁹³ *Id.*

not require the overruling of *Diamond I*, *Diamond I*'s reasoning could simply be shifted from the first amendment to a state constitutional foundation and its holding reaffirmed.⁹⁴

What is most surprising about the court's willingness to rely on this past precedent is that *Hudgens* had not yet been decided when the court decided *Diamond I*. Thus, the United States Supreme Court's concerns about the lack of state action, the core of the *Hudgens* holding,⁹⁵ had never been squarely addressed by a California court. The only reference to state action in *Diamond I* was the passing reference in a footnote that "[i]n *Logan Valley, Lane, and Schwartz-Torrance* the United States Supreme Court and this court found 'state action' under the Fourteenth Amendment in a shopping center's refusal to permit the exercise of First Amendment rights in such public areas as sidewalks, parks, and malls."⁹⁶ No additional discussion of state action was offered in *Pruneyard*.⁹⁷

Despite this omission, *Pruneyard* was emphatic in overruling *Diamond II* by holding that article I, sections 2 and 3 of the California Constitution provide protection to expressive activities on the grounds of large shopping centers even if the subject of expression is unrelated to the center's business operations.⁹⁸ The opinion was less clear, however, as to the scope of the free speech rights it was recognizing. The central focus of *Pruneyard* was on the unique role played by shopping centers in American society as a location where the public commonly congregates, and the corresponding importance of guaranteeing access to that location for expressive activities.⁹⁹ Furthermore, the court explic-

⁹⁴ *Id.* at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860.

⁹⁵ See *supra* note 51 and accompanying text.

⁹⁶ *Diamond v. Bland*, 3 Cal. 3d 653, 666 n.4, 477 P.2d 733, 741 n.4, 91 Cal. Rptr. 501, 509 n.4 (1970) (quoting *In re Cox*, 3 Cal. 3d 205, 216 n.11, 474 P.2d 982, 999 n.11, 90 Cal. Rptr. 24, 31 n.11 (1970)).

⁹⁷ See Salzman, *Pruneyard's Progeny: State-Created Free Speech Access to Quasi-Public Property*, 1984 ANN. SURV. AM. L. 121, 133 n.88 (noting *Pruneyard* court did not expressly address state action issue and "did not state that the shopping center performed public functions and should be treated like the state"); Note, *Private Abridgement of Speech and the State Constitutions*, 90 YALE L.J. 165, 180 (1980) (asserting *Pruneyard*'s holding "premised entirely upon the public forum role assumed by shopping centers in California and not on any finding of state action behind the owner's abridgement of speech").

⁹⁸ *Pruneyard*, 23 Cal. 3d at 910-11, 592 P.2d at 347-48, 153 Cal. Rptr. at 860-61.

⁹⁹ *Id.* at 907, 910, 592 P.2d at 345, 347, 153 Cal. Rptr. at 858, 860.

itly quoted Justice Mosk's limiting language from his dissent in *Diamond II* that "[i]t bears repeated emphasis that we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment."¹⁰⁰ That language, in context, suggests that *Pruneyard's* holding is limited in its scope to large shopping centers or their functional equivalents. On the other hand, the court cited *Lane*, among other prior California cases, with approval. It noted that "[t]he fact that those opinions cited federal law that subsequently took a divergent course does not diminish their usefulness as precedent."¹⁰¹ Moreover, the court also described *Lane* as extending "the assurance of protected speech to the privately owned sidewalk of a grocery store."¹⁰² How this language is to be reconciled with the court's subsequent admonition that its holding was *not* to apply to a "modest retail establishment" was never fully explained.¹⁰³

One year later, in *Pruneyard Shopping Center v. Robins*,¹⁰⁴ the United States Supreme Court reviewed and affirmed the California Supreme Court's conclusion that the California Constitution's free speech rights could exceed those of the federal constitution.¹⁰⁵ After tracing its own evolution from *Logan Valley* to *Lloyd*, the Court found that *Lloyd* "does not *ex proprio vigore* limit the authority of the State to . . . adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."¹⁰⁶ The Court summarized *Lloyd* and *Hudgens* as holding that no new rights of expression are conferred under the *federal* constitution when a mall owner opens her property to the public. These cases, however, had no impact on a state's constitutional provisions.¹⁰⁷ Indeed, Justice Marshall noted in his concurrence that the majority's opinion was part of "a very

¹⁰⁰ *Id.* at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860 (quoting *Diamond II*, 11 Cal. 3d at 345, 521 P.2d at 470, 113 Cal. Rptr. at 478 (Mosk, J., dissenting)).

¹⁰¹ *Id.* at 908, 592 P.2d at 346, 153 Cal. Rptr. at 859.

¹⁰² *Id.* at 909, 592 P.2d at 346, 153 Cal. Rptr. at 859.

¹⁰³ See 73 Op. Att'y Gen. 213, 217-18 (1990) (recognizing this ambiguity and the difficulty of reconciling *Lane* holding with "modest retail establishment" exception in *Pruneyard*).

¹⁰⁴ 447 U.S. 74 (1980).

¹⁰⁵ *Id.* at 81.

¹⁰⁶ *Id.* (citing *Cooper v. California*, 386 U.S. 58, 62 (1967)).

¹⁰⁷ The Court noted that in *Lloyd* "there was no state constitutional or statutory provision that had been construed to create rights to the use of

healthy trend of affording state constitutional provisions a more expansive interpretation than [the] Court ha[d] given the Federal Constitution."¹⁰⁸

The Court also concluded that this extension of free speech rights did not violate the mall owners federal constitutional rights under the first or fifth amendments. The loss of the power to exclude an occasional signature solicitor did not undermine the value or the utility of the shopping center to a sufficient degree to constitute a taking of property without payment of just compensation.¹⁰⁹ Moreover, any perceived link between the solicitor's expression and the property owner was far too tenuous to establish that the owner was being unconstitutionally compelled to express or affirm a belief not her own.¹¹⁰

C. *The Scope of Pruneyard*

The fundamental question left open after the Supreme Court upheld *Pruneyard* involved the extent to which free speech rights could be permitted to encroach on private property other than shopping centers. States had been given a green light to aggressively follow the doctrinal road that California had developed, but neither *Pruneyard* opinion provided useful guidance on how this new constitutional journey was to proceed. By allowing free speech rights on some private property, *Pruneyard* created fertile ground for endless conflicts between property owners and those who sought access to their property for expressive purposes.

Jurisdictions outside of California that have interpreted their constitutions to provide *Pruneyard*-like free speech rights have struggled to determine the scope of this new freedom.¹¹¹ California, on the other hand, has had little opportunity to apply the reasoning of *Pruneyard* beyond the shopping center context.¹¹² Thus, in determining the scope of *Pruneyard* in California, it is necessary to examine the attempts of other jurisdictions generally to resolve the problem of free speech rights on private property, their specific decisions on whether speech rights extend to protests on the grounds of medical clinics providing abortion serv-

private property by strangers, comparable to those found to exist by the California Supreme Court [in *Pruneyard*]." *Id.*

¹⁰⁸ *Id.* at 91 (Marshall, J., concurring).

¹⁰⁹ *Id.* at 82-84. See generally *infra* text accompanying notes 300-90.

¹¹⁰ *Id.* at 85-88. See generally *infra* text accompanying notes 391-420.

¹¹¹ See *infra* notes 145-47, 149-226 and accompanying text.

¹¹² See *infra* notes 260-74 and accompanying text.

ices, and the consistency of the reasoning and conclusions of these decisions with the relevant California case law.

Unfortunately, these cases do not fall into any easily summarized pattern. Of the sixteen jurisdictions in addition to California that have struggled with the issue of free speech rights on private property, five initially and explicitly resorted to the doctrine of state action in resolving the competing interests of property owner versus speaker.¹¹³ Four others, largely without explanation, declined to extend their state constitutions to provide free speech rights beyond those guaranteed by the first amendment.¹¹⁴ Of the remaining seven jurisdictions, five utilized some form of balancing test to allocate rights among the competing speech and property interests¹¹⁵ and two resolved the issue on other grounds.¹¹⁶ Because the United States Supreme Court has grounded its reasoning on state action doctrine, however, this is probably the logical place to begin the analysis of state law responses to the *Pruneyard* decision.

1. State Action

Unlike California, many jurisdictions elected to resolve the conflict between private property owners and speakers seeking access to private property for expressive purposes by adopting a formal state action analysis to limit the scope of the speaker's rights. Although they had the discretion to do otherwise, the courts in these jurisdictions determined that the boundaries imposed by the federal courts on first amendment claims were equally applicable to state constitutions. Thus, to evaluate the merits of these state court conclusions, it is necessary to critically examine Supreme Court authority supporting a restrictive state action analysis in this area.

There is no doubt that the primary focus of the United States Supreme Court's decision in *Hudgens v. NLRB* was the issue of state action. In *Hudgens*, the Court held that *Logan Valley* was incorrectly decided because it ignored the "truism" that "the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state."¹¹⁷ *Marsh v. Alabama*

¹¹³ See *infra* notes 128-34 and accompanying text.

¹¹⁴ See *infra* notes 135-39 and accompanying text.

¹¹⁵ See *infra* notes 149-218 and accompanying text.

¹¹⁶ See *infra* notes 219-26 and accompanying text.

¹¹⁷ *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976); see also *Salzman supra*

established a limited, "public-function" exception to that basic principle, but *Marsh* did not erode the importance and centrality of state action limitations on the scope of constitutional rights.¹¹⁸ A company town, because of its complete identification with the functions of a municipal government, might be found to be a state actor, but shopping centers and all other commercial property must retain their private character.¹¹⁹ Any other conclusion risked pushing the Court down a doctrinal slope without braking points that would inevitably constitutionalize all speech interactions among private citizens.

The Court's concerns in *Hudgens* are legitimate, but its analysis consists of little more than empty formalisms. When the state arrests and prosecutes an individual distributing political leaflets in a shopping center because the owner of the mall objects to that activity, the Court cannot completely ignore the constitutional implications of this event by proclaiming the absence of state action. Although both the speaker and owner are private entities, state authorities enforcing a private decision intrinsically transform this disagreement between private parties into an arguably public conflict for constitutional purposes. The state through its police and courts is intractably involved in the substantive resolution of the dispute. It is a rule of state law, after all, that directs government officers to protect the property owner's interest in this dispute rather than those of the speaker. If there is no state action here, the Court must at least explain why the state's apparently active involvement in the case must be ignored.¹²⁰

note 97, at 125 ("The first amendment's state action requirement is the constitutional principle that best explains the Court's retreat in *Lloyd* and *Hudgens* from *Logan Valley's* protection of speech at privately owned shopping centers.").

¹¹⁸ *Hudgens*, 424 U.S. at 513-14. See *supra* text accompanying notes 48-51 (discussing *Hudgens*).

¹¹⁹ *Id.* at 516-20 (quoting *Logan Valley*, 391 U.S. at 330-33 (Black, J., dissenting) and *Lloyd*, 407 U.S. at 567-70).

¹²⁰ See *Batchelder v. Allied Stores Int'l*, 388 Mass. 83, 89 n.7, 445 N.E.2d 590, 593 n.7 (1983) ("The use of the courts to enforce the laws of trespass could be regarded as 'State action' in a constitutional sense."); *City of Sunnyside v. Lopez*, 50 Wash. App. 786, 798-99, 751 P.2d 313, 320 (1988) (Thompson, J., dissenting) (arguing arrest and prosecution of trespasser attempting to speak on shopping center grounds constitutes state action); M. NIMMER, *NIMMER ON FREEDOM OF SPEECH*, § 4.09[D], at 4-102 to -103 (1984) (maintaining that enforcement of trespass law constitutes state action regardless of locale); cf. *Abernathy, Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375, 412 (1958).

The conventional response to this challenge would be to insist that the enforcement of neutral, nondiscriminatory laws in the resolution of commercial and property disputes does not require attributing the interests and motives of the contesting private parties to the state itself. It is the shopping center owner who elects to prohibit expressive activities on her property. The state does nothing to encourage that decision. Thus, there is no nexus between the substantive restriction on speech that is being challenged and the impartial role of the state in promulgating and implementing general rules governing property ownership and commercial transactions.¹²¹ Just as the Court has failed to find state action when private entities fail to provide "procedural due process" to their customers or employees,¹²² there is no constitutionally cognizable state action here. Unless every private dispute that ultimately is adjudicated in court is held to be state action because of the involvement of state dispute resolution mechanisms, the issue in the shopping center cases is essentially one of private interests, not constitutional law.

This analysis would analogize trespass cases involving political speech in shopping centers to the civil rights cases of thirty years

¹²¹ See, e.g., *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 165-66 (1978) (holding state statute permitting bailee to sell bailor's goods on default of payment for storage costs does not transform sale of goods into state action as to which due process requirements apply); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (requiring petitioner to demonstrate that "there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself" to establish state action); *State v. Schmid*, 84 N.J. 535, 548, 423 A.2d 615, 622 (1980) (stating that "property owner's recourse to appropriate and otherwise neutral penal sanctions to protect its legitimate interests does not constitute action by the State nor clothe the property owner with a state identity for First Amendment purposes"); *Lopez*, 50 Wash. App. at 796, 751 P.2d at 319 ("Enforcement of trespass laws by the government should not have the effect of transforming private interference with free speech activities into state interference."); *State v. Horn*, 139 Wis. 2d 473, 485-86, 407 N.W.2d 854, 859-60 (1987) (holding that state enforcement of trespass laws at property owner's request does not constitute state action); see also *Salzman*, *supra* note 97, at 122 n.11 (noting that while "any governmental involvement [including] enforcement of trespass laws to expel an activist or a court order enjoining speech activity might trigger the first amendment's protection," Supreme Court consistently holds "that such governmental involvement is not state action, at least in the first amendment area").

¹²² See, e.g., *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

ago. When courts uphold the eviction of black protesors from a segregated restaurant under general, neutral laws providing for the protection of property rights, they do not clearly violate equal protection guarantees. The trespass law at issue is neutral on its face and in its purpose. The motives of the property owner may be invidious, but the state's purposes are constitutionally benign.¹²³

Without more, this argument is incomplete and inadequate. Indeed, the Court's insistence that state action constitutes a uniform, formal threshold that all constitutional claimants must cross before their disputes may be adjudicated on the merits is particularly unpersuasive in the free speech context.¹²⁴ This can be clearly demonstrated by reversing the Court's analysis in *Hudgens*. The Court contends there is no state action if the state enforces its trespass laws at the shopping center owner's request against a speaker on mall property. This is simply a private dispute between private parties. Surely then there is no state action if the state refuses to enforce its trespass laws in this same situation and permits the speaker to express herself without state interference. Further, there would be no state action if the state enforced general tort and criminal laws prohibiting battery to prevent the owner from using self-help in expelling the speaker from her property. Indeed, the United States Supreme Court in *Pruneyard*

¹²³ See, e.g., *Bell v. Maryland*, 378 U.S. 226 (1964). The Court did not reach the issue of whether the restaurant's decision to evict a black protestor constituted state action and was therefore subject to constitutional constraint. Justices Douglas and Goldberg argued that state action should be recognized in this circumstance. *Id.* at 255-56 (Douglas, J., concurring in part). Justice Black's dissent, joined by Justices Harlan and White, espoused the argument recited in the text. Justice Black quoted the Solicitor General's argument at length:

"[T]he mere fact of State intervention through the courts or other public authority in order to provide sanctions for a private decision is not enough to implicate the State for the purposes of the Fourteenth Amendment. . . . Where the only State involvement is color-blind support for every property-owner's exercise of the normal right to choose his business visitors or social guests, proof that the particular property-owner was motivated by racial or religious prejudice is not enough to convict the State of denying equal protection of the laws."

Id. at 332 (Black, J., dissenting) (quoting Solicitor General).

¹²⁴ See, e.g., M. NIMMER, *supra* note 120, § 4.09[D], at 4-100 to -105 (examining state action requirement as threshold to first amendment rights).

should never have examined the shopping center owner's takings clause and compelled affirmation of belief claims on the merits if the Court's analysis in *Lloyd* and *Hudgens* is correct. Both arguments should have been rejected out of hand because of a lack of state action.¹²⁵ If the dispute between the parties is truly a private one, and trespass laws operate neutrally when they favor property rights over speech rights, then it seems equally correct to recognize that the reverse conclusion, favoring speech over property rights, is also inherently private and neutral for constitutional purposes.¹²⁶

The problem is not with the concept of state action and the Court's legitimate concern that the scope of constitutional rights must be limited in their application to private interactions. The

¹²⁵ Indeed, if one adopts the Court's formalistic analysis in a case like *Flagg Bros.*, 436 U.S. 149, as a general principle of state action doctrine that applies without regard to the nature of the constitutional claim at issue, much of the protection provided for property rights under the takings clause could be circumvented with relative ease by state governments. *Flagg Bros.* suggests that state action is not implicated when, by statute, the government allows one individual to impair the rights of another and refuses to provide redress to the victim. *Id.* at 164-66. Pursuant to that reasoning, a state could avoid the constraints of takings clause cases such as *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (involving invasions by private parties, see discussion *infra* notes 320-36, 343-55 and accompanying text) by drafting its laws to "deny relief" to property owners who seek to eject trespassers from their property. *Flagg Bros.*, 436 U.S. at 165.

¹²⁶ Some of the United States Supreme Court's language in *Pruneyard* suggests just such a neutral approach. The Court rejected the "general proposition" that "the United States, as opposed to the several States, [is] possessed of residual authority that enables it to define 'property' in the first instance." *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 84 (1980). One implication of this statement is that state constitutions may define property in a way that renders it subject to intrusions for expressive purposes *ab initio*. Thus, no property right would exist by virtue of ownership that conflicts with such expressive activity, and, accordingly, no fifth amendment violation could result from a state's allowing such expression to occur. Nothing would be "taken" because the owner never acquired the power to exclude speakers when she took title to the property in the first place. Under this analysis, state decisions to allocate rights between private parties with regard to speech and property interests would not invoke federal constitutional guarantees.

The problem with this argument, of course, is that it provides no basis for limiting a state's power to define property out of existence. See generally Note, *supra* note 97, at 174-77.

difficulty arises from the misguided attempt to resolve this question by determining how "state-like" defendants are, or how much they have been influenced by the state in their conduct, when they are subject to constitutional challenge.¹²⁷ By treating state action as a formal threshold to all constitutional adjudication rather than a substantive question that is part of the merits of constitutional claims, the Supreme Court creates chaos for the lower federal courts and state courts. They are trapped in the worst of all possible worlds: they can either adopt an unpersuasive doctrine that produces incoherent results or they can ignore this formal analysis at their peril without any guidance from the Court on how to approach the problem in substantive terms.

For these reasons, many state courts, which wrestled with the issue of speaker access to private property under state constitutional principles after *Pruneyard* was decided, confronted the problem of state action and generally foundered in resolving it. The courts of Connecticut,¹²⁸ New York,¹²⁹ Michigan,¹³⁰ Wisconsin,¹³¹ and Arizona,¹³² for example, explicitly accepted the mechanical application of state action suggested by the *Hudgens* opinion and became subject to the same criticisms directed at that decision. These decisions were often more intellectually coherent than comparable United States Supreme Court opinions.¹³³ In the end, however, they succumbed to the same empty formalisms of federal authority.¹³⁴ It is also reasonable to presume that the

¹²⁷ Criticisms of the Court's insistence that state action is a formal threshold factor, which can be applied consistently regardless of the substance of the claim at issue, are legion. See, e.g., M. NIMMER, *supra* note 120, § 4.09[D], at 4-100 to -105; L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 18-1 to -7 (2d ed. 1988); Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221; Nerken, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory*, 12 HARV. C.R.-C.L. L. REV. 297, 364-65 (1977).

¹²⁸ *Cologne v. Westfarms Assocs.*, 192 Conn. 48, 469 A.2d 1201 (1984).

¹²⁹ *SHAD Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 488 N.E.2d 1211, 498 N.Y.S.2d 99 (1985).

¹³⁰ *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 378 N.W.2d 337 (1985).

¹³¹ *Jacobs v. Major*, 132 Wis. 2d 82, 390 N.W.2d 86 (1986).

¹³² *Fiesta Mall Venture v. Mecham Recall Comm.*, 159 Ariz. 371, 767 P.2d 719 (Ct. App. 1988).

¹³³ Compare *supra* notes 117-27 and accompanying text with the cases discussed *infra* notes 140-42 and accompanying text.

¹³⁴ See *infra* note 143 and accompanying text.

courts of four other states, Minnesota,¹³⁵ Missouri,¹³⁶ Georgia,¹³⁷ and North Carolina,¹³⁸ which, without explanation, declined to extend state constitutional rights beyond the parameters set out by their federal counterpart, were influenced, in part, by state action doctrine in reaching their decision.¹³⁹

¹³⁵ *State v. Friberg*, 435 N.W.2d 509 (Minn. 1989); *State v. Scholberg*, 412 N.W.2d 339 (Minn. Ct. App. 1987).

¹³⁶ *Kugler v. Ryan*, 682 S.W.2d 47 (Mo. Ct. App. 1984).

¹³⁷ *Citizens for Ethical Government, Inc. v. Gwinnett Place Assocs.*, 260 Ga. 245, 392 S.E.2d 8 (1990) (involving shopping mall-free speech issue); *Kerr v. State*, 193 Ga. App. 165, 387 S.E.2d 355 (1989) (involving abortion clinic and criminal trespass issue).

¹³⁸ *State v. Felmet*, 273 S.E.2d 708 (N.C. 1981) (involving shopping mall-free speech issue).

¹³⁹ Minnesota, Missouri, Georgia, and North Carolina declined to extend the protection provided by their state constitutions beyond the requirements of current first amendment doctrine but were not specific as to their reasoning. In 1968 the Supreme Court of Minnesota, in *State v. Miller*, 280 Minn. 566, 159 N.W.2d 895 (1968), upheld the right of individuals to distribute pamphlets on the grounds of a shopping center. That brief one-paragraph opinion was explicitly based on the United States Supreme Court authority of *Logan Valley*. *Id.* at 567, 159 N.W.2d at 896. Minnesota courts did not return to the issue again for 19 years. When they did, in *State v. Scholberg*, 412 N.W.2d 339 (Minn. Ct. App. 1987) (*Scholberg II*), an intermediate level court of appeals upheld the trespass conviction of an antiabortion protestor arrested for distributing leaflets on the private sidewalk in front of a medical building housing a medical clinic providing abortion services. The building's other tenants included over 100 physicians and dentists and 24 other businesses. *Scholberg II* repudiated *State v. Miller* as no longer good law based on the United States Supreme Court's overruling of *Logan Valley*. *Id.* at 343. Under current first amendment doctrine, free speech rights would only be protected against direct state interference, except in the narrow circumstances in which a public-function exception to state action requirements was held to apply. *Id.* Because shopping centers did not fall into this category, as the *Hudgens* case had made clear, abortion clinics certainly did not either. *Id.*

The court also refused to hold that the Minnesota Constitution provides greater protection to expression on private property than does its federal counterpart. *Id.* at 344. The court observed that the Minnesota Supreme Court had been reluctant to extend state constitutional guarantees beyond those provided by the United States Constitution. *Id.* Thus, it was clearly inappropriate for a lower level tribunal to reach such a result on its own initiative. *Id.*

An intermediate level appellate court in Missouri was similarly tentative in *Kugler v. Ryan*, 682 S.W.2d 47 (Mo. Ct. App. 1984) when it affirmed an injunction prohibiting antiabortion protestors from trespassing on the grounds of a medical clinic. The court rejected the defendant's state constitutional claims, explaining that it knew of no Missouri Supreme Court

To their credit, those courts that explicitly adopted state action limitations on state constitutional rights aggressively probed the value and functions performed by state action doctrine. In particular, they recognized that separation of powers principles required that there be some intrinsic constraint on the nature of rights in order to appropriately allocate authority between the legislature and the judiciary. If all constitutional rights might arguably be protected against interference of any kind and from any source, an extraordinarily wide range of personal interactions would be constitutionalized with the responsibility of resolving competing interests in all of these circumstances lodged exclusively with the judiciary. This result was problematic not only because it unreasonably limited the range of policy judgments to be determined by the polity through democratically elected representatives and substituted judicial decisions in their place. It also replaced the flexibility, superior fact finding capabilities, and efficiency in interest balancing of the political branches with the more static, circumscribed, and long term process of constitutional adjudication.¹⁴⁰

authority holding, as the California Supreme Court had ruled in *Pruneyard*, "that individuals had a free speech right which overrode the property right of the owner of a shopping center," much less a medical clinic. *Id.* at 51.

In Georgia, in *Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assocs.*, 260 Ga. 245, 392 S.E.2d 8 (1990), the supreme court was clear as to its result but ambiguous in its reasoning. It held that "nothing in the Georgia constitution . . . establishes a right of private citizens to enter onto [shopping mall] property to solicit signatures for a recall petition." *Id.* at 246, 392 S.E.2d at 10. Other than expressing a preference for the reasoning of *Lloyd Corp. v. Tanner* over California's *Pruneyard*, however, no explanation was given for the court's conclusion. *Id.*

The Supreme Court of North Carolina was the most terse of all. Refusing to reverse the trespass conviction of an individual soliciting signatures on an antidraft petition in a large shopping mall, the court, in *State v. Felmet*, 273 S.E.2d 708 (N.C. 1981), recognized that under the United States Supreme Court's opinion in *Pruneyard* it could protect the solicitor's expressive activity without infringing the property rights of the shopping center owner. *Id.* at 712. "However, we are not so disposed" was the extent of its conclusion and analysis. *Id.*

¹⁴⁰ In *Cologne v. Westfarms Assocs.*, 192 Conn. 48, 469 A.2d 1201 (1984), the Connecticut Supreme Court concluded that state constitutional rights could only be enforced against governments, not private individuals. *Id.* at 62-63, 469 A.2d at 1208-09. While the court acknowledged that the state constitution employed affirmative language in its provisions rather than the "No state shall . . ." framework of the fourteenth amendment, this terminology did not substantively extend the scope of the rights being

In addition to raising concerns relating to institutional compe-

recognized. *Id.* Nor should the fact that the state enforced the shopping center's exclusionary policies alter this analysis. It was not the job of the state courts to balance private property rights and free speech rights as a matter of constitutional law. *Id.* at 65, 469 A.2d at 1210. Allocating legal entitlements among these competing private interests was the more appropriate function of the legislature "which has far greater competence and flexibility to deal with the myriad complications which may arise" when important rights and interests are in conflict. *Id.*

The New York Court of Appeals was even more emphatic. In *SHAD Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 488 N.E.2d 1211, 498 N.Y.S.2d 99 (1985), it insisted that the free speech provisions of the state constitution were intended to be applied exclusively against state actors. *Id.* at 503-04, 488 N.E.2d at 1215-17, 498 N.Y.S.2d at 103-05. Because the New York and Connecticut constitutions used common language, the *Cologne* holding was cited with approval. *Id.* at 501, 488 N.E.2d at 1214, 498 N.Y.S.2d at 102. Moreover, the state action requirement was "a crucial foundation for both private autonomy and separation of powers." *Id.* at 503, 488 N.E.2d at 1216, 498 N.Y.S.2d at 104 (citing L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 18-2, at 1149-52 (1st ed. 1978)). Indeed, most other jurisdictions that had considered the question of state action with regard to state constitutions had reached similar conclusions. *Id.* at 501, 488 N.E.2d at 1214, 498 N.Y.S.2d at 102. Those opinions that did not were either unpersuasive or distinguishable. *Id.* at 501 n.5, 488 N.E.2d at 1214 n.5, 498 N.Y.S.2d at 102 n.5. California's *Pruneyard* decision received especially scathing criticism. *Id.*

The Supreme Court of Michigan in *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 378 N.W.2d 337 (1985) also strongly endorsed the state action reasoning of the Connecticut court in *Cologne*. As an historical matter, the Michigan constitution's free speech provisions were intended to apply solely against state action although their text included no such specific limitation. *Id.* at 204, 378 N.W.2d at 343-46. More importantly, a state action requirement served the theoretical and practical value of leaving the accommodation of competing private interests to the legislature which, because of its superior fact-finding ability and flexibility, was better suited to resolving this type of dispute. *Id.* at 212 & n.29, 378 N.W.2d at 347 & n.29. The balancing approach endorsed in cases in some other states was fatally flawed for failing to take into account this separation of powers concern. *Id.* at 232, 378 N.W.2d at 357.

In Arizona an intermediate level appellate court agreed with the reasoning of the Connecticut, New York, and Michigan cases and also held that the Arizona constitution does not restrain private conduct such as the action of a shopping center owner in excluding persons engaged in signature solicitation from the center's grounds. *Fiesta Mall Venture v. Mecham Recall Comm.*, 159 Ariz. 371, 767 P.2d 719 (Ct. App. 1988).

Wisconsin has similarly committed itself to state action requirements in interpreting the rights protected under its constitution. In *Jacobs v. Major*, 139 Wis. 2d 492, 407 N.W.2d 832 (1987), the supreme court upheld the issuance of an injunction barring a political dance troupe from performing

tency and legitimacy, state courts also worried that too expansive a definition of some rights jeopardized the existence of others. Specifically, the application of certain constitutional rights against private parties threatened basic autonomy, liberty, and privacy concerns. By interpreting rights through a state action prism against government entities alone, a sphere of protected personal activity would always be left open. Without some such constraint, the burden of complying with constitutional principles could become stifling and oppressive.¹⁴¹

an antinuclear war skit and leafletting in a shopping mall and affirmed contempt convictions for the violation of that order. After rejecting "the proposition that a negative restraint on government creates a positive right assertable against all other persons," the court went on to castigate *Pruneyard* as "more a decision of desire rather than analytic conviction." *Id.* at 512-14, 407 N.W.2d at 840-41. As in the other jurisdictions supporting state action limits on the scope of their constitutions, the court advocated judicial restraint and respect for the legislative process.

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. Balancing between competing or conflicting interests is better conducted by the legislature, as long as within the constitutional limitations against governmental interference with private rights.

Id. at 521, 407 N.W.2d at 844.

A sixth and a seventh state, Washington and Pennsylvania, finally resorted to the state action doctrine after initially adopting a balancing test. *See infra* notes 199, 200-05.

¹⁴¹ *See, e.g., Michigan Citizens Lobby*, 423 Mich. at 210-11, 378 N.W.2d at 347 (stating that basic purpose of state action requirement is to preserve personal freedom of individual which would be lost if all personal conduct had to conform to constitutional requirements); *SHAD Alliance*, 66 N.Y.2d at 503, 488 N.E.2d at 1216, 498 N.Y.S.2d at 104 (stating that state action is "crucial foundation . . . for private autonomy"); *see also* *Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co.*, 512 Pa. 23, 31, 515 A.2d 1331, 1335 (1986) (suggesting that if constitution governed "adjustment" of disputes among private parties, "significant governmental intrusion into private individuals' affairs and relations would be likely to routinely occur"); *Southcenter Joint Venture v. National Democratic Policy Comm.*, 113 Wash. 2d 413, 430, 780 P.2d 1282, 1290-91 (1989) (stating that state action requirement prevents Constitution from "preempting individual liberty"); *Harvey, Private Restraint of Expressive Freedom: A Post Pruneyard Assessment*, 69 B.U.L. REV. 929, 968 (1989) ("The view that private conduct is not subject to [constitutional] scrutiny and restraint similar to that applied to government has allowed the creative

These arguments all had substantial merit.¹⁴² The problem with these state court decisions was not that they recognized the

activity of an enormously diverse range of individuals and associations to flourish.”).

In support of this contention, some state courts cite or quote Professor Tribe's treatise, *AMERICAN CONSTITUTIONAL LAW* § 18-2 (1st ed. 1978) [hereafter L. TRIBE (1st ed.)], as recognizing the role of state action requirements in protecting personal freedom and autonomy. See, e.g., *Michigan Citizens Lobby*, 423 Mich. at 210, 378 N.W.2d at 347; *SHAD Alliance*, 66 N.Y.2d at 503, 488 N.E.2d at 1216, 498 N.Y.S.2d at 104; *Southcenter Joint Venture*, 113 Wash. 2d at 1430, 780 P.2d at 1290-91 (quoting L. TRIBE, *supra* note 127, § 18-2). The quotation is technically accurate. Had the state court judges read further, however, they would have discovered that despite the role that state action plays in protecting personal autonomy, Tribe is harshly critical of the “mechanical jurisprudence” of the United States Supreme Court's state action doctrine as it is applied in the shopping center cases, L. TRIBE (1st ed.), *supra*, § 12-22, at 695, § 18-5, at 1166-67. Indeed, Tribe argues explicitly that the Court was “mistaken” in failing to find state action in *Hudgens* because “the first and fourteenth amendments should apply to test the state's allocation of exclusionary power through its rules of property and trespass *whether or not* the shopping center is ‘functionally equivalent’ to a municipality.” *Id.* § 12-22, at 695 n.15 (emphasis in original).

¹⁴² One commentator has said:

The historic role of a constitution in the American tradition is to constitute, structure, empower, and constrain government. Thus viewed, the guarantees of the Bill of Rights apply only against federal governmental action, and their emanations — channelled through the fourteenth amendment — constrain only actions of the states. Needed restraints on private conduct and the detailed adjustments of private interests are thus left for legislative action or, to some extent, to governance by the common law. Nothing in this role allocation denigrates either the values implicit in the constitutional guarantees or the vital work of the courts in explicating them. It simply affirms the value of democratic legislatures and the tools they can utilize in the development of the law. Important in this role-allocation also has been the judiciary's perception of its own institutional limitations: its limited ability to ascertain reliably and with adequate generality “legislative facts,” its difficulties in balancing competing private interests, and its problems in surmounting the limitations of the case or controversy in hand to articulate, clearly and with sufficient determinacy, generalized norms to guide future conduct.

Harvey, *supra* note 141, at 965. *But see* Salzman, *supra* note 97, at 141-42, 142 n.167 (criticizing argument that state legislature rather than state judiciary should play primary role in balancing competing property and speech interests).

value of state action limitations on constitutional rights, it was that they ended their analytic work when they reached that conclusion. The courts did not consider as a substantive matter which of the conflicts between speech and property rights should be resolved as a matter of constitutional law and which should be determined as a matter of political interest balancing by the legislature or personal choice by individuals. Instead, these courts simply concluded in summary fashion, on the basis of federal precedent, that the exclusion of speakers from private property lacked state action even if that result was accomplished through court injunction or the arrest of the speaker.¹⁴³ It is this formal

¹⁴³ See *supra* note 139; see also *Fiesta Mall Venture*, 159 Ariz. at 376, 767 P.2d at 724 (rejecting public-function argument for state action requirement on basis of *Lloyd* because shopping malls are more like large, single stores than downtown business districts); *Cologne*, 192 Conn. at 66, 469 A.2d at 1210 (rejecting argument that shopping center limits on speech constitute state action for two reasons: (1) on basis of *Lloyd* and (2) because there would be no clear basis for distinguishing shopping centers from other private property); *Michigan Citizens Lobby*, 423 Mich. at 220-27, 378 N.W.2d at 351-54 (finding no state action in shopping center's enjoining consumer groups from engaging in expressive activity on mall premises under reasoning of *Hudgens* and *Lloyd*); *SHAD Alliance*, 66 N.Y.2d at 505-06, 488 N.E.2d at 1217-18, 498 N.Y.S.2d at 105-06 (proclaiming state action "not reducible to ritualistic incantations or precise formulations," then rejecting relevance of arguments relating to function and nature of shopping centers, or need for access to them for expressive purposes, on grounds that state action must involve "significant government participation in private conduct"); *Western Pa. Socialist Workers*, 512 Pa. at 35, 515 A.2d at 1337 (holding state action analysis of *Hudgens* and *Lloyd* correct and applicable to Pennsylvania State Constitution as well); *Southcenter Joint Venture*, 113 Wash. 2d at 432, 780 P.2d at 1292 (perceiving no "persuasive reason" for state action doctrine to be applied "any differently" under state constitution than as applied in *Lloyd* under federal constitution); *Jacobs v. Major*, 132 Wis. 2d at 522-24, 407 N.W.2d at 844-45, 847 (finding no state action unless institution limiting speech is fully comparable to company town in *Marsh* and seeing no relevance to arguments discussing nonobtrusive nature of speech activities, lack of available alternative avenues of communication, or size and nature of property at issue).

Harvey summarizes these state decisions less critically than the text of this Article but reaches the same basic conclusion:

Thus far, none of the state courts that have required state action has found that requirement satisfied through any of the expansive state action rationales employed in the earlier federal decisions. Each has maintained its view that the complex balancing involved in adjudicating claims of expressive freedom

and uncritical reasoning of the state courts which must be condemned as unacceptable and unpersuasive.

2. Ad Hoc and Definitional Balancing

Not all jurisdictions accepted the applicability of state action doctrine to their state constitutions, however. As noted, of the sixteen states that have wrestled with the issue of free speech rights on private property, only nine have explicitly dismissed the free speech claims outright either on the basis of a lack of state action or in almost kneejerk conformity to federal precedent.¹⁴⁴ The remaining seven jurisdictions, at least initially, dismissed the lack of state action argument, in some cases by reading the rights created by their state constitutions as creating affirmative privileges or rights not just against government but more broadly against any entity that interfered with their exercise.¹⁴⁵ Judges asserting this argument were often emboldened by the specific language of their state constitutions which typically did not contain the kind of state action constraint that begins the fourteenth amendment.¹⁴⁶ Further, they argued that the purpose of the state

against private infringement is primarily a legislative, not a judicial, enterprise.

Harvey, *supra* note 141, at 966.

¹⁴⁴ See *supra* notes 139-40.

¹⁴⁵ See *Batchelder v. Allied Stores Int'l*, 388 Mass. 83, 84, 92-93, 445 N.E.2d 590, 590-91, 595 (1983) (holding state constitutional rights apply against private conduct); *State v. Schmid*, 84 N.J. 535, 560, 423 A.2d 615, 628 (1980) (holding state constitution affirmatively recognizes freedom of speech); *Commonwealth v. Tate*, 495 Pa. 158, 169, 432 A.2d 1382, 1387 (1981) (holding constitution affirmatively protects "free communication of thoughts and opinions"); *Right to Life Advocates, Inc. v. Aaron Women's Clinic*, 737 S.W.2d 564, 566-67 (Tex. Ct. App. 1987) (noting state constitution provides "[e]very person shall be at liberty to speak, write or publish his opinions on any subject"); *Alderwood Assocs. v. Washington Envtl. Council*, 96 Wash. 2d 230, 240-41, 635 P.2d 108, 114-15 (1981) (noting Washington Constitution parallels language of New Jersey and California constitutions in protecting speech against private abridgment); see also *infra* note 219 for a discussion of *Lloyd Corp. v. Whiffen*, 307 Or. 674, 773 P.2d 1294 (1989); *infra* notes 220-22 and accompanying text (discussing *Johnson v. Tait*, 774 P.2d 185 (Alaska 1989)).

¹⁴⁶ See, e.g., *Batchelder*, 388 Mass. at 88-89, 445 N.E.2d at 593 (stating that provision in state constitution protecting election rights "is not by its terms directed only against governmental action" nor is any "parallelism with the Federal Constitution" required); *Schmid*, 84 N.J. at 557, 423 A.2d at 626 (noting state constitution provides both that "[e]very person may freely speak . . ." and that "[n]o law shall . . . abridge the liberty of speech");

action limitation on constitutional rights in the fourteenth amendment was in part to promote federalism concerns by restricting the authority of the national government. This concern, of course, had no bearing on the scope of a state's own constitutional rights. Thus, there was less need for a state action doctrine limiting state constitutional rights.¹⁴⁷

If state action limitations did not apply, however, how was the *scope* of state free speech rights on private property to be determined? It was clear to all courts that this issue could extend far beyond the parking lots and interior sidewalks of shopping cen-

Tate, 495 Pa. at 171, 432 A.2d at 1388 (“[R]ights of freedom of speech . . . [are] guaranteed . . . not simply as restrictions on the powers of government, as found in the Federal Constitution, but as inherent and ‘invaluable’ rights of man.”); *Aaron Women’s Clinic*, 737 S.W.2d at 567 (implicitly accepting argument that “the language of the Texas Constitution should be construed as creating a presumption in favor of free speech, even on private property, unless competing interests outweigh the constitution’s preference for free speech”); *Alderwood*, 96 Wash. 2d at 240, 635 P.2d at 114 (holding state constitutional provision protecting free speech “is not by its express terms limited to governmental actions” as is true of fourteenth amendment). *But see Southcenter Joint Venture*, 113 Wash. 2d at 423-25, 780 P.2d at 1287-88 (holding lack of state action language in state constitution’s free speech provision does not reflect intent of drafters to extend speech rights against private parties but rather reflects the recognition that state action limitation was obvious and intrinsic limit on scope of constitutional rights).

¹⁴⁷ *Schmid*, 84 N.J. at 559-60, 423 A.2d at 628 (arguing that because “there are no constraints arising out of principles of federalism” which apply to the interpretation of state constitutions, “federal requirements concerning ‘state action,’ founded primarily in the language of the Fourteenth Amendment and in principles of federal-state relations, do not have the same force when applied to state-based constitutional rights”); *Alderwood*, 96 Wash. 2d at 242, 635 P.2d at 115 (explaining that federalism concerns prevent United States Supreme Court from adopting rule that stifles state experimentation but state courts operate under no such handicap); *see also* *Cologne v. Westfarms Assocs.*, 192 Conn. 48, 73-74, 469 A.2d 1201, 1213-14 (1984) (Peters, J., dissenting) (maintaining that court should employ California Supreme Court’s reasoning in *Pruneyard*, which recognized state’s authority to adopt in its own constitution individual liberties broader than those granted in federal constitution, and interpret Connecticut’s Constitution as permitting free expression without prior showing of state action); *Michigan Citizens Lobby*, 423 Mich. at 210, 378 N.W.2d at 347 (noting that “the federalism concern, which is a primary principle supporting the state action requirement of the federal constitution, is, obviously, not a concern with respect to the state constitution,” but adopting state action requirement to promote private autonomy and separation of powers values).

ters and might even invoke the worst case scenarios of which Justice Black warned in his dissent in *Logan Valley*.¹⁴⁸ Courts required some doctrinal methodology to determine the dimensions of this new right they had created and to limit its application to appropriate circumstances. Five jurisdictions, New Jersey, Washington, Pennsylvania, Texas, and Massachusetts responded initially by creating a balancing test to weigh the competing rights of free expression on the one hand, and the property, privacy, and autonomy rights of property owners on the other.¹⁴⁹ Often this balancing process involved a detailed analysis which weighed and compared specific competing interests of the property owner and the speaker. Indeed, four of the jurisdictions struggling with the problem of free speech rights on private property resorted initially to a highly subjective and ad hoc, multifactor analysis to determine whether specific expression should be permitted on particular property.¹⁵⁰

a. Ad Hoc Balancing: The Initial Approach

In the first case to address the speech on private property issue, the New Jersey Supreme Court in *State v. Schmid*¹⁵¹ utilized a multifactor balancing test to reverse the trespass conviction of political activists distributing literature on the campus of Princeton University.¹⁵² Seeking "to achieve the optimal balance between the protections to be accorded private property and those to be given to expressional freedoms exercised upon such property,"¹⁵³ the court emphasized the basic compatibility between

¹⁴⁸ See *supra* notes 30-34 and accompanying text (discussing dissenting Justices' criticism of *Logan Valley*); see also *Cologne*, 192 Conn. at 164, 469 A.2d at 1209 (concluding that without state action requirement, private speech would have to be permitted not only on shopping center grounds, but also on the premises of "sport stadiums, convention halls, theatres, country fairs, large office or apartment buildings, factories, supermarkets or department stores"); *Michigan Citizens Lobby*, 423 Mich. at 225, 378 N.W.2d at 353 (accord, citing *Cologne*); *Jacobs v. Major*, 132 Wis. 2d 492, 513, 407 N.W.2d 832, 840-41 (1987) (abandoning state action requirement would "work a change from protecting rights from government action to granting rights to every person enforceable against all other persons").

¹⁴⁹ See *infra* notes 151-226 and accompanying text.

¹⁵⁰ See *infra* notes 151-80 and accompanying text.

¹⁵¹ 84 N.J. 535, 423 A.2d 615 (1980).

¹⁵² *Id.* at 563, 423 A.2d at 630; see also *Harvey*, *supra* note 141, at 935-38 (discussing *Schmid* extensively).

¹⁵³ *Schmid*, 84 N.J. at 562, 423 A.2d at 629.

the defendants' expression and the University's asserted educational mission.¹⁵⁴ Given the lack of any demonstrable interference with the University's function that would result from allowing the distribution of literature to continue, there seemed no reason to support the University's insistence that it could exercise standardless discretion in determining which speakers and subjects it would permit on campus.¹⁵⁵

One year later in *Alderwood Associates v. Washington Environmental Council*,¹⁵⁶ the Washington Supreme Court, in a four vote plurality opinion, tracked the analysis of the California Supreme Court in *Pruneyard* in ringing terms.¹⁵⁷ Like California, Washington courts had initially protected expressive activity on shopping center grounds under the authority of *Logan Valley* as a matter of federal constitutional law.¹⁵⁸ With the overruling of *Logan Valley*, Washington interpreted the free speech provision of its state constitution (which had been modeled after article I of the California constitution)¹⁵⁹ to conform to the holding in *Pruneyard*. Rights of expression were not limited by state action; they applied against private entities as well.¹⁶⁰ The application of those rights against private property owners, however, required a sensitive balancing of the competing interests. Courts needed to consider the use and nature of the subject property, the nature of the speech activity, and the potential for reasonable regulation of the speech at issue.¹⁶¹ The Washington court's evaluation of these factors with regard to signature solicitation on the grounds of shopping centers fully paralleled the conclusion of its California counterpart. On balance, the right to solicit signatures on initiative petitions outweighed the private property interests of shopping mall own-

¹⁵⁴ *Id.* at 563-64, 423 A.2d at 630-31.

¹⁵⁵ *Id.* at 566-67, 423 A.2d at 631-32.

¹⁵⁶ 96 Wash. 2d 230, 635 P.2d 108 (1981).

¹⁵⁷ *Id.* at 240-46, 635 P.2d at 114-17. Justice Dolliver rejected the plurality's general abrogation of state action doctrine, but concurred in the judgment upholding the right of signature solicitation on shopping center grounds on the basis of a state constitutional provision authorizing the initiative process. *Id.* at 247-53, 635 P.2d at 118-21 (Dolliver, J., concurring).

¹⁵⁸ See *Sutherland v. Southcenter Shopping Center, Inc.*, 3 Wash. App. 833, 478 P.2d 792 (1970) (protecting signature gathering at Washington shopping centers on both federal and state constitutional grounds).

¹⁵⁹ See *Alderwood*, 96 Wash. 2d at 240-46, 635 P.2d at 114-17.

¹⁶⁰ *Id.* at 240, 635 P.2d at 115-16.

¹⁶¹ *Id.* at 244-45, 635 P.2d at 116-17.

ers and, therefore, the court upheld rights of expression in these locations.¹⁶²

Both *Schmid* and *Alderwood* provided a detailed set of factors that courts might use in balancing speech rights and property interests. *Schmid* suggested an analytic continuum; the more that property was devoted to a public use, the more it must accommodate the basic rights of members of the public who might use the property for its intended purpose.¹⁶³ More precisely, the court would consider three factors: the nature, purpose, and primary use of the property in question; the extent and nature of the public's invitation to use the property; and the purpose of the expressive activity in relation to the public and private use of the property.¹⁶⁴ The *Alderwood* factors generally overlapped the balancing criteria in *Schmid* with marginal variations. Washington courts were to evaluate the use and nature of the private property, the nature of the speech activity, and the potential for reasonable regulation of the proposed expression to protect the owner's legitimate concerns about the use and value of her property.¹⁶⁵

In *Commonwealth v. Tate*,¹⁶⁶ the Supreme Court of Pennsylvania employed a similar ad hoc balancing test in upholding the right of protestors to distribute leaflets outside the auditorium of a private college where the Director of the FBI had been invited to present a lecture.¹⁶⁷ Citing the *Schmid* holding in New Jersey, the Pennsylvania court defined its responsibilities under the state constitution as requiring it to "balance the college's right to possess and protect its property against appellants' rights of expression in light of the compatibility of that expression with the 'activity of [the] particular place at [the] particular time.'" ¹⁶⁸

¹⁶² *Id.* at 246, 635 P.2d at 117.

¹⁶³ See *State v. Schmid*, 84 N.J. 535, 561, 423 A.2d 615, 629 (1980) (approving "sliding scale" analysis described in *Marsh* and concluding that "[t]he state constitutional equipoise between expressional rights and property rights must be similarly gauged on a scale measuring the nature and extent of the public's use of such property").

¹⁶⁴ *Id.* at 563, 423 A.2d at 630.

¹⁶⁵ *Alderwood*, 96 Wash. 2d at 244-45, 635 P.2d at 116.

¹⁶⁶ 495 Pa. 158, 432 A.2d 1382 (1981).

¹⁶⁷ *Id.* at 173, 432 A.2d at 1390.

¹⁶⁸ *Id.* The *Tate* opinion did not elaborate on the factors a court should weigh in implementing this balancing standard. Its analysis recognized the utility to the persons distributing leaflets of having access to college property and found little of value on the other side to support the college's

Despite the subjectivity and ambiguity surrounding the doctrinal tests being applied, the ultimate balancing process these courts used followed a common pattern. The courts initially described the property in question as being compatible with expressive activities. Shopping malls were "the functional equivalent of a town center or a community business block."¹⁶⁹ Private universities were centers for public debate and the discussion of public policy issues.¹⁷⁰ Thus, both locations were appropriate sites for expressive activities. This was confirmed by the breadth of the invitation extended to the general public to visit these premises. Substantial numbers of outsiders were invited and expected. Accordingly, the autonomy and privacy interests retained by the owners could only be minimal in these circumstances.¹⁷¹ For the same reason both universities and shopping centers were important locations at which political expression could be directed at a diverse audience. The utility of opening access to these locations to political speech and the exchange of ideas was important to the functioning of a democratic government. Finally, in light of the reasonable time, place, and manner restrictions which owners might constitutionally enforce against disruptive or inconvenient expressive acts, the claim of owners for total discretion to determine who might use the premises for expressive purposes could not be sustained. Free speech and the solicitation of political support outweighed the "bare title" prerogatives insisted on by owners.¹⁷²

"vague" and "standardless" permit policy. *Id.* at 174-75, 432 A.2d at 1390-91.

¹⁶⁹ *Alderwood*, 96 Wash. 2d at 246, 635 P.2d at 117.

¹⁷⁰ *State v. Schmid*, 84 N.J. 535, 551-52, 423 A.2d 615, 623-24 (1980); *Tate*, 495 Pa. at 168, 174, 432 A.2d at 1387, 1390.

¹⁷¹ *Schmid*, 84 N.J. at 565, 423 A.2d at 631 (stating that public access is not incompatible with university educational mission which requires and encourages exposure to 'outside world'); *Alderwood*, 96 Wash. 2d at 244, 635 P.2d at 116 ("When property is open to the public, the owner has a reduced expectation of privacy and, as a corollary, any speech activity is less threatening to the property's value."); see *supra* note 168 (discussing balancing in *Tate*).

¹⁷² *Schmid*, 84 N.J. at 568, 423 A.2d at 633 (noting that new time, place, and manner regulations adopted by Princeton subsequent to occurrences on which this case is based demonstrate University's ability to protect its "institutional integrity" while accommodating rights of access and expression); *Tate*, 495 Pa. at 174, 432 A.2d at 1390 (stating that college is not powerless to protect its own interests through reasonable regulations); *Alderwood*, 96 Wash. 2d at 245, 635 P.2d at 117 (stating that shopping center

The only jurisdiction to utilize this kind of ad hoc multifactor balancing test without reservation in the abortion clinic context was Texas. In Texas there was no direct precedent under the state constitution for protecting speech activities on private property, even on shopping center grounds (although one lower court had suggested in dicta that a right of access to private property might still exist under the first amendment in a situation in which there were no alternative avenues of communication available for the exercise of free speech rights).¹⁷³ Thus, in *Right to Life Advocates, Inc. v. Aaron Women's Clinic*,¹⁷⁴ the Texas courts evaluated, as a matter of first impression, the constitutionality of antiabortion "sidewalk counseling"¹⁷⁵ on the private grounds of an office building that housed, among other tenants, a clinic offering abortion services. In deciding to affirm a permanent injunction barring expressive activity on the interior sidewalk and parking lots outside the clinic, the court adopted the balancing test suggested by the New Jersey Supreme Court in *Schmid*, acknowledging as it did so that its analysis must be fact specific and "highly subjective."¹⁷⁶

None of the three factors the court considered directly favored the protestors. With regard to the purpose of the expressive activity at issue and its relation to the private and public use of the property, the court recognized that, while the protestors' conduct was directly related to the clinic's activities, their signs would be clearly visible to the patients visiting the clinic from the public sidewalk. Thus the protestor's legitimate objective of acquainting patients of the availability of abortion counseling could be adequately served through alternative channels of communication

may impose on expression reasonable time, place, and manner regulations that have proven effective in protecting owner's interests in other locations and circumstances).

¹⁷³ *Rains v. Mercantile Nat'l Bank at Dallas*, 599 S.W.2d 121, 124 (Tex. Civ. App. 1980).

¹⁷⁴ 737 S.W.2d 564 (Tex. Ct. App. 1987).

¹⁷⁵ *Id.* at 566. Sidewalk counseling was more specifically described by its proponents as "attempting to counsel with and distribute literature to parties who are visiting the clinic . . . for pregnancy terminations," *Id.* at 568. The clinic's description suggested, however, that the "counseling" was difficult "to avoid and escape" because "[d]emonstrators often approached people at their car doors and then followed them to the doors of the building." *Id.* at 569.

¹⁷⁶ *Id.* at 567.

that did not require an invasion of the clinic's grounds.¹⁷⁷

As to the use of the property, if the clinic's operations were lawful, it had the right to continue its business without interference or harassment. Given the protestors' avowed purpose of preventing abortions at the clinic, the expression at issue was inconsistent with the clinic's function. Further, the effect of the sidewalk counseling efforts upset patients and disturbed their privacy.¹⁷⁸ Such conduct was particularly problematic in light of the limited nature of the invitation to the public to use the private grounds adjacent to the clinic. Far from creating a public forum or a "focal point of community activity," the parking lot and interior sidewalks were open to clients of the building's tenants for the sole purpose of making it easier for patients to obtain the tenants' services.¹⁷⁹ In that context the protestors' activities were unprotected and could be enjoined.¹⁸⁰

b. Definitional Balancing: The Final Model

Although the decisions of the New Jersey, Washington, and Pennsylvania courts were reasonable and hardly alarming in light of the precedent of *Pruneyard*, the reasoning employed in these cases remained highly problematic. Recognizing a right to occasionally distribute leaflets at a shopping center or a large university campus were relatively simple results to reach. The analytic framework apparently being implemented through these balancing tests, however, had no built-in stopping place. In theory all private interactions relating to speech had become constitutionalized.

By repudiating state action limitations on the scope of constitutional rights, these courts had created a gaping doctrinal vacuum. As noted, state action doctrine served overlapping functions. It not only promoted federalism, it also protected the separation of powers by recognizing that many areas of social conflict are properly subject to legislative policy judgments for their resolution rather than the constitutional balancing of the judiciary.¹⁸¹ Cer-

¹⁷⁷ *Id.* at 568-69.

¹⁷⁸ *Id.* at 569.

¹⁷⁹ *Id.* at 568.

¹⁸⁰ *Id.* at 572.

¹⁸¹ See *supra* note 140; see also Note, Robins v. Pruneyard Shopping Center: Free Speech Access to Shopping Centers Under the California Constitution, 68 CALIF. L. REV. 641, 649-60 (1980) (explaining purpose of state action requirement is to reserve to legislature, not courts, balancing of speech,

tainly, at some point, the conflict between rights of expression and privacy and property rights would have to be resolved as a matter of constitutional law; but did this *always* have to be the case?

Formal state action doctrine as interpreted by the United States Supreme Court provided an inadequate basis for delineating the scope of constitutional rights because it operated as a universal boundary insensitive to the important substantive differences among constitutional rights. It simply made no sense to determine the extent to which free speech rights should be permitted on private property without considering the relative values of either speech or property rights.¹⁸² That did not mean, however,

privacy, and autonomy interests, and that “[w]ithout a state action requirement every private conflict involving competing private autonomy interests and free speech interests would raise a state constitutional issue”).

¹⁸² In equal protection cases courts had often been particularly willing to find state action, *see, e.g.*, *Jackson v. Statler Found.*, 496 F.2d 623, 628-29 (2d Cir. 1974); *see also* *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 369 & n.2 (1974) (Marshall, J., dissenting); Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 661-62 (1974), but there still remained a broad range of private interactions that depended on civil rights legislation to allocate rights between employers, business establishments, and disfavored minorities. These limited extensions of the state action principle to accommodate antidiscrimination objectives did not, however, result in a complete and coherent doctrine. *See* Harvey, *supra* note 141, at 930 (stating that Supreme Court’s “tinker[ing] with the limiting concept of state action” resulted in “decisions [which] wander[ed] the constitutional landscape like Pirandello characters: judicial actions in search of a determinate and limitable theory”). A comparable, limiting, and hopefully more intelligible doctrine was needed to reconcile competing claims involving property prerogatives and freedom of speech. Unfortunately, the formal state action doctrine of the United States Supreme Court provided no assistance in resolving this problem.

To begin with, the language and text of many state constitutions did not directly support such a limitation on state constitutional rights. *See supra* notes 146-47 and accompanying text. And even if state action constraints could be inferred from state constitutional provisions, the role of the state in enforcing the access rules of property owners could not logically be ignored. *See supra* note 120.

In equal protection cases it was sometimes possible to avoid constitutional requirements even under an expansive interpretation of state action by recognizing that statutes, such as trespass laws, were neutral on their face and supported by nondiscriminatory motives. Allowing trespass laws to be invoked by both bigoted and nonbigoted property owners did not violate the equal protection clause on the merits under traditional doctrine. *See generally* *Village of Arlington Heights v. Metropolitan Housing Dev.*

that the only alternative was to adopt an ad hoc balancing approach.

The real choice is not *whether* substantive free speech and property concerns should be evaluated in these cases, it is *how* they should be considered. Two possibilities exist. Courts may subjectively balance free speech rights against the competing property, privacy, and autonomy interests asserted by the property owner. This will involve an ad hoc multifactor analysis weighing the specific variables in each case in which one of the parties to the dispute invokes state authority in its resolution. Alternatively, courts may develop general substantive doctrine as a form of definitional balancing of state-protected freedom of speech. Within this framework the goal must be to establish rules that identify those limited situations in which speech is permitted on private property as a matter of constitutional law. Other conflicts between speech and property rights are to be resolved by the political process until the point is reached that the entitlements provided to speakers become so intrusive that the property owner's constitutional rights are abridged.

Over time state courts began to adopt just such a definitional

Corp., 429 U.S. 252 (1977) (finding racially discriminatory impact of city's refusal to rezone property insufficient to warrant invalidating decision on equal protection grounds without proof of racially discriminatory intent); *Washington v. Davis*, 426 U.S. 229 (1976) (requiring proof of invidious motive to challenge facially neutral law on equal protection grounds). The substantive challenge raised in free speech cases, however, cannot be so easily resolved. Unlike the protection provided suspect classes against discrimination, fundamental rights *can* be abridged by neutral laws enacted for noninvidious reasons. Cases involving symbolic speech, the free exercise of religion, and the right to have an abortion demonstrate that point convincingly. See generally Brownstein, *Illicit Legislative Motive in the Municipal Land Use Regulation Process*, 57 U. CIN. L. REV. 1, 16-21 (1988) and cases cited therein. But see *Employment Div., Dep't of Human Resources v. Smith*, 110 S.Ct. 1595 (1990) (upholding constitutionality of Oregon criminal statute that incidentally forbids performance of religious act — smoking peyote — because law was not specifically directed to religious practice and was otherwise constitutional as applied). Accordingly, state law that neutrally permits a property owner to deny access to speakers she finds offensive or bothersome inescapably raises substantive first amendment issues that cannot be avoided simply by invoking state action and pointing to the private status of the owner whose discretionary decisions are being enforced. The state's decision to permit that private choice to limit freedom of speech, through property and trespass laws, must be justified in constitutional terms. See L. TRIBE, *supra* note 127, § 12-25, at 1000 n.15, § 18-5, at 1710-11.

balancing approach. In the Texas case, *Right to Life Advocates, Inc. v. Aaron Women's Clinic*,¹⁸³ antiabortion protestors attempted to invoke the state free speech rights that had been so liberally enforced in shopping center and university contexts to justify their expressive activities on private property surrounding medical clinics providing abortion services. Applying the multifactor balancing test in this circumstance, however, produced very different results.¹⁸⁴ In cases involving antiabortion protestors on clinic grounds the remaining three jurisdictions that initially utilized an ad hoc balancing test reached the same substantive conclusion as the Texas court. The nature of the tests they applied, however, changed significantly. In place of the subjective evaluation and ad hoc weighing of competing factors,¹⁸⁵ courts in these jurisdictions began to identify threshold and controlling principles that more carefully limited the scope of the speech and access rights that protestors might assert. These decisions are remarkable in the uniformity of their reasoning and the similarity of their conclusions.

In New Jersey, for example, subsequent to the *Schmid* decision, the trial and intermediate appellate courts took divergent paths in interpreting *Schmid* although they typically reached the same result. In one case not involving an abortion clinic, an intermediate appellate court held that the complicated *Schmid* analysis was unnecessary.¹⁸⁶ The court explained that the three-factor balancing test need only be employed to adjudicate a conflict between speech and property rights if the court first finds that the owner

¹⁸³ 737 S.W.2d 564 (Tex. Ct. App. 1987).

¹⁸⁴ See *supra* notes 173-80 and accompanying text (discussing balancing test used in *Aaron Women's Clinic*).

¹⁸⁵ See generally Salzman, *supra* note 97, at 136 (describing *Alderwood* test as determining when speech may be allowed on private property through "individualized treatment based on the facts of each case").

¹⁸⁶ In *Bellemead Dev. Corp. v. Schneider*, 196 N.J. Super. 571, 483 A.2d 830 (App. Div. 1984), the trial court enjoined union members attempting to organize office workers from distributing leaflets outside the doors of office buildings located in a multipurpose corporate center. The court carefully evaluated all three of the factors in the *Schmid* test in reaching its decision, although it determined that the factor relating to the scope of the invitation extended to the public to use the property carried the most weight in the balance. *Id.* at 575, 483 A.2d at 832. The appellate division affirmed the injunction, but it noted that the trial court judge had "made his task unnecessarily difficult" by applying the three *Schmid* factors to the facts before it. *Id.*

has devoted his property to a public use.¹⁸⁷ Without such a foundation, no accommodation of speech and property rights was required. Subsequently, in an abortion clinic case, *State v. Brown*,¹⁸⁸ the appellate court criticized two prior trial court decisions that had applied the *Schmid* multifactor analysis in cases involving antiabortion protestors.¹⁸⁹ Again, the appellate court saw no reason to apply the sliding scale balancing test utilized by

¹⁸⁷ *Id.*

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

¹⁸⁹ In *Brown v. Davis*, 203 N.J. Super. 41, 495 A.2d 900 (Ch. Div. 1984), a trial court refused to enjoin the prosecution of an antiabortion protestor who had been arrested for trespass while engaging in expressive conduct on the grounds of a medical clinic where abortions were performed. Applying the *Schmid* balancing test, the court concluded that a small complex of commercial offices in which the clinic was located was "not the functional equivalent of a suburban shopping center." *Id.* at 47, 495 A.2d at 903. Far from being a place for the public to congregate, its grounds were for the benefit of "prospective customers visiting specific businesses for the limited services made available to them." *Id.* Similarly, the invitation to the public was narrow, not general, and was primarily directed to visits by appointment. *Id.* As to the third factor, it was clear to the court that the expression at issue was incompatible with the clinic's business operations. *Id.* at 48, 495 A.2d at 904.

The trial court also applied the *Schmid* balancing test in *Planned Parenthood of Monmouth County, Inc. v. Cannizzaro*, 204 N.J. Super. 531, 499 A.2d 535 (Ch. Div. 1985), a case in which a Planned Parenthood clinic sought to enjoin antiabortion protestors from trespassing on the clinic's grounds. The trial court interpreted *Bellemead* as rejecting speech claims on property that was "exclusively private." *Id.* at 538, 499 A.2d at 539. That condition did not apply in this case, however, despite the fact that the clinic was the sole occupant of property at issue, because the clinic was a recipient of public funds. Therefore, all of the *Schmid* factors had to be individually considered. *Id.*

The court determined that one factor favored the defendants. The defendants' expression was clearly related to the clinic's activities; thus the clinic's property was a particularly appropriate site for expression from the protestors' perspective. *Id.* at 541, 499 A.2d at 540. That factor, however, was outweighed by the other considerations which favored the plaintiff. *Id.*

The function of the clinic was particularly "personal and private" in nature. *Id.* at 539, 499 A.2d at 539. Moreover, the extent and nature of the invitation extended to the public reflected the clinic's purpose; it was an invitation for people to visit the clinic to have their private and personal needs attended to. *Id.* at 540, 499 A.2d at 540. The invitation extended by a medical clinic is distinct from that provided by a public hall or park. *Id.* Therefore, an injunction could be issued to protect the privacy and property rights of the clinic and its invitees against expression that impaired these interests. *Id.* at 540-43, 499 A.2d at 540-42.

the trial courts. The appellate court found that the *Schmid* test was only relevant with regard to property that is "devoted to [a] public use."¹⁹⁰ A medical clinic's invitees are there by specific invitation while "[t]he general public is not invited to use the property, nor does it."¹⁹¹ Accordingly, the conduct of the antiabortion protestor who sought a reversal of her trespass conviction was not constitutionally protected and her conviction was upheld.¹⁹²

Washington courts' commitment to the multiple-factor balancing test described in *Alderwood*¹⁹³ was also relatively short-lived. Seven years after *Alderwood*, in *City of Sunnyside v. Lopez*,¹⁹⁴ a defendant appealed her conviction for trespass claiming that she had a constitutional right to distribute antiabortion leaflets on the grounds of a medical complex that included eleven tenants: a laboratory, a pharmacy, and several physicians, one of whom provided abortion services. The appellate court upheld the protestor's conviction after evaluating only one of the *Alderwood* factors, the use and nature of the private property.¹⁹⁵ The court held:

[T]he specific invitation extended by the doctor-tenants of Sunnyside Professional Center to members of the public who seek their medical expertise is not sufficient to classify the center as open to public use. Unlike a shopping mall, Sunnyside Professional Center is not a successor to the public forum historically provided by the streets and sidewalks of the town business district. It presents no significant opportunity to disseminate ideas, and prohibiting such activity on its premises does not curtail the realistic opportunity of citizens to exercise their right of free speech. The center was not the functional equivalent of a public place; [the defendant] had no constitutional right of access to the center for speech activities.¹⁹⁶

The court also rejected the contention that the presence of the pharmacy transformed the entire medical complex into a public forum.¹⁹⁷ Citing the California Supreme Court's language and reasoning in *Robins v. Pruneyard Shopping Center*, the court distin-

¹⁹⁰ *State v. Brown*, 212 N.J. Super. at 64, 513 A.2d at 976.

¹⁹¹ *Id.* (quoting *Bellemead*, 196 N.J. Super. at 576, 483 A.2d at 833).

¹⁹² *Id.* at 65-66, 513 A.2d at 976-78.

¹⁹³ *See supra* notes 157-62 and accompanying text.

¹⁹⁴ *City of Sunnyside v. Lopez*, 50 Wash. App. 786, 751 P.2d 313 (1988).

¹⁹⁵ *Id.* at 794-95, 751 P.2d at 318.

¹⁹⁶ *Id.* at 794, 751 P.2d at 318.

¹⁹⁷ *Id.* at 794-95, 751 P.2d at 318.

guished between the "modest retail establishment" in the case before it and the giant shopping center in *Alderwood*, where free speech rights had been vindicated.¹⁹⁸ Thus, the appellate court in *Lopez* introduced a threshold requirement that the property in question be sufficiently public in nature before the more ad hoc multifactor balancing test in *Alderwood* was to be applied.¹⁹⁹

Pennsylvania, like New Jersey, began modifying its analysis of free speech on private property even before an abortion clinic case came before its courts. In *Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Insurance Co.*²⁰⁰ political campaign workers sought injunctive relief to enable them to solicit signatures on their candidate's nominating petitions in a large suburban shopping center outside of Pittsburgh. The Pennsylvania Supreme Court ruled that they had no such state constitutional right.²⁰¹ The Court distinguished *Commonwealth v. Tate* on its facts: while the property of the college in *Tate* was "private in name," it was "used in fact as a forum for public debate."²⁰² The shopping mall to which plaintiffs sought access, however, had not deliberately transformed itself into a public forum. It sought to maintain its identity "as a market place for the exchange of goods and services but not as a market place for the exchange of

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 794-95, 751 P.2d at 318-19. Moreover, the doctrinal change in direction signaled by the analysis and holding in *Lopez* did not end with that decision. Two years later in *Southcenter Joint Venture v. National Democratic Policy Comm.*, 113 Wash. 2d 413, 780 P.2d 1282 (1989), the Washington Supreme Court repudiated its analysis in *Alderwood* and held that free speech rights under the state constitution did not protect expression on the grounds of private shopping centers because of the absence of any state action limiting speech in such circumstances. *Id.* at 419, 422-25, 780 P.2d at 1285, 1287-88. The holding in *Alderwood* was narrowed to apply only to the solicitation of signatures on initiative petitions, not expressive activities in general, paralleling the conclusions of the Massachusetts courts. *Id.* at 428-29, 780 P.2d at 1289-90.

A primary rationale for the Washington court's return to a state action limitation on free speech rights was its concern for separation of powers principles. The balancing of speech and property interests, it concluded, was a function that "reside[s] with the legislative branch of government," not the judiciary. *Id.* at 426, 780 P.2d at 1288.

²⁰⁰ 512 Pa. 23, 515 A.2d 1331 (1986).

²⁰¹ *Id.* at 39, 515 A.2d at 1339.

²⁰² *Id.* at 33-34, 515 A.2d at 1336-37 (citing *Commonwealth v. Tate*, 495 Pa. 158, 432 A.2d 1382 (1981)); see *supra* text accompanying notes 166-72.

ideas.”²⁰³ To the Pennsylvania court, that private decision was permissible. Shopping centers are not inherently the constitutional equivalent of downtown business districts.²⁰⁴ They may choose to reject that status.²⁰⁵

Given the court’s unwillingness to protect expression on the grounds of a shopping center, it is hardly surprising that a subsequent Pennsylvania trial court concluded in *Crozer Chester Medical Center v. May*²⁰⁶ that antiabortion protestors have no constitutional right to demonstrate or distribute literature on the private grounds of a large medical center which leased part of its premises to a clinic providing abortion services.²⁰⁷ The nature of the medical clinic was essentially private. Access to it was limited. The public was invited to the clinic only to transact specific business — to obtain medical treatment from the professional staff — not for the purpose of discussing political or moral issues.²⁰⁸

Only one jurisdiction, Massachusetts, arguably arrived at definitional balancing approach without first attempting a more ad hoc analysis. In *Batchelder v. Allied Stores International*,²⁰⁹ the Massachusetts Supreme Court upheld the right of a candidate for public

²⁰³ *Western Pennsylvania*, 512 Pa. at 35, 515 A.2d at 1337.

²⁰⁴ *Id.*

²⁰⁵ Underlying the narrow reading the Pennsylvania Supreme Court gave to the *Tate* decision in *Western Pennsylvania*, 512 Pa. at 33-35, 515 A.2d at 1336-37, were the same separation of powers concerns, often manifested through state action doctrine, that influenced the Washington court in *Southcenter Joint Venture*. See *supra* note 199. Rights such as freedom of speech are protected against government interference because the adjustment of rights of property and expression are the proper subject matter of the civil law, either statutory or common law. Disputed relationships among individuals require a more “flexible legal framework” for their resolution than the long-term, relatively static principles embodied in the Constitution. The development of that legal framework is the appropriate role of the legislature and the common law courts. *Western Pennsylvania*, 512 Pa. at 31-32, 515 A.2d at 1335-36. For a critical analysis of the *Western Pennsylvania* court’s reinterpretation of *Tate*, see Harvey, *supra* note 141, at 940-42.

²⁰⁶ 352 Pa. Super. 51, 506 A.2d 1377 (1986).

²⁰⁷ *Id.* at 58-64, 506 A.2d at 1381-83. *Tate* was further redefined as involving a quasi-state actor because the college’s property in that case served as the community center of the town in which it was located. *Id.* at 59-61, 506 A.2d at 1381-82. No state action rationale, however, could mitigate the medical clinic’s essentially private nature. *Id.* at 61, 506 A.2d at 1382.

²⁰⁸ *Id.*

²⁰⁹ 388 Mass. 83, 445 N.E.2d 590 (1983).

office to solicit signatures for his nominating petition in a large shopping center. After reviewing out-of-state authorities, such as *Schmid* and *Alderwood*, the court carefully weighed the candidate's constitutional right to solicit ballot signatures. The court defined this right narrowly under a state constitutional provision protecting participation in free elections, and distinguished it from a broader right to freedom of expression. Finally, the court balanced the value of that right against the prerogative to exclude individuals as a matter of personal choice, a power alleged to be inherent in the ownership of bare title to the shopping center property. The result favored the right to solicit signatures.²¹⁰ Although the court made oblique references to the nature of the property at issue, that did not seem to be identified as a threshold factor.²¹¹ Rather, the special importance of the right to solicit ballot signatures seemed to control the court's decision.

Three years later in *Ingram v. Problem Pregnancy of Worcester, Inc.*,²¹² the same court confronted a claim by antiabortion protesters that they had the constitutional right to engage in "corridor counseling"²¹³ in the hallways of a commercial office building in which Planned Parenthood operated a clinic. The court reiterated its distinction in *Batchelder* between rights of ballot access and freedom of speech, only the former of which was to extend on to

²¹⁰ *Id.* at 90-92, 445 N.E.2d at 593-95.

²¹¹ *Id.* at 92, 445 N.E.2d at 594-95 (referring to property "held open to the public" and property that has "been dedicated to the public as a practical matter"). The majority opinion in *Batchelder* also suggested, in distinguishing prior precedent, that there were significant differences between the shopping center in this case and other private property locations, such as the parking lot of a private hospital, *id.* at 89 n.8, 445 N.E.2d at 593 n.8, and that there were differences between the right to solicit ballot signatures and more general free speech rights. *Id.* at 91-92, 445 N.E.2d at 595. The majority seemed to consider these concerns to be relevant only to its overall balancing responsibilities, however. They did not constitute a threshold showing of what must be established before a candidate's rights could be upheld. Indeed, the dissent's objection to the majority's analysis was that by substituting a balancing test for the threshold question of state action, the court had, by implication, constitutionalized a wide variety of private disputes without any suggestion as to how such expanded judicial power might be contained or limited. *Id.* at 97, 445 N.E.2d at 597-98 (Lynch, J., dissenting). For additional discussion of Massachusetts cases preceding and following *Batchelder*, see Harvey, *supra* note 141, at 947-64.

²¹² 396 Mass. 720, 488 N.E.2d 408 (1986).

²¹³ *Id.* at 721, 488 N.E.2d at 409.

private property.²¹⁴ More importantly, the court concluded that as a threshold matter, the protestor's right of expression could only be recognized on private property that had been "dedicated to public use,"²¹⁵ and the office building corridors could not be identified as such.²¹⁶ In blunt terms the court explained, "The fact that the corridors are common areas within the building does not alter the essentially private nature of the premises."²¹⁷ Rights of expression did not extend to such nonpublic locations.²¹⁸ Thus, Massachusetts now seemed to require a threshold finding that the property in question was public or quasi-public in nature; then the court could balance the relevant speech and property interests to determine if particular kinds of expressive activity must be permitted there.

Of the two remaining state courts to address the issue of free speech rights on private property, Oregon and Alaska, only the latter jurisdiction provides a relevant constitutional analysis.²¹⁹

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ Oregon initially interpreted the United States Supreme Court's decision in *Lloyd* as rigorously as the California Supreme Court had in *Diamond II*. See *Lenrich Assoc. v. Heyda*, 264 Or. 122, 504 P.2d 112 (1972). Expressive activity could not be protected on the grounds of shopping centers under the Oregon Constitution because enforcing such a requirement would violate the property owner's rights under the United States Constitution. *Id.* at 127-29, 504 P.2d at 115-16. Sixteen years later an intermediate level appellate court reversed an injunction issued by a trial court which prohibited the defendants from gathering signatures on their initiative petitions on plaintiffs' shopping center grounds. *Lloyd Corp. v. Whiffen*, 89 Or. App. 629, 750 P.2d 1157 (1988), *aff'd*, 307 Or. 674, 773 P.2d 1294 (1989). Recognizing that the Supreme Court's opinion in *Pruneyard* had rendered the Oregon Supreme Court prior decision obsolete, the appellate court determined that the only appropriate injunction which might be issued in compliance with the Oregon Constitution could do no more than place reasonable time, place, and manner restrictions on defendants' activities. *Id.* at 637-38, 750 P.2d at 1162.

The Oregon Supreme Court affirmed the appellate court's decision but declined to reach the constitutional issue on which the lower court had based its reasoning. *Lloyd Corp. v. Whiffen*, 307 Or. 674, 679-80, 773 P.2d 1294, 1296-97 (1989). Instead, the supreme court applied equitable principles governing the granting of injunctions in trespass cases to limit the scope of the remedy the shopping center owner might obtain. *Id.* at 683-84, 773 P.2d at 1299. The court included as factors in its consideration the potential injury to the public interest that might result if plaintiff had total

The Alaska cases are indeterminate with regard to the broad issue of free speech rights on private property used for very public purposes, such as shopping centers, but they explicitly deny state constitutional protection to speech on property with more restricted access. The Alaska Supreme Court, in *Johnson v. Tait*,²²⁰ considered a claim to freedom of expression within a small tavern to which the plaintiff had been denied access. After reviewing the decisions of several other jurisdictions, the court concluded that in other states the only property to which individuals had been provided access as a matter of state constitutional law were large shopping centers and universities, not single, smaller enterprises.²²¹ Leaving aside the question of whether the Alaska constitution should be interpreted to extend free speech rights to equivalent property, the court adopted the limiting language in *Pruneyard* which recognized that rights of expression did not extend to the grounds of "a modest retail establishment" such as a tavern.²²² The next year the intermediate level appellate court in *Fardig v. Municipality of Anchorage*²²³ applied the reasoning of the *Tait* decision to deny constitutional protection to an antiabortion protestor charged with trespassing who had distributed "pro-life" literature in the parking lot of a medical clinic.²²⁴ The court affirmed that "[a]s a matter of law, the rationale in the shopping center and the university cases does not overcome the private autonomy of a small proprietor in the conduct of its busi-

discretion to control access to, and expression on, the shopping center's grounds, and the very limited harm that plaintiff would experience if limited expressive opportunities were permitted. The court concluded that "plaintiff is not entitled to an injunction to prohibit peaceful solicitation of signatures in the mall or on its walkways that does not substantially interfere with the commercial activity on the premises." *Id.* at 687, 773 P.2d at 1301. More intrusive activities such as setting up cardtables or the buttonholing of customers might be prohibited, however, and other time, place, and manner regulations would be upheld as long as they did not confine "signature solicitors to the least traveled byways and to times when few people are at the center." *Id.*

²²⁰ 774 P.2d 185 (Alaska 1989)

²²¹ *Id.* at 188-90.

²²² *Id.* at 188, 190 (citing *Pruneyard*, 23 Cal. 3d 899, 910, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860 (1979) (quoting *Diamond v. Bland*, 11 Cal. 3d 331, 345, 521 P.2d 460, 470, 113 Cal. Rptr. 448, 478 (1974) (Mosk, J., dissenting))).

²²³ 785 P.2d 911 (Alaska Ct. App. 1990).

²²⁴ *Id.* at 915.

ness.’ ”²²⁵ What is unclear, however, is whether this distinction between modest retail establishments and large shopping centers and universities in Alaska represents a public-function state action analysis or the accommodation of free speech and property rights as a matter of substantive constitutional law.²²⁶

²²⁵ *Id.* (quoting *Johnson v. Tait*, 774 P.2d 185, 190 (Alaska 1989)).

²²⁶ Wisconsin ordinarily would require little attention with regard to the abortion clinic issue. Because the Wisconsin Constitution only protects freedom of speech against state action and, therefore, leafletters may be constitutionally excluded from shopping malls, it is hardly surprising that protests on the grounds of abortion clinics are held to be subject to the state's trespass laws. Two Wisconsin clinic protest cases do require some mention here, however. In *State v. Horn*, 139 Wis. 2d 473, 407 N.W.2d 854 (1987), the majority and three concurring justices upheld the trespass conviction of several antiabortion protestors, but for difference reasons. The majority relied on the court's analysis in *Jacobs v. Major*, 132 Wis. 2d 492, 407 N.W.2d 832 (1987), a shopping center case decided at the same time. Thus, it rejected the protestors' state constitutional claim on the grounds that the free speech provisions of the Wisconsin Constitution only provided protection against state action, not against the decisions of private property owners. *Horn*, 139 Wis. 2d at 490, 407 N.W.2d at 861-62. The three concurring justices in *Horn*, however, had dissented from the formal state action holding of *Jacobs*. These justices insisted that the state constitution did protect the reasonable exercise of free speech rights on private property, such as a shopping center, which by its nature and practice constituted a public forum. *Jacobs*, 132 Wis. 2d at 531, 407 N.W.2d at 848 (Abrahamson, J., joined by Heffernan, J., and Bablitch, J., concurring in part and dissenting in part). State constitutional protection did not apply in the abortion clinic context, however, because the clinic was "not a 'public forum.'" *Horn*, 139 Wis. 2d at 491, 407 N.W.2d at 862 (Abrahamson, J., concurring).

The other abortion protest case, *State v. Migliorino*, 150 Wis. 2d 513, 442 N.W.2d 36 (1989), involved a challenge to a Wisconsin statute which explicitly prohibited unauthorized entry into a medical facility. Rejecting the claim that the statute discriminated against antiabortion expression, the court determined that the law was a valid content-neutral regulation of expression in a nonpublic forum. *Id.* at 525-26, 442 N.W.2d at 41. A more difficult argument raised by the defendants asserted that the medical trespass statute involved unconstitutional content discrimination because it exempted "lawful conduct in labor disputes" from its application. *Id.* at 531, 442 N.W.2d at 43. The supreme court responded that the statute failed to provide any preference to labor expression because "lawful conduct in labor disputes" did not require access to the inside of a medical facility. *Id.* at 533, 442 N.W.2d at 44. That conclusion, however, as the trial court had noted in declaring the law unconstitutional, rendered the exemption for labor activities meaningless. *Id.*

While the problem of reconciling access rights granted to labor organizers with the enforcement of restrictions on other expressive activity

3. Adapting *Pruneyard* to "Private" Property Under the California Constitution

The controlling authority in those states that have considered the issue of free speech rights on private property is overwhelmingly one-sided. Speech rights are limited either by a formal application of state action doctrine or under a balancing test that has become progressively more principled and less ad hoc. Moreover, the clear consensus in all states, including those that have adopted the basic *Pruneyard* analysis, is that freedom of speech does not protect antiabortion protestors on clinic grounds against civil or criminal sanction.²²⁷ Thus, a similar resolution of this question in California might appear to be preordained. Nevertheless, it seems worthwhile to consider whether the reasoning of these non-California decisions deserves to be followed and to test their compatibility with the line of California authority that culminated with *Pruneyard*.

on private property is beyond the scope of this Article, it should be noted, at a minimum, that this problem is not limited to state constitutional analysis. National labor legislation also recognizes rights of access to private property for the expressive activity of union organizers that are not available to other speakers. See generally *infra* notes 381-82. Those policies to date have been distinguished from content discriminatory regulations that permit labor picketing in traditional public forums but exclude other comparable expression, which the Court has invalidated as unconstitutional. See, e.g., *Carey v. Brown*, 447 U.S. 455 (1980); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972).

²²⁷ See, e.g., *Fardig v. Municipality of Anchorage*, 785 P.2d 911 (Alaska 1990); *Kerr v. State*, 193 Ga. App. 165, 387 S.E.2d 355 (1989); *Ingram v. Problem Pregnancy of Worcester, Inc.*, 396 Mass. 720, 488 N.E.2d 408 (1986); *State v. Friberg*, 435 N.W.2d 509 (Minn. 1989) (en banc); *State v. Scholberg*, 412 N.W.2d 339 (Minn. Ct. App. 1987); *Kugler v. Ryan*, 682 S.W.2d 47 (Mo. Ct. App. 1984); *State v. Brown*, 212 N.J. Super. 61, 513 A.2d 974 (App. Div. 1986); *Planned Parenthood of Monmouth County, Inc. v. Cannizzaro*, 204 N.J. Super. 531, 499 A.2d 535 (Ch. Div. 1985); *Brown v. Davis*, 203 N.J. Super. 41, 495 A.2d 900 (Ch. Div. 1984); *Commonwealth v. Wall*, 372 Pa. Super. 534, 539 A.2d 1325 (1988); *Crozer Chester Medical Center v. May*, 352 Pa. Super. 51, 506 A.2d 1377 (1986); *Right to Life Advocates, Inc. v. Aaron Women's Clinic*, 737 S.W.2d 564 (Tex. Ct. App. 1987); *Hoffart v. State*, 686 S.W.2d 259 (Tex. Ct. App. 1985); *City of Sunnyside v. Lopez*, 50 Wash. App. 786, 751 P.2d 313 (1988); *State v. Migliorino*, 150 Wis. 2d 513, 442 N.W.2d 36 (1989); *State v. Horn*, 139 Wis. 2d 473, 407 N.W.2d 854 (1987).

a. *Why Shopping Centers Are Different than Medical Clinics*

Those courts which accept (or accepted) *Pruneyard* while rejecting the free speech rights of antiabortion protestors focus on three basic distinctions to justify the limits they impose on free speech rights on private property. The first distinction relates to the propriety of using the property for expressive purposes. Propriety here includes both the general utility to society of having unrestricted expression occur in a particular location and the general compatibility of expression with the uses to which the property is being put.²²⁸ Under this analysis access to shopping

²²⁸ Both of these themes are intrinsic to orthodox first amendment analysis and underlie much of the United States Supreme Court's preoccupation with the nature of the "forum" in which speech occurs. Tribe explains:

The "public forum" doctrine holds that restrictions on speech should be subject to higher scrutiny when . . . speech occurs in areas playing a vital role in communication The designation "public forum" thus serves as shorthand for the recognition that a particular context represents an important channel of communication in the system of free expression.

L. TRIBE, *supra* note 127, § 12-24, at 987.

Nimmer emphasizes an alternative rationale of public forum doctrine that focuses on "whether the speech activities would be incompatible with the use to which the premises are dedicated or primarily devoted." M. NIMMER, *supra* note 120, § 4.09[D], at 4-72 to -77.

State courts attempting to balance speech rights against the privacy and autonomy prerogatives of property owners also recognize the importance of both of these considerations. For example, the Pennsylvania Supreme Court, in *Commonwealth v. Tate*, 495 Pa. 158, 432 A.2d 1382 (1980), determined that in order to evaluate the constitutionality of the arrest of alleged trespassers distributing leaflets on the grounds of a private college "we must balance the college's right to possess and protect its property against appellant's rights of expression in light of the compatibility of that expression with the 'activity of [the] particular place at [the] particular time.'" *Id.* at 173, 432 A.2d at 1390 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972)). That balance was struck in favor of the individuals handing out leaflets because the college permitted its grounds to be open to the general public, sponsored public events on campus, and allowed its facilities to be used as a forum for controversial speakers. In that context peaceful and unobtrusive persons distributing leaflets could not be arbitrarily excluded from the campus.

The New Jersey Supreme Court utilized a similar analysis in upholding state free speech rights on the campus of Princeton University in *State v. Schmid*, 84 N.J. 535, 423 A.2d 615 (1980). The court explained that:

Princeton University, as a private institution of higher education, clearly seeks to encourage both a wide and continuous exchange

centers (and to a lesser extent universities) for expressive purposes substantially furthers the free exchange of ideas and information because these areas represent a primary location where the public congregates.²²⁹ The underlying premise is that there is

of opinions and ideas and to foster a policy of openness and freedom with respect to the use of its facilities. . . . The University itself has endorsed the educational value of an open campus and the full exposure of the college community to the "outside world," (*i.e.*, the public at large).

Id. at 565, 423 A.2d at 631. Accordingly, "defendant's attempt to disseminate political material was not incompatible with either Princeton University's professed educational goals or the University's overall use of its property for educational purposes." *Id.*; *see also*, *Alderwood Assocs. v. Washington Env'tl. Council*, 96 Wash. 2d 230, 244-47, 635 P.2d 108, 116-17 (1981) (finding defendants' speech activity — soliciting signatures — not incompatible with nature and use of shopping mall's property).

²²⁹ The need to provide access to critically useful locations for expressive purposes was one of the underlying concerns emphasized in *Logan Valley*, the California *Pruneyard* decision, and *Diamond I* on which *Pruneyard* was based. *See Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 323-25 (1968); *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 910, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860 (1979) (stating that shopping centers provide "essential and invaluable forum" for free speech rights, not unlike business districts in downtown areas); *Diamond v. Bland*, 3 Cal. 3d 653, 662, 477 P.2d 733, 738, 91 Cal. Rptr. 501, 506 (1970) ("Access to the thousands of persons who congregate on foot daily at the [mall] is a highly significant vehicle for the dissemination of ideas, particularly when the activity requires time for discussion and a place for obtaining signatures."); *see also* *Harvey*, *supra* note 141, at 933 (noting that "[i]n an obvious effort to avoid over-breadth, the [*Pruneyard*] court directed much of its attention to the special function performed by large shopping centers in the life of the state").

State courts following *Pruneyard* adopted similar reasoning. In *Alderwood* the Washington Supreme Court explained that to allow shopping centers to exclude expressive activity

would significantly undermine free speech and particularly the effectiveness of the initiative process. The shopping center now performs a traditional public function by providing the functional equivalent of a town center or community business block. . . . The ability to gather the requisite number of initiative signatures, and to communicate ideas, would be greatly reduced if access to these centers were denied.

96 Wash. 2d at 246, 635 P.2d at 117. In a similar vein, the Pennsylvania Supreme Court, in *Tate*, 495 Pa. 158, 432 A.2d 1382, justified its reversal of the trespass conviction of leaflet distributors by focusing on the specific utility of the college campus as a forum for expression:

Here we are faced with an educational institution which holds itself out to the public as a community resource and cultural

a significant need to provide inexpensive channels of communication through which speakers can reach the general public.²³⁰ As to the compatibility factor, shopping centers represent a milieu of

center, allows members of the public to walk its campus, permits a community organization to use its facilities as a forum for a public official of national importance, and at the same time arbitrarily denies a few members of the public the right to distribute leaflets peacefully to the relevant audience present at that forum.

Id. at 168, 432 A.2d at 1387.

The Massachusetts Supreme Court in *Batchelder v. Allied Stores Int'l*, 388 Mass. 83, 445 N.E.2d 590 (1983) was equally emphatic in describing the special utility of shopping centers for obtaining signatures on ballot petitions:

[A] person needing signatures for ballot access requires personal contact with voters. He or she cannot reasonably obtain them in any other way. Reasonable access to the public is essential in ballot access matters. . . .

. . . [Accordingly] North Shore Shopping Center is the most favorable area in the Sixth Congressional District to solicit signatures.

Id. at 92-93, 445 N.E.2d at 595. The New Jersey court in *Schmid*, however, was slightly more equivocal on this issue with regard to the value of providing public access to the grounds of Princeton University. Although the court recognized that maintaining an open campus would substantially further the goals of "public involvement and participation in the academic life of the University," *Schmid*, 84 N.J. at 565, 423 A.2d at 631, it also noted that there were ample alternative locations at which members of the public could communicate with the University community without being provided access to the University's private grounds. *Id.* at 551, 423 A.2d at 623.

See also Note, *supra* note 181, at 644 n.23 (explaining that expanding role of shopping centers and need to provide access to such locations was one justification for *Pruneyard* decision); Note, *supra* note 97, at 168-69 (describing shift of primary site at which public congregates from traditional downtown trading districts to shopping malls and noting corresponding importance of shopping centers as forum for public expression).

But see *Fiesta Mall Venture v. Mecham Recall Comm.*, 159 Ariz. 371, 376, 767 P.2d 719, 724 (Ct. App. 1989) (noting shopping malls are just areas "in which a large number of retail businesses [are] grouped together for convenience and efficiency" to further only one purpose, "shopping").

²³⁰ In Justice Marshall's words:

For many persons who do not have easy access to television, radio, the major newspapers, and the other forms of mass media, the only way they can express themselves to a broad range of citizens on issues of general public concern is to picket, or to handbill, or to utilize other free or relatively inexpensive means of communication. The only hope that these people have to be able to communicate effectively is to be permitted to speak in those areas in which most of their fellow citizens can be found.

undifferentiated interaction in which anonymous individuals mix and mingle amidst a regular background of noise and chatter.²³¹ In an environment subject to a range of expressive activity as to which any particular person may be more or less receptive, the additional message of someone seeking signatures on a petition may be easily subsumed in the totality of the visitor's experience.²³²

One such area is the business district of a city or town or its functional equivalent.

Lloyd Corp. v. Tanner, 407 U.S. 551, 580-81 (1972) (Marshall, J., dissenting); *see also*, L. TRIBE, *supra* note 127, § 12-24, at 987 (noting that higher scrutiny must be imposed on speech restrictions governing particular locations "because of how indispensable communication in these places is to people who lack access to more elaborate (and more costly) channels"); Note, *supra* note 97, at 166 ("An effective expression system must insure that individuals and groups are afforded inexpensive and easily utilized channels of public communication.").

²³¹ *See* Note, *supra* note 97, at 168 ("[S]hopping centers have become 'new downtowns,' in which members of the public may not only shop, but also stroll, sit, meet friends, and participate in community activities as they once did in downtown business districts."); *see also* *Batchelder*, 388 Mass. at 86 n.4, 445 N.E.2d at 591 n.4 (1983) (stating that shopping center to which access is sought "presents such events as Military Week; a Memorial Day Service; a Peabody School Exposition; Fire Prevention Week; Bicycle Safety Week; Library Week; a Dental Health Fair Exhibit; a Health and Beauty Fair; a Boat Show; a Winterizing Show; a Senior Citizens' Week; a Charity Week at which churches, PTA groups, Girl Scouts, and other nonprofit organizations may sell homemade goods; a United Cerebral Palsy Telethon; and orchestra and band concerts"); *SHAD Alliance v. Smith Haven Mall*, 118 Misc. 2d 841, 843, 462 N.Y.S.2d 344, 345-46 (Sup. Ct. 1983), *rev'd*, 66 N.Y.2d 496, 488 N.E.2d 1211, 498 N.Y.S.2d 99 (1985) (describing mall as "designed to encourage people from the community to linger, browse, and congregate" and to "provide numerous opportunities for public gatherings and events" including "80 promotional events each year").

²³² *See, e.g.*, *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 910-11, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860 (1979) (noting that with respect to larger shopping centers where 25,000 people congregate daily "[a] handful of additional orderly persons soliciting signatures and distributing handbills" will not disturb the owner's business operations); *Diamond I*, 3 Cal. 3d at 664-65, 477 P.2d at 740, 91 Cal. Rptr. at 508 (stating that "[a] shopping center to which the public is invited and where thousands of persons come to shop, browse, stroll, and talk is no more likely to be disrupted by peaceful and orderly circulation of a petition" than other locations in which free speech rights have been upheld); *Batchelder*, 388 Mass. at 93 n.12, 445 N.E.2d at 595 n.12 (noting where shopping center has allowed civic groups, charitable organizations, and political candidates to engage in expressive activity on its grounds, it is unlikely that plaintiff's

Other property, such as a medical clinic providing abortion services, requires a very different analysis.²³³ Now the speaker

ballot signature-solicitation activity would constitute “a significant intrusion” on the shopping center’s interests); *Schmid*, 84 N.J. at 566, 423 A.2d at 631 (noting no indication on record that distributor of leaflets “caused any interference or inconvenience with respect to normal use of University property and the normal routine and activities of the college community”); *Tate*, 495 Pa. at 167, 432 A.2d at 1386-87 (noting persons arrested for trespass were indistinguishable from other members of public on private college campus except that those arrested were distributing leaflets); *Alderwood*, 96 Wash. 2d at 244, 635 P.2d at 116 (“As property becomes the functional equivalent of a downtown area or other public forum, reasonable speech activities become less of an intrusion on the owner’s autonomy interests.”); .

See generally *M. NIMMER*, *supra* note 120, § 4.09[D], at 4-118 to -121 (arguing that as privacy interests of property owner decline in shopping center environment, basis for restricting speech in such an area becomes progressively less persuasive); Note, *supra* note 181, at 653 (stating that because shopping center owner “has already chosen to open his premises to the general public, requiring him to endure the limited speech activity of others will not violate his right of privacy”).

²³³ Although one obvious distinction between a shopping center and a medical clinic is the generally larger size of the former, it is clear that while this factor is relevant, *see, e.g.*, *Fardig v. Municipality of Anchorage*, 785 P.2d 911, 915 (Alaska 1990) (noting that even if state constitutional free speech rights extend to shopping centers, that would not justify extending such rights to grounds of small medical facility); *Pruneyard*, 23 Cal. 3d at 910-11, 592 P.2d at 347-48, 153 Cal. Rptr. at 860-61 (distinguishing right to speak on grounds of “modest retail establishment” from right to speak on grounds of shopping center), it is not dispositive. Size is not the primary difference that courts focus on when they limit free speech rights more severely on the grounds of medical clinics than in shopping malls. The nature of the property’s use seems to be more critical than its absolute dimensions. Thus, many cases reject the free speech rights of antiabortion protestors despite the fact that the clinic which is the focus of the protest is located in a medical or office complex or building of substantial size. *See, e.g.*, *State v. Brown*, 212 N.J. Super. 61, 513 A.2d 974 (App. Div. 1986) (finding free speech rights do not extend to two-acre medical complex including three one-story buildings and parking areas); *Crozer Chester Medical Center v. May*, 352 Pa. Super. 51, 506 A.2d 1377 (1986) (finding no right to conduct antiabortion protests on grounds of 68-acre hospital and medical complex in which clinic providing abortion services is located); *Right to Life Advocates, Inc. v. Aaron Women’s Clinic*, 737 S.W.2d 564 (Tex. Ct. App. 1987) (finding no right to protest on grounds of parking lot of five-story office building including as tenants construction company, accountants, doctors, VISA center, and medical facility providing abortion services); *City of Sunnyside v. Lopez*, 50 Wash. App. 786, 787, 751 P.2d 313, 314 (1988) (finding antiabortion advocates may not protest on grounds

does not want to communicate with the public. She wants to talk to you — the particular person who visits this kind of establishment. This raises a more complex first amendment issue in that the specificity of both the communication and its intended audience raises the countervailing interests of the person who does not want to hear the speaker's message. Although the speaker may have a more substantial interest in being able to deliver a specific message to a particular audience, the right of person *A* to communicate with the general public may involve different and stronger first amendment values than the right of *A* to deliver a message to the unconsenting *B*. In important ways, society's interest in the occurrence of that latter communication is less clear and more circumspect.²³⁴ The lack of compatibility between

of clinic located in 1-1/2 acre medical complex including medical laboratory, pharmacy, several doctor's offices, other tenants, and 110 parking spaces).

²³⁴ In some circumstances, courts have viewed speakers as possessing a particularly strong first amendment interest in obtaining access to a discrete audience, such as the customers of a store accused of being unfair to its employees. See, e.g., *Lloyd*, 407 U.S. at 563, 566-67 (distinguishing *Logan Valley*, which involved attempt to communicate with specific audience accessible only on shopping center's grounds, from present case in which speakers had ample communication alternatives available to reach general public); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 324-25 (1968) (supporting access to shopping-center grounds so that "on-the-spot public criticism" of practices of particular businesses could occur); *Diamond v. Bland*, 3 Cal. 3d 653, 662-63, 477 P.2d 733, 739, 91 Cal. Rptr. 501, 507 (1970) (finding speakers have more compelling need for access to shopping center grounds when their expression is related to center's business operations than do speakers who simply want to communicate with general public); *Planned Parenthood of Monmouth County, Inc. v. Cannizzaro*, 204 N.J. Super. 531, 541, 499 A.2d 535, 540 (Ch. Div. 1985) (concluding antiabortion protestors' expression specifically directed to activity conducted on medical clinic's property is factor weighing in favor of protecting protestors' right of access to, and speech on, clinic's grounds).

The contention that speakers possess a strong first amendment interest in obtaining access to a discrete audience becomes far less persuasive, however, when the intended audience has an important reason for not consenting to receive the speaker's message. Nimmer makes it clear that the primary function of the first amendment, to communicate ideas and enlighten one's audience, may be inapplicable to situations in which the audience does not want to listen to what the speaker has to say. Thus, the existence of a "captive audience" may substantially weaken a speaker's claim to constitutional protection for her expressive activities. M. NIMMER, *supra* note 120, § 1.02[F], at 1-23 to -24. Nimmer warns that this doctrine should

the challenged expression and the clinic's operation is also signifi-

be used "sparingly" so as not to restrict unnecessarily the scope of protected expression, and that it is most appropriately invoked when the audience's legitimate privacy interests are threatened. He concedes, however, that "even in the absence of a privacy interest . . . speech to an unwilling audience may not be entitled to First Amendment protection." *Id.* at 1-24.

In the same vein Tribe argues:

The Court seems understandably troubled that the individual may be able to find refuge from . . . bombardments of his sensibilities only in the sanctuary of the home [But] the Court has not generally allowed government to suppress speech solely to protect unwilling listeners from 'offensive' expression unless substantial privacy interests have been invaded.

L. TRIBE, *supra* note 127, § 12-19, at 948-49. Tribe goes on to explain, however, that

[i]n public places an individual's privacy interests in avoiding offensive communications are generally thought insubstantial unless the person is deemed a member of a 'captive audience,' either because the person is literally not free to leave without great burden, or because the person is in a place where there is a basic right to remain and where one cannot readily avoid exposure to the unwanted communication.

Id. at 949 n.24 (citations omitted). See generally *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988) (recognizing privacy interests in and around one's home may outweigh first amendment rights of protestors); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) (holding that because bus passengers constitute captive audience with regard to billboards placed on buses, content restrictions applied to such expression will be upheld); *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 737-38, 740 (1970) (finding recipient of unsolicited sexually graphic advertisements may instruct post office to order sender to desist from mailing addressee any additional material); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (noting that city may, through time, place, and manner regulations, protect homeowner's privacy against solicitors and unwanted visitors); *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 207, 378 N.W.2d 337, 345 (1985) ("[T]he right to free speech and writing is not one to force speech and writing on an unwilling audience or readers, and the constitutional guaranty does not authorize a citizen to appropriate to his own use public or private property in a community for the purpose of exercising that guaranty.") (quoting 16 C.J.S. *Constitutional Law* § 213, at 1108 (1955) (revised and renumbered, see 16B C.J.S. *Constitutional Law* (1985))).

Many courts explicitly recognize the interests of the unconsenting and captive audience of women patients and clinic employees as a limit on free speech rights and, accordingly, decline to protect the speech of protestors on the grounds of clinics providing abortion services. In *Aaron Women's Clinic*, 737 S.W.2d 564, for example, the court described how "[d]emonstrators often approached people at their car doors and then fol-

cant. The much more limited uses to which a medical clinic is put makes argumentative expression there a singular and much more intrusive event than it is in the shopping center environment.²³⁵

lowed them to the doors of the building." *Id.* at 569. One woman, a pregnant employee of the clinic reported how "the demonstrators continued to try to talk to her after she told them she did not want to listen." *Id.* at 571. In light of this evidence, the court ruled that the antiabortion protestors' "right to engage in expressive activities does not extend to the parking lot and interior sidewalks [of the office building in which the clinic is located]." *Id.* at 569. The court explained:

While we recognize the importance of freedom of speech in our society, it must be balanced against the rights of individuals to be free in their choice of lawful pursuits. Although we are free to think, follow and express our personal beliefs, we cannot force our thoughts and beliefs on others. . . . The right of free speech is not an absolute right which may be indiscriminately exercised under all circumstances and conditions or a right which may be exercised everywhere.

Id.; see also *Cannizzaro*, 204 N.J. Super. at 541, 499 A.2d at 540-41 (acknowledging value of free flow of ideas, yet refusing to protect their expression on medical clinic grounds when that expression resulted in deprivation of rights of others); *City of Sunnyside v. Lopez*, 50 Wash. App. 786, 792, 751 P.2d 313, 317 (1988) (surveying and agreeing with jurisdictions that "have decided that the private property rights of medical center tenants and owners override the right of a citizen to express anti-abortion sentiments").

But see Mississippi Women's Medical Clinic v. McMillan, 866 F.2d 788, 790, 794-96 (5th Cir. 1989) (concluding women seeking abortions have neither right not to hear antiabortion protesters on public sidewalk in front of clinic nor right to obtain abortion in nonintimidating atmosphere).

²³⁵ In extreme situations, expression might be protected despite the intrusiveness of the means of its communication if no alternative avenues of communication are possible. See *Salzman*, *supra* note 97, at 143 & n.173 (arguing expanded speech rights and access to private property are critically important at institutions like nursing homes and migrant labor camps in which audience is effectively isolated and immobile). No special conditions apply to justify speech rights at medical clinics, however. The class to receive the message, pregnant women, may be communicated with in a variety of circumstances and through many different expressive mediums. Moreover, most courts have recognized that prohibiting speakers from invading a clinic's grounds will not preclude antiabortion activists from communicating their message to any clinic patient who is willing to hear what they have to say. See, e.g., *Brown v. Davis*, 203 N.J. Super. 41, 49, 495 A.2d 900, 904 (Ch. Div. 1984) (noting alternative avenues of communication available to antiabortion protestors to communicate their message without entering clinic grounds); *Crozer Chester Medical Center v. May*, 352 Pa. Super. 51, 63, 506 A.2d 1377, 1383 (1986) ("By being restricted to picketing along the public sidewalk, [the protestors] do not lose their relevant audience, but are seen by virtually anyone entering, exiting,

The audience is more exposed and sensitive, the interaction is more direct and personal, and the lack of consent on the part of the audience is more easily presumed and, typically, more emphatic in its manifestation.²³⁶

The second distinction courts use to justify accepting

or going by the hospital grounds"); *Aaron Women's Clinic*, 737 S.W.2d at 568-69 (noting that restricting protest activity to public sidewalk does not prevent expression of protestors' views because their "signs are clearly visible to anyone entering or exiting the building and the clinic's patients are free to approach [protestors] for counseling if the patients so desire").

²³⁶ The court in *People v. Maher*, 137 Misc. 2d 162, 520 N.Y.S.2d 309 (Crim. Ct. 1987), described in detail the unwillingness of the audience approached by an antiabortion protestor in front of a clinic providing abortion services to receive the protestor's message:

The officer observed the [protestor] follow pedestrians as they went in and out of the building. In particular, she approached young women and would stand in front of them blocking their pathway while speaking to them. If a pedestrian tried to walk around her, the [protestor] would continue to talk to and walk with the pedestrian, blocking the pedestrian's path. The [protestor] would also try to hand pamphlets to the pedestrian.

By walking around the [protestor], a pedestrian was able to continue on her way, though the [protestor] would continue to try to talk to and walk directly next to the pedestrian. The [protestor] would continue with the pedestrian into the doorway of the building. . . .

. . . On several occasions when the [protestor] confronted women passersby, attempting to hand out pamphlets, the officer overheard those women respond with words to the effect of: 'Leave me alone, you don't know what I'm going through.'

Id. at 164, 520 N.Y.S. 2d at 310; *see also Cannizzaro*, 204 N.J. Super. at 543, 499 A.2d at 542 (finding protestors' "intimidating and harassing" activities interfere with rights of clinic and its patients); *Brown v. Davis*, 203 N.J. Super. at 48, 495 A.2d at 904 (incompatibility between expression of antiabortion protestor and operation of clinic providing abortion services is demonstrated by need for clinic personnel to escort patients from parking lot to clinic door to avoid and counter impact of protestors); *Aaron Woman's Clinic*, 737 S.W.2d at 569 (noting witnesses testified they saw "one couple arrive and leave three times before they could enter the building because they were intimidated by [demonstrators]"); *State v. Horn*, 126 Wis. 2d 447, 377 N.W.2d 176 (Ct. App. 1985) (finding antiabortion expression on clinic property "directly impairs" use of property to provide abortion services), *aff'd*, 139 Wis. 2d 473, 485-86, 491, 407 N.W.2d 854, 859-60, 862 (1987) (affirming for lack of state action).

The court succinctly described antiabortion protests on clinic grounds in *State v. Brown*, 212 N.J. Super. 61, 513 A.2d 974 (App. Div. 1986): "No one questions the fact of the intrusion." *Id.* at 67, 513 A.2d at 978.

Pruneyard's reasoning while limiting free speech rights for antiabortion protestors relates to the nature of the private property and the scope of the invitation extended by the property owner or its tenants. The institution of property is one of the legal mechanisms by which society permits its members to exclude voices, images, and individuals from the owner's immediate surroundings.²³⁷ To be sure, property may also be used inclusively as a way to connect to and interact with others. Part of the basic utility of the institution of private property as a screening mechanism, however, is that the owner gets to make basic choices as to how accessible her property is going to be. In order to further a variety of legitimate police power objectives, society requires that owners who choose to use their property inclusively to attract visitors must comply with various conditions and regulations that prohibit discrimination.²³⁸ It seems also clear, how-

²³⁷ Nimmer describes the term "property" as

a catch-all term for that bundle of rights which the law ordinarily accords to one who has acquired "title," and is, therefore, a property owner. Perhaps the most central of these is the right to exclude the world, which is to say, a right of privacy over that domain in which a property interest resides. It is the right to privacy, derived perhaps from a property interest in the premises, but not the property interest per se, which explains why there is no First Amendment right to speak in or at the threshold of a private residence contrary to the occupant's wishes.

M. NIMMER, *supra* note 120, § 4.09[D], at 4-118 to -119.

²³⁸ See, e.g., *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 909, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860 (1979) ("The shopping center may no more exclude individuals who wear long hair . . . who are black, who are members of the John Birch Society, or who belong to the American Civil Liberties Union, merely because of these characteristics or associations, than may the City of San Rafael' .") (quoting *In re Cox*, 3 Cal. 3d 205, 217-18, 474 P.2d 992, 1000, 90 Cal. Rptr. 24, 32 (1970)); *Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers' Union Local No. 31*, 61 Cal. 2d 766, 771, 394 P.2d 921, 924, 40 Cal. Rptr. 233, 236 (1964) ("The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.' ") (quoting *Marsh v. Alabama*, 326 U.S. 501, 506 (1946)); *State v. Schmid*, 84 N.J. 535, 561, 423 A.2d 615, 629 (1980) ("[P]rivate property may be subjected by the state, within constitutional bounds, to reasonable restrictions upon its use in order to serve the public welfare."); *Commonwealth v. Tate*, 495 Pa. 158, 171-72, 432 A.2d 1382, 1389 (1980) ("[T]he right to possess and use property . . . is not absolute," it is "subject to the paramount right of the Government to reasonably regulate and restrict [it], under a reasonable and

ever, that owners do not completely lose the ability to exclude others whenever any third parties are invited to the premises. Opening one's property to the public need not be an all or nothing proposition.²³⁹ Thus, courts appropriately examine the extent to which third parties are invited to the property to determine if the owner is attempting to provide a relatively exclusive environment as opposed to an open one.²⁴⁰

Medical clinics constitute such a private, limited-invitation use of property.²⁴¹ Visits are narrowly focused in their purpose.

non-discriminatory exercise of the police power . . . ' ") (quoting *Andress v. Zoning Bd. of Adjustment*, 410 Pa. 77, 83-84, 188 A.2d 709, 712 (1963)).

²³⁹ See, e.g., *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972) ("[P]roperty [does not] lose its private character merely because the public is generally invited to use it for designated purposes."); *Johnson v. Tait*, 774 P.2d 185, 190 (Alaska 1989) ("[T]he rationale in the shopping center and university cases does not overcome the private autonomy of a small proprietor in the conduct of its business."); *Ingram v. Problem Pregnancy of Worcester, Inc.*, 396 Mass. 720, 723, 488 N.E.2d 408, 409 (1986) ("The fact that the corridors are common areas within the [office] building does not alter the essentially private nature of the premises.").

²⁴⁰ See *supra* text accompanying notes 170-71 (describing use of this factor in balancing test applied in *Schmid* and *Alderwood*). Many abortion clinic cases also evaluate this criteria. See *infra* notes 241, 249.

²⁴¹ See, e.g., *Fardig v. Municipality of Anchorage*, 785 P.2d 911, 914 (Alaska 1990) (noting private medical clinic providing obstetrical and gynecological care including abortion is not "'public' in nature" so antiabortion protestor has no free speech rights in such location); *State v. Scholberg*, 412 N.W.2d 339, 342 (Minn. Ct. App. 1987) ("Merely because the public is invited to use [the medical buildings'] sidewalk to enter the building to visit patients and see doctors, make purchases at the stores, or have [an] abortion at the clinic does not render [the medical buildings'] sidewalk a public forum."); *State v. Brown*, 212 N.J. Super. 61, 65, 513 A.2d 974, 976 (App. Div. 1986) (concluding multibusiness office complex in which abortion clinic operates is not available for public expression because "[t]he tenants and their invitees are there by specific invitation"); *Planned Parenthood of Monmouth County, Inc. v. Cannizzaro*, 204 N.J. Super. 531, 540, 499 A.2d 535, 540 (Ch. Div. 1985) (stating that "extent and nature of the public's invitation to use" medical clinic providing abortion services "is clearly for private and personal purposes," as opposed to invitations extended to public to use hall or park); *Brown v. Davis*, 203 N.J. Super. 41, 47, 495 A.2d 900, 903 (Ch. Div. 1984) (noting that multibusiness office complex containing private medical facility providing gynecological services including abortion neither provides nor makes space "available to pedestrians to congregate in and about the premises, . . . is normally used by employees of tenants and prospective customers visiting specific businesses for the limited services made available to them, [and] is not a place to which a general consumer would go to shop for personal,

Most commonly, appointments are required.²⁴² Interactions are expected to be personal and the services provided are often intimate.²⁴³ The operators of medical clinics, for obvious reasons, want to create quiet, nonthreatening, and confidential environments.²⁴⁴ It almost seems absurd to argue that state constitutions should prevent them from doing so.

Shopping centers issue a fundamentally different invitation which is far broader in its scope and more open in its purpose. Everyone is invited.²⁴⁵ While buying is encouraged, browsers are welcome. Bookstores, movie theatres, and other mechanisms for distributing or presenting expressive material are part of the environment.²⁴⁶ One can certainly argue that shopping center own-

household or general business merchandise"); *Crozer Chester Medical Center v. May*, 352 Pa. Super. 51, 61, 506 A.2d 1377, 1382 (1986) (noting large medical complex in which clinic providing abortion services is located does "not invite or encourage the public to congregate upon hospital grounds for the purpose of discussing issues of the day").

See generally *Armes v. City of Philadelphia*, 706 F. Supp. 1156, 1164 (E.D. Pa. 1989) (abortion clinic's "invitation to members of the public who seek to use its services does not transform the clinic into the functional equivalent of a public forum"); *Right to Life Advocates, Inc. v. Aaron Women's Clinic*, 737 S.W.2d 564, 568 (Tex. Ct. App. 1987) (distinguishing invitation of office building in which medical clinic is tenant from invitation extended by shopping malls in that former is invitation exclusively to "clients" who seek "to do business with specific tenants").

²⁴² *See* *Brown v. Davis*, 203 N.J. Super. at 41, 47, 495 A.2d at 901, 903 (noting visits to clinic providing abortion services are by appointment only except for pregnancy testing).

²⁴³ *See, e.g.,* *State v. Brown*, 212 N.J. Super. at 67, 513 A.2d at 977 (noting invitation to use medical facility property is for "'private and personal purposes'"); *Cannizzaro*, 204 N.J. Super. at 539, 499 A.2d at 539 (noting that purpose of members of public visiting medical clinic providing gynecological and abortion services is "personal and private" and concluding "nothing [is] more personal and private" than activities at clinic).

²⁴⁴ *See, e.g.,* *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989) (noting clinic operators seek injunctions against protestors on sidewalk in front of clinic to protect patients from intimidating atmosphere).

²⁴⁵ *See, e.g.,* *Fiesta Mall Venture v. Mecham Recall Comm.*, 159 Ariz. 371, 376, 767 P.2d 719, 724 (Ct. App. 1988) (noting shopping mall is open to joggers, walkers, and those trying to get out of sun); *see also supra* note 231.

²⁴⁶ *See generally* *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 902, 592 P.2d 341, 342, 153 Cal. Rptr. 854, 855 (1979) (noting mall includes 65 shops, 10 restaurants, and 1 movie theater); *Batchelder v. Allied Stores Int'l*, 388 Mass. 83, 85, 445 N.E.2d 590, 591, (1983) (noting mall

ers should also retain the discretion to exclude visitors whose presence will not contribute to the profitability of their operation.²⁴⁷ Indeed, a court's focus on this factor, the nature of the invitation extended to third parties, might well suggest reading *Pruneyard* as narrowly as possible.²⁴⁸ What is completely clear, however, is that an invitation analysis strongly supports restricting speaker access rights on the grounds of medical clinics and other related property uses.²⁴⁹

houses 95 retail establishments including movie theater and church); *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 193, 378 N.W.2d 337, 339 (1985) (noting mall includes 80 stores); *SHAD Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 513, 488 N.E.2d 1211, 1222, 498 N.Y.S.2d 99, 110 (1985) (concluding mall is as much a place to congregate and linger as to shop); Note, *supra* note 97, at 168 (stating that shopping centers today may include banks, restaurants, discotheques, post offices, reference libraries, churches, and conference facilities).

²⁴⁷ In jurisdictions that guarantee freedom of expression exclusively against state action, *see supra* notes 128-32, 135-38, courts frequently stress this prerogative of the property owner. *See, e.g., Fiesta Mall Venture*, 159 Ariz. at 376, 767 P.2d at 724 (stressing mall's invitation is to those who will contribute to its profitability); *Michigan Citizens Lobby*, 423 Mich. at 225, 378 N.W.2d at 353; *see also* *Citizens for Ethical Gov't Inc. v. Gwinnett Place Assocs.*, 260 Ga. 245, 392 S.E.2d 8 (1990) (ruling shopping mall may be open for shopping, dining, and entertainment, but it may exclude all political activities).

²⁴⁸ This conclusion unreasonably exaggerates the discretionary prerogatives of the owners of property which is clearly opened to the general public for diverse purposes, and it is inconsistent with the holding of *Pruneyard* itself. The authors support the pruning of *Pruneyard*, not the uprooting and overruling of its interpretation of the state constitution. Because of the critical importance to the functioning of a democratic system of providing inexpensive and effective communication channels through which messages can reach the general public, state courts should support decisions like *Pruneyard* that make shopping centers and other fungible sites accessible for expressive purposes. *See* Note, *supra* note 97, at 178 (arguing it is judiciary's responsibility, not legislature's, "to supervise the functioning, as opposed to the outcomes, of [the] democratic process").

²⁴⁹ Cases involving medical clinics often focus on the limited nature of the clinic's invitation to the public in determining that rights of expression cannot be extended to provide access to private parking lots, internal sidewalks, and corridors for protests and "counseling". *See supra* note 241. In *Ingram v. Problem Pregnancy of Worcester, Inc.*, 396 Mass. 720, 488 N.E.2d 408 (1986), the Massachusetts Supreme Court explicitly rejected the defendant's claim that a medical clinic hallway and a shopping mall were "similarly dedicated to the public use." *Id.* at 723, 488 N.E.2d at 409. The court stated that the "'conduct of a private business . . . does not implicate the public interest to the extent that its premises may be deemed public

The final distinction courts use to justify accepting *Pruneyard* while limiting free speech rights for antiabortion protestors relates to the specific incompatibility of a particular speaker's expression with the use to which the subject property is being put. There are at least four levels at which this analysis might proceed. All courts recognize that expressive conduct that actually disrupts the operation of a business by physically obstructing movement or shouting in areas where quiet is essential may be prohibited on private property of any kind or use.²⁵⁰ That con-

under a public function theory.' " *Id.* (quoting *Commonwealth v. Hood*, 389 Mass. 581, 586-87, 452 N.E.2d 188, 192 (1983)). In *Brown v. Davis*, 203 N.J. Super. 41, 47, 495 A.2d 900, 903 (Ch. Div. 1984), *aff'd*, *State v. Brown*, 212 N.J. Super. 61, 513 A.2d 974 (App. Div. 1986), a New Jersey trial court stressed that the medical center providing abortion services was not the functional equivalent of a suburban shopping center. Rather, prospective customers visited the center for the limited services made available to them there. Likewise, in *Planned Parenthood of Monmouth County, Inc. v. Cannizzaro*, 204 N.J. Super. 531, 539, 499 A.2d 535, 539 (Ch. Div. 1985), the court noted that the use of the property at issue was devoted to those who wished to avail themselves of the clinics' services and that most visitors' purposes were personal and private. In *Crozer Chester Medical Center v. May*, 352 Pa. Super. 51, 61, 506 A.2d 1377, 1382 (1986), the court also recognized that there had been no invitation to the public to congregate on the clinic's grounds. Finally, in *City of Sunnyside v. Lopez*, 50 Wash. App. 786, 794, 751 P.2d 313, 318 (1988), the court held: "[T]he specific invitation extended by the doctor-tenants of Sunnyside Professional Center to members of the public who seek their medical expertise is not sufficient to classify the center as open to public use." *Id.* Accordingly, because the center was not the equivalent of a public place, antiabortion protestors had no constitutional right of access to the premises for speech activities. *Id.*; *see also* 73 Op. Att'y Gen. 213, 222-23 (1990) (arguing that by virtue of clinic's private nature and limited invitation extended to the public, free speech rights under California Constitution do not extend to grounds of medical clinics providing abortion services).

²⁵⁰ *See Pruneyard*, 23 Cal. 3d at 910-11, 592 P.2d at 347-48, 153 Cal. Rptr. at 860-61 (mall owner may adopt reasonable regulations "to assure that [expressive] activities do not interfere with normal business operations"); *Batchelder*, 388 Mass. at 93, 445 N.E.2d at 595 (shopping mall may prescribe reasonable limitations on location and manner of ballot solicitations permitted on its property); *State v. Schmid*, 84 N.J. 535, 563, 423 A.2d 615, 630 (1980) (university "is entitled to fashion reasonable rules to control the mode, opportunity and site for the individual exercise of expressional rights on his property"); *Commonwealth v. Tate*, 495 Pa. 158, 174-75, 432 A.2d 1382, 1390 (1981) (accord, citing *Schmid*); *Crozer*, 352 Pa. Super. at 62, 506 A.2d at 1383 (accord); *Alderwood Assocs. v. Washington Env'tl. Council*, 96 Wash. 2d 230, 246, 635 P.2d 108, 117 (1981) (citing *Pruneyard's* discussion with approval).

sensus, however, establishes little more than that property owners can protect their interests by adopting and enforcing time, place, and manner regulations.²⁵¹ At the other extreme is the contention that even shopping centers can preclude any and all expression which has the effect of reducing the profitability of the enterprise. Under this perspective, any benign speech completely unrelated to the shopping center's operation could be prohibited if it offended a single, potential customer.²⁵² A less extreme position tolerates content-based restrictions on expression intended to discourage patronage of the owner's business. The distribution of negative information about a particular business by union organizers and pickets, for example, could be prohibited as inconsistent or incompatible with the shopping center's function. Under the same rationale, the activities of abortion protestors could be restricted because they are obviously intended to discourage women from making use of the clinic's abortion services.²⁵³

A final form of incompatibility is focused not simply on what the speakers are communicating but on the particular effect of permitting such undesired expression in the area in question. In the medical clinic situation, for example, antiabortion protestors intrude into the doctor-patient relationship in order to alter the patient's decision to terminate her pregnancy.²⁵⁴ This is exper-

²⁵¹ See *supra* note 250.

²⁵² See *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 232 n.47, 378 N.W.2d 337, 357 n.47 (1985) (discussing market study presented by mall owners describing economic harm that results from permitting political activity to occur on mall grounds).

²⁵³ See *supra* notes 2, 236 ; *infra* notes 384, 387.

²⁵⁴ The Washington Supreme Court noted:

The right of privacy dictates protection of the private relationship between a woman and her physician and the physician's right to freely practice medicine and perform legal abortions without coercive outside restraints. . . .

. . . [P]icketing in close proximity to a clinic in which abortions are provided . . . [or] directly in front of the clinic could have such a coercive impact upon a woman that she forgoes the exercise of that right or seeks to exercise it elsewhere under the care of a licensed or unlicensed physician not of her first choosing.

Bering v. Share, 106 Wash. 2d 212, 227-28, 721 P.2d 918, 928 (1986) (citation omitted); see also *Right to Life Advocates, Inc. v. Aaron Women's Clinic*, 737 S.W.2d 564, 567 (Tex. Ct. App. 1987) (noting clinic providing abortion

ienced as far more invasive and disruptive than someone trying to convince a customer not to purchase a pair of socks at a department store that is allegedly "unfair to labor."²⁵⁵ Moreover, the antiabortion communications are likely to have a more pronounced emotional effect on the clinic's patrons because women seeking abortions or other highly personal medical care will be especially vulnerable to affront.²⁵⁶ The consequences of disturbing a patient's emotional tranquility immediately prior to treatment can be severe and may adversely affect the patient's health and recuperation.²⁵⁷ Finally, by turning what should be a

services "has the legal right to practice medicine and its patients the legal right to consult with their doctors and choose to terminate pregnancies . . . without interference or harassment").

²⁵⁵ See, e.g., *Planned Parenthood of Monmouth County, Inc. v. Cannizzaro*, 204 N.J. Super. 531, 534-35, 499 A.2d 535, 537 (Ch. Div. 1985) (noting protestors refer to clinic employees as murderers, beseech patients to stop "killing babies," and taunt director of clinic with Holocaust allusions); *People v. Maher*, 137 Misc. 2d 162, 168, 520 N.Y.S.2d 309, 313 (Crim. Ct. 1987) (noting testimony indicates that expression of protestor caused substantial annoyance to patients attempting to enter clinic); *Bering*, 106 Wash. 2d at 217-18, 721 P.2d at 923 (describing antiabortion protestors "threatening or screaming at patients who refused to take literature, . . . accusing patients or their doctors of killing babies [and] telling one patient that she would go to hell for seeing particular doctors"); see also *supra* note 2 (discussing Davis, California protests).

²⁵⁶ As the court noted in *State v. Migliorino*, "Any medical consultation, treatment or procedure usually is a very personal, very private activity. It often creates a great deal of apprehension and tension even under the most optimum circumstances. Except in emergencies such activities are usually conducted away from the gaze or the comments of outsiders." 150 Wis. 2d 513, 528, 442 N.W.2d 36, 42 (1989) (upholding the application of a Wisconsin statute against an antiabortion protester for trespassing on the property of a medical facility); see also *People v. Maher*, 137 Misc. 2d at 169, 520 N.Y.S.2d at 313 (noting likelihood of conflict when protestors express their position to "women who might that very day be having an abortion").

²⁵⁷ "Woman entering and leaving clinics have been verbally harassed; the effect of such harassment has been to increase the level of anxiety a woman feels and to exacerbate any emotional problems associated with abortion decision and procedure which in turn may have an adverse effect on the medical procedure itself and on the patient's psychological well-being thereafter."

Bering, 106 Wash. 2d at 228, 721 P.2d at 928 (quoting *American College of Obstetricians & Gynecologists v. Thornburgh*, 613 F. Supp. 656, 666 (E.D. Pa. 1985)); see also *O.B.G.Y.N. Ass'n v. Birthright, Inc.*, 64 A.D.2d 894, 894, 407 N.Y.S.2d 903, 905 (1978) (noting that as result of antiabortion demonstrations in front of clinic "many patients entered the subject premises crying and visibly upset, causing delays and rescheduling of physician's

very private interaction into a public event, the protestors jeopardize the confidentiality of the woman's decision to have an abortion.²⁵⁸

It should be recognized that the special problems resulting from allowing expression on the grounds of establishments providing private professional services is a concern that may extend beyond the abortion context. Suppose protestors wanted to challenge the value of certain kinds of therapy provided by a mental health facility. Could they stand at the door of the therapist's office providing unwanted "counseling" to individual's and couples as they show up for their fifty-minute sessions. By publicizing the fact that patients are seeking professional counseling and by upsetting patients immediately prior to their treatment, the protestors would clearly threaten the viability of the therapeutic enterprise. Their presence and expression would be starkly incompatible with the mental health facility's use of its property.

Thus, the factors considered by those jurisdictions which recognize some free speech rights on private property all point persuasively to the conclusion that there should be substantial limits to the extent to which speakers can demand access to private property. Property that is used for private purposes, purposes with which the exercise of expressive rights may be functionally incompatible, should not as of right be open to the speech of third parties.²⁵⁹ The logic of the California Supreme Court's opinion in *Pruneyard* is only sound for property that resembles shopping centers with regard to its utility for, and compatibility

appointments to the detriment of the health and welfare of the patients"); *Aaron Women's Clinic*, 737 S.W.2d at 569 (stating that "witnesses testified that patients were visibly upset by their confrontations with [antiabortion] demonstrators" on the clinic grounds); *Migliorino*, 150 Wis. 2d at 518-19, 442 N.W.2d at 38 (noting patients upset by antiabortion protestor talking to them and attempting to give them literature to read in waiting room of medical facility providing abortion services).

²⁵⁸ See, e.g., *Chico Feminist Women's Health Center v. Scully*, 208 Cal. App. 3d 230, 256 Cal. Rptr. 194 (1989) (noting protestors outside clinic identified patient seeking abortion and notified relatives in order to discourage woman's decision to terminate pregnancy); *Crozer Chester Medical Center v. May*, 352 Pa. Super. 51, 54, 506 A.2d 1377, 1378 (1986) (noting protestors' activities included pointing cameras at patients entering or leaving the clinic); see also *supra* note 2 (discussing Davis, California protests).

²⁵⁹ But see Note, *supra* note 97, at 187 (arguing privacy interests cannot be asserted to limit expression on walkways and in corridors leading to private areas such as individual housing units).

with, expressive activity. Medical clinics simply do not fall within those parameters.

b. Post-Pruneyard Doctrine in California

While other jurisdictions have aggressively wrestled with the doctrinal difficulties that emerged from the *Pruneyard* decision, California itself has contributed virtually nothing to that discussion. In particular, no California case addresses the issue of expression on the grounds of medical clinics that provide abortion services. The only California Supreme Court authority focusing on the scope of *Pruneyard* is the oblique and nonanalytic discussion in *Press v. Lucky Stores, Inc.*²⁶⁰ In that case plaintiffs had succeeded in convincing the superior court that *Pruneyard* applied to relatively small shopping centers, including one in which a Lucky's supermarket and sixteen other stores were located. The only issue before the supreme court, however, was whether the trial court had correctly determined the amount of the attorney's fees to which plaintiff's counsel was entitled for prevailing on this issue. While adjudicating the attorney's fees issue required the supreme court to indirectly review the decision below, the court's decision only acknowledged the propriety of the lower court's ruling, it did not justify it.²⁶¹

While several intermediate level appellate courts have discussed the parameters of *Pruneyard*, only two have done so in contexts not involving shopping centers. In *Cox Cable San Diego, Inc. v. Bookspan*,²⁶² the court rejected a cable company's claim that *Pruneyard* required the owner of a 150 unit apartment complex to allow the company to supply particular tenants with its cable service.²⁶³ The court found *Pruneyard* distinguishable on two grounds. The installation of cable equipment would be a permanent occupation that could not be imposed on a property owner without the payment of just compensation under the takings clause.²⁶⁴ Also, an apartment complex is not a "quasi-public

²⁶⁰ 34 Cal. 3d 311, 667 P.2d 704, 193 Cal. Rptr. 900 (1983).

²⁶¹ *Id.* at 318-19, 667 P.2d at 707-08., 193 Cal. Rptr. at 903-04.

²⁶² 195 Cal. App. 3d 22, 240 Cal. Rptr 407 (1987).

²⁶³ *Id.* at 29-30, 240 Cal. Rptr. at 411-12.

²⁶⁴ *Id.* at 29, 240 Cal. Rptr. at 411 ("The cases on which [the cable company] relie[d] all involve, at most, transitory trespasses by leafletters and speakers. None involve the sort of permanent physical occupation sought here.").

forum like a shopping mall.”²⁶⁵ The public is not generally invited to use the premises; indeed, it is generally excluded from the area.

In a much more complex case, the court in *Laguna Publishing Co. v. Golden Rain Foundation of Laguna Hills*²⁶⁶ ordered that the publisher of a give-away neighborhood newspaper be permitted to deliver its publication to homeowners living in a private, gated, residential community named Leisure World.²⁶⁷ The court’s struggle to wind its way through the applicable precedent was courageous and persistent, even if its reasoning is not altogether persuasive. Leisure World, the court determined, was not directly analogous to the company town in *Marsh v. Alabama*, because it did not include commercial enterprises, though it did have many company town-like characteristics.²⁶⁸ The community was also distinct from the shopping center in *Pruneyard* because the public was not generally invited nor provided access to its property.²⁶⁹ Thus, because neither its identity nor the invitation it extended was sufficiently public, Leisure World was not compelled to admit signature solicitors, political or religious campaigns, or door to door salespeople to its residential areas.²⁷⁰ Once Leisure World allowed one newspaper publisher access to its streets and homes, however, the court ruled it could not discriminate against other distributors of similar expressive material.²⁷¹

The doctrinal basis for this constitutional obligation not to discriminate among publishers was the court’s “differential view of ‘state action.’”²⁷² Whether the conduct of private actors constituted state action depended not only on the nature of the actor (here an instrumentality with many town-like characteristics), but also on the substantive constitutional principles that the actor’s conduct was alleged to abridge. Thus, discriminatory exclusions

²⁶⁵ *Id.*

²⁶⁶ 131 Cal. App. 3d 816, 182 Cal. Rptr. 813 (1982).

²⁶⁷ *Id.* at 824-25, 182 Cal. Rptr. at 817-18.

²⁶⁸ *Id.* at 836, 182 Cal. Rptr. at 824-25.

²⁶⁹ *Id.* at 837, 182 Cal. Rptr. at 825.

²⁷⁰ *Id.* at 845, 182 Cal. Rptr. at 830.

²⁷¹ *Id.* at 843, 182 Cal. Rptr. at 828-29.

²⁷² *Id.* at 842-43, 182 Cal. Rptr. at 828 (“[T]he outline of a workable rule . . . derives from the differential view of ‘state action’ as characterized in the *discrimination* cases when compared to that in other constitutional cases.” (emphasis in original)).

by the residential community could be held to be state action and subject to constitutional restraints while neutral restrictions on expressive conduct retained their private character and would be upheld against constitutional challenge.²⁷³ The court further supported this analysis by recognizing that because one giveaway newspaper was already allowed to be delivered to the residents of Leisure World, there would only be a de minimis additional intrusion into the residents' privacy if another distributor was allowed a similar privilege.²⁷⁴

None of these appellate decisions have significant precedential value for the issue of permitting speech on the grounds of medical clinics. They do, however, point in the same general doctrinal direction. Free speech rights on private property will vary depending on, among other factors, the nature of the property to which access is sought and the intrusiveness of the expressive activity. These cases suggest that any proposed extensions of *Pruneyard* beyond shopping centers to more private property must be evaluated carefully.

c. *The Compatibility of California Precedent with the Pruning of Pruneyard*

While post-*Pruneyard* cases in California are inconclusive, the analysis of cases in other jurisdictions provides a strong basis for holding that free speech rights do not extend to the property of private medical clinics providing abortion services. The remaining open question is whether California courts can reach that conclusion consistently with prior state authority. Given the overwhelming consensus of other jurisdictions, this question should only be answered in the negative if a convincing line of authority precludes such a result. That level of doctrinal certainty, however, simply does not exist in California precedent.

Indeed, far from clearly departing from the logic of other state's decisions, the California case law, with one notable exception,²⁷⁵ is remarkably consistent with the reasoning expressed by judges in other jurisdictions. The California cases repeatedly emphasize the marginal and only theoretical nature of the owner's interest in suppressing speech on the property at issue. The courts regularly find that no privacy interests are at stake and

²⁷³ *Id.* at 842-43, 182 Cal. Rptr. at 828-29.

²⁷⁴ *Id.* at 844-45, 182 Cal. Rptr. at 830.

²⁷⁵ See *infra* notes 280-93 and accompanying text (discussing *Lane*).

no interference with normal business operations occurs. The owner's interest in exclusive control over access to the property is typically so diluted by her invitation to "the entire public" that the prerogatives of "bare title" are easily outweighed by freedom of speech concerns.²⁷⁶ All of these factors are generally applicable to shopping centers (or other very large, public, and impersonal instrumentalities such as railroad stations), but have little relevance to the medical clinic context.

The common emphasis on the thousands of visitors congregating on the property to which speakers seek access further confirms the California courts' recognition of the distinction between shopping centers and other, less public property.²⁷⁷ The locations to which rights of expression accrue are understood to have become quasi-public property in functional terms. Thus, the California Supreme Court found state action "in a shopping center's refusal to permit the exercise of first amendment rights in such public areas as sidewalks, parks, and malls,"²⁷⁸ under the orthodox public-function analysis of *Marsh* and related California authority. Obviously, any corresponding argument that a medical clinic providing abortion services is "the modern suburban counterpart of the town center"²⁷⁹ is far less persuasive and borders on the ludicrous.

The primary exception to this general approach to the issue in California precedent is *Lane*,²⁸⁰ the case that held that expression on the grounds of a single large supermarket is constitutionally protected. The court's reasoning in this decision seemed less fact

²⁷⁶ See *supra* notes 52-88 and accompanying text (discussing *Hoffman*, *Schwartz-Torrance*, and *Diamond II*).

²⁷⁷ See *Diamond v. Bland*, 3 Cal. 3d 653, 656, 477 P.2d 733, 734, 91 Cal. Rptr. 501, 502, (1970) (noting mall had 25,000 visitors daily); *Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers' Union Local No. 31*, 61 Cal. 2d 766, 771, 394 P.2d 921, 924, 40 Cal. Rptr. 233, 236, (1964) (approximating 10,000 visitors weekly).

²⁷⁸ *Diamond I*, 3 Cal. 3d at 666 n.4, 477 P.2d at 741 n.4, 91 Cal. Rptr. at 509 n.4 (quoting *In re Cox*, 3 Cal. 3d 205, 216 n.11, 474 P.2d 992, 999 n.11, 90 Cal. Rptr. 24, 31 n.11 (1970)).

²⁷⁹ *Id.* at 660, 477 P.2d at 737, 91 Cal. Rptr. at 505 (quoting *In re Cox*, 3 Cal. 3d at 216 n.11, 474 P.2d at 999 n.11, 90 Cal. Rptr. at 31 n.11); *Pruneyard*, 23 Cal. 3d at 910 n.5, 592 P.2d at 347 n.5, 153 Cal. Rptr. at 860 n.5 (quoting *Diamond v. Bland*, 11 Cal. 3d 331, 342, 521 P.2d 460, 468, 113 Cal. Rptr. 468, 476 (1974) (Mosk, J., dissenting)) (referring to shopping malls as "miniature downtowns").

²⁸⁰ 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969); see *supra* text accompanying notes 64-68 (discussing *Lane*).

oriented and more formal than its other precedent. The nature of the property and the interests of the property owner in preventing expression on the supermarket's grounds were largely ignored. Instead, the court seemed to imply that wherever members of the public are invited for commercial purposes, they carry their right to freedom of speech with them.²⁸¹

While some of the language in *Lane* is troubling, the holding of the case, its distinguishing limitations, its relation to subsequent authority, and subsequent changes in the California Constitution itself, all demonstrate that *Lane* has virtually no precedential relevance to the question of antiabortion protests on clinic grounds. On its facts *Lane* deals with union leafletting on the premises of a large supermarket.²⁸² Certainly there is no privacy dimension inherent in this use of property, no intimacy or confidentiality in the transactions that occur there, and the market's customers have no emotional vulnerabilities which might aggravate the impact of the expressive materials being distributed. The analogy between a supermarket and a shopping center is far closer than is any proposed relationship between a supermarket and a medical clinic.

Moreover, labor related expression has always been recognized as uniquely situated under California law because of the economic and employment relationship on which it is based. This was made explicitly clear in *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Worker's Union Local No. 31*,²⁸³ a shopping center case which preceded *Lane*. To be engaged in a business involving numerous employees requires some accommodation of property and speech rights because the requirements of union organizing and collective bargaining intrinsically involve expression. Thus, access rights that facilitate the state's labor relations policies may stand on different footing than rights related to other expressive interests.²⁸⁴

It is also clear that the California Supreme Court does not treat

²⁸¹ *Id.* at 878, 457 P.2d at 565, 79 Cal. Rptr. at 733; see also *supra* notes 100-03 and accompanying text (describing *Pruneyard* court's discussion of *Lane*'s place in evolution of California's first amendment jurisprudence).

²⁸² *Lane*, 71 Cal. 2d at 873, 457 P.2d at 562, 79 Cal. Rptr. at 730.

²⁸³ 61 Cal. 2d 766, 40 Cal. Rptr. 233, 394 P.2d 921 (1964); see *supra* text accompanying notes 52-55 (discussing *Schwartz-Torrance*).

²⁸⁴ In upholding organizational picketing on the grounds of a shopping center, the court in *Schwartz-Torrance* explained that "[t]he Legislature has expressly declared that the public policy of California favors concerted

Lane as a significant extension of the shopping center decisions. In *Diamond I*, for example, the supreme court repeatedly grouped *Logan Valley*, *Schwartz-Torrance*, and *Lane* together as defining “the scope of the property interest possessed by the owners of shopping centers.”²⁸⁵ There was no suggestion that *Lane* supported opening up other kinds of property for unconsented-to expression. *Pruneyard* itself further confirms this conclusion. The significant emphasis in the *Pruneyard* opinion on the size and function of modern shopping centers²⁸⁶ is virtually incomprehensible if *Lane* is understood as binding precedent requiring that expression be permitted on virtually all commercial property. Similarly, the court’s pointed reservation in *Pruneyard* that it did “not have under consideration the property or privacy rights of an individ-

activities of employees for the purpose of collective bargaining” 61 Cal. 2d at 769, 394 P.2d at 922, 40 Cal. Rptr. at 234. Accordingly

the picketing in the present case cannot be adjudged in the terms of absolute property rights; it must be considered as part of the law of labor relations, and a balance cast between the opposing interests of the union and the lessor of the shopping center. . . . The interest of the union thus rests upon the solid substance of public policy and constitutional right; the interest of the plaintiff lies in the shadow cast by a property right worn thin by public usage.

Id. at 774-75, 394 P.2d at 926, 40 Cal. Rptr. at 238.

Cases subsequent to *Lane* have recognized that the holdings of *Lane* and *Schwartz-Torrance* were influenced by the fact that both cases involved legitimate union activity. See *Sears, Roebuck & Co. v. San Diego City Dist. Council of Carpenters*, 25 Cal. 3d 317, 328, 599 P.2d 676, 683, 158 Cal. Rptr. 370, 377 (1979) (“In *Diamond II* . . . we distinguished both [*Schwartz-Torrance* and *Lane*] on the ground that ‘labor unions had a labor dispute with, and were picketing, businesses located within the shopping center . . . a factor which led us to strike the balance between private property rights and first amendment activities in favor of the latter.’”) (quoting *Diamond v. Bland*, 11 Cal. 3d 331, 334 n.3, 521 P.2d 460, 463 n.3, 113 Cal. Rptr. 468, 470 n.3 (1974)). Significantly, the court in *Sears* upheld labor picketing on the grounds of a department store under the statutory authority of the Moscone Act, 1975 Cal. Stat. 1156 (codified at CAL. CIV. PROC. CODE § 527.3 (West 1979), and explicitly declined to opine on whether the picketing was constitutionally protected under the authority of *Pruneyard*. *Sears*, 25 Cal. 3d at 328, 599 P.2d at 683-84, 158 Cal. Rptr. at 377; see also 73 Op. Atty. Gen. 213, 218 (1990) (reading *Sears* case as suggesting that “*Lane*’s value as precedent” may be limited to labor cases).

²⁸⁵ *Diamond v. Bland*, 3 Cal. 3d 653, 662, 477 P.2d 733, 739, 91 Cal. Rptr. 501, 507 (1970).

²⁸⁶ *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 907, 592 P.2d 341, 345, 153 Cal. Rptr. 854, 858 (1979).

ual homeowner or the proprietor of a modest retail establishment"²⁸⁷ clearly relegates *Lane* to the modest doctrinal role of adding large supermarkets to the constitutional rule previously applicable to shopping centers and railroad terminals.²⁸⁸

A final reason for doubting the relevance or utility of *Lane* in resolving the question of free speech rights on the grounds of abortion clinics is that the California Constitution was amended in important respects after *Lane* was decided. In 1972 the right of "privacy" was explicitly added to the inalienable rights of individuals enumerated in article I, section 1.²⁸⁹ Since that time California courts have emphasized the far-reaching and rigorous protection this amendment provides to the right of privacy in California, noting repeatedly that the California Constitution's mandate in this regard is far broader than its federal counterpart.²⁹⁰

In general terms, privacy is defined for state constitutional purposes as "the right to be left alone."²⁹¹ More specifically, with regard to abortion, the California Supreme Court has stated:

By virtue of the explicit protection afforded an individual's inalienable right of privacy by article I, section 1 of the California Constitution . . . the decision whether to bear a child or to have an abortion is so private and intimate that each woman in this

²⁸⁷ *Id.* at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860 (quoting *Diamond II*, 11 Cal. 3d at 345, 521 P.2d at 470, 113 Cal. Rptr. at 478 (Mosk, J., dissenting)).

²⁸⁸ See 73 Op. Att'y Gen. 213, 218 (1990) (rejecting argument "that the rights announced in *Lane* would survive in California as part of the freedom of speech guaranteed by article 1, sec. 2(a) of the California Constitution . . . because it flies in the face of the express language in the [*Pruneyard*] opinion that it does not apply to 'the proprietor of a modest retail establishment'"); Note, *supra* note 181, at 664 n.120 (noting inconsistency between language in *Pruneyard* decision and holding of *Lane*, but supporting *Lane* decision on merits).

²⁸⁹ See *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 262, 625 P.2d 779, 784, 172 Cal. Rptr. 866, 871 (1981).

²⁹⁰ *Id.* at 263, 625 P.2d at 784, 172 Cal. Rptr. at 871 ("The federal right [to privacy] . . . 'appears to be narrower than what the voters approved in 1972 when they added "privacy" to the California Constitution.'") (quoting *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 130 n.3, 610 P.2d 436, 440 n.3, 164 Cal. Rptr. 539, 543 n.3 (1980)); *American Academy of Pediatrics v. Van de Kamp*, 214 Cal. App. 3d 831, 839-41, 263 Cal. Rptr. 46, 49-51 (1989); *Planned Parenthood Affiliates v. Van de Kamp*, 181 Cal. App. 3d 245, 276-77, 226 Cal. Rptr. 361, 378 (1986).

²⁹¹ *Committee to Defend Reproductive Rights*, 29 Cal. 3d at 291, 625 P.2d at 803, 172 Cal. Rptr. at 890 (Bird, J., concurring) (quoting election brochure given to voters regarding right to privacy amendment).

state — rich or poor — is guaranteed the constitutional right to make that decision *as an individual*, uncoerced by governmental intrusion.²⁹²

These interpretations of the right of privacy suggest that there must be limits placed on the protection provided intrusive speech that invades locations at which highly personal decisions are being made. Thus, whatever may be the scope of free speech rights on private property that *Lane* read into the California Constitution in 1969, those rights must now be balanced against the Constitution's newly enumerated, countervailing privacy rights. These privacy rights, as interpreted by the supreme court, conflict with any expansive interpretation of *Lane's* holding.²⁹³

²⁹² *Id.* at 284, 625 P.2d at 798, 172 Cal. Rptr. at 885 (emphasis in original). Although the conclusion of the statement quoted in the text refers to "government intrusion," it is clear that the right of privacy applies against invasions by private persons as well as the state. *See, e.g., Chico Feminist Women's Health Center v. Scully*, 208 Cal. App. 3d 230, 242, 256 Cal. Rptr. 194, 200 (1989); *Park Redlands Covenant Control Comm. v. Simon*, 181 Cal. App. 3d 87, 98, 226 Cal. Rptr. 199, 205 (1986); *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 829, 134 Cal. Rptr. 839, 842 (1976).

²⁹³ That privacy rights must be taken into account in determining the scope of state free speech rights can be seen by comparing two state decisions, *Women's Int'l League for Peace and Freedom v. Fresno*, 186 Cal. App. 3d 30, 237 Cal. Rptr. 577 (1986) and *Chico Feminist Women's Health Center*, 208 Cal. App. 3d 230, 256 Cal. Rptr. 194. In *League for Peace and Freedom* the City of Fresno enacted an ordinance prohibiting political advertising on municipally owned and operated buses used for public transportation purposes. 186 Cal. App. 3d at 32, 237 Cal. Rptr. at 577. The United States Supreme Court had upheld similar restrictions on speech against first amendment attack in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), but the plaintiffs, who wanted to display anticonscription placards in city buses, argued that the California Constitution provided greater protection to speech than the first amendment and, therefore, *Lehman* was not controlling authority. *League for Peace and Freedom*, 186 Cal. App. 3d at 35, 237 Cal. Rptr. at 579. The court agreed with plaintiffs in principle, yet it upheld the challenged ordinance. Even if free speech rights were more aggressively protected under the state constitution, "the privacy rights of the 'captive audience' of bus passengers," were also constitutionally protected and this countervailing interest "justified the exclusion within transit buses of all forms of expression which could not otherwise be restricted." *Id.* at 41, 237 Cal. Rptr. at 584.

In *Chico Feminist Women's Health Center*, the plaintiff, a clinic providing abortion services, sought to enjoin all antiabortion picketing on the public sidewalk outside the clinic on the day when abortions were performed. 208 Cal. App. 3d at 239, 256 Cal. Rptr. at 198. The clinic argued that the presence of the picketers deprived women seeking abortion of their right to

Given the basic compatibility between California precedent and that of other jurisdictions described above, it seems clear that California courts may freely adopt the conclusion reached by all of the other states that have considered the issue: antiabortion protestors have no constitutional right to trespass on the grounds of clinics providing abortion services. What may require some clarification is the analytic framework the California courts should adopt in reaching that decision. Should free speech rights be balanced against property rights through the ad hoc application of a multifactor balancing test or should definitional balancing provide more specific guidelines for these cases and limit the scope of judicial discretion? The precedent is indecisive. California cases do balance speech rights against property interests, but they almost invariably conclude that the property owner's interests are illusory or trivial given the availability of reasonable time, place, and manner restrictions and the type of property which is at issue.²⁹⁴ Thus, no close weighing of competing interests has

make that decision in confidence. In a small community, patients feared being recognized by the protestors and the corresponding loss of their privacy. *Id.* at 240-42, 256 Cal. Rptr. at 198-200.

The court refused to grant the requested injunction on the grounds that the patients' privacy interests were outweighed by the free speech rights of the protestors to express their views in a traditional public forum. The protestors had to be provided the opportunity to communicate their views; the patients' privacy interests could not completely bar them from doing so. *Id.* at 243-47, 256 Cal. Rptr. at 201-03. The court did, however, bar picketers from "[i]dentifying (except from prior personal knowledge) or disclosing the identity of any person approaching, entering, or leaving the Health Center . . .," *id.* at 250, 256 Cal. Rptr. at 205, thus "protecting the rights of *both* sides involved in a volatile dispute." *Id.* at 248, 256 Cal. Rptr. at 204 (emphasis in original).

The balancing of privacy and speech rights in both these cases is essential to adequate constitutional analysis; it cannot be avoided. The absence of any consideration of the legitimate privacy concerns of property owners and their invitees in a case like *Lane* renders such precedent useless in determining how speech and privacy rights are to be accommodated in a situation in which both rights are at issue under a constitution that explicitly recognizes and protects both interests.

²⁹⁴ See, e.g., *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 910, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860 (1979) (noting *Hoffman*); *Diamond v. Bland*, 3 Cal. 3d 653, 665-66, 477 P.2d 733, 741, 91 Cal. Rptr. 501, 509 (1970) (emphasizing that in all cases relied on, *Marsh*, *Logan*, *Schwartz-Torrance*, *Lane* and *Hoffman*, courts have recognized right of shopping center owners to enforce reasonable regulations to protect their legitimate interests against disruptive expressive activity, but have refused to subordinate free speech rights to "bare title" of owner); *In re Hoffman*, 67

been necessary.

Other jurisdictions are split, but barely, on this issue. The great majority of courts support either definitional balancing as a matter of substantive constitutional law²⁹⁵ or a formal state action requirement.²⁹⁶ Either approach offers an efficient solution to the problem in terms of conserving judicial resources and maximizing the predictability of results in disputed situations. More importantly, these approaches also affirm a legitimate role for the legislature in performing some of the balancing that might ultimately be undertaken to extend speech rights beyond the minimum required by the state constitution.

The formal state action analysis is ultimately unpersuasive, however, in that it cannot explain why the conduct of the same ostensibly private actors are recognized as state action in some situations and not others.²⁹⁷ Furthermore, even if shopping centers were held to be state actors under an expansive interpretation of the public-function exception, that analysis provides no basis for defending or justifying the substantive result that speech may be prohibited at other, generally open, locations at the property owner's discretion. The fact that the owner is a private actor is, by doctrinal fiat, controlling. Definitional balancing avoids these criticisms by recognizing the court's obligation to explain why speech should or should not be permitted in particular locations.

If California courts adopt a definitional balancing approach, they might focus appropriately on the degree to which the property in question is *public* in three senses of the term: first, the degree to which third parties are provided access without discrimination or precondition; second, the open, nonprivate, and impersonal nature of the environment as a site where people of various dispositions and purposes may meet and mix without constraint; and third, the usefulness of the location as a place where communication to the general public may reasonably occur. Shopping malls, railroad terminals, and, to some extent, large supermarkets, areas where access for expressive purposes is already pro-

Cal. 2d 845, 851-53, 434 P.2d 353, 356-57, 64 Cal. Rptr. 97, 100-01 (1967) (stating that railroad station's goal of smooth operations could be realized by "reasonable and objective limitations" imposed on expressive activity).

²⁹⁵ See *supra* notes 181-218 and accompanying text.

²⁹⁶ See *supra* notes 128-43 and accompanying text.

²⁹⁷ See *supra* notes 124-27 and accompanying text.

tected by the California case law, are primary examples of property that meet these criteria.

II. BEYOND *PRUNEYARD* — FEDERAL CONSTITUTIONAL IMPLICATIONS

The previous discussion suggests that state constitutional rights of expression should extend only to private property that has public characteristics similar to shopping centers. Suppose, however, that a state court interprets the free speech provisions of its constitution more aggressively to permit antiabortion protests on the grounds of medical clinics providing abortion services. Alternatively, that same result might be reached through legislation rather than constitutional adjudication.²⁹⁸ In such circumstances are there any federal constitutional constraints that would limit this exercise of state power?²⁹⁹ Three possible limits on such state action exist: the takings clause of the fifth amendment, the first amendment's prohibition against compelled affirmations of belief, and the right to privacy which subsumes the right to have an abortion.

A. *The Fifth Amendment — Takings Clause*

One of the arguments advanced by the mall owners in *Pruneyard* before the California Supreme Court was that the extension of free speech rights to their property amounted to an unconstitutional taking.³⁰⁰ Apparently basing their argument on *Lloyd Corp.*

²⁹⁸ As noted, many courts decline to recognize a state constitutional right to engage in expressive activity on private property on the grounds that the balancing of such competing speech and property interests is more appropriately carried out by the legislature rather than the judiciary. See *supra* notes 128-40 and accompanying text. If a state legislature accepts that responsibility and exercises it in a way that permits antiabortion protests on clinic sidewalks and parking lots, that legislative decision may be challenged as violating the United States Constitution.

²⁹⁹ This presumes, of course, that state authorization for, and protection of, such protests constitute state action. See *supra* notes 117-43 and accompanying text. The United States Supreme Court's decision in *Pruneyard* is obviously predicated on such presumption.

³⁰⁰ *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 904, 592 P.2d 341, 343, 153 Cal. Rptr. 854, 856. The United States Supreme Court concluded that the property owners' takings clause claim was included within their general argument to the California Supreme Court that permitting expressive activity at the shopping center would violate the

v. Tanner,³⁰¹ the owners contended that the power to exclude petition signature solicitors was an essential aspect of the ownership of property protected against impairment by the United States Constitution. The California Supreme Court rejected this analysis, holding instead that *Lloyd* was “primarily a First Amendment case” and that it provided no guidance as to the scope of property owners’ rights under the fifth or fourteenth amendments.³⁰² By way of explanation, the court analogized the presence of the public on mall property to the presence of union-organizing employees on an employer’s property.³⁰³ Because the public, like a company’s employees, were rightfully on the owner’s property to begin with, allowing them freedom of expression would not elevate their presence to a taking.³⁰⁴ Finally, the court concluded that the interests of society in freedom of expression outweighed the owners’ right to exclude others from their property.³⁰⁵ “Property rights cannot be used as a shibboleth to cloak conduct which adversely affects the health, safety, the morals, or the welfare of others.”³⁰⁶

When *Pruneyard* reached the United States Supreme Court, Justice Rehnquist, writing for the majority, responded to the mall owners’ takings claim by evaluating the specific intrusion they protested in light of recent precedent. The appropriate factors to consider in determining whether a taking had occurred were (1) the character of the governmental action, (2) its economic impact, and (3) its interference with reasonable, investment-backed expectations.³⁰⁷ Under these criteria, the mall owner’s property had not been taken. Although the solicitors’ presence could be

owner’s property rights. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82 n.5 (1980).

³⁰¹ 407 U.S. 551 (1972). For a discussion of *Lloyd* see *supra* text accompanying notes 40-47.

³⁰² *Pruneyard*, 23 Cal. 3d at 904, 592 P.2d at 343, 153 Cal. Rptr. at 856. For a discussion of *Lloyd* see *supra* text accompanying notes 40-47.

³⁰³ *Id.* at 905, 592 P.2d at 344, 153 Cal. Rptr. at 857. See generally *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) (discussing right of employees to distribute organizational literature on employer’s property because employees have right to be there to perform employment duties.)

³⁰⁴ *Pruneyard*, 23 Cal. 3d at 905-06, 592 P.2d at 344, 153 Cal. Rptr. at 857.

³⁰⁵ *Id.* at 906, 908, 592 P.2d at 344-45, 346, 153 Cal. Rptr. at 857-58, 859.

³⁰⁶ *Id.* at 907, 592 P.2d at 345, 153 Cal. Rptr. at 858.

³⁰⁷ *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980) (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)).

characterized as a physical invasion, this conclusion alone was not dispositive.³⁰⁸ While as an abstract matter the right to exclude others was a fundamental component of property ownership, the mall owners had failed to show in this case that “ ‘the right to exclude others’ is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a ‘taking.’ ”³⁰⁹

The majority was generally correct in its doctrinal summary in *Pruneyard*. Orthodox takings clause doctrine (to the extent that this is not an oxymoron) does indicate that the court will look at the three factors Rehnquist described to determine whether or not a taking occurs.³¹⁰ The application of these factors in judicial opinions, however, demonstrates that this tripartite framework is only the tip of the analytic iceberg. In particular the relationship among these variables is far more complicated than Rehnquist’s reasoning in *Pruneyard* suggests.

1. Permanent and Temporary Invasions

With regard to the first factor, the character of the action, the Court has traditionally distinguished between a physical intrusion — in the form of an invasion, occupation, or appropriation of private property — and a regulatory taking — involving legal sanctions that limit the use the owner may make of her property.³¹¹ Recent cases, however, have muddled these concepts by creating a third category which seems to form a conceptual bridge between physical intrusions and regulations. Basically, the Court has divided situations involving physical intrusions into two categories: permanent occupations and temporary invasions. A permanent physical occupation, even of only a minor part of the owner’s property, constitutes a *per se* taking regardless of its effect on the value of the property at issue. Thus, the character of the government’s action becomes a threshold issue. Other more temporary invasions that fall short of a permanent occupation are subject to a complex multifactor balancing process. This balancing process, however, is more rigorous than the tests the Court

³⁰⁸ *Id.* at 83-84.

³⁰⁹ *Id.* at 84.

³¹⁰ *See, e.g.* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962)).

³¹¹ *Id.*; *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426-35 (1982).

currently applies to determine whether a pure regulatory taking exists.³¹² Accordingly, three categories are now recognized: the permanent physical occupation, the temporary invasion, and the regulatory taking.³¹³

This new model, however, is filled with ambiguity. To determine whether requiring a landowner to allow third parties to engage in expressive activity on her property constitutes a taking, two critical questions must be resolved. First, the line between a permanent occupation and a temporary invasion needs to be delineated. To the extent that intrusions for expressive purposes are found to be permanent occupations, requiring such access is per se unconstitutional unless accompanied by the payment of just compensation. Second, the multifactor balancing test for evaluating temporary invasions needs to be intelligibly explained and applied. Such an analysis would assist courts in determining whether takings result from any nonpermanent invasions of property permitted by an expansive interpretation of *Pruneyard*. Unfortunately, under existing case law neither question can be easily answered.

With regard to the former question, the distinction between permanent occupations and temporary invasions did not seem to be on the Justices' minds when they decided *Pruneyard*. The majority recognized that the case involved an invasion of property, but said nothing to elaborate on the nature of that intrusion. The fact that property had been physically invaded was relevant but not dispositive to determining whether a taking had occurred. Thus, the character of the government's action, an invasion, did not preclude the need to perform a multifactor analysis.³¹⁴ The Court's conclusion, that only invasions which unreasonably impaired the use and value of property should be recognized as takings, seemed to apply generally to both temporary and permanent invasions.

The only other contemporary, physical invasion case cited in *Pruneyard*, *Kaiser Aetna v. United States*,³¹⁵ was similarly silent as to any distinction between types of invasion or occupation. In *Kaiser*

³¹² See *Loretto*, 458 U.S. at 426.

³¹³ *Id.* at 430.

³¹⁴ *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82-83 (1980) (noting government action that deprives owner of right to exclude others must be evaluated in terms of its fairness and effect to determine if it constitutes a taking).

³¹⁵ 444 U.S. 164 (1979).

Aetna the owners of a private marina had, at considerable expense and with the apparent blessing of the Army Corps of Engineers, dredged a channel between a pond located on their private property and a bay adjoining the Pacific Ocean. Upon completing the project the Corps of Engineers informed the owners that the existence of the channel transformed the formerly private pond into a navigable waterway to which the public could not legally be denied entry.³¹⁶ Litigation ensued and the Supreme Court ruled in favor of the property owners. The Court ruled that the Army Corps of Engineers had engendered the owners' investment-backed expectations in the continued privacy of their property. Accordingly, the marina owners possessed a traditional property interest in their pond, protected by the takings clause of the fifth amendment.³¹⁷ That interest could not be impaired constitutionally by abridging the owner's right to exclude the public from their waters, notwithstanding the government's recognized right to regulate access to navigable waterways, without the payment of just compensation.³¹⁸

Unlike *Pruneyard*, which seemed to treat invasions as only one factor of many to consider in evaluating a takings claim, the *Kaiser Aetna* opinion included language which suggests that the power to exclude others is a fundamental aspect of property ownership, the elimination of which necessarily establishes a taking.³¹⁹ The holding of *Kaiser Aetna* is confused, however, by the Court's additional emphasis on the defeat of the significant investment-backed expectations of the marina owners that resulted from the Corps of Engineers change of policy. Obviously, the owners would never have incurred the expense of dredging the channel had they known beforehand that they would be required to open their waters to public access. The unfairness of that change in the rules after play had commenced could serve as an additional, and perhaps a necessary, factor in the Court's determining that a taking had occurred.

³¹⁶ *Id.* at 168.

³¹⁷ *Id.* at 179-80. (holding that while consent of individual government officials did not "estop" government's action, it led to development of investment-backed expectations embodied in concept of "property" which takings clause protects).

³¹⁸ *Id.*

³¹⁹ "In this case we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." *Id.*

The Court's attention returned directly and exclusively to the character of the government's action in *Loretto v. Teleprompter Manhattan CATV Corp.*³²⁰ In *Loretto* the Court held that a New York law requiring landlords of residential apartment buildings to permit cable TV boxes to be installed on their property constituted a per se taking.³²¹ Justice Marshall, writing for the majority, explained the unique status of a permanent physical occupation for takings clause purposes in both conceptual and practical terms. Permanent physical occupations destroy the owner's ability to possess, use, and dispose of her property.³²² Possessory rights are impaired by the loss of the power to exclude others from the invaded area, and this dispossession correspondingly precludes any control over or use of the occupied location.³²³ Finally, the ability to dispose of the property is burdened by the consequence that any conveyance would be subject to continued occupation despite the change in ownership.³²⁴ To these losses are added the almost insulting psychological experience of having one's ownership rights so completely disturbed.³²⁵

This conceptual defense of the special nature of a permanent occupation provides the foundation for the Court's attempts to justify its distinction between an event of this kind and other invasions that would not constitute per se takings. Permanent occupations must involve the total loss of *all* ownership prerogatives. Thus, Justice Marshall argued that government requirements that a landlord install mail boxes, fire extinguishers, and smoke detectors in his building do not fall within this category.³²⁶ Although these regulations might be more burdensome to the landlord in one important sense (unlike the cable box, the landlord has to pay for each installation), they do not constitute per se takings

³²⁰ 458 U.S. 419 (1982).

³²¹ *Id.* at 421-26.

³²² *Id.* at 435. To demonstrate the seriousness of physical invasions, Justice Marshall borrowed a metaphor from *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979), and explained that with a permanent physical occupation of property, "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Id.*

³²³ *Loretto*, 458 U.S. at 435-36.

³²⁴ *Id.* at 436.

³²⁵ *Id.* ("[A]n owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property.") (emphasis in original)).

³²⁶ *Id.* at 440.

because the landlord will necessarily retain some rights and authority with regard to the placement, manner, and use of such personally owned fixtures.³²⁷

That Justice Marshall used the term “permanent” to mean complete and total dispossession of all ownership authority over a particular area is further demonstrated by the way he distinguished *Pruneyard* and *Kaiser Aetna* from *Loretto*. The required public access to the private marina in *Kaiser Aetna* and to shopping centers for expressive purposes in *Pruneyard* were clearly permanent in the sense that they had no temporal limits. These were public access rights to be exercised in perpetuity. What made these invasions “temporary” was that they did not “absolutely dispossess the owner of his rights to use, and exclude others from, his property.”³²⁸ This analysis is confirmed by Marshall’s lengthy quotation from *St. Louis v. Western Union Telegraph Co.*³²⁹ in which the Court explained why the placement of telegraph poles on city streets required the payment of compensation while public access over those same streets did not.

The use which the [company] makes of the streets is an exclusive and permanent one, and not one temporary, shifting and in common with the general public. The ordinary traveler, whether on foot or in a vehicle, passes to and fro along the streets, and his use and occupation thereof are temporary and shifting. The space he occupies one moment he abandons the next to be occupied by any other traveller. . . . But the use made by the telegraph company, is, in respect to so much of the space as it occupies with its poles, permanent and exclusive. It as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground.”³³⁰

In his dissent Justice Blackmun misconstrued Marshall’s meaning when he argued that a permanent occupation must be one that lasts forever.³³¹ Blackmun was correct that the cable box is *not* permanent in that sense because it need only remain on Mrs. Loretto’s roof as long as her building retains its residential rental

³²⁷ *Id.* at 440 n.19. Thus, if New York required landlords to provide cable television to tenants, such a law would allow the landlord to “minimize the physical, esthetic, and other effects of the installation” by determining how best to comply with the applicable statute. *Id.*

³²⁸ *Id.* at 435 n.12.

³²⁹ 148 U.S. 92 (1893).

³³⁰ *Loretto*, 458 U.S. at 428-29 (emphasis omitted) (quoting *St. Louis v. Western Union Telegraph Co.*, 148 U.S. at 98-99).

³³¹ *Id.* at 448 (Blackmun, J., dissenting).

use and as long as the cable company wishes to maintain it there.³³² That duration is likely to be for a far shorter time than forever, but this fact is irrelevant to Marshall's analysis. While it is there, the cable box is a fixed, exclusive dispossession of the owner's authority over that small part of her roof for some significant period of time.

Once the determination is made that a permanent occupation exists, the Court's analysis ends and a taking is established. The characterization of the government's action as a permanent occupation is dispositive. Neither of the other takings factors continue to be relevant. Thus, Justice Marshall rejected the dissent's argument that the cable boxes actually increase the property's resale and rental value because the availability of cable service would be attractive to tenants, and, therefore, the economic impact of the invasion is a positive one.³³³ Such information may help a court determine what compensation is due the owner, but it has no bearing on whether a taking should be found to exist initially.³³⁴ Permanent occupations are per se takings despite their "minimal economic impact on the owner."³³⁵ Similarly, the fact that the cable boxes were already in place when plaintiff first purchased her apartment building effectively negates any suggestion that the installation of the boxes interfered with her distinct investment-backed expectations.³³⁶ This information, again, was persuasive only to the dissent.

Under the *Loretto* analysis, there would be little basis for arguing that most *Pruneyard*-type expressive activities involve a permanent occupation. Individuals distributing leaflets or soliciting signatures or even picketing a business would all be recognized as transitory, temporary invasions. Occasionally, however, a more exclusive and absolute intrusion might be successfully challenged on takings clause grounds.

In *Cox Cable San Diego, Inc. v. Bookspan*,³³⁷ for example, a Califor-

³³² *Id.* (citing majority opinion at 439.)

³³³ *Id.* at 437 n.15.

³³⁴ *Id.*

³³⁵ *Id.* at 434-35.

³³⁶ "When appellant purchased the building, she was unaware of the existence of the cable. Thus, she could not have invested in the building with any reasonable expectation that the one-eighth cubic foot of space occupied by the cable television installment would become income-productive." *Id.* at 445 (Blackmun, J., dissenting) (citations omitted).

³³⁷ 195 Cal. App. 3d 22, 240 Cal. Rptr. 407 (1987).

nia appellate court rejected the free speech arguments of a cable company and ruled that *Pruneyard* did not require a large apartment complex to permit the installation of cable equipment. The court found that such a requirement would constitute a per se taking.³³⁸ *Pruneyard* would not any more require the owner to allow cable equipment to be installed on her property than it would require the owner to allow third parties “to build a permanent kiosk to disseminate information or to erect a permanent stage with attached amplification equipment for speeches.”³³⁹ Similarly, in *Judlo, Inc. v. Vons Companies*,³⁴⁰ another California appellate court held that *Pruneyard* did not compel a supermarket at a shopping center to permit the plaintiff to place a newsrack offering the plaintiff’s newspaper for sale in front of the market.³⁴¹ The court construed the newsrack to represent a permanent occupation that could not be imposed on the property owner without the payment of just compensation.³⁴²

The court’s conclusion that a newsrack is a permanent occupation may stretch the *Loretto* reasoning because such an instrumentality is mobile and may be easily shifted from one location to another. If a newsrack is sufficiently permanent to constitute a per se taking, however, it is at least arguable that some conventional *Pruneyard* authorized activity — such as a ballot solicitation table — might also transgress takings clause protected property rights. The solicitation table, unlike the newsrack, would presumably be removed at night, but it is unclear that a permanent daytime intrusion might not be a per se taking.

The *Loretto* analysis, however, was not the Supreme Court’s last word on the meaning of a permanent occupation. In *Nollan v. California Coastal Commission*,³⁴³ the Court concluded that requiring a landowner to grant a narrow easement to the public to transverse his beach-front property between a seawall and the mean high tide line would result in a per se taking.³⁴⁴ Justice Scalia, writing for the majority, argued that “ ‘a permanent physical occupation’ has occurred, for purposes of [the per se taking] rule, where individuals are given a permanent and continuous

³³⁸ *Id.* at 28-30, 240 Cal. Rptr. at 410-12.

³³⁹ *Id.* at 29-30, 240 Cal. Rptr. at 411.

³⁴⁰ 211 Cal. App. 3d 1020, 259 Cal. Rptr. 624 (1989).

³⁴¹ *Id.* at 1027, 1029, 259 Cal. Rptr. at 627, 629.

³⁴² *Id.* at 1026-27, 259 Cal. Rptr. at 627.

³⁴³ 483 U.S. 825 (1987).

³⁴⁴ *Id.* at 831-32.

right to pass to and fro, so that the real property may continuously be transversed, even though no particular individual is permitted to station himself permanently upon the premises."³⁴⁵

Clearly, *Nollan's* language substantially expands the definition of a permanent physical occupation past the narrow parameters endorsed by Justice Marshall in *Loretto*. Indeed, Marshall dissented to the majority's analysis in *Nollan*.³⁴⁶ What remains perplexingly obscure is what *Nollan* suggests as a substitute for the total exclusion and dispossession of the *Loretto* criteria. Justice Scalia described the Coastal Commission's requirement in *Nollan* as involving "a permanent grant of continuous access to the property."³⁴⁷ That access, however, would not be continuous in literal terms. Part of the year the easement would be under water because the mean high tide mark reaches the sea wall and the width of the easement collapses into nonexistence during that period.³⁴⁸ Even at its widest extent, there would still be extended occasions when no member of the public would be crossing the owner's property. Thus, permanent and continuous access must refer to the general availability of access to third parties. If that kind of an invasion constitutes a per se taking, however, how can the court explain its holding in *Pruneyard* and its analysis in *Kaiser Aetna* regarding general public access rights that were previously recognized in *Loretto* as not involving per se takings?³⁴⁹

The *Nollan* Court's answer is distressingly brief. *Pruneyard* is not inconsistent with *Nollan*, Justice Scalia explained, because in *Pruneyard* "the owner had already opened his property to the general public, and in addition permanent access was not required."³⁵⁰ *Kaiser Aetna* can be distinguished, "because it was affected by traditional doctrines regarding navigational servitudes."³⁵¹ And in any case, Scalia concluded, neither *Pruneyard* nor *Kaiser Aetna* involved "a classic right-of-way" easement.³⁵²

None of these arguments is particularly precise or even com-

³⁴⁵ *Id.* at 832.

³⁴⁶ *Id.* at 842 (Brennan, J., with whom Marshall, J. joins, dissenting).

³⁴⁷ *Id.* at 836.

³⁴⁸ *Id.* at 853-54 (Brennan, J., dissenting) (citing factual record contained in brief by California Commission).

³⁴⁹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433-34 (1982).

³⁵⁰ *Nollan*, 483 U.S. at 832 n.1.

³⁵¹ *Id.*

³⁵² *Id.*

prehensible, but it is possible to read some substantive meaning into Scalia's makeshift distinctions. A right of way easement may be a permanent occupation, while the access requirements in *Pruneyard* and *Kaiser Aetna* were not, because the access requirements did not entail the specificity and inflexibility of an easement. In *Nollan* a particular strip of property was subject to repeated and regular invasion.³⁵³ The access permitted in *Kaiser Aetna* and *Pruneyard* was more general, indeterminate, and, at least in the latter case, subject to significant restrictions on the part of the property owner.³⁵⁴ The difficulty with this explanation, standing alone, however, is that it suggests that a Coastal Commission order requiring a beach front lot owner to generally open her property to public use subject to reasonable time, place, and manner restrictions would not be a taking, although that kind of invasion would be far more burdensome to the owner than the limited easement at issue in *Nollan*.

A second distinguishing consideration, however, may alleviate this concern. The Court pointed to the fact that the owner in *Pruneyard* "had already opened his property to the general public"³⁵⁵ as being relevant to its conclusion that there was no per se taking in that case. The implication here might be that a requirement of general public access would be a per se taking with regard to property that was much more limited in its openness to third parties prior to the government's action. It is difficult to argue that a shopping center owner has been dispossessed by a permanent occupation when a few leafletters are permitted to mingle with shoppers and browsers. The owner of a beach front lot who is ordered to open his grounds to the general public, however, has been much more distinctly and exclusively dispossessed of his property.

The specificity of the invasion and the degree to which third parties are already given access to the subject property would be,

³⁵³ *Id.* at 832.

³⁵⁴ The Court in *Kaiser Aetna* never described with specificity the nature of the public right of access that was at issue in that case. *Kaiser Aetna v. United States*, 444 U.S. 164, 167-70 (1979). In *Pruneyard*, the Supreme Court noted explicitly that "[t]he decision of the California Supreme Court makes it clear that the Pruneyard [Shopping Center] may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions." *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980).

³⁵⁵ *Nollan*, 483 U.S. at 832 n.1.

presumably, interrelated factors. Even in a shopping center generally open to the public, speakers could not demand regular and continuous access to a particular location as a site for their expressive activities. That would too closely parallel the burden of an actual easement. Conversely, however, if a specific property site was open to a limited extent to third party use, it might not be a permanent occupation to require additional, less discriminating access, of a comparable kind. For example in *Hilton Washington Corp. v. District of Columbia*,³⁵⁶ the D.C. Circuit rejected a takings clause challenge to a D.C. ordinance that prohibited local hotels from excluding any licensed taxicab from picking up or discharging passengers at a location on hotel grounds, such as a hackstand, where taxi operators were regularly permitted.³⁵⁷ The plaintiff, a Hilton Hotel, argued the ordinance imposed a permanent occupation on its property, citing a 1928 case, *Delaware, Lackawanna and Western Railroad Co. v. Morristown*,³⁵⁸ in which the Supreme Court invalidated as a taking a city ordinance declaring that railroad property set aside for the exclusive use of one Taxi Cab Co. must be transformed into a larger "public hackstand" for more general use.³⁵⁹ The court of appeals distinguished *Morristown* from the *Hilton* case by noting that the Hilton Hotel was under no obligation either to create a hackstand on, or to admit taxi cabs to, its property.³⁶⁰ Once it elected to operate a taxi stand on its property, however, it could not "deny any licensed taxi cab admission to the stand,"³⁶¹ if local law required such access.

The above analysis helps reconcile *Pruneyard* and *Nollan*. It is also consistent with the Court's suggestion that *Kaiser Aetna* is a special case because of its reliance on navigational servitudes. Under this approach, declaring that a private marina must be open to the public would ordinarily be a per se taking because the marina, unlike the shopping center in *Pruneyard*, but like the beachfront lot in *Nollan*, was not open to the general public for unrestricted use. In *Kaiser Aetna*, however, by dredging the channel from their private pond to a navigable waterway, the marina's owners created conditions which traditionally render private

³⁵⁶ 777 F.2d 47 (D.C. Cir. 1985).

³⁵⁷ *Id.* at 48.

³⁵⁸ 276 U.S. 182 (1928).

³⁵⁹ *Id.* at 194-95.

³⁶⁰ *Hilton*, 777 F.2d at 50.

³⁶¹ *Id.*

property subject to the public servitudes that control access to navigable waterways.³⁶² These servitudes typically limit property rights *ab initio* and do not constitute takings, per se or otherwise.³⁶³ A taking occurred in *Kaiser Aetna* solely because the government, through the Army Corps of Engineers, had engendered the marina owner's justified investment-backed expectation that their efforts would create private property from which the public could legally be excluded. Thus, *Kaiser Aetna* involves a complex analysis rather than the finding of a per se taking because the private owners ostensibly surrendered their rights not to be permanently occupied by dredging the channel that connected their pond to a navigable waterway. The Court only resuscitated the protected property status of this marina's waterway because of the distorted expectations the owners had developed in their interaction with the Corps of Engineers. In other cases, without unusual predicates of this kind, the transformation of a private pond into a public waterway by government fiat would constitute a per se taking without any further analysis.

³⁶² *Kaiser Aetna v. United States*, 444 U.S. 164, 175-77 (1979). The Court has repeatedly recognized that the government possesses a "navigational servitude" over state waters derived from "the important public interest in the flow of interstate waters that in their natural condition are in fact capable of supporting public navigation." *Id.* at 175 (citing *United States v. Cress*, 243 U.S. 316 (1917); *United States v. Chandler-Dunbar Co.*, 229 U.S. 53 (1913)). Thus, by connecting their pond to a navigable bay, the marina owners had arguably changed the pond into a navigable waterway subject to navigational servitudes. *Id.* at 176.

³⁶³ When the government exercises its rights under these navigational servitudes, no taking occurs that requires the payment of compensation, despite the adverse impact of the government's action on the property owner's interests. *See generally* *United States v. Rands*, 389 U.S. 121 (1967); *United States v. Twin City Power Co.* 350 U.S. 222 (1956). Nothing has been taken because the owner acquired initially a property right that was inherently subordinate to the government's authority to facilitate the use of navigable waterways.

Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.

Scranton v. Wheeler, 179 U.S. 141, 163 (1900).

The remaining uncertainty in *Nollan* on this issue is Justice Scalia's suggestion that *Pruneyard* did not involve a per se taking because "permanent access was not required"³⁶⁴ as it was in *Nollan* itself. In what way, however, were the access rights mandated in *Pruneyard* less permanent than the access rights required in *Nollan*? Neither invasion is permanent in any literal sense; visitors are highly unlikely at 3 a.m. in either location. Moreover, the rights available under *Pruneyard* can be described as an easement for expressive purposes on shopping center grounds that can be exercised at any time that the shopping center is open to the public. Perhaps Scalia believes that expressive activities under *Pruneyard* will be more sporadic and less regular than the use of the beach front right of way. Or perhaps his analysis is directed at the formal nature of an easement through the recording of the deed that will permit public access regardless of the use made of the remainder of the lot.³⁶⁵ That distinction, however, while it differentiates *Pruneyard* from *Nollan* in one respect, seems inconsistent with the logic of *Loretto* which found a per se taking even though the cable box was only as permanent as the continued use of the apartment building for residential rentals.³⁶⁶ Moreover, it seems unlikely that *Nollan* is intended to be a Pyrrhic victory for lot owners who may still be required to open their property to the general public as long as there is no demand for a formal recording of their doing so.

Given this uncertainty as to exactly what Justice Scalia meant by his opaque reference to the greater permanence of the invasion in *Nollan* as compared to *Pruneyard*, all that can be reasonably concluded is that this language reflects the Court's intent to scrutinize occupations more rigorously with regard to those factors that establish permanence. This attitude, coupled with the prior anal-

³⁶⁴ *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 832 n.1 (1987).

³⁶⁵ The California Coastal Commission required as a condition to granting the development permit to the Nollans that they include in their deed a restriction that would ensure lateral access to the public. *Id.* at 845 (Brennan, J., dissenting).

³⁶⁶ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 448 (1982) (Blackmun, J., dissenting). Thus, if the fact that public access to the owner's beach front must be made available in perpetuity is an important factor distinguishing *Nollan* from *Pruneyard*, it still cannot be a dispositive factor in determining when a per se, permanent occupation taking must be found to exist. The majority opinion in *Loretto* clearly contemplates that much shorter term occupations constitute per se takings as well. *Id.* at 439 n.17.

ysis, suggests that after *Loretto* and *Nollan* a permanent invasion occurs if (1) the owner is exclusively dispossessed of a particular area for some substantial period of time, (2) the owner's property is opened to the general public when access to it has been much more specifically limited in the past, or (3) a particular part of the property is opened to regular and continuous use by members of the public for a purpose not currently permitted by the owner, thereby creating an easement like effect on the subject property.

2. Invading Clinics that Provide Abortion Services

Under the foregoing analysis, a state that allows antiabortion protestors to regularly patrol the interior sidewalks and parking lots of medical clinics without the clinic operator's consent may commit a per se taking. This invasion has an intrinsically different nature and purpose than the visits of women patients arriving at appointments for treatment. Furthermore, the invasion is sufficiently regular, continuous, and specific in time and place to produce an easement-like burden on the owner's property. It is difficult to understand how a newsrack or taxi stand could constitute a per se taking while antiabortion protestors continually standing sentry at the doors of medical clinics do not.

If allowing antiabortion protestors to engage in expressive conduct on clinic grounds is not a per se taking, however, such an invasion may still violate the takings clause under the multifactor balancing test applied in *Pruneyard*. Finding a non-per se taking requires an ad hoc analysis of varying degrees of rigor. When a property owner alleges a pure regulatory taking, the court primarily examines two factors: the economic impact of the regulation and the extent to which it interferes with the owner's justified investment-backed expectations.³⁶⁷ Underlying those more specific inquiries is the fundamental concern that no person or group should be forced to bear a disproportionately large part of the costs of government. These costs should be fairly spread among the public as a whole.³⁶⁸

³⁶⁷ *Id.* at 426 (noting that when permanent physical occupation is not at issue in determining whether property has been taken, "the economic impact of the regulation, especially the degree of interference with investment-backed expectations, is of particular significance"). See generally *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

³⁶⁸ "The 'Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Penn*

In most regulatory takings cases neither the two specific factors nor the more general principle is likely to lead to a finding that a taking has occurred. The economic impact of the regulation only establishes a taking if the owner is left without *any* reasonable beneficial use of her property. A finding that no reasonable beneficial use remains will seldom be reached even if the uses still available to the owner are trivial in comparison to the property's intended function.³⁶⁹ The protection of justified investment-backed expectations is similarly undermined by the Court's interpretation of this criteria. An investor in an already heavily regulated industry is presumed to expect additional regulation that will undermine the value of her property.³⁷⁰ In addition, the acquisition of vacant land or property uncommitted to a new specific use creates no particularized expectations, the defeat of which would constitute a taking.³⁷¹ As for the principle that costs should be spread fairly among the public, the burdening of rela-

Central, 438 U.S. at 123 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). See generally Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 HARV. L. REV. 1165 (1967).

³⁶⁹ See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255, 262-63 (1980) (finding that owners not deprived of reasonable beneficial use of prime land for residential development by zoning ordinance limiting construction on five-acre parcel to five houses); *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (suggesting that statute prohibiting sale of Indian artifacts containing eagle feathers does not constitute taking because owners may "derive economic benefit from the artifacts [by exhibiting them] for an admissions charge").

³⁷⁰ See, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1008-09 (1984) (holding that owner who revealed trade secrets relating to commercially produced pesticides to EPA pursuant to federal law "had no reasonable, investment-backed expectation that its information would remain inviolate [because in] an industry that long has been the focus of great public concern and significant government regulation, the possibility was substantial that the Federal Government . . . would find disclosure to be in the public interest").

³⁷¹ One commentator noted:

Where a property holder merely plans to pursue a use currently permitted but not as yet expressly authorized, the state has [great] freedom to limit these expectations Present law makes clear that a person's reasonable expectations in this category are limited to the assurance that *some* reasonable use of the land be secured to him.

Note, *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1495 (1978) (emphasis in original); see also *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 521, 542 P.2d 237, 246, 125 Cal. Rptr. 365, 374 (1975) ("The long settled state of zoning law renders the possibility of change in zoning clearly fore-

tively small and discrete classes, such as those properties in New York City identified as historical landmarks (about four hundred in number out of one million structures), has been accepted as a sufficiently general regulation to withstand this type of a challenge.³⁷²

When an invasion of property occurs, however, the Court is much more willing to find that a taking exists even though non-permanent occupations do not constitute a taking per se. Justice Marshall repeatedly emphasized in *Loretto* that a physical invasion is a property restriction “of an unusually serious character.”³⁷³ Citing *Kaiser Aetna* as precedent, the Court in *Loretto* reaffirmed that the “power to exclude” others is “considered one of the most treasured strands in an owner’s bundle of property rights.”³⁷⁴ *Nollan* makes the same point, citing *Loretto*.³⁷⁵

Yet if a temporary physical invasion falls somewhere between a permanent occupation and a regulation of use how is this factor to be taken into account? Surely, the owner need not *also* establish that she no longer retains any reasonable beneficial use of her property and that the invasion has substantially interfered with her distinct investment-backed expectations. That would make the fact of an invasion essentially irrelevant. Indeed, *Pruneyard* itself seems to suggest the converse of the reasonable beneficial use standard. Rather than focusing on the viable uses which remain available to the owner, the Court explained that requiring owners to allow expressive activity on shopping center grounds would only constitute a taking if the permitted activity would “unreasonably impair the value or use of their property as a shopping center.”³⁷⁶ The owners must demonstrate that the “‘right to exclude others’ is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a ‘taking.’”³⁷⁷ Because no such effect on the use or value of shopping centers could be established in *Pruneyard*, no taking was

seeable to land speculators and other purchasers of property, who discount their estimate of its value by the probability of such change.”).

³⁷² *Penn Central*, 438 U.S. at 133-35.

³⁷³ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 433 (1982).

³⁷⁴ *Id.* at 435 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979)).

³⁷⁵ *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 831 (1987).

³⁷⁶ *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980).

³⁷⁷ *Id.* at 84.

found.³⁷⁸

Current takings decisions do not provide a set formula or standard of review to help determine what degree of impairment of a designated use or how much of a loss of value is required to find a taking. An ad hoc analysis seems to be envisioned within the parameters established by the case law. Allowing a few individuals to solicit signatures on petitions in a shopping mall clearly produces too little an effect to be considered a taking.³⁷⁹ Forcing the owners of an exclusive marina to open their property to public use, on the other hand, sufficiently impairs the private marina's utility and value to amount to a taking.³⁸⁰ Union organizing activity permitted under federal law does not constitute a taking although it may adversely effect the business operations of the owner.³⁸¹ This intrusion is carefully limited, however, to be no more extensive than is necessary to facilitate national labor policy. In particular, such invasions are regulated as to who may participate, the locations where expressive activity may occur, and the duration of the organizing activity itself.³⁸² Moreover, there is nothing intrinsically private or exclusive about most businesses

³⁷⁸ *Id.* at 83-84.

³⁷⁹ *Id.* at 83.

³⁸⁰ See *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979).

³⁸¹ Although the takings clause is rarely referred to explicitly, numerous decisions by the federal courts, the California courts, and the National Labor Relations Board make it clear that, in appropriate circumstances, laws may deny owners the power to exclude persons engaged in union activity from their property without violating the federal constitutional protection provided to property rights. See, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 570-76 (1978); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Lechmere, Inc. v. NLRB*, 914 F.2d 313 (1st Cir. 1990), *review granted*, 59 U.S.L.W. 3627 (1991); *Scott Hudgens*, 1977-78 NLRB Dec. (CCH) ¶ 18,290 (1977); *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 25 Cal. 3d 317, 599 P.2d 676, 158 Cal. Rptr. 370 (1979).

³⁸² The explanation given by the courts as to why the protection afforded union activity does not constitute a taking — despite the obvious impairment of the owner's ability to exclude others from her property — is not entirely clear nor is it always persuasive. The Supreme Court's primary observation on this issue seems particularly distorted. The Court stated, "Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). While this principle may be superficially true, it ignores the critical distinction that labor's right to organize and to engage in concerted economic activity is provided by federal statute while at

that are subject to union activity to suggest that the right to

some point private property rights are guaranteed by the Constitution. Presumably, the former authority is necessarily subordinate to the latter.

Further, the Court has recognized that the statutory protection provided union activity engaged in by the employees of the property owner stands on a fundamentally different footing than the rights of outsiders. " 'Employees [are] already rightfully on the employer's property, [thus,] the employer's management interests rather than his property interest' " are all that are impaired by employee union activity. *Eastex*, 437 U.S. at 571-72 (quoting *Hudgens v. NLRB*, 424 U.S. 507, 521 n.10 (1976)). This analysis is relatively consistent with current takings clause analysis in that it focuses on the degree to which the owner has already opened access to her property to a general class of persons which includes the particular individuals that the owner seeks specifically to exclude. See *supra* notes 355-61 and accompanying text.

The rights of non-employees to engage in union activity on the employer's property are more limited. In this situation the employer's property interests are at stake as is her "right to keep strangers from entering on [her] property." *Eastex*, 437 U.S. at 571. Still, the property owner's right to exclude others is not sacrosanct. The National Labor Relations Board is given the initial and primary responsibility to balance the competing interests and determine the "proper adjustments" that both labor and property owners may have to make to accommodate the interests of the other. *Babcock*, 351 U.S. at 112.

In theory, the abridgement of property rights required to facilitate national labor policy should be limited and United States Supreme Court case law describes this accommodation in narrow terms. In *Central Hardware Co. v. NLRB*, 407 U.S. 539, 544-45 (1972) the Court explained that the *Babcock* principle

requires a 'yielding' of property rights only in the context of an organization campaign. Moreover, the allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employees' § 7 rights. After the requisite need for access to the employer's property has been shown, the access is limited to (i) union organizers; (ii) prescribed nonworking areas of the employer's premises; and (iii) the duration of organization activity. In short, the principle of accommodation announced in *Babcock* is limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and minimal.

In *Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180, 205 n.41 (1978), the Court added that union assertions of the right to trespass for organizational purposes have "generally been denied except in cases involving unique obstacles to nontrespassory methods of communication with the employees."

Under the foregoing analysis, union activity that intrudes too far into the privacy, autonomy, and property prerogatives of owners should be subject to legal sanction. Indeed, the fifth amendment prohibits government from

exclude union organizers is essential to the ongoing use value of business property.

Protestors at clinics providing abortion services are arguably closer to the *Kaiser Aetna* context than the shopping center and union organizing examples in two important respects. First, the services provided by medical clinics, particularly clinics providing pregnancy related and abortion services, are so strongly imbued with important privacy concerns that the right to exclude others may well be essential to the current use of the property.³⁸³ This is especially true in situations in which the intruders have, as their express purpose, the goal of discouraging women from obtaining abortions.³⁸⁴ Indeed, Justice Marshall concurred in *Pruneyard's* rejection of the shopping center owner's takings clause challenge because no core constitutional interests were jeopardized by the minor additional access required by the California Constitution. Marshall explained, "There has been no showing of interference with . . . normal business operations. The California court has not permitted an invasion of any personal sanctuary. No rights of privacy are implicated. In these circumstances there is no basis

reaching a contrary conclusion. The interpretation the National Labor Relations Board and the lower federal courts give to *Babcock*, however, is arguably inconsistent with the Supreme Court's reasoning in one fundamental respect. In *Jean Country*, 1988-89 NLRB Dec. (CCH) ¶ 15,118 (1988), the Board set out in detail the balancing test it will apply to implement *Babcock*. The Board will weigh three primary factors, the "strength of employees' Section 7 right, [the] strength of employer's property right, [and the] availability and efficacy of alternative means of communication." *Lechmere*, 914 F.2d at 321 (citing *Jean Country*). The problem with this analysis, however, is that it suggests that all of these factors stand on an equal footing. Thus, if the § 7 interest is compelling and no alternative means of communication are available, the employer's property rights must give way. That result seems inconsistent with takings clause doctrine that recognizes that sufficiently severe impairments of property rights violate the takings clause even when those impairments serve extremely worthwhile governmental interests.

³⁸³ See *supra* notes 241-43, 253-58 and accompanying text; see *infra* notes 426-42 and accompanying text.

³⁸⁴ See, e.g., *Kugler v. Ryan*, 682 S.W.2d 47, 49 (Mo. Ct. App. 1984) (noting protestor's purpose was to dissuade persons from obtaining abortions at clinic); *Brown v. Davis*, 203 N.J. Super. 41, 44, 495 A.2d 900, 902 (Ch. Div. 1984) (noting protestors' attempts to persuade women not to have abortions at clinic); *Right to Life Advocates, Inc. v. Aaron Women's Clinic*, 737 S.W.2d 564, 568 (Tex. Ct. App. 1987) ("It is undisputed that the appellants' purpose was to prevent the pregnant women from doing business with the clinic.").

for strictly scrutinizing the intrusion authorized by the California Supreme Court.”³⁸⁵ Medical clinic protests, on the other hand, raise the very impairment of privacy interests as to which Justice Marshall reserved judgment.³⁸⁶

Second, protestors at abortion clinics are arguably closer to the *Kaiser Aetna* context because their actions are sufficiently extensive and problematic that they impair the use and value of the clinic owner’s property. Unlike union activity, which is carefully circumscribed, the extent to which antiabortion protests are permitted on clinic grounds has no intrinsic limits. Anyone may participate in the protests, the protests have no fixed duration, and they may occur on a regular basis as long as the clinic remains in operation and provides abortion services.³⁸⁷

At some point the scope of these activities must constitute a taking. Justices Powell and White, who concurred in the Court’s takings clause analysis in *Pruneyard*, made this point explicitly clear. The holding in *Pruneyard* did not extend beyond large shopping centers to “privately owned, freestanding stores and commercial premises.”³⁸⁸ Indeed, not even all shopping centers could be invaded without violating takings clause requirements. “Even large establishments may be able to show that the number or type of persons wishing to speak on their premises would create a substantial annoyance to customers that could be eliminated only by elaborate, expensive, and possibly unenforceable time, place, and manner restrictions.”³⁸⁹ In such circumstances the takings clause would apply to protect property owners against

³⁸⁵ *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 94-95 (1980) (Marshall, J., concurring) (citations omitted).

³⁸⁶ See *supra* notes 241-43, 253-58 and accompanying text; *infra* notes 426-42 and accompanying text.

³⁸⁷ See, e.g., *Ingram v. Problem Pregnancy of Worcester, Inc.*, 396 Mass. 720, 721, 488 N.E.2d 408, 408-09 (1986) (noting antiabortion group rented office on same floor of building as clinic to engage in “corridor counselling” with clinic’s patients); *Kugler*, 682 S.W.2d at 49 (describing repeated and regular protest activity); *Brown v. Davis*, 203 N.J. Super. at 45, 495 A.2d at 902 (noting that protestors “seek to confront, on a one-on-one basis, prospective users of the Center by meeting them as they exist [sic] their vehicles and walking with them to the front door of the Women’s Center . . .”).

³⁸⁸ *Pruneyard*, 447 U.S. at 96 (Powell, J., and White, J., concurring in part and in the judgment).

³⁸⁹ *Id.*

that level of intrusion.³⁹⁰

B. The First Amendment — Compelled Affirmation of Belief

If antiabortion protestors are successful in convincing a California court that *Pruneyard* applies to their activities, and the court is not persuaded by the clinic's takings clause claim, the clinic may also argue that such an extension of *Pruneyard* violates its own first amendment rights. Specifically, the clinic may argue that the protestors' presence amounts to a compelled affirmation of belief.

1. The Foundation for Invalidating Compelled Affirmations of Belief

The genesis of the doctrine prohibiting compelled affirmations of belief can be found in the 1942 United States Supreme Court case of *West Virginia State Board of Education v. Barnette*.³⁹¹ In *Barnette* a group of Jehovah's witnesses objected to a statute requiring public school students to salute and pledge allegiance to the United States flag. The Court invalidated the statute mandating the salute and pledge, finding that it "require[d] affirmation of a belief and an attitude of mind" that was as violative of the first amendment as censorship or suppression of expression.³⁹² Overruling prior precedent which had held that the important state interest of promoting good citizenry should not be interfered with by the Court, Justice Jackson wrote that "the action of local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amend-

³⁹⁰ One commentator has suggested that allowing speakers access to a shopping center should not constitute a taking because the government is not appropriating a benefit through this requirement; rather it is avoiding a harm. See Note, *supra* note 181, at 654. Because shopping centers have significantly reduced the utility of central business districts as public forums, the state may order shopping centers to open their property to offset this externality. *Id.* Though it is true that government may invade or appropriate harmful property without paying just compensation to the owner, see, e.g., *North Am. Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908); *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905), no case suggests that a business, by attracting customers from a competitor, produces the kind of harm which renders the business beyond the protection of the takings clause and vulnerable to invasion or appropriation.

³⁹¹ 319 U.S. 624 (1943).

³⁹² *Id.* at 633.

ment . . . to reserve from all official control.”³⁹³

After *Barnette* the Court slowly expanded the doctrine of compelled affirmation of belief beyond the extreme scenario of state-compelled recitations of a message the state had dictated. In *Wooley v. Maynard*³⁹⁴ the Court determined that individuals could not be forced to carry a message authored by the state on their personal property. Thus, a New Hampshire statute requiring all drivers to use license plates proclaiming “Live Free or Die,” the state motto, was stricken as an unconstitutional compelled affirmation of belief.³⁹⁵ The Court acknowledged a difference between compelling a spoken pledge to the flag and the adhesion of a message to property, but classified the distinction as “one of degree.” By requiring an individual to carry a message on his property, the government nonetheless “force[d] an individual, as part of his daily life, . . . to be an instrument for fostering adherence to an ideological point of view he finds unacceptable.”³⁹⁶

Following *Wooley*, the Court applied the doctrine to situations in which the state required *access* to private property for the messages of third parties (as opposed to messages of the state). In *Miami Herald Publishing Co. v. Tornillo*,³⁹⁷ the Court invalidated a right-to-reply statute which required newspapers to print candidates’ replies to any criticism of the candidate appearing in the newspaper.³⁹⁸ Similarly, in *Pacific Gas & Electric Co. v. Public Utilities Commission*³⁹⁹ (*PG&E*), the Court invalidated Public Utility Commission requirements that compelled PG&E four times a year to substitute a consumer group’s reports for the company’s newsletter that regularly accompanied the delivery of its bills.⁴⁰⁰ Both of these cases shared a common analytic foundation. In each case the petitioner was subject to content specific regula-

³⁹³ *Id.* at 642 (overruling *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940)).

³⁹⁴ 430 U.S. 705 (1977).

³⁹⁵ *Id.* at 713.

³⁹⁶ *Id.* at 715.

³⁹⁷ 418 U.S. 241 (1978).

³⁹⁸ *Id.* at 258. The Court pointed out that newspaper editors, faced with the “penalties” that would apply to any news or commentary “within the reach of the right-to-access statute,” might decide to avoid controversial issues altogether. *Id.* at 257. “Government-enforced right-of-access inescapably ‘dampens the vigor and limits the variety of public debate.’ ” *Id.* (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964)).

³⁹⁹ 475 U.S. 1 (1986).

⁴⁰⁰ *Id.* at 5-7.

tions that provided access not to the public at large in the spirit of full debate, but rather to parties with whose message the petitioner was certain to disagree.⁴⁰¹ While this mandated access was conditional in *Tornillo* and absolute in *PG&E*,⁴⁰² the effect of these requirements would be the same in both cases. In order to avoid having to publish criticisms of their own viewpoints, publishers would be motivated to censor their own speech.⁴⁰³ In *PG&E*, however, the Court noted one additional impermissible consequence of this type of regulation: PG&E's right to not speak at all would be undermined. The company would experience substantial pressure to respond to the criticisms levied against it in its own billing envelopes.⁴⁰⁴ Thus, by being compelled to distribute the consumer group's message in its billing envelopes, PG&E was not only discouraged from speaking out on particular issues because of the predictable rebuttal from the consumer group it

⁴⁰¹ In *PG&E*, the company was compelled to give access to a group called TURN (Toward Utility Rate Normalization) that regularly assisted the Public Utilities Commission (PUC) in its regulatory proceedings. *Id.* at 5-6. The PUC regulation was content discriminatory because, pursuant to its requirements, "[a]ccess [was] limited to persons or groups — such as TURN — who disagree with [PG&E's] views as expressed in [the company's newsletter] and who oppose [PG&E] in Commission proceedings." *Id.* at 13. In *Tornillo*, the statute compelled the newspaper editors to allow access to third parties specifically because the third parties' views conflicted with those of the editors. Indeed, the third party's writings would be in direct response to the opinions of the editors. *Tornillo*, 418 U.S. at 244.

⁴⁰² *PG&E*, 475 U.S. at 6. The right of reply statute at issue in *Tornillo* required the newspaper to open its pages to only these candidates for nomination or election that the newspaper had previously "assailed." *Tornillo*, 418 U.S. at 244. Newspapers that did not criticize candidates were not obligated to do anything under the statute. The PUC requirements under review in *PG&E* permitted TURN, the consumer group, to insert its own message four times a year in *PG & E's* billing envelopes without any prior conditions being met.

⁴⁰³ *PG&E*, 475 U.S. at 14. While TURN would get access to PG&E's billing envelopes as a matter of course, without regard to the content of PG&E's communications with its customers, the critical fact was that access had been provided exclusively to a group that generally disagreed with PG&E's views and was highly likely to continue to do so. *Id.* at 13. Accordingly, under the PUC requirements, PG&E "must contend with the fact that whenever it speaks out on a given issue, it may be forced — at TURN's discretion — to help disseminate hostile views [and] 'might well conclude' that, under these circumstances, 'the safe course is to avoid controversy.'" *Id.* at 14 (quoting *Tornillo*, 418 U.S. at 257).

⁴⁰⁴ *Id.* at 15-16, 18 (suggesting PG&E would be forced to speak "where it would prefer to remain silent").

would subsequently have to send its customers, but it also had its choice of “what not to say” impaired by the need to respond to the consumer groups criticisms.

Despite the expansion of the doctrine of compelled affirmation of belief to situations where the state required that access to private property be made available for the messages of third parties, the Court refused to apply the first amendment to restrict the free speech rights provided in *Pruneyard*. The shopping mall owners in *Pruneyard* argued that *Wooley*, *Barnette*, and *Tornillo*⁴⁰⁵ established the principle that “a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others.”⁴⁰⁶ The Court, however, distinguished a state allowing signature solicitors to circulate petitions in a shopping mall from these prior cases on several grounds.

First, the mall property, while privately owned, had been opened to the public and was not limited to the owner’s personal use. Due to the public nature of such property, the Court found that views expressed there by third parties were not likely to be identified with the beliefs of the owner.⁴⁰⁷ Second, no specific message was dictated by the state, as was the case in *Wooley*, thus alleviating any concern about governmental discrimination for or against a particular viewpoint.⁴⁰⁸ The state-created right of free speech on private property in *Pruneyard* was content neutral and available to any member of the public regardless of their message. Finally, the Court found that the mall owners could easily disclaim any sponsorship of the speaker’s message, thereby avoiding any implication of approval of their visitor’s expression that might otherwise exist.⁴⁰⁹

Pruneyard, however, was a deceptively simple case. Because shopping centers did not typically communicate with the public on controversial issues, the problem raised in *Tornillo* — a right of

⁴⁰⁵ *PG&E*, had not yet been decided when *Pruneyard* reached the Supreme Court.

⁴⁰⁶ *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85-88 (1980).

⁴⁰⁷ *Id.* at 87.

⁴⁰⁸ *Id.* Nor was access given specifically to a particular third party whose message was likely to conflict with the views of the property owner, although the Court did not mention this point explicitly. This condition had offended the Court in *Tornillo* and the later-decided *PG&E*. See *supra* notes 401-04 and accompanying text.

⁴⁰⁹ *Pruneyard*, 447 U.S. at 87. This distinguished the case from *Barnette* where such a disclaimer was impossible, but not from *Tornillo* where such a disclaimer would be conceivable.

access chilling editorial discretion — was largely irrelevant.⁴¹⁰ Accordingly, the Court's focus in *Pruneyard* was on distinguishing *Barnette* and *Wooley*. That objective could be easily accomplished by emphasizing that neither the shopping center nor its tenants were likely to be associated with the content of the messages of visitors permitted by state law to solicit signatures on the premises.⁴¹¹

The subsequently decided *PG&E* case complicates this analysis, however, by adding the concern that forced access of, or association with, views with which one strongly disagrees creates a pressure to respond that is also antithetical to first amendment values.⁴¹² Accordingly, Justice Powell's opinion in *PG&E* distinguished *Pruneyard* on two grounds. The access rights addressed in *Pruneyard* were not content based so that the shopping center's own speech would not be chilled.⁴¹³ Moreover, the owners in *Pruneyard* did not object to the message they were seeking to exclude from their property.⁴¹⁴ Therefore, by implication, they would feel no compulsion to respond to such expression.

2. Compelled Affirmation of Belief in the Context of Clinics Providing Abortion Services

Under the parameters of the doctrine of compelled affirmation of belief are set out by the above cases, permitting antiabortion

⁴¹⁰ *Id.* at 88. The Court's conclusion that its concerns about the right of reply statute in *Tornillo* chilling editorial discretion and " 'dampe[ning] the vigor . . . of public debate' . . . are not present" in *Pruneyard, id.*, suggests that the Court views shopping center owners as having a limited role, if any, to play in the discussion of public issues. This analysis implies, however, that a different result might be appropriate if the institution on which access rights were imposed did take deliberate positions on an important public policy issue.

⁴¹¹ *Pruneyard*, 447 U.S. at 87-88. The Court suggested that shopping center owners could easily post signs near the speakers or handbillers disavowing their views. *Id.* at 88.

⁴¹² *PG&E*, 475 U.S. at 15-16; see also *supra* note 404.

⁴¹³ *PG&E*, 475 U.S. at 12. Because the right of access upheld in *Pruneyard* would apply regardless of anything a shopping center owner might say or decline to say, Powell presumably believed that the owner's speech would not be inhibited because there seemed to be nothing to gain in avoiding access by self-censorship. It is unclear whether such a presumption is justified. A politically vocal business establishment might be exposed to particularly regular and burdensome access demands under *Pruneyard* that a quiet owner might avoid through a nonprovocative public posture.

⁴¹⁴ *Id.*

protests on a medical clinic's property may constitute a compelled affirmation of belief. A medical clinic providing abortion services may argue initially that California's right to free speech on private property grants access to third parties to convey their messages in a way that impermissibly associates the clinic with a viewpoint with which it strongly disagrees. The nature of the clinic's property, while not as private as an individual's car or a company envelope, is clearly more private than a shopping center. While the property owners in *Pruneyard* invited the public-at-large to enjoy the mall, an abortion clinic's invitation is much more limited.⁴¹⁵ Consequently, the degree of intrusiveness of the forced association is much more offensive.⁴¹⁶ The clinic is required " 'to contribute to the support of an ideological cause' "⁴¹⁷ it opposes

⁴¹⁵ See *supra* notes 241-44 and accompanying text.

⁴¹⁶ For the clinic to have to tolerate antiabortion protestors on its grounds would raise some of the same dignitary concerns that influenced the Court's analysis in *Wooley v. Maynard*. The clinic may not want its grounds to be used as the "courier" for the protestors' message, *Wooley v. Maynard*, 430 U.S. 705, 717 (1977), for the same reason that Mr. Maynard did not want his car to carry the message "Live free or die." From the clinic's perspective, the antiabortion protestors' message may be " 'morally, ethically, religiously and politically abhorrent,' " *see id.* at 713, and having to participate in the communication of that message, even indirectly, may be experienced as offensive. Because the clinic only extends a limited invitation to the public for the use of its property and because its staff participates in a much more intimate relationship with its invitees than is true of a shopping center, offensive speech on the clinic's premises might constitute much more of a personal affront than would occur with larger and more impersonal institutions.

⁴¹⁷ *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 98 n.2 (1980) (Powell, J., concurring in part and in the judgment) (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977)). One commentator noted that extending rights of expression on to private property, as *Pruneyard* permits, cannot constitute an unconstitutional compelled affirmation of belief because labor-organizing activity is permitted on private property as a matter of federal law. Note, *supra* note 97, at 176 n.57. If the owner's first amendment rights are not abridged by her having to tolerate union organizers on her property, they should not be impaired when other expressive activity, with which the owner disagrees, is given similar access rights. *Id.*

The point is well taken. It may be, however, that the owner's first amendment rights are being burdened by labor activities to some extent, but the national interest in facilitating the effective operation of the collective bargaining system is sufficiently compelling to justify that abridgment of the owner's rights. Certainly, labor statutes generally limit

by having to make its property available as a site for hostile speakers and its invitees accessible as an audience for such expression.

In addition the clinic may argue it is being forced to respond to what it considers to be unfounded and erroneous criticism. There will be considerable pressure not to leave the messages of the antiabortion protestors unanswered when they are delivered at the clinic's door to patients arriving for treatment. The merits of this second contention, however, depend on the interpretation given to prior precedent. As noted, *PG&E* identifies two defects in the Public Utility Commission's requirements. First, the content discriminatory mandatory inclusion in billing envelopes of only speech with which PG&E disagrees may convince the company not to express itself on issues to avoid having to subsequently distribute extensive criticisms of its own position.⁴¹⁸ Second, the Commission's orders may compel the company to speak out, when it would prefer to not speak, because of a perceived need to respond to the negative expression of the consumer group directed to its customers.⁴¹⁹ What remains unclear is whether either of these consequences in and of itself is sufficient to invalidate compelled access rights for expressive purposes. An extension of *Pruneyard* to permit speech on the grounds of abortion clinics only implicates one of these concerns: compelling the clinic to speak out when it would prefer to remain silent. The right of access provided is content neutral. The government is not facilitating a particular message that conflicts with the property owner's beliefs. As applied, however, requiring the opening of the clinic's grounds to outside speakers is likely to create a significant compulsion to respond to the resulting protests.

For Justice Powell, the author of the *PG&E* opinion, this question would probably be resolved in favor of the clinic. In his concurrence in *Pruneyard*, Powell argued that a "church-operated enterprise asked to host demonstrations in favor of abortion . . . could be placed in an intolerable position if state law requires it to make its private property available to anyone who wishes to

management's expression in a variety of circumstances, the first amendment notwithstanding.

Of course, there is no comparable overriding national policy being implemented that would justify allowing antiabortion protestors to impair the rights of clinic operators and their patients.

⁴¹⁸ *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1, 13-14 (1986).

⁴¹⁹ *Id.* at 15-16.

speak.”⁴²⁰ Accordingly, the first amendment must protect property owners from such offensive burdens. The Court’s composition has changed so significantly after Powell’s resignation, however, that one can only speculate whether this viewpoint would prevail today.

A medical clinic providing abortion services might avoid the need to precisely interpret *PG&E* by arguing that in a sense both of the constitutional defects identified in that opinion apply if antiabortion protestors are allowed on the clinic’s grounds. Not only would medical clinics be compelled to speak out when they might prefer to remain silent, but they may also be deterred from discussing the availability of abortion services with some women to avoid protests that frighten or disturb patients seeking other services.

C. The Right to Privacy — Abridging the Right to Obtain an Abortion

Even if courts do not find that the presence of antiabortion protestors chills a clinic’s free speech, such protests may diminish a clinic’s willingness to facilitate the exercise of a different constitutional right — the right to have an abortion. Further, expressive activity on clinic grounds may directly burden a woman’s decision to terminate her pregnancy. While the state’s action in extending free speech rights to the grounds of medical clinics would not explicitly discriminate against the right to an abortion, the burdening of that right might be the inevitable result.⁴²¹ The extent to which opening the grounds of clinics to protestors would impermissibly burden the right to an abortion, however, remains unclear.

Given the current uncertainty regarding the extent to which the right to obtain an abortion is constitutionally protected, any evaluation of the impact of allowing protestors on the grounds of clinics providing abortion services must be carefully limited in its scope. The analysis which follows assumes that *Roe v. Wade*⁴²² and the subsequent cases applying the *Roe* trimester framework⁴²³

⁴²⁰ *Pruneyard*, 447 U.S. at 99 (Powell, J., concurring in part and in the judgment.).

⁴²¹ Fundamental rights may be abridged unintentionally if the effect of the challenged state action is to seriously impair the exercise of the right. See generally Brownstein, *supra* note 182, at 16-21 (and cases cited therein).

⁴²² 410 U.S. 113 (1973).

⁴²³ See, e.g., *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *Akron v. Akron Center for*

remain good law under the United States Constitution. If the *Roe* framework is replaced by the standard suggested by Justice O'Connor, a standard that rigorously scrutinizes only regulations that may "unduly burden" the right to have an abortion,⁴²⁴ it is less likely that allowing protestors access to the grounds of abortion clinics will violate federal constitutional guarantees. Obviously, if *Roe* is overruled and states are permitted to criminalize abortion, the burdens described below would also clearly be constitutional.

Under Supreme Court doctrine established in *Roe* and amplified and expanded in *Akron v. Akron Center for Reproductive Health*⁴²⁵

Reproductive Health, 462 U.S. 416 (1983); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976).

⁴²⁴ O'Connor most fully described and defended her "unduly burdensome" standard of review in her dissent in *Akron*, 462 U.S. at 461-66 (O'Connor, J., dissenting), but the analytic foundation for her position remains unclear. She argued that precedent supports her conclusion, but the cases she primarily relied on, *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980); *Bellotti v. Baird*, 428 U.S. 132 (1977); and *H. L. v. Matheson*, 450 U.S. 398 (1981); see *Akron*, 462 U.S. at 453, 464 (O'Connor, J., dissenting), all involve special circumstances that distinguish them from the more conventional abortion regulation context. *Maher* and *Harris* involve the failure to fund abortions for indigent women, while *Bellotti* and *Matheson* involve regulations that limit the availability of abortions to minors.

O'Connor argued further that requiring plaintiffs to demonstrate that the state is imposing a heavy burden on the exercise of their rights "is not novel in our fundamental-rights jurisprudence" *Id.* at 462. Perhaps not, but it is certainly not the rule either. If it were, the invalidation of the relatively minor poll tax in *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966), would be difficult to explain as would recent compelled affirmation of belief cases which focus more on the principle at stake than the magnitude of the burden. See, e.g., *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (prohibiting unions from spending compulsory dues on political activities to which particular members object). A more accurate generalization suggests that the case law varies among rights with regard to how substantial a burden must be demonstrated to invoke rigorous scrutiny.

O'Connor seemed to recognize this uncertainty when she went on to explain that "[t]he 'unduly burdensome' standard is particularly appropriate in the abortion context because of the *nature* and *scope* of the right that is involved." *Akron*, 462 U.S. at 463 (emphasis in original). Unfortunately, other than asserting that the right to an abortion cannot be "absolute," *id.*, (which is true of virtually all fundamental rights), O'Connor provided no further support for the aforementioned contention.

⁴²⁵ 462 U.S. 416 (1983).

and *Thornburgh v. American College of Obstetricians and Gynecologists*,⁴²⁶ allowing antiabortion protestors access to the grounds of medical clinics so that they may communicate their views to women seeking abortions burdens the right to an abortion in at least five important ways. First, to the extent that women cannot avoid the message the protestors seek to convey, the protestors intrude into the physician-patient relationship that the right of privacy protects. *Roe* explicitly recognized that “the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.”⁴²⁷ In *Akron* the Court struck down informed-consent requirements “designed to influence the woman’s informed choice between abortion or childbirth.”⁴²⁸ Similarly, in *Thornburgh* the Court invalidated state regulations which forced information on women that was not “always relevant to the woman’s decision, and . . . may serve only to confuse and punish her and to heighten her anxiety, contrary to accepted medical practice.”⁴²⁹

These cases establish a sphere of autonomy and privacy in which the medical choice to have an abortion may be made without external interference. Access to abortion may not be conditioned on a patient’s having to submit to ideological “counseling”⁴³⁰ intended to influence her decision. While courts may not intend to coerce women into hearing antiabortion messages before they can obtain an abortion, such a burdensome effect on the right to obtain an abortion, may be unavoidable under an expansive interpretation of free speech rights that permit antiabortion protestors to patrol a clinic’s walkways and parking lots. Even neutral laws that result in unacceptable burdens being imposed on the exercise of constitutional rights may be challenged on an as applied basis.⁴³¹

Second, the right to an abortion is burdened because allowing

⁴²⁶ 476 U.S. 747 (1986).

⁴²⁷ *Roe v. Wade*, 410 U.S. 113, 166 (1973).

⁴²⁸ *Akron*, 462 U.S. at 443-44.

⁴²⁹ *Thornburgh*, 476 U.S. at 762.

⁴³⁰ While the actual activities of antiabortion protestors suggest that the term “counseling” is something of a misnomer in this context, the protestors often describe their conduct using such terms. See, e.g., *Ingram v. Problem Pregnancy of Worcester, Inc.*, 396 Mass. 720, 721, 488 N.E.2d 408, 409 (1986) (“corridor counseling”); *Right to Life Advocates, Inc., v. Aaron Women’s Clinic*, 737 S.W.2d 564, 566 (Tex. Ct. App. 1987) (“sidewalk counseling”); see also *supra* note 2 (discussing Davis, California protests).

⁴³¹ See *supra* note 422.

protestors access to the clinic's grounds may jeopardize the confidentiality of the decision to have an abortion. The Court in *Thornburgh* noted pointedly that "[a] woman and her physician will necessarily be more reluctant to choose an abortion if there exists a possibility that her decision and her identity will become known publicly."⁴³² To avoid that consequence the Court struck down record-keeping requirements that unacceptably increased the risk that the decision to obtain an abortion would lack confidentiality.⁴³³ Clearly, that same risk of exposure is increased, particularly in smaller communities where people are more easily recognized, if outsiders may transform visits to clinics into public events or impromptu encounters.⁴³⁴

⁴³² *Thornburgh*, 476 U.S. at 766.

⁴³³ *Id.* at 766-67.

⁴³⁴ See *Chico Feminist Women's Health Center v. Scully*, 208 Cal. App. 3d 230, 256 Cal. Rptr. 194 (1989), in which the administrator of a clinic declared as follows in support of a lawsuit seeking to enjoin antiabortion protestors from picketing in front of the Women's Health Center:

Because Chico is a small community, it is more difficult for the Feminist Women's Health Center to ensure the anonymity of its clients, than in a large metropolitan community. For all of our clients in the abortion clinic, this is an utmost concern [for] the picketer. The picketers present in front of our [clinic] may indeed recognize our clients. They may indeed be members of their own family, church or school. As long as the picketers are in front of the clinic we cannot guarantee to our clients that they will not be recognized. I have spoken to at least two clients who have not come to the Feminist Women's Health Center because they fear being recognized by the picketers.

Id. at 240-41, 256 Cal. Rptr. at 199. Because the antiabortion protestors conducted their activities on a public sidewalk, the clinic's request for an injunction barring the protests was denied. An injunction prohibiting the protestors from identifying or disclosing the identity of any of the clinic's clients was affirmed, however. *Id.* at 250, 256 Cal. Rptr. at 205.

Whatever the merits of the appellate court's decision in *Chico Feminist Women's Health Center* may be, it is clear that the problem under discussion in this Article is substantially different than the one the *Chico Feminist Women's Health Center* court confronted. It is one thing to argue that a clinic located adjacent to a public sidewalk cannot insist that its patients' privacy interests justify excising a shielded area from a traditional public forum where speech interests ordinarily receive maximum protection. It is quite another thing to contend that medical professionals may not protect their patients seeking abortion services from intentional disruptions of their privacy by providing, on private property, a location where patients may park their cars and walk to their physician's office confidentially, and without interruption. The latter contention is the issue addressed here.

Third, the expression of antiabortion protestors causes clinic patients significant emotional distress.⁴³⁵ In part, this involves the feeling that one's privacy is invaded. In part, it results from the protestors deliberate attempt to incite fear and guilt in patients before they receive treatment. Even without regard to the specific content of the protestor's message, the close proximity of hostile third persons is threatening in its own right. Certainly, given past history, it must be unclear to patients whether the protestors they confront will only use expression and not more physical conduct to promote their objectives.⁴³⁶ Moreover, because these protests are typically directed toward patients immediately before they receive medical services, or immediately thereafter, the protests impose a substantial emotional trauma on women who are, at these times, particularly vulnerable to affront.⁴³⁷

Fourth, the protests will increase the cost of providing abortion services. The only legal alternatives available to clinic operators to mitigate the impact of hostile expression on their patients will require the development of time, place, and manner regulations to control antiabortion activity. The enforcement of those regulations will require considerable staff-time and perhaps the employment of security guards.⁴³⁸ These costs, at least in part, will be

⁴³⁵ See *supra* notes 236, 254-57.

⁴³⁶ See, e.g., *Kerr v. State*, 193 Ga. App. 165, 165, 387 S.E.2d 355, 356 (1989) (physical blockade of abortion clinic); *Planned Parenthood League of Mass., Inc. v. Operation Rescue*, 406 Mass. 701, 704, 550 N.E.2d 1361, 1363 (1990) (antiabortion protestors block clinic entrance); *Planned Parenthood of Monmouth County, Inc. v. Cannizzaro*, 204 N.J. Super. 531, 535, 499 A.2d 535, 537 (Ch. Div. 1985) (protestors' conduct deteriorated into shoving match between picketers and clinic staff).

⁴³⁷ See *supra* notes 255-57.

⁴³⁸ This problem has been recognized for shopping centers, see, e.g., *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 96 (1980) (Powell, J., concurring) ("Even large establishments may be able to show that the number or type of persons wishing to speak on their premises would create a substantial annoyance to customers that could be eliminated only by elaborate, expensive, and possibly unenforceable time, place, and manner restrictions."); *Cologne v. Westfarms Assocs.*, 192 Conn. 48, 55, 469 A.2d 1201, 1205 (noting police needed to control protestors on mall property). The problem for clinics providing abortion services is obviously even more acute, see, e.g., *State v. Brown*, 212 N.J. Super. 61, 67, 513 A.2d 974, 977 (App. Div. 1986) (describing how clinic's staff provided escort service to patients from their cars to door of clinic); *Right to Life Advocates, Inc. v. Aaron Women's Clinic*, 737 S.W.2d 564, 570 (Tex. Ct. App. 1987) (noting

passed on to patients, thus increasing the expense incurred in obtaining abortion services. Courts have recognized that regulations which increase the cost, or decrease the availability, of abortions may be invalidated if they cannot be adequately justified.⁴³⁹

Finally, the presence of protestors will not only adversely affect those patients seeking abortion services, it will also disturb the clinic's other patients as well as customers and clients of other professional offices in the same building or complex.⁴⁴⁰ Pregnant women seeking prenatal care will reasonably want a private, confidential, safe, and nonintrusive environment in which their medical treatment may be provided. Hostile activity surrounding the entrance to clinics may result in patients seeking other health care providers. This consequence creates a disincentive to physicians who would otherwise be willing to provide abortion services to their patients and risks limiting the availability of abortion services.⁴⁴¹

property manager of office building in which clinic is located drafted two memorandums to security guards detailing procedures to be followed in dealing with protesters).

⁴³⁹ In *Ragsdale v. Turnock*, 841 F.2d 1358 (7th Cir. 1988), the court invalidated medical licensing regulations which could burden a woman's decision to have an abortion. The court explained that if "regulations are shown to have more than a *de minimis* impact on the abortion decision, the government must show a compelling basis for the law . . ." *Id.* at 1368. It found that the regulation's consequences, an increased cost of \$25-\$40 for an abortion and the possible limiting of available facilities, were not *de minimis*, and that the government did not meet its burden of justifying the regulations as furthering "important state health objectives." *Id.* at 1370-71, 1373-75. See also *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 434, 438-39 (1983) (explaining that additional cost to the woman resulting from requirement that second trimester abortions must be performed in hospitals "places a significant obstacle in the path of women seeking abortion" and therefore requires reasonable justification); *Birth Control Centers, Inc. v. Reizen*, 743 F.2d 352 (6th Cir. 1984); *Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980).

⁴⁴⁰ See, e.g., *Aaron Women's Clinic*, 737 S.W.2d at 568 (noting that antiabortion protestors "did not differentiate among those whom they approached" causing other tenants in office building in which clinic was located to complain about protestors' activity); *Bering v. Share*, 106 Wash. 2d 212, 229, 721 P.2d 918, 929 (1986) (noting that owners of buildings in which abortion clinics are located may refuse to renew leases to clinics in order to protect other tenants and their clients from having to confront antiabortion protestors in front of their offices).

⁴⁴¹ See *Bering*, 106 Wash. 2d at 229, 721 P.2d at 929 (recognizing picketing and other expressive harassment will discourage physicians from

Although some of these burdens cannot be completely avoided if antiabortion protestors exercise their right of expression on public streets and sidewalks adjacent to medical facilities,⁴⁴² these burdens are increased substantially when protestors are permitted to stand sentry on private property directly outside the doors of the clinics they have targeted. Indeed, many state courts adjudicating cases involving abortion protests on or near clinic grounds have recognized that such activity burdens a woman's right to an abortion.⁴⁴³ These concerns are heightened when protestors claim the right to engage in antiabortion expression on the interior walkways, halls, and parking lots of clinics.

What remains unclear, however, is whether federal courts would determine that these effects unduly burden the right to an abortion if the standard of review that Justice O'Connor advocates replaces the current *Roe* framework. In her dissent in *Akron*, O'Connor was willing to uphold the requirement that all second semester abortions must occur in a hospital⁴⁴⁴ despite the majority's contention that this regulation would impose "a 'significant obstacle' [to obtaining an abortion] in the form of increased costs and decreased availability"⁴⁴⁵ There is some question, however, whether O'Connor was generally rejecting the idea that

performing legal abortions in order to protect their other patients and their medical practice).

⁴⁴² See, e.g., *Chico Feminist Women's Health Center v. Scully*, 208 Cal. App. 3d 230, 240-41, 256 Cal. Rptr. 194, 199 (1989) (noting that picketers on public sidewalk in front of clinic providing abortion services jeopardizes confidentiality of abortion decision); *Bering*, 106 Wash. 2d at 228-29, 721 P.2d at 928-29 (noting that picketers on public sidewalk in front of clinic can substantially burden exercise of right to terminate pregnancy).

⁴⁴³ See, e.g., *Planned Parenthood of Monmouth County, Inc. v. Cannizzaro*, 204 N.J. Super. 531, 542-43, 499 A.2d 535, 541-42 (Ch. Div. 1985) (finding that right of privacy and right to have an abortion cannot be infringed by expressive activity of antiabortion protestors on clinic grounds); *Aaron Women's Clinic*, 737 S.W.2d at 568-69 (finding that clinic has right to provide abortion services and patients have right to terminate pregnancies without being burdened by expression of antiabortion protestors); *Bering*, 106 Wash. 2d at 229-30, 721 P.2d at 929 (enjoining antiabortion picketing on public sidewalk in front of clinic because "the coercive presence of the picketers directly in front of the Medical Building would severely compromise the ability of a woman to effectuate the abortion decision, in turn violating the women's constitutional right of privacy under *Roe v. Wade*").

⁴⁴⁴ *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 466 (O'Connor, J., dissenting).

⁴⁴⁵ *Id.* (quoting majority opinion, 462 U.S. at 434-35)

increased costs can constitute an undue burden, or whether she endorsed the more limited position that increased costs resulting from reasonable health regulations do not constitute an "undue burden" on abortion rights.⁴⁴⁶ In both *Akron* and *Thornburgh* O'Connor would have upheld informed consent requirements that the majority struck down.⁴⁴⁷ Again, however, while these opinions demonstrate a willingness to allow greater intrusion by the state into "the physician's discretion to be the sole judge of what his or her patient needs to know,"⁴⁴⁸ they do not suggest an unlimited tolerance for such interference. O'Connor characterized the information to be disclosed as "balanced"⁴⁴⁹ and "calculated to inform rather than intimidate"⁴⁵⁰ and suggested, at least, that requiring exposure to "inflammatory and inaccurate" information might constitute an undue burden.⁴⁵¹

In her dissent in *Thornburgh* O'Connor also seemed less con-

⁴⁴⁶ Much of O'Connor's analysis on this issue seems to reject the argument that increased costs alone can ever constitute an "undue burden." She criticized the majority's concern about "increased abortion costs and decreased availability" as "misplaced" and noted that there is no evidence that any woman has been denied an abortion at a hospital under the law at issue for financial reasons. *Id.* at 466. Nevertheless, O'Connor did cite favorably the Court's decision in *Simopoulos v. Virginia*, 462 U.S. 506 (1983), in which a state's costly licensing requirement was upheld as "not an unreasonable means of furthering the state's compelling interest in preserving maternal health." *Akron*, 462 U.S. at 467. The possible implication here, that costly abortion regulations must at least be reasonably related to legitimate health objectives, would still subject such requirements to a far lower standard of review than strict scrutiny. The inquiry into the regulations' reasonableness, however, would be deeper than the trivial and highly deferential review the Court reserves for most economic and social welfare legislation. *See id.* at 467 n.11. Attempting to read a marginally higher standard of review into O'Connor's dissent may well be wishful thinking on the part of the authors, however. O'Connor concluded that the state's second trimester hospitalization requirement "has a 'rational relation' to a valid state objective" and cited *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), for support. *Akron*, 462 U.S. at 467. If the level of scrutiny O'Connor is proposing to apply to costly medical regulations is no more rigorous than the review applied in *Lee Optical*, then all such regulations will be routinely upheld.

⁴⁴⁷ *See Akron*, 462 U.S. at 470-72 (O'Connor, J., dissenting); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 830-31 (1986) (O'Connor, J., dissenting).

⁴⁴⁸ *Thornburgh*, 476 U.S. at 830 (O'Connor, J., dissenting).

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.* at 831.

cerned about risks of public disclosure and lack of confidentiality than the majority, but again her analysis was limited in its scope. Without a proper record to evaluate she contended that on its face the statutory reporting requirements before the court did not constitute a "substantial threat" of identifying women obtaining abortions.⁴⁵² How she would react to a better documented breach of confidentiality, or an argument based on increased risks of exposure that discouraged women from exercising their rights, remains unclear.

As to the concern that women seeking abortions will experience significant emotional distress if they must confront hostile protestors when entering a clinic to receive treatment, one must also conclude, regrettably, that there is significant doubt as to whether Justice O'Connor would recognize this experience as an undue burden. In *Hodgson v. Minnesota*,⁴⁵³ O'Connor concluded that the state's judicial bypass provision cured the constitutional defect in its two-parent notification requirement before a minor might receive an abortion.⁴⁵⁴ Given the evidence recited in Part IV of the majority opinion (which O'Connor joined)⁴⁵⁵ to the effect that judicial bypass proceedings produce "fear, tension, anxiety and shame among minors"⁴⁵⁶ and given O'Connor's own determination that notifying both parents is sometimes unreasonable and unjustified,⁴⁵⁷ it is clear that O'Connor recognized that the Minnesota statutory scheme forced some minors to undergo the distress of the court proceeding when there was no legitimate reason for requiring them to do so. Her acceptance of the imposition of this unnecessary burden can only be rationalized under her own standard of review if the bypass proceeding is understood *not* to constitute an "undue burden."⁴⁵⁸ In that case O'Connor would apply a deferential rational relationship test that tolerates such over-inclusive regulations as being within the legislature's discretion.⁴⁵⁹

⁴⁵² *Id.* at 832.

⁴⁵³ 110 S.Ct. 2926 (1990).

⁴⁵⁴ *Id.* at 2951 (O'Connor, J., concurring in part and in the judgment).

⁴⁵⁵ *Id.* at 2949.

⁴⁵⁶ *Id.* at 2940.

⁴⁵⁷ *Id.* at 2950 (O'Connor, J., concurring in part and in the judgment).

⁴⁵⁸ *Id.* at 2950-51 (O'Connor, J., concurring in part and in the judgment).

⁴⁵⁹ *Id.* at 2950 (O'Connor, J., concurring in part and in the judgment).

O'Connor's concurrence in *Hodgson* is difficult to understand. If a parental notice requirement was itself reasonable and appropriate in most cases, requiring a judicial bypass procedure might be justified as the only way to

Thus, the extent to which the right to obtain an abortion is con-

assure that the minor receives some supervision and assistance in making the decision to have an abortion in those limited cases in which parental involvement would be unhelpful or even dangerous to the child's well-being. The two-parent notification requirement in *Hodgson*, however, is clearly so sweeping in its scope and so divorced from the legitimate objective of helping minors reach an informed and careful decision, that O'Connor invalidated it as irrational. *Id.* at 2951. What O'Connor failed to explain after she reached that conclusion is why the burden of having to undergo the judicial bypass procedure remains justified when many minors will have to exercise that option even though they have already consulted with one of their parents and there is nothing useful to be gained by seeking the advice of the other.

Both conceptually and practically, when one parent has been notified already of the minor's intent to have an abortion, the judicial bypass procedure must constitute an unnecessary burden on the abortion decision in a significant number of cases. To justify its imposition, O'Connor must believe that the overall statutory scheme taken as a whole (two-parent notification requirement along with a judicial bypass procedure) can withstand constitutional review. To support that conclusion, she must argue that the statute need not be precisely drawn to be upheld, because there is an obvious, less burdensome way to further the state's legitimate objectives: requiring the notification of only one parent. From O'Connor's perspective those minors who will have to utilize the bypass procedure when they could have avoided doing so pursuant to a one-parent notification requirement simply have to bear the cost of the state's failure to narrowly tailor its regulations.

What kind of a standard of review is O'Connor applying to the overall statutory scheme that tolerates this degree of imprecision? As noted, O'Connor postulated a two-tier system in which laws that "unduly burden" the abortion decision must further a compelling state interest while other abortion regulations need not do so. *See supra* notes 424, 444-52 and accompanying text. O'Connor also argued, in *Akron*, that state regulations that burden the abortion decision need not be narrowly drawn. *See Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 467 n.11 (1983) (O'Connor, J., dissenting). There is some ambiguity as to whether she is suggesting that precise tailoring is never required of abortion regulations, no matter how substantial and unavoidable the burdens imposed by such regulations may be, or whether she is only willing to dispense with a close connection between the state's means and its ends when something less than an "undue burden" is imposed on a woman's decision to terminate her pregnancy. The argument in the text of this Article assumes the latter interpretation. Pursuant to that conclusion, O'Connor's willingness to accept the challenged law's imposition of unnecessary and unreasonable burdens on the abortion decision in some significant number of circumstances can only be explained in one way. Because the challenged law does not create "undue burdens" for women, it may be upheld despite its lack of careful tailoring. Thus, O'Connor's decision in *Hodgson* becomes intelligible by postulating that the emotional distress experienced by

stitutionally protected determines whether antiabortion protests on private medical clinic grounds constitute an unacceptable burden on that right. While a persuasive argument can be made that antiabortion protests burden the right to an abortion within the *Roe v. Wade* framework, if the Court retreats substantially from *Roe*, a different analysis and conclusion will apply. Protests on the grounds of clinics may be just one of the obstacles women seeking to terminate a pregnancy could be forced to confront if the Court adopts the standard of review Justice O'Connor advocates — a standard that displaces rigorous scrutiny for regulations that do not “unduly burden” the right to an abortion.

CONCLUSION

The California Constitution, for persuasive and legitimate reasons, permits an individual to exercise her freedom of speech on the grounds of certain kinds of private property, including shopping centers, railroad terminals, and, perhaps less convincingly, large supermarkets. *Robins v. Pruneyard Shopping Center* strongly affirmed this principled proposition. The *Pruneyard* case, however, and its antecedents and progeny, do not establish a general easement for expressive activity that applies without distinction to all private property that is, in some sense, open to the public. California case law is more limited in its scope, and the overwhelming authority of other jurisdictions confirms the merit of this conclusion.

Within the free speech framework adopted in *Pruneyard* it is clear that protestors have no state constitutional right to express

minors, in having to utilize a judicial bypass procedure to lawfully terminate a pregnancy, is not an “undue burden” on the minor’s choice.

On the other hand, if O'Connor believes that abortion regulations never need to be precisely drawn to withstand judicial review, even if the challenged regulation substantially burdens a woman's ability to obtain an abortion, then no inference can be drawn from her opinion in *Hodgson* as to how she weighs emotional distress as a burden. Under this alternative analysis, women may be confronted by unnecessary, undue burdens in numerous instances as long as the overall statutory scheme under review serves a compelling state interest. Two-parent notification requirements with a judicial bypass procedure arguably further such a goal by assuring that the minor's decision is made with adequate consultation. One may legitimately argue that strict scrutiny without a narrow tailoring requirement is inherently contradictory and that it allows laws that are grossly overburdensome to be sustained. That may be, however, what O'Connor believes to be the appropriate standard of review for abortion regulations.

their opposition to abortion on the grounds of medical clinics. An examination of the various factors that are relevant to determining the appropriate scope of free speech rights on private property demonstrates the total inadequacy of any attempt to analogize shopping malls to medical clinics that provide abortion services. The nature of medical clinics, the limited scope of the invitation extended to third parties to use clinic property, and the basic incompatibility between antiabortion expression and the use to which clinic property is put all convincingly support a distinction between these fundamentally different uses of property. Neither the precedent of *Pruneyard*, nor an analysis of the competing speech and privacy interests which are in conflict, justifies the subordination of property and privacy interests to rights of expression in the medical clinic context.

Even if a state court or legislature reached the contrary conclusion and attempted to protect expressive activity on the grounds of medical clinics providing abortion services, such a decision could be vigorously challenged on federal constitutional grounds. The exercise of expansive free speech rights in this circumstance without the payment of just compensation to the property owner may result in the unconstitutional taking of property. Alternatively, forcing an owner to host such expression on his property may constitute a compelled affirmation of belief in violation of the first amendment. Finally, the effect of permitting antiabortion protestors to patrol the parking lots and interior sidewalks of medical clinics may abridge the right of women to choose to terminate their pregnancy in consultation with their physician and only such other persons as they, as individuals, deem appropriate.

