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## **Supreme Court of New York Appellate Division, Third Department - Kings Mall, LLC v. Wenk**

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**Supreme Court of New York Appellate Division, Third Department - Kings Mall,  
LLC v. Wenk**

**Cover Page Footnote**

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**SUPREME COURT OF NEW YORK  
APPELLATE DIVISION, THIRD DEPARTMENT**

Kings Mall, LLC v. Wenk<sup>1</sup>  
(decided July 5, 2007)

Kings Mall, LLC, (“Kings Mall”) the owner of a shopping mall, brought an action to permanently enjoin the defendants, a group of protestors against the war in Iraq, from entering its property.<sup>2</sup> At the outset of the litigation, Kings Mall filed a motion for a preliminary injunction, and upon satisfaction of the requisite elements,<sup>3</sup> the state supreme court granted its motion.<sup>4</sup> The defendants appealed to the Appellate Division, Third Department, which addressed whether the defendants’ free speech protections afforded under the United States Constitution<sup>5</sup> or the New York Constitution<sup>6</sup> were violated when they were enjoined from protesting against the federal government within the “privately” owned mall.<sup>7</sup> The appellate division affirmed, holding that the defendant’s constitutional rights were not vi-

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<sup>1</sup> 839 N.Y.S.2d 313 (App. Div. 3d Dep’t 2007).

<sup>2</sup> *Wenk*, 839 N.Y.S.2d at 315.

<sup>3</sup> *Id.* “In order to have been entitled to a preliminary injunction, plaintiff had to establish (1) a likelihood of success on the merits, (2) irreparable injury and (3) a balancing of the equities in its favor.” *Id.* (citing *In re Kalichman*, 820 N.Y.S.2d 648 (App. Div. 3d Dep’t 2006)).

<sup>4</sup> *Wenk*, 839 N.Y.S.2d at 315.

<sup>5</sup> U.S. CONST. amend. I, states, in pertinent part: “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”

<sup>6</sup> N.Y. CONST. art. I, § 8, states, in pertinent part: “Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.”

<sup>7</sup> *Wenk*, 839 N.Y.S.2d at 315.

olated because the mall's actions did not amount to state action.<sup>8</sup>

The mall accommodates thirty-two stores, one of which is leased by the United States government as a military recruiting center, and a common area all under the roof of a large, single space.<sup>9</sup> "Displayed at every entrance to the mall are printed notices advising that the mall 'is reserved only for the use of the owners and employees of business tenants and their patrons' and entering . . . 'for any other purpose is prohibited.'"<sup>10</sup>

In May 2005, the defendants commenced a series of "aggressive and disorderly" protests against the war in Iraq within the mall's premises, clearly failing to comply with the reservations posted at the various mall entrances.<sup>11</sup> On a number of occasions, mall tenants summoned the police, which resulted in the arrests of some of the defendants for harassment, trespass, and disorderly conduct.<sup>12</sup> In response, the mall owner filed an action with the state supreme court and subsequently moved for temporary relief. Under the lease agreements with its tenants, Kings Mall was required to act to prevent and dispose of any actions detrimental to its tenants' business operations.<sup>13</sup> In support of its motion, Kings Mall submitted sworn affidavits from a number of its tenants, which attested to a decline in the amount of customers and sales at its stores during the organized pro-

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 315.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 315.

<sup>12</sup> *Wenk*, 839 N.Y.S.2d at 315 n.1 ("The harassment charges were dismissed in the interest of justice, while the other charges were adjourned in contemplation of dismissal.").

<sup>13</sup> *Id.* at 316.

tests.<sup>14</sup>

The defendants argued that the tenants' affidavits were not supported by sufficient facts and further that any damages incurred as a result of the protests could be adequately compensated.<sup>15</sup> The trial court disagreed, and granted the preliminary injunction, but stipulated the defendants would be permitted to protest outside the premises of the mall at specified times.<sup>16</sup> The defendants appealed to the Appellate Division, Third Department, which affirmed the lower court's decision, concluding that: (1) the plaintiff was likely to succeed on the merits of the case;<sup>17</sup> (2) that without the issuance of a preliminary injunction the plaintiff would suffer irreparable harm;<sup>18</sup> (3) and that the potential loss to the plaintiff, in terms of money and visitors, far outweighed an order requiring defendants to protest outside the confines of the mall.<sup>19</sup>

On appeal, the reassessment of the preliminary injunction elements raised the issue of whether the federal or state constitution protected the defendants' actions.<sup>20</sup> If protected, the plaintiff would be unable to establish likelihood of success on the merits and the preliminary injunction would be overturned. The appellate division

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 315 ("[The] court granted a preliminary injunction, allowing defendants to protest on the outside sidewalks of the mall during a two-hour time period on Saturday afternoons.").

<sup>17</sup> *Wenk*, 839 N.Y.S.2d. at 316.

<sup>18</sup> *Id.* The court found that monetary compensation would be an inadequate remedy for the plaintiff " 'because of the difficulty in proving how many individuals would have been deterred from patronizing those businesses as a direct result of defendants' conduct.' " *Id.* (quoting *People v. Anderson*, 529 N.Y.S.2d 917, 924 (App. Div. 4th Dep't 1988) (alteration in original)).

<sup>19</sup> *Wenk*, 839 N.Y.S.2d at 316.

<sup>20</sup> *Id.* at 315.

found that “the state and federal constitutional guarantees of free speech protect individuals against governmental action,” and not against individual action.<sup>21</sup> The appellate division found no evidence of any federal or state governmental action in violation of the defendants’ constitutional rights.<sup>22</sup> Accordingly, the court affirmed the granting of the preliminary injunction, reasoning that because the mall owner was a private party, the defendants did not have an actionable freedom of speech claim.<sup>23</sup>

The appellate division also addressed whether the defendants were afforded protection under the Federal Constitution.<sup>24</sup> Accordingly, the court referred to the United States Supreme Court’s decision in *Hudgens v. NLRB*.<sup>25</sup> In *Hudgens*, four warehouse employees of the Butler Shoe Company entered a privately-owned shopping mall and began picketing against one of the mall’s retail stores in response to the tenant store’s refusal to comply with the contract demands of the employees’ union.<sup>26</sup>

Initially, the mall general manager warned the protestors that if they did not refrain from picketing and leave, they would be arrested.<sup>27</sup> The general manager’s threat of arrest was successful; the employees departed. However, the departure was short-lived and the picketers returned. Once more, the general manager threatened the

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<sup>21</sup> *Id.* at 315 (citing *SHAD Alliance v. Smith Haven Mall*, 488 N.E.2d 1211 (N.Y. 1985)).

<sup>22</sup> *Wenk*, 839 N.Y.S.2d at 315.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> 424 U.S. 507 (1976).

<sup>26</sup> *Hudgens*, 424 U.S. at 509.

<sup>27</sup> *Id.*

striking employees with arrest and again they vacated the premises.<sup>28</sup> However, after this second threat the employees' union filed a claim with the National Labor Relations Board ("NLRB"), "alleging interference with rights protected by section seven of the [National Labor Relations] Act."<sup>29</sup>

The NLRB entered a cease and desist order against the owner of the shopping mall, finding that the warehouse employees were afforded the right to protest on the mall premises under the First Amendment.<sup>30</sup> Upon petition for review, the United States Court of Appeals for the Fifth Circuit affirmed the Board's ruling.<sup>31</sup> The Supreme Court granted certiorari.<sup>32</sup>

The Supreme Court vacated the circuit court's decision and remanded with directions that the First Amendment right of freedom of speech should receive no consideration in the case's ultimate decision.<sup>33</sup> The Court held the striking warehouse employees were not afforded a First Amendment right to protest against the company within the confines of the shopping mall.<sup>34</sup> In its analysis, the Court

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 509-10. See 29 U.S.C.A. § 157 (West 2000).

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment . . .

*Id.*

<sup>30</sup> *Hudgens*, 424 U.S. at 510.

<sup>31</sup> *Id.* at 512.

<sup>32</sup> 420 U.S. at 971 (1975).

<sup>33</sup> *Hudgens*, 424 U.S. at 523.

<sup>34</sup> *Id.* at 521.

followed the reasoning set forth in *Lloyd Corp., Ltd. v. Tanner*.<sup>35</sup>

*Lloyd* involved a group of people who entered a shopping mall and “distributed . . . handbill invitations to a meeting of the ‘Resistance Community’ to protest the draft and the Vietnam war.”<sup>36</sup> Although the handbill solicitation was peaceful and received few complaints, the mall abided by a long-standing policy of prohibiting any form of handbilling inside its facility.<sup>37</sup> Accordingly, security guards advised the solicitors that they would be arrested for trespassing unless they refrained from distributing their handbills inside the mall.<sup>38</sup> The solicitors complied with the guards’ request and, at the guards’ suggestion, resumed distributing handbills on the public walkways outside the mall.<sup>39</sup> However, the solicitors initiated a lawsuit premised on a First Amendment violation and sought an injunction to prevent the property owner from barring them from handbilling within the mall.<sup>40</sup> The district court held, and the circuit court of appeals affirmed, that the plaintiffs’ First Amendment rights were violated when they were prohibited from distributing their handbills within the mall.<sup>41</sup>

The Supreme Court granted the mall owner’s petition for certiorari<sup>42</sup> to determine whether prohibiting solicitors from distributing handbills on privately-owned mall property was contrary to the free

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<sup>35</sup> 407 U.S. 551 (1972).

<sup>36</sup> *Lloyd*, 407 U.S. at 556.

<sup>37</sup> *Id.* at 555.

<sup>38</sup> *Id.* at 556.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Lloyd*, 407 U.S. at 556-57.

<sup>42</sup> 404 U.S. 1037 (1972).



speech provisions afforded under the First Amendment to the United States Constitution.<sup>43</sup> The Court overturned the lower courts' decisions, finding that even though the mall was open to the general public and contained sidewalks, streets, and parking areas, it did not lose its private nature, and thus was permitted to prohibit solicitors from distributing handbills on its property.<sup>44</sup>

The Supreme Court found that the mall's invitation to the public was extended for the purpose of inducing business transactions with those who maintain retail space therein.<sup>45</sup> In particular, the mall owner informed the public via small signs at various locations within the mall that the "Areas . . . Used By The Public Are Not Public Ways But Are For The Use Of Lloyd Center Tenants And The Public Transacting Business With Them. Permission To Use Said Areas May Be Revoked At Any Time."<sup>46</sup> The Court held the mall retained its private nature despite inviting the public to shop within its facility.<sup>47</sup> The Court reasoned that a private individual store does not "assume[] significant public attributes merely because the public is invited to shop there."<sup>48</sup> The Court took this notion further and held, by increasing property size and adding a number of adjoining stores to an individual store, thereby creating a shopping mall, there was no effect on the private nature of the property as a whole despite the property's continued openness to the public and increased commercial ca-

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<sup>43</sup> *Lloyd*, 407 U.S. at 567.

<sup>44</sup> *Id.* at 568-69.

<sup>45</sup> *Id.* at 565 (citing *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 338 (1968) (White, J., dissenting)).

<sup>46</sup> *Lloyd*, 407 U.S. at 554-55.

<sup>47</sup> *Id.* at 569.

<sup>48</sup> *Id.*

capacity.<sup>49</sup>

Moreover, the Court disagreed that the presence of sidewalks, streets, and parking areas classified the property as a municipality.<sup>50</sup> If this were so, the Court reasoned, then the public at large, whether invited or not, would be entitled to enter a mall and enjoy the same free speech protections afforded when on a city street or town sidewalk.<sup>51</sup> The Court found, “The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use.”<sup>52</sup> Nothing in the record suggested to the Court that the mall owner intended any of its property to be dedicated to public use.<sup>53</sup> Rather, the mall was intended to be a commerce center where the public was invited to engage in business with the multitude of stores leasing space within its complex.<sup>54</sup>

Accordingly, the Supreme Court reversed the lower court’s decision and held that the solicitors were not entitled to First Amendment protections. The Court found the Federal Constitution “safeguard[s] the rights of free speech . . . by limitations on *state* action, not on action by the owner of private property used nondiscriminatorily for private purposes only.”<sup>55</sup> Therefore, it follows that if a privately-owned shopping mall has not dedicated its property to public use, it may restrict speech rights on its premises because such actions would be carried out by a private owner, and not the govern-

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 569.

<sup>51</sup> *Lloyd*, 407 U.S. at 569.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 570.

<sup>54</sup> *Id.* at 564.

<sup>55</sup> *Id.* at 567.

ment.<sup>56</sup>

In contrast, in *PruneYard Shopping Center v. Robins*,<sup>57</sup> a case decided eight years later, the Supreme Court affirmed a judgment permitting a group of individuals to distribute pamphlets and petitions within a privately-owned shopping mall open to the public.<sup>58</sup> However, this right was not afforded under the Federal Constitution, but rather under the California State Constitution.<sup>59</sup> At the state level, the California Supreme Court held a group of students the had right to exercise their free speech rights within the premises of the privately-owned property without threat of retaliation by mall ownership.<sup>60</sup>

In *PruneYard*, a group of high school students entered the privately-owned PruneYard shopping center to encourage others to join in their petition in opposition to a “United Nations resolution against ‘Zionism,’ ” albeit in a peaceful manner.<sup>61</sup> Similar to the cases already discussed, the solicitors were approached by mall security and ordered to relocate their activities to the public sidewalks alongside the perimeter of the mall’s property.<sup>62</sup> Though the students complied, they commenced a lawsuit arguing that their federal and state constitutional rights were violated.<sup>63</sup> The trial court and the court of appeals both disagreed, but the California Supreme Court re-

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<sup>56</sup> *Wenk*, 839 N.Y.S.2d at 315.

<sup>57</sup> 447 U.S. 74 (1980).

<sup>58</sup> *PruneYard*, 447 U.S. at 88.

<sup>59</sup> *Id.* at 78. See CAL. CONST. art. I, § 2 (“A law may not restrain or abridge liberty of speech or press.”); CAL. CONST. art. I, § 3 (“The people have the right to . . . petition government for redress of grievances, and assemble freely . . .”).

<sup>60</sup> *PruneYard*, 477 U.S. at 78.

<sup>61</sup> *Id.* at 77 (internal citations omitted).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

versed the lower courts' decisions and held the students' state constitutional rights were violated.<sup>64</sup>

Before the Supreme Court, the shopping mall owner argued that *Lloyd* should control. However, the Court disagreed, concluding that the "reasoning in *Lloyd* . . . does not . . . limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."<sup>65</sup> The Court further held that the mall owner's constitutional rights under the Fifth<sup>66</sup> and Fourteenth<sup>67</sup> Amendments were not violated by judicial decision to allow the students to enter upon the privately owned property and continue their activities.<sup>68</sup> The Court reasoned that prohibiting the mall from exercising its right to exclude the students from the premises would not "unreasonably impair the value or use of their property as a shopping center."<sup>69</sup> As an alternative, the Court suggested that the mall promulgate regulations that protect its tenants from actions detrimental to business operations.<sup>70</sup> With respect to the mall owner's due process argument, the Court held the mall owner failed to establish that its

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<sup>64</sup> *Id.* at 77-78.

<sup>65</sup> *PruneYard*, 477 U.S. at 81 (citing *Cooper v. California*, 386 U.S. 58, 62 (1967)).

<sup>66</sup> U.S. CONST. amend. V states, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

<sup>67</sup> U.S. CONST. amend. XIV, §1 states, in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

<sup>68</sup> *PruneYard*, 447 U.S. at 84. The Court noted "it is well established that 'not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense.'" *Id.* at 82 (citing *Armstrong v. United States*, 364 U.S. 40, 48 (1960)).

<sup>69</sup> *PruneYard*, 447 U.S. at 83.

<sup>70</sup> *Id.* ("PruneYard may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions.").

private property rights outweighed the state's interest in expanding the right of freedom of speech.<sup>71</sup> Accordingly, the Court held that a mall owner's refusal to allow individuals to enter upon its privately-owned property, which is open to the public, for the purpose of engaging in peaceful solicitation and petitioning constituted a violation of the state constitution's freedom of speech provision.<sup>72</sup>

New York State does not follow the same approach, as indicated by the appellate division in *Wenk*. The *Wenk* court was guided by the New York Court of Appeals' decision in *SHAD Alliance v. Smith Haven Mall*.<sup>73</sup> The Court of Appeals determined that New York adheres to the rule that the "State . . . constitutional guarantees of freedom of speech protect the individual against action by governmental authorities, not by private persons."<sup>74</sup>

In *SHAD*, a group of individuals from the SHAD and Paumanok organizations entered the privately-owned Smith Haven Mall in Suffolk County without the mall owner's authority and began distributing opinionated information concerning the under-construction Shoreham Nuclear Power Plant.<sup>75</sup> Historically, the mall observed a policy prohibiting protests or distribution of political materials on mall premises to promote a business-oriented environment fueled by consistent patronage and goodwill.<sup>76</sup> Mall security advised the solici-

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<sup>71</sup> *Id.* at 85.

<sup>72</sup> *Id.* at 88.

<sup>73</sup> 488 N.E.2d 1211 (N.Y. 1985).

<sup>74</sup> *SHAD*, 488 N.E.2d at 1215.

<sup>75</sup> *Id.* at 1213.

<sup>76</sup> *Id.* at 1212 ("The Mall has consistently and nondiscriminatorily prohibited all leafletting, and . . . political activities . . .").

tors of the existing policy and ordered they refrain from continuing.<sup>77</sup> Subsequently, the individuals filed a claim citing a free speech violation under the New York State Constitution, and moved for an injunction obliging mall ownership to allow the distribution of leaflets within the mall.<sup>78</sup>

The trial court determined that the mall's policy prohibiting the distribution of leaflets violated the free speech provision of the New York Constitution. The appellate division affirmed, granting the organizations the right to leaflet within the mall property.<sup>79</sup> The New York Court of Appeals did not interpret the free speech provision as broadly as the lower courts.<sup>80</sup> Instead, the court found the "drafters of the . . . free speech clause . . . intended the State Constitution to govern the rights of citizens with respect to their government and not the rights of private individuals against private individuals."<sup>81</sup> For a private individual to successfully assert a free speech claim under the New York State Constitution there must be evidence of some form of state action.<sup>82</sup>

In *Sharrock v. Dell Buick-Cadillac, Inc.*, the New York Court of Appeals defined state action as<sup>83</sup>

Purely private conduct, however egregious or unreasonable, does not rise to the level of constitutional significance absent a significant nexus between the State and the actors or the conduct. This nexus has

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<sup>77</sup> *Id.* at 1213.

<sup>78</sup> *Id.*

<sup>79</sup> *SHAD*, 488 N.E.2d at 1213.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 1215.

<sup>82</sup> *Id.* at 1217.

<sup>83</sup> 379 N.E.2d 1169 (N.Y. 1978).

been denominated “State action” and is an essential requisite to any action grounded on violation of equal protection of the laws or a deprivation of due process of law.<sup>84</sup>

Moreover, the state must be “significantly” involved with the conduct of the private party in order for a constitutional claim to arise.<sup>85</sup> To make this determination, the court listed a number of relevant factors, such as “whether the State is so entwined with the regulation of the private conduct as to constitute State activity [and] whether there is meaningful State participation in the activity.”<sup>86</sup>

The New York Court of Appeals in *SHAD* applied the *Sharrock* reasoning to analyze whether the state was significantly involved with the mall’s conduct.<sup>87</sup> The organizations argued that the mall conducted activities that characterize its operations as that of a “public forum”; however, the court reasoned that such an argument is irrelevant and does not offer proof of state action.<sup>88</sup> Further, the court found no similarities between the mall and the government, especially in terms of their respective conduct.<sup>89</sup> It followed that the plaintiff failed to prove any significant involvement on the part of the state government to suggest its conduct was “so entwined” with the mall’s prohibition on the distribution of pamphlets and leaflets within the

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<sup>84</sup> *SHAD*, 488 N.E.2d at 1172 (citation omitted).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1217.

<sup>88</sup> “On some occasions the Mall has permitted local officials to park mobile vans in its parking lot to offer public services such as advice to senior citizens and veterans and blood and glaucoma tests.” *Id.* at 1212.

<sup>89</sup> *SHAD*, 488 N.E.2d at 1217.

mall.<sup>90</sup> Accordingly, the New York Court of Appeals reversed the decision of the lower court, finding no state action and thus no state constitutional issue.<sup>91</sup>

In contrast, as set forth in the Supreme Court of New Jersey's decision in *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*,<sup>92</sup> New Jersey's own constitution protects freedom of speech "not only from abridgement by government, but also from unreasonably restrictive and oppressive conduct by private entities."<sup>93</sup> In *J.M.B. Realty*, a coalition of different groups against U.S. intervention in the Middle East, specifically in regards to the conflict between Iraq and Kuwait, joined forces to initiate a leafleting campaign to convince members of the public to protest the impending vote on military intervention.<sup>94</sup> The staging points for their campaign were shopping malls, and after requesting and ultimately receiving permission to assemble at a few mall locations, the coalition sought an injunction to prevent the owners from denying them access to the malls to carry on their campaign in accordance with their right to freedom of speech.<sup>95</sup> Some of the malls that agreed to allow the coalition to enter its premises for its desired purpose imposed some restrictions on the coalition's freedom of speech rights such as prohibitions on offensive speech, on approaching mall visitors, and on full

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<sup>90</sup> *Id.* at 1218.

<sup>91</sup> *Id.*

<sup>92</sup> 650 A.2d 757 (N.J. 1994).

<sup>93</sup> *J.M.B. Realty*, 650 A.2d at 771. See N.J. CONST. art. I, § 6, which states, in pertinent part: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."

<sup>94</sup> *Id.* at 762.

<sup>95</sup> *Id.* at 766.



access to the mall's premises.<sup>96</sup> The trial court entered judgment in favor of the mall owners, and that order was affirmed by New Jersey's Appellate Division.<sup>97</sup> However, the Supreme Court of New Jersey reversed.<sup>98</sup>

The Supreme Court of New Jersey determined the freedom of speech provisions afforded under the New Jersey State Constitution were not limited to protections against governmental actions.<sup>99</sup> The court identified three elements to consider in determining whether to allow the protestors to conduct their activities on the privately-owned mall property.<sup>100</sup> The court found the purpose of the mall seems to be expanding with a variety of activities offered to the general public, including commercial shopping, walkways for exercise, and community and political information booths.<sup>101</sup> In addition, the court stated that leafleting, in relation to the public and private uses of the mall, would not interfere with the business aspect of the mall, and as a safeguard, restrictions on the time, place, and manner of leafleting would further secure the property.<sup>102</sup> Accordingly, the court held that leafleting, as limited by the restrictions set forth by the mall, "will perform the intended role of assuring that the free speech of New Jersey's citizens can be heard, can be effective, and can reach at least as

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *J.M.B. Realty*, 650 A.2d at 784.

<sup>99</sup> *Id.* at 771.

<sup>100</sup> *Id.* ("(1) the nature, purposes, and primary use of such private property . . . (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property.").

<sup>101</sup> *Id.* at 772-75.

<sup>102</sup> *J.M.B. Realty*, 650 A.2d at 775.

many people as it used to before the downtown business districts were transported to the malls.”<sup>103</sup> In effect, New Jersey expanded its free speech protections to cover violations committed by owners of private property open to the public.

The underlying issue in the “shopping mall” cases concerns the debate between private property “owners [who] seek to defend their private property rights [and] [s]peech activists [who] seek to expand the areas where expressive activities are protected to include shopping centers.”<sup>104</sup> The federal courts appear to protect private property owners by providing that those who prevent or prohibit members of the public from entering upon their premises for protesting purposes do not violate the free speech protections afforded under the United States Constitution.<sup>105</sup> Individual state protection may be broader. The right of free speech may protect protestors partaking in political activities on private property. Thus, states may vary on whether to afford more protection to private property rights or to speech activists via expansion of free speech rights.<sup>106</sup>

According to some scholars, the states that prefer to protect the rights of free speech on private property, such as New Jersey and California, are protecting the fundamental importance of the First

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<sup>103</sup> *Id.* at 783.

<sup>104</sup> Frederick W. Schoepflin, Comment, *Speech Activists in Shopping Centers: Must Property Rights Give Way to Free Expression?*, 64 WASH. L. REV. 133 (1989).

<sup>105</sup> An exception rests in “company towns” where a “company assumes ownership of a town, [and] it puts all areas traditionally open for expressive activities under private control . . . .” See *id.* at 151 (citing *Marsh v. Alabama*, 326 U.S. 501 (1946)).

<sup>106</sup> See *PruneYard*, 447 U.S. at 81 (“[A] State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision.”).

Amendment and are moving in the direction of the twenty-first century, an age in which the “shopping mall is a central institution in modern American society.”<sup>107</sup> Other states, such as New York, reason that there is no doubt that a privately-owned mall’s prohibition of protests “do[es] not constitute the state action necessary to implicate federal constitutional protections.”<sup>108</sup> Depending on the state, private property owners may in fact infringe upon state constitutional rights when they prohibit a party from expressing their right to freedom of speech. For instance, assuming the facts to be those presented in *Wenk*, New York would rule that the private mall owner did not violate the rights of the prohibited party under the New York Constitution, while California would determine, under those same facts, that the mall owner did violate the party’s free speech rights under the California Constitution.<sup>109</sup>

New York seems to take more of a “traditional” approach to its free speech analysis, relying on the historical nature of the subject matter.<sup>110</sup> In that respect, New York courts do a sufficient job in conserving the importance of “private autonomy and separation of powers” by mandating that there be state action as an element of the analysis.<sup>111</sup> Otherwise, there would be few or no limits on private property as to the right of freedom of speech and surely that would become burdensome on shopping mall owners and those who fre-

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<sup>107</sup> Mark C. Alexander, *Attention, Shoppers: The First Amendment in the Modern Shopping Mall*, 41 ARIZ. L. REV. 1, 38 (1999).

<sup>108</sup> *Id.* at 315.

<sup>109</sup> See *SHAD*, 488 N.E.2d at 1211. See also *PruneYard*, 447 U.S. at 74.

<sup>110</sup> *SHAD*, 66 N.E.2d at 1213.

<sup>111</sup> *Id.* at 1216.

quent their properties. Thus, according to some scholars, the issue is “[w]hether to legitimate trespass by speech activists, not whether to remedy wrongful acts by shopping center owners.”<sup>112</sup> Clearly, New York chose to protect the private property rights to the extent they prohibit expressive activities by nondiscriminatory means.

However, the ultimate decision rests in the hands of the various state judiciaries, which may choose to interpret the inherent right of freedom of speech in a broader fashion. The issue will continue to present itself in the federal and state courts as the debate over how to protect expressive activities without infringing upon private property rights rages on.

*Steven Fox*

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<sup>112</sup> See Schoepflin, *supra* note 104, at 143.

## SEARCH & SEIZURE

United States Constitution Amendment IV:

*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

New York Constitution article I, section 12:

*The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

