FREE EXERCISE OF SPEECH IN SHOPPING MALLS: BASES THAT SUPPORT AN INDEPENDENT INTERPRETATION OF ARTICLE 40 OF THE MARYLAND DECLARATION OF RIGHTS

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I. INTRODUCTION

Protected by both the First Amendment to the U.S. Constitution and Article 40 of the Maryland Declaration of Rights,[1] the right to free expression is one of the most sacred freedoms in our society.[2] Similarly, the rights of private property owners are highly valued.[3] Consequently, when a person seeks to engage in speech on private property, the courts often must intervene to resolve the tension between these competing rights. This tension between speech and property rights has been especially apparent when citizens have attempted to engage in expressive activities in private shopping malls.

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[1] The First Amendment states in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. The Maryland Constitution contains a Declaration of Rights which is similar to the U.S. Constitution's Bill of Rights. *See* MD. CONST. DECL. OF RTS. Article 40 of the Declaration of Rights states "[t]hat the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege." MD. CONST. DECL. OF RTS. art. 40.

[2] *See, e.g.*, Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence . . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . ."); Phillips v. Wash. Magazine, Inc., 472 A.2d 98, 101 (Md. Ct. Spec. App. 1984) (stating that the freedom of speech is "the matrix . . . of nearly every other freedom") (quoting Palko v. Connecticut, 302 U.S. 319, 327 (1937) (internal quotations omitted)).

[3] *See, e.g.,* Dolan v. City of Tigard, 512 U.S. 374, 394–96 (1994) (holding certain zoning and planning restrictions on landowner's development of commercial property unconstitutional exactions under the Takings Clause); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031–32 (1992) (holding that state law prohibiting development of shoreline real estate may constitute a taking); Knapp v. Smethurst, 779 A.2d 970, 985–87 (Md. Ct. Spec. App. 2001) (discussing protected property rights and their attendant procedural due process rights).

Although such cases have arisen in other jurisdictions, they have not yet been considered by the Maryland courts. However, when the time does come for the Maryland courts to adjudicate these competing interests, they should protect a constitutional right to engage in issue-oriented, non-disruptive speech in large shopping malls, even when these malls are privately owned.

The Supreme Court has interpreted the First Amendment of the Federal Constitution to hold that shopping malls do not involve state action because they do not carry out functions traditionally performed by the government.[4] Notwithstanding, Maryland courts must interpret Maryland's free speech provision: Article 40 of the Declaration of Rights. Unlike the First Amendment, Article 40 should not be interpreted to require state action; rather, it should also apply to private parties, including the owners of shopping malls. Moreover, the broad speech rights conferred by Article 40 require that Maryland courts find that shopping malls are dedicated to a public function. As such, malls in Maryland should be constitutionally obligated to permit free speech.[5]

The grounds favoring an independent state interpretation of the right to free speech are countless.[6] One recognized ground is case law from state courts that have favored independent interpretations of state constitutional provisions.[7] This Article draws from these cases, and examines a series of foundations for independent interpretation. These include: the specific text of Article 40; Maryland state traditions; Maryland state history; the merit and relevance of federal case law; and the merit and relevance of sister

[4] *See infra* Part II.

[5] Nothing in the Federal Constitution prevents a state court from interpreting its constitution to confer greater rights than the First Amendment. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (citing Cooper v. California, 386 U.S. 58, 62 (1967)). The Supreme Court of Colorado, for example, has construed its state constitution to confer broader speech rights than the Federal Constitution. Bock v. Westminster Mall Co., 819 P.2d 55, 59 (Colo. 1991) (en banc) ("The First Amendment is a floor, guaranteeing a high minimum of free speech, while our own [constitution] . . . is the 'applicable law' under which the freedom of speech in Colorado is further guaranteed.").

[6] Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 645 (1998).

[7] *Id.* The conclusion that Article 40 confers such broad free speech rights follows from an application of factors articulated by a series of judges and commentators. *See* State v. Hunt, 450 A.2d 952, 964–67 (N.J. 1982) (Handler, J., concurring); Jones v. State, 745 A.2d 856, 864–65 (Del. 1999) (listing the *Hunt* factors in interpreting Delaware's search and seizure provision); State v. Domicz, 873 A.2d 630, 641–43 (N.J. Super. Ct. App. Div. 2005) (recognizing broader protection under the New Jersey Constitution than under the Fourth Amendment of the Federal Constitution); State v. Paul T., 993 P.2d 74, 84 & n.1 (N.M. 1999) (Baca, J., dissenting) (criticizing the majority for failing to consider "various reasons for departing from federal constitutional interpretations," including the *Hunt* factors).

state case law.

Before exploring these various bases which support an independent interpretation of Article 40, Part II introduces the state action concept and U.S. Supreme Court case law adjudicating free speech in private shopping malls. Part III follows with an examination of the merits of independent state constitutional analysis. Finally, the article applies to Article 40 the various bases for departure drawn from state court opinions and assesses the value of departing from First Amendment jurisprudence.

II. THE STATE ACTION CONCEPT AND THE U.S. SUPREME COURT'S ADJUDICATION OF THE FREE SPEECH RIGHT IN PRIVATE SHOPPING MALLS

The Federal Constitution protects individual rights against invasions by government, or invasions that involve what has been called "state action."[8] In other words, the Federal Constitution generally does not seek to govern or regulate the affairs of private individuals.[9] The state action doctrine first arose in the *Civil Rights Cases*,[10] where the U.S. Supreme Court held that the Fourteenth Amendment did not authorize Congress to prohibit discrimination by inns, conveyances, and places of amusement that were privately owned. Rather, its purpose was "to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment."[11] Thus, the rights and liberties guaranteed by the Fourteenth Amendment "erect[] no shield against merely private conduct."[12]

The Supreme Court, however, has failed to adequately explain the state action concept. The academic consensus is that the state action doctrine is a "conceptual disaster area."[13] The Court has

[8] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 18–1, at 1688 & n.1 (2d ed. 1988) (discussing the limited scope of most constitutional protections).

[9] Henry C. Strickland, *The State Action Doctrine and The Rehnquist Court*, 18 HASTINGS CONST. L.Q. 587, 592 (1991). As in Strickland's article, the term "private individuals" in this Article is used to refer to "all nongovernmental entities, including not only natural persons but also private corporations, associations, and other private entities." *Id.* at 591 n.14. "Only the thirteenth amendment prohibition of slavery applies to private as distinguished from governmental action." *Id.* at 591 n.13; *see also* TRIBE, *supra* note 8, at 1688 n.1.

[10] 109 U.S. 3 (1883).

[11] *Id.* at 11.

[12] Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

[13] R. George Wright, *State Action and State Responsibility*, 23 SUFFOLK U. L. REV. 685, 685 (1989); TRIBE, *supra* note 8, at 1690 (quoting Charles L. Black, Jr., *The Supreme Court, 1966*

particularly struggled to define the line of demarcation between state and private entities.[14] "Even a brief examination of state action case law reveals a profusion of controversial tests and considerations of uncertain scope."[15]

The Court employs one of these controversial state action tests in First Amendment cases involving restrictions on speech activities on private property, such as shopping malls. Specifically, the Court has found state action "where the 'private' actor [has restricted free speech] while engaging in some function that has traditionally been reserved exclusively to the state or federal government."[16] In *Marsh v. Alabama*, the Court held that the guarantees of free speech in the First and Fourteenth Amendments were violated when the private owners of a company town prevented literature from being distributed in its downtown business district.[17] Finding that the company town had all the attributes of a municipality, the Court held that the private owner's action was state action for constitutional free speech purposes.[18]

In *Amalgamated Food Employees Union Local 590 v. Logan*

Term–Foreword: "State Action," Equal Protection, and California's Proposition 14, 81 HARV. L. REV. 69, 95 (1967)); *see also* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 504–05 (1985) (noting the success of commentators in "demonstrating the incoherence of the state action doctrine"); Jesse H. Choper, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, 1979 WASH. U. L.Q. 757, 771 (1979) (explaining that the state action doctrine is inconsistent because "[s]everal qualitative gradations of state action affect private individuals, some of which plainly satisfy the state intent requirement under current doctrine, and some of which plainly do not"); Henry J. Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290–91 (1982) (stating that most of the U.S. Supreme Court's state action decisions have been "perfunctory and conclusory"); Thomas D. Rowe, Jr., *The Emerging Threshold Approach to State Action Determinations: Trying to Make Sense of* Flagg Brothers, Inc. v. Brooks, 69 GEO. L.J. 745, 747–48, 752 (1981) (arguing that the Supreme Court has failed to articulate an adequate basis for determining state action in "'nonordinary' cases," where the state is not "unambiguously the sole initiator of the particular challenged action"); Ronna Greff Schneider, *The 1982 State Action Trilogy: Doctrinal Contraction, Confusion, and a Proposal for Change*, 60 NOTRE DAME L. REV. 1150, 1153, 1156–57 (1985) (arguing that prior to the contraction of the state action doctrine in the *Blum* trilogy, state action analysis did not require a "direct governmental" tie to the specific challenged action). *See generally* Michael J. Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 ST. LOUIS U. L.J. 683, 683 (1984) (explaining why the state action doctrine possesses an "incoherent character").

[14] Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1544–45 (1998).

[15] Wright, *supra* note 13, at 687.

[16] *Id.* at 692 (explaining that this state action test was originally propounded by the Supreme Court in Marsh v. Alabama, 326 U.S. 501, 507–09 (1946)).

[17] *Marsh*, 326 U.S. at 508–09. "*Company town*. A residential and commercial community opened by a company for public use and operated under color of state law." BLACK'S LAW DICTIONARY 281 (6th ed. 1990).

[18] *Marsh*, 326 U.S. at 507–09.

Valley Plaza, Inc.,[19] the Court expanded speech protections on private property by holding that the Federal Constitution also prevented a private shopping mall from enjoining the peaceful picketing of a business enterprise located within the mall.[20] The Court concluded that the shopping center "serves as the community business block," and in so doing, performs a public function.[21] Therefore, "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."[22] The Court stressed that it could not tolerate such exclusion because the suburban shopping center was a popular place for public congregation.[23]

However, only four years after *Logan Valley*, the U.S. Supreme Court stemmed the expansion of free speech in shopping malls by holding in *Lloyd Corp. v. Tanner* that war protesters had no right of free speech at shopping centers.[24] Although *Lloyd* did not expressly overrule *Logan Valley*, the Court avoided the constraints of the *Logan Valley* decision by distinguishing the operative facts in that case.[25] Whereas in *Logan Valley* the picketing was based on the labor practices of a mall tenant, the handbilling in *Lloyd* was not related to the activities of any tenants.[26] Specifically, the speech concerned the federal government's Vietnam policy.[27] The Court limited the holding in *Logan Valley* to situations in which speech was related to shopping center activities.[28]

The implications of the Supreme Court's decision in *Lloyd* were clarified in *Hudgens v. NLRB*.[29] In *Hudgens*, union members were threatened with arrest for criminal trespass while picketing a store with which they were involved in a labor dispute.[30] The picketers sued in federal court citing a First Amendment right to picket labor practices on their employers' property.[31] In ruling against the union members, the Court found that although it had factually

[19] 391 U.S. 308 (1968).
[20] *Id.* at 323–25.
[21] *Id.* at 319.
[22] *Id.*
[23] *Id.* at 324–25.
[24] Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551, 556, 570 (1972).
[25] *Id.* at 560–63.
[26] *Id.* at 564.
[27] *Id.* at 556.
[28] *Id.* at 563; *see* 391 U.S. at 320 n.9.
[29] Hudgens v. NLRB, 424 U.S. 507 (1976).
[30] *Id.* at 508.
[31] *Id.* at 509–10.

distinguished *Logan Valley* from *Lloyd*,[32] the latter opinion "amounted to a total rejection of the holding in *Logan Valley*."[33] Indeed, the Court will not ascribe state action to the private owners of shopping malls because malls do not closely enough resemble company towns.[34]

At the same time, the U.S. Supreme Court's holdings have acknowledged that state courts may construe the free speech provisions of their state constitutions to accord greater speech rights in malls than required by federal precedent. In *PruneYard Shopping Center v. Robins*, the Court held that states could confer such rights without violating the Fifth Amendment of the Federal Constitution.[35] Chief Justice Rehnquist found nothing to suggest that forcing malls to permit speech activities would "unreasonably impair the value or use of their property as a shopping center."[36] Rehnquist added that "it is well established that 'not every destruction or injury to property by governmental action has been held to be a "taking"'" that violates the Fifth Amendment.[37] In other words, the Supreme Court permits private malls to prohibit speech because the First Amendment does not obligate the state to protect such speech. The Fifth Amendment, however, does not prevent the state from installing such protections.[38] Accordingly, the Court invited state judiciaries to use their state constitutions to depart from federal precedent and craft a more speech-protective doctrine.[39] The following section presents a series of state constitutional grounds for Maryland to depart from these federal precedents.

[32] *Id.* at 517–18.

[33] *Id.* at 518. The Court will only find state action in the actions of a private actor restricting speech in a special situation like the company town in *Marsh*, "'complete with streets, alleys, sewers, stores, residences, and everything else that goes to make a town.'" *Id.* at 516 (quoting *Logan Valley*, 391 U.S. at 330–31 (Black, J., dissenting)).

[34] *See id.* at 520–21 (quoting *Logan Valley*, 391 U.S. at 332, 332–33 (Black, J., dissenting)).

[35] 447 U.S. 74, 83 (1980) (holding that such rights do not constitute an "unconstitutional infringement [on] appellants' property rights under the Taking Clause").

[36] *Id.*

[37] *Id.* at 82 (quoting Armstrong v. United States, 364 U.S. 40, 48 (1960)).

[38] *Id.* (revealing that the California Supreme Court has interpreted the California Constitution to permit "its citizens to exercise free expression and petition rights on shopping center property" even though the court acknowledges that such essentially equates to a taking of the "right to exclude others").

[39] *See id.* at 81.

III. THE BASES USED BY OTHER STATE COURTS TO DEPART FROM FEDERAL PRECEDENT, AND APPLICATION OF THESE BASES TO ARTICLE 40

To determine whether Article 40 of the Maryland Declaration of Rights obligates shopping malls to permit free speech in a manner that exceeds the requirements under the Federal Constitution, Maryland courts should consider some of the bases used by other state courts to justify departing from federal precedent. In determining which bases to apply, a helpful "starting place is [the] list of factors developed by Justice [Alan] Handler of the New Jersey Supreme Court in *State v. Hunt*."[40] In addition to these factors, Maryland judges should consider virtually anything else that contributes to the analysis of Article 40, even any ideological differences with the United States Supreme Court.[41]

Before Maryland courts analyze the bases for independent interpretation of Article 40, one important question they must address is whether to presume the legitimacy of federal precedents. Two schools of thought have emerged from state opinions addressing this question. On the one hand, most state courts have found that their decisions should adhere to the federal constitutional interpretation unless there is some special reason for departure.[42] Accordingly, these judges subscribe to a presumption

[40] Friedman, *supra* note 6, at 645. In *Hunt*, Justice Handler weighed the (1) textual language, (2) legislative history, (3) preexisting state law, (4) structural differences between federal and state constitutions, (5) matters of particular state interest or local concern, (6) state traditions, and (7) public attitudes. 450 A.2d 952, 965–67 (N.J. 1982) (Handler, J., concurring). Since Handler's *Hunt* concurrence, numerous state high courts have employed a similar series of factors to analyze their own state constitutions. *See, e.g.*, Gannon v. State, 704 A.2d 272, 276 & n.4 (Del. 1998) (citing several *Hunt* factors in discussion of "expansion beyond federally guaranteed individual liberties by a state constitution"); State v. Gunwall, 720 P.2d 808, 812–13 & n.9 (Wash. 1986) (en banc) (relying on several of Justice Handler's *Hunt* criteria to develop Washington's own "nonexclusive . . . criteria . . . relevant to determining whether, in a given situation, the constitution of the State of Washington should be considered as extending broader rights to its citizens than does the United States Constitution"); *see also* State v. Gomez, 932 P.2d 1, 7–8 (N.M. 1997) (adopting an "interstitial approach" which "provid[es] broader protection where . . . federal analysis [is] unpersuasive" and citing to Justice Handler's *Hunt* concurrence in support of this approach); People v. P.J. Video, Inc., 501 N.E.2d 556, 560 (N.Y. 1986) (utilizing "noninterpretive analysis," which considers "any preexisting State statutory or common law [that] defin[es] the scope of the . . . right in question[,] the history and traditions of the State," matters of "State or local concern[,] and . . . attitudes of the State citizenry"); Almada v. State, 994 P.2d 299, 308 (Wyo. 1999) (applying the factors enumerated in *Gunwall*).

[41] Friedman, *supra* note 6, at 645–46.

[42] *See, e.g.*, Osterndorf v. Turner, 426 So. 2d 539, 543 (Fla. 1982) (calling federal equal protection precedent "relevant and persuasive" in state equal protection claims); *In re* Clark, 281 S.E.2d 47, 53 (N.C. 1981) (relying on federal due process precedent to hold that an

against departing from federal precedent.[43] In contrast, other state judges have argued that such a presumption prevents the coherent development of a state's law.[44] These judges accord equal or greater weight to state constitutional provisions than federal cognates.[45]

State judges offer various reasons for granting equal or greater weight to state constitutional provisions, and arguments in favor of this approach are persuasive. Thus, in reviewing the free speech right in shopping malls, Maryland courts should grant significant weight to the Article 40 provision. Below, this Article draws from state court opinions a series of bases that are highly relevant to determining whether an independent interpretation of Article 40 is appropriate when deciding the parameters of free speech in shopping malls.

A. Judges Offer Compelling Reasons for Granting Equal or Greater Weight to State Constitutional Provisions

In adjudicating the scope of free speech rights in shopping malls, Maryland courts should ascribe significant weight to the Article 40 provision. Unlike the majority of state courts, Maryland should independently interpret its state constitution without presuming the legitimacy of federal precedent. As a result, Maryland courts would be free to grant speech rights in shopping malls if Article 40 supports such a decision.

In doing away with a presumption for federal case law, the Maryland judiciary would acknowledge the significant value of state constitutions in the dual-sovereign system. The framers of the Federal Constitution anticipated that state judges would rely extensively on state constitutions, thus providing "double security" for personal rights when combined with federal safeguards.[46] As

indigent parent has no state constitutional right to have counsel appointed for a hearing at which her parental rights were terminated).

[43] *See, e.g.*, *In re* P.S., 676 N.E.2d 656, 661–62 (Ill. 1997) (interpreting the Illinois Constitution in accordance with the U.S. Supreme Court's interpretation of the Fifth Amendment of the Federal Constitution).

[44] Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 178 (1984); *see, e.g.*, Charles G. Douglas, III, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U. L. REV. 1123, 1140 (1978) (Justice Douglas of the New Hampshire Supreme Court wrote that "[t]he federalization of all our rights has led to a rapid withering of the development of state decisions based upon state constitutional provisions").

[45] *See* Douglas, *supra* note 44, at 1140; Linde, *supra* note 44, at 178 & n.36.

[46] THE FEDERALIST NO. 51, at 351 (James Madison and Alexander Hamilton). "Under the federal system of dual sovereignty, state constitutions embody the reservation to the states of all residual power not expressly or impliedly conferred upon the federal government." Ellen A. Peters, *State Constitutional Law: Federalism in the Common Law Tradition*, 84 MICH. L.

"Under the federal system of dual sovereignty, state constitutions embody the reservation to the states of all residual power not expressly or impliedly conferred upon the federal government."[47] In his influential 1977 law review article, Justice Brennan wrote that Madison would "welcome the broadening by state courts of the reach of state constitutional counterparts beyond the federal model as proof of his conviction that independent tribunals of justice 'will be naturally led to resist every encroachment upon rights expressly stipulated for.'"[48]

Another reason for disavowing any presumption that the Supreme Court's interpretation is correct is that the Supreme Court's ability to recognize rights is more constrained than in the case of a state court. "[F]ederalism and other institutional concerns, either explicity [sic] or implicitly, pervade Supreme Court decisions declining to recognize rights" against the government.[49] Indeed, the Court is reluctant to invalidate a state statute out of respect for state autonomy; the Court therefore grants considerable deference to state legislatures.[50] In *Allied Stores of Ohio, Inc. v. Bowers*, for example, the Court stressed that "[t]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action."[51] No comparable policy, however, constrains the state judiciary.[52] Consequently, the Maryland judiciary should not presume the validity of federal precedent.[53]

REV. 583, 588 (1986).

[47] Peters, *supra* note 46, at 588.

[48] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 504 (1977) (quoting 1 ANNALS OF CONG. 439 (Gales & Seaton eds. 1789)).

[49] Robert F. Williams, *Methodology Problems in Enforcing State Constitutional Rights*, 3 GA. ST. U. L. REV. 143, 170 (1986–1987) (footnote omitted).

[50] "The United States Supreme Court itself has acknowledged that the First Amendment, which implicates [the freedom of the press], does not accord to it the degree of protection that may be available through state law." State v. Schmid, 423 A.2d 615, 626 (N.J. 1980) (citing Branzburg v. Hayes, 408 U.S. 665, 706 (1972)).

[51] 358 U.S. 522, 532 (1959) (Brennan, J., concurring); *see also* Katzenbach v. Morgan, 384 U.S. 641, 659 (1966) (Harlan, J., dissenting) (stating that "the boundaries between federal and state political authority" are "fundamentals in the American constitutional system").

[52] *See generally* Williams, *supra* note 49, at 165–71. Professor Williams points out that the presumptive validity of the U.S. Supreme Court's interpretations of the Bill of Rights is a mistaken belief. *Id.* at 165. Despite this mistaken belief, the U.S. Supreme Court's interpretation "still exerts a significant amount of intuitive force" because (1) there is a conception of power and prestige that U.S. Supreme Court decisions hold and (2) the decisions that have been redefining state constitutional law rely on U.S. Supreme Court precedent to provide a basis in order to argue the desired outcome for the state constitution. *Id.* at 165, 168.

[53] *See id.* at 160–61.

Such a presumption ignores the fact that these federal decisions were grounded in federalism and other institutional concerns, factors that do not affect state courts.[54]

Yet another reason counsels the state judiciary to avoid a presumption when analyzing a constitutional issue. Professor Lawrence G. Sager has pointed out that state judges are more capable than federal judges of assessing what he calls "strategic considerations"; a few examples are the state's unique "political and social climate," the "regulatory scope of the . . . state judiciar[y]," and the "actual working[s] of [state] institutions."[55] Since federal decisions defer to states because of these strategic considerations, an independent state judicial review is essential.[56] "United States Supreme Court decisions rejecting asserted federal constitutional rights should persuade state courts confronting similar claims under their state constitutions *only* by their reasoning, discounted for federalism or strategic concerns, or any other type of deference to the states."[57]

By taking into account a series of bases used by other courts to depart from federal precedent, the Maryland judiciary would disavow any presumption for federal constitutional interpretations.

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[54] *Id.* at 170.

[55] *Id.* at 170–71 (quoting Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 971, 976 (1985)).

[56] *Id.* at 171.

[57] *Id.* These arguments have attracted criticism from a series of scholars, including Earl Maltz of the Rutgers School of Law. *See* Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985); *see also* Steven J. Twist & Mark Edward Hessinger, *New Judicial Federalism: Where Law Ends and Tyranny Begins*, 3 EMERGING ISSUES ST. CONST. L. 173, 178–79 (1990) (stating that when a state court reads a constitutional right more broadly, it removes the decision from the hands of the people and assumes that a "mere textual variance between state and federal provisions, *ipso facto*, requires the state provision be interpreted differently"). Maltz primarily asserts that when state constitutional decisions duplicate federal review, they do not increase overall personal rights. Maltz, *supra*, at 1007–11. However, at least with regard to Maltz's critique of state constitutional decisions granting free speech rights in shopping malls, *see id.* at 1008, these assertions are unpersuasive. For example, Maltz insists that the California Supreme Court in *Robins v. Pruneyard Shopping Center*, 592 P.2d 341 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980), decreased the property rights of the defendant shopping mall. Maltz, *supra*, at 1008. However, in deciding *PruneYard Shopping Center v. Robins*, the U.S. Supreme Court stated that the requirement of freedom of expression in private shopping malls does not constitute a taking pursuant to the Fifth Amendment so long as it does not interfere with the mall's "commercial functions." 447 U.S. at 83–84. Moreover, there is no reason to think that Maltz's observation, that state decisions do not increase overall personal rights, should prove fatal to state judicial departures from federal precedent. Even assuming that they do not increase personal rights on the whole, state departures still have value because they allocate rights in the specific manner demanded by the state's constitution. *See also infra* note 209 and accompanying text (arguing that it is the duty of the judiciary to weigh competing constitutional interests).

Indeed, other courts have considered a series of bases for departure and, at the same time, explicitly discarded any presumption for federal constitutional interpretations.[58] Under this mode of analysis, the bases provide a "nonexclusive" set of factors, which are only persuasive.[59] Therefore, even if a court found that none of the bases suggested in this Article supported a departure from federal precedent, the court could still justify a departure by relying on other bases.[60] This approach permits the state judiciary to engage in a principled interpretation of the state constitution,[61] without blindly relying on federal precedent. Accordingly, the approach prescribed below employs no presumption in favor of federal precedents.

B. Consideration of Bases for Departing from Federal Precedent: Maryland Courts Should Interpret Article 40 to Shield Free Speech in Shopping Malls

This section considers bases justifying departure from federal precedent and independently interpreting Article 40 in the context of shopping malls. The following bases are examined: (1) the specific text of Article 40; (2) Maryland state traditions; (3) Maryland state history; (4) the merit and relevance of federal case law; and (5) the merit and relevance of sister state case law.

These bases were chosen because they have been used by other state courts to determine whether to depart from federal constitutional interpretation. It bears repeating that the number of bases favoring independent Maryland interpretations is limitless, and it is not necessarily recommended that the Maryland judiciary confine itself to only these bases.[62]

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[58] *See, e.g.*, State v. Gunwall, 720 P.2d 808, 812–13 (Wash. 1986) (finding that its approach need not carry a presumption against state constitutional departure from federal constitutional standards, as long as the bases it examines are "nonexclusive" and considered "to the end that our decision will be made for well founded legal reasons and not by merely substituting our notion of justice for that of . . . the United States Supreme Court"); State v. Hunt, 450 A.2d 952, 967 n.3 (N.J. 1982) (Handler, J., concurring).

[59] *See Gunwall*, 720 P.2d at 812.

[60] Friedman, *supra* note 6, at 645–46.

[61] Just as the Supreme Court does not to resort to intuition, but to a principled interpretation of the Constitution, the state judiciary does not resort to "pure intuition, but [to] a process that is at once articulable, reasonable and reasoned." *Gunwall*, 720 P.2d at 813.

[62] Friedman, *supra* note 6, at 645.

1. Specific Text of Article 40

The first appropriate basis for departing from federal case law is the specific text chosen by the Declaration's framers to delineate the speech right.[63] Numerous state courts have heavily weighed textual differences between applicable state and federal provisions.[64] In fact, the state courts in *Robins v. Pruneyard Shopping Center* and *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.* both relied on unique state constitutional text to find that their respective state speech provisions provided protections that exceeded federal protections.[65]

Just like the text that was examined in *Robins* and *New Jersey Coalition*, the text of Article 40 of the Maryland Declaration of Rights appears to prohibit all parties, whether affiliated with the state or private, as in the case of malls, from interfering with speech rights. Article 40 states: "That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege."[66] Thus, the framers of Article 40 chose to phrase the free speech guarantee in affirmative language, rather than the negative language of the First Amendment, which only safeguards free speech from infringement by the government, not private parties.[67] Accordingly, the text appears to extend application of the provision to private actors, thereby granting broader protection for speech in shopping malls than does the First Amendment.[68] Maryland courts should

[63] Judicial authorities examining state constitutions unanimously agree that the text of the relevant constitutional provision is critical to interpreting that provision. "[T]he accepted methodology of constitutional analysis . . . requires that text be the beginning point." Commonwealth v. Wasson, 842 S.W.2d 487, 504 (Ky. 1992) (Lambert, J., dissenting) (citing Ky. State Bd. For Elementary & Secondary Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979)).

[64] *See, e.g.*, Hollowell v. Jove, 279 S.E.2d 430, 433 (Ga. 1981) (holding that the plain meaning of the language is the strongest evidence of legislative intent); Hirschfield v. Barrett, 239 N.E.2d 831, 835 (Ill. 1968) (stating that each word in a statute is presumed important and should be given "some reasonable meaning"); Hansen v. Owens, 619 P.2d 315, 317 (Utah 1980) ("In legal formulations, it is to be assumed that the words used were chosen advisedly. This is particularly true in such foundational documents as constitutions, which it can be assumed are framed with greater than usual care and deliberation." (footnote omitted)).

[65] Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 346 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980); N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 770 (N.J. 1994); *see infra* notes 174–83 and accompanying text for discussion of these two cases.

[66] MD. CONST. DECL. OF RTS. art. 40.

[67] *N.J. Coal.*, 650 A.2d at 770 (interpreting New Jersey's free speech provision, which is similar to Maryland's, to grant "substantive free speech rights"); State v. Schmid, 423 A.2d 615, 627 (N.J. 1980).

[68] The First Amendment provides that "*Congress shall make no law* . . . abridging the

interpret Article 40 to mean precisely what it says; the Article should protect against speech-restrictions by private parties such as shopping malls.

Maryland case law supports this literal interpretation of Article 40's text. Maryland cases strongly caution against "contemporaneous" interpretations that "contradict the plain meaning of the text."[69] This rule for interpreting constitutional provisions was reaffirmed more than sixty years ago in *Johnson v. Duke*.[70] There, the Court of Appeals of Maryland held that "[w]here the Constitution speaks in plain language, in reference to a particular matter, we have no right to place a different meaning on the words employed."[71] Maryland courts must therefore respect the plain meaning of the text.[72]

Furthermore, the Declaration as a whole demonstrates that when the framers omitted language that would have required state action, they did so purposely. For example, the Maryland judiciary should examine provisions of the Declaration that, like Article 40, contain no textual state action requirement. In part because these provisions do not explicitly require state action, Maryland courts have not ruled out applying such provisions to private actors. For example, the text of Article 41 does not require state action; rather, it imposes restrictions on private parties.[73] Similarly, Article 14

freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I (emphasis added).

[69] Johnson v. Duke, 24 A.2d 304, 308 (Md. 1942); *see also* HENRY CAMBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS § 20 (2d ed. 1911) ("The contemporary construction of [a] constitution . . . must be resorted to with caution and reserve, and they can never be allowed to abrogate, contradict, enlarge, or restrict the plain and obvious meaning of the text.").

[70] *Johnson*, 24 A.2d at 308.

[71] *Id.* at 306; *see also* Southcenter Joint Venture v. Nat'l Democratic Policy Comm., 780 P.2d 1282, 1293 (Wash. 1989) (en banc) (Utter, J., concurring) ("There simply is no compelling reason why we should append a state action requirement to section 5 when the plain language and drafting history of the provision suggest otherwise." (footnote omitted)).

[72] *See also* Commonwealth v. Wasson, 842 S.W.2d 487, 504 (Ky. 1992) (Lambert, J., dissenting) ("When judges free themselves of constitutional text, their values and notions of morality are given free rein and they, not the Constitution, become the supreme law.").

[73] Article 41 states: "That monopolies are odious, contrary to the spirit of a free government and the principles of commerce, and ought not to be suffered." MD. CONST. DECL. OF RTS. art. 41. While the Maryland Court of Appeals has examined whether private actors violated Article 41, the holdings in these cases were based on findings that the private actors had not created monopolies, rather than the absence of state action. Thus, the Maryland judiciary has yet to consider whether Article 41 has a state action requirement. *See, e.g.*, Levin v. Sinai Hosp. of Baltimore City, Inc., 46 A.2d 298, 302–03 (Md. 1946) (finding that the rules and regulations of the medical board of Sinai Hospital did not fall within the strictures of Article 41 because "[t]heir purpose was not to destroy competition or to restrain the free

states, "[t]hat no aid, charge, tax, burthen or fees ought to be rated or levied, under any pretense, without the consent of the Legislature."[74] Although the Court of Appeals has rarely interpreted Article 14,[75] the provision seems to prohibit private parties from levying taxes on other private parties.[76] Like Article 41 and Article 14, the text of Article 40 also lacks a state action requirement, and should therefore be understood by Maryland courts to apply to private actors.

By contrast, some provisions of the Declaration differ from Article 40 in that they do contain an express state action requirement, suggesting that if the Maryland framers had desired that Article 40 contain such a requirement, they would have expressly included one. For instance, Article 46 declares: "Equality of rights *under the law* shall not be abridged or denied because of sex."[77] The framers excluded from Article 40 any such express requirement. This exclusion implies that they intended to safeguard free speech from the intransigencies of private as well as state actors.[78] For these reasons, the text strongly suggests that Article 40 should apply to private shopping mall restrictions on speech.

availability of hospital or medical services to the public," not because the board was a private party); *see also* Baltimore County Hosp., Inc. v. Md. Hosp. Serv., Inc., 200 A.2d 39, 42 (Md. 1964) (holding that Blue Cross had not violated Article 41 because "Blue Cross has not combined with or conspired with anyone to interfere with, restrain or prevent the Hospital from carrying on its business," not because Blue Cross was a private actor).

[74] MD. CONST. DECL. OF RTS. art. 14.

[75] The few Court of Appeals cases that have interpreted Article 14 have not addressed whether the provision applies to private parties. *See, e.g.*, Halle Dev., Inc. v. Anne Arundel County, 808 A.2d 1280, 1281–82 (Md. 2002) (considering whether a chartered county government (Anne Arundel) violated Article 14 when the county developed a "School Fee Agreement" as a predicate to granting a waiver of school capacity requirements under the Adequacy of Facilities Ordinance).

[76] *See* MD. CONST. DECL. OF RTS. art. 14.

[77] *Id.* art. 46 (emphasis added); *see also* MD. CONST. of 1864, art. 45 ("That the Legislature shall pass no law providing for an alteration, change or abolishment of this Constitution, except in the manner therein prescribed and directed."); Burning Tree Club, Inc. v. Bainum, 501 A.2d 817, 836 n.3 (Md. 1985) (Eldridge, J., concurring and dissenting) (observing that the "under the law" language has been equated with the "state action doctrine").

[78] *But see* McIntyre v. Guild, Inc., 659 A.2d 398, 405 (Md. Ct. Spec. App. 1995) ("As a threshold matter, we must consider whether [the conduct] constituted government action," since there could be no violation of the constitutional right to free speech if there was no state action); Bleich v. Florence Crittenton Servs. of Baltimore, Inc., 632 A.2d 463, 469 (Md. Ct. Spec. App. 1993) (holding that a "claim that . . . discharge by a private employer was wrongful because it was in retaliation for [the employee's] exercise of her free speech rights fail[ed] to state a cause of action"); Miller v. Fairchild Indus., Inc., 629 A.2d 1293, 1299 (Md. Ct. Spec. App. 1993) ("Constitutional prohibitions do not currently extend to private actors. This Court will not do what the framers of the state and federal constitutions themselves declined to do. We will not extend the reach of constitutional restraints.").

2. Maryland History

History is another factor state courts have explored when determining whether to independently interpret a state constitutional provision.[79] "A state's history . . . may also provide a basis for the independent application of its constitution."[80] In construing constitutional provisions, state courts have looked to "the history of a constitutional provision," or formal records of constitutional conventions such as committee hearings, committee reports, and transcripts of debates.[81] Also relevant to a review of Article 40's history is the social and political setting in which Article 40 originated.[82] Legislative actions that occurred early in the state's history may reveal key aspects of this social and political setting.[83] Admittedly, legislative actions are not as persuasive as, for example, records of constitutional conventions, and some have questioned whether they should be given much weight.[84] Nevertheless, courts have examined legislative actions when interpreting constitutional provisions.[85] The Maryland judiciary should not overlook the valuable insights that historical records offer into the meaning of Article 40.

Maryland's 200-year history of providing broad speech rights provides a basis for an independent interpretation of Article 40. Maryland's Constitution was adopted in 1776, a full ten years prior to the ratification of the United States Constitution.[86] Like most of the original thirteen colonies, Maryland's constitution was drafted in the midst of the American Revolution as an overt expression of

[79] *See, e.g.*, State v. Hunt, 450 A.2d 952, 965–66 (N.J. 1982) (Handler, J., concurring).

[80] *Id.* at 966.

[81] *See* Ann Lousin, *Constitutional Intent: The Illinois Supreme Court's Use of the Record in Interpreting the 1970 Constitution*, 8 J. MARSHALL J. PRAC. & PROC. 189, 190–91 (1974–1975); Kalodimos v. Vill. of Morton Grove, 470 N.E.2d 266, 269 (Ill. 1984) (examining documents such as the 1970 report of the Bill of Rights Committee in interpreting the meaning of article I, section 22 of the Illinois Constitution (the right to bear arms)); *see also* Doe v. Dep't of Soc. Servs., 487 N.W.2d 166, 175–76 (Mich. 1992); Cologne v. Westfarms Assocs., 469 A.2d 1201, 1207–08 (Conn. 1984).

[82] *See* Linde, *supra* note 44, at 183.

[83] *See, e.g.*, *infra* notes 88–94 and accompanying text for a description of the Whig Club incident.

[84] *See, e.g.*, State *ex rel.* Oregonian Publ'g Co. v. Deiz, 613 P.2d 23, 27 (Or. 1980).

[85] *See, e.g.*, City of Pawtucket v. Sundlun, 662 A.2d 40, 45 (R.I. 1995) ("In construing a constitutional provision, this court properly consults . . . any legislation related to the constitutional provision that was enacted at or near the time of the adoption of the constitutional amendment.").

[86] WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS 5 (Rita Kimber & Robert Kimber trans., Univ. of N.C. Press 1980) (1973).

independence from the British Crown.[87] Maryland's history offers numerous examples of speech protection exceeding the analogous federal protections, including both examples demonstrating Maryland's history of applying Article 40 protections to private actors and examples showing other broad speech rights historically protected in Maryland.

a. Maryland Has Historically Interpreted Article 40 to Protect Against Infringements by Private Actors

History yields at least two examples suggesting that Article 40 does not include a state action requirement. On February 25, 1777, William Goddard published an anonymous article in the *Maryland Journal* supporting a Tory point of view.[88] In response, the Whig Club of Baltimore, a private revolutionary society composed of radical members of disbanded government committees,[89] demanded that Goddard reveal who wrote the article. When Goddard refused to release the name, the Club ordered him to leave Baltimore on March 4, 1777.[90]

Copies of the Whig Club's proceedings and Goddard's own diary reveal Goddard's indignant response to this demand.[91] Nevertheless, Goddard subsequently traveled to Annapolis, where he waged a complaint against the Club before the state legislature, who promptly passed resolutions vindicating the liberty of the press in Maryland.[92] The legislature declared the Club's attempt to limit free speech "a most daring infringement and manifest violation of the Constitution of this State, directly contrary to the Declaration of Rights."[93] Accordingly, the legislature upheld the free speech provision, even though the Whig Club was unaffiliated with the

[87] *See id.* at 61. Thus, in contrast to the popular misconception that state constitutions borrowed from the United States Constitution, the reverse is true. The Federal Bill of Rights was patterned after the state constitutions of the colonies. *See* WILLIAM J. BRENNAN, JR., THE BILL OF RIGHTS AND THE STATES 3–4 (1961); *see also* Commonwealth v. Edmunds, 586 A.2d 887, 896 (Pa. 1991).

[88] COL. J. THOMAS SCHARF, THE CHRONICLES OF BALTIMORE; BEING A COMPLETE HISTORY OF "BALTIMORE TOWN" AND BALTIMORE CITY FROM THE EARLIEST PERIOD TO THE PRESENT TIME 157 (1874).

[89] *Id.* at 155.

[90] *Id.* at 157–59.

[91] After the Club ordered him to leave Baltimore, Goddard wrote, "Before I left the place where the Club was held, I told them I was not the author, that I disclaimed their authority, and would not submit to their violent proceedings, [and] recommended to them to pursue their lawful occupations . . . ." *Id.* at 159.

[92] *Id.* at 161.

[93] *Id.*

government.[94] Given that this controversy occurred so early in the state's history, the legislature's determination is valuable evidence of the speech-protective social and political setting in which the Article 40 provision was originally drafted.

Another historical example comes from the Maryland Acts of 1896. Pursuant to Chapter 249 of these Acts, Maryland was the first state in the United States to enact a specific statute that immunized newspapers from being compelled to reveal the sources of their printed articles.[95] Chapter 249 stated that "no person engaged in . . . journal[ism] shall be compelled to disclose in any legal proceeding or trial, or before any committee of the legislature *or elsewhere*, the source of any news."[96] By including the phrase "or elsewhere," the General Assembly seemed to install speech protections against parties other than the government, such as private parties. Thus, historically, Maryland has seen fit to prevent not just government, but also private infractions of speech rights. The above example also shows that Maryland is innovative in protecting speech, as it has not confined itself to the federal standard.

b. In Addition to Protecting Speech from Infringement by Private Actors, Maryland Historically Has Granted Broad Protections for Other Speech Rights

In addition to disavowing a state action requirement, Maryland has historically adopted other protections of free speech that exceed federal protections. For example, at the Maryland Convention to

[94] *Id.* The Whig Club can be distinguished from the Jaybird Committee in the Supreme Court case of *Terry v. Adams* (*White Primary Cases*), 345 U.S. 461 (1953). In the *White Primary Cases*, the Court ascribed state action to the Committee because it was "the dominant political group in the county since organization, having endorsed every county-wide official elected since 1889." *Id.* at 463. The Whig Club, on the other hand, was a vigilante group ostracized from the political community that, according to the legislature, lacked "any . . . powers of government." SCHARF, *supra* note 88, at 161. Therefore, the legislature did not consider the Whig Club to be a state actor. *See id.* Moreover, because Maryland courts interpret the Maryland Constitution, the *White Primary Cases* are not controlling. In addition, the *White Primary Cases* have been distinguished by a series of state and federal judges who have observed "that a political party is a state actor in some instances, such as when it is conducting elections, but a private organization in other instances, such as when it is conducting certain of its internal affairs." Republican Party v. Dietz, 940 S.W.2d. 86, 92 (Tex. 1997); *see also* Seergy v. Kings County Republican County Comm., 459 F.2d 308, 314 (2d Cir. 1972). By suppressing speech, the Whig Club was conducting internal affairs and, therefore, this activity was private; the Club certainly was not pursuing "traditional government function[s]" such as conducting elections. *Dietz*, 940 S.W.2d at 92.

[95] Telnikoff v. Matusevitch, 702 A.2d 230, 244 (Md. 1997).

[96] *Id.* (citing chapter 249 of the Maryland Acts of 1896) (emphasis added).

ratify the proposed Constitution of the United States, a drafting committee staked out broader protections against seditious libel prosecutions. "[I]t is clear that [the draftsmen] did not share the [federal] view that a guarantee of freedom of the press would not affect seditious libel prosecutions."[97] Thus, the drafting committee evidences Maryland's commitment early in the state's history to speech rights above and beyond analogous federal rights.

Also indicative of Maryland's history of greater speech protections are the 1864 Debates of the Constitutional Convention concerning Article 40. Successfully contesting an amendment to narrow the scope of Article 40 to permit prosecution for treasonable utterances, delegate Mr. Stirling spoke for the majority: "This article is intended . . . to assert a general principle. . . . If this broad exception is made to the rule, then the question is—who is to decide what are treasonable purposes?"[98]

This excerpt demonstrates how cautiously the delegates guarded the speech right, refusing to include any additional language that would detract from the "general principle."[99] Thus, the generalities of Article 40 were no accident; the delegates purposely crafted the Article to confer the broadest possible speech rights. The Maryland judiciary should give due regard to the significance of the framers' intentions.

3. Maryland's Unique State Traditions

In deciding whether to interpret Article 40 more broadly than the federal courts interpret the First Amendment, the Maryland judiciary should next examine a basis closely related to history: unique state traditions. A myriad of state courts have considered such state traditions to be one of the appropriate bases for departing from federal precedent. For instance, in reviewing whether to depart from federal precedent, the New York Court of Appeals in *People ex rel. Arcara v. Cloud Books, Inc.*,[100] found determinative its long state "tradition of fostering freedom of expression, often tolerating . . . works which in other States would be found

[97] David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 472 (1982). *See generally* BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 730–38 (1971) (discussing the Maryland Ratifying Convention).

[98] 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND 387 (1864).

[99] *See id.*

[100] 503 N.E.2d 492 (N.Y. 1986).

offensive."[101]

Like New York, Maryland has cultivated a unique state tradition in the realm of protecting free speech, in particular by providing ample venues for speech activities. Maryland has a rich tradition of speech activities in downtown business districts, but suburban shopping malls have severely threatened Maryland's tradition of providing speech venues.

a. Maryland Has Enjoyed a Rich Tradition of Speech in Downtown Business Districts

Traditionally, Maryland's speech activities have especially thrived in urban areas that have been heavily populated and, consequently, have afforded an indispensable opportunity to communicate.[102] This tradition is especially pronounced when examining free speech activities related to civil rights. "Compared to some cities, Baltimore [has] a long tradition of civic activism and political involvement among its African American population."[103] As early as the 1930s, African-Americans garnered national attention by gathering in downtown business districts to picket stores with discriminatory hiring practices.[104] Throughout the early 1950s, "[t]argets of protests and demonstrations in Baltimore included downtown theaters, department stores, and eating establishments."[105] Protesters have also used downtown business districts to demonstrate against alleged brutality by the Baltimore police force.[106] Thus, downtown business districts were historically important venues for free speech to occur, thereby fulfilling the intent of the framers of Article 40 that Marylanders would enjoy a broad opportunity for free expression.

b. Maryland Shopping Malls Have Significantly Displaced Downtown Business Districts, and, Because this Displacement Jeopardizes Maryland's Constitutionally-Based Tradition of

[101] *Id.* at 494. New York provides greater protections for the freedom of expression than the minimal standards established by the U.S. Supreme Court. *Id.* at 494–95. Specifically, New York cannot restrict the freedom of expression, "absent a showing . . . that such expression will immediately and irreparably create public injury" and the restraint is narrowly tailored to achieve the State's purpose. *Id.* at 495.

[102] *See* W. EDWARD ORSER, BLOCKBUSTING IN BALTIMORE: THE EDMONDSON VILLAGE STORY 69 (1994).

[103] *Id.*

[104] *Id.* at 70.

[105] *Id.*

[106] *Id.*

Providing Free Speech Venues, Courts Should Interpret Article 40 to Protect Speech in Malls

The framers of Article 40 intended speech rights in Maryland to be expansive. To enjoy these rights, however, Marylanders must have access to speech venues. Whereas downtown business districts traditionally served as such venues, these districts no longer provide free speech opportunities because Marylanders no longer frequent them. Rather, regional and community shopping centers "significantly compete with and have in fact significantly displaced downtown business districts" as a gathering point for citizens.[107]

The explosion of shopping mall development is demonstrated by statistics. In 1950, privately-owned shopping centers of any size numbered less than 100 across the country.[108] By contrast, from 1972 to 1992, the number of regional and super-regional shopping centers across the United States increased by 800 percent.[109] Maryland statistics mirror this national trend. Indeed, from 2000 to 2003 alone, eighteen new shopping centers were erected statewide, and Maryland now boasts eleven malls each covering more than one million square feet.[110] Almost four million people shop at Maryland shopping malls of this size per month.[111] David Fick, a managing director with Legg-Mason Wood Walker, Inc. in Baltimore, observed that "[r]egional [shopping] malls are on an absolute tear."[112]

Although the decline of downtown business districts is not so easily documented by statistics, courts in other states have not required such statistics. New Jersey's Supreme Court took "judicial notice of the fact that in every major city of this state . . . there has been not only a decline, but in many cases a disastrous decline" of downtown business districts.[113] The court concluded that "[t]he economic lifeblood once found downtown has moved to suburban shopping centers, which have substantially displaced the downtown

[107] N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 766 (N.J. 1994).

[108] *Id.* (citing Steven J. Eagle, *Shopping Center Control: The Developer Besieged*, 51 J. URB. L. 585, 586 (1974)).

[109] *Id.* In 1972, there were 199 malls; by 1992, that number had increased to 1,835. *Id.*

[110] Int'l Council of Shopping Ctrs., Scope U.S. 2004, *available at* http://www.icsc.org /srch/rsrch/scope/current/research_scope_bystate.shtml (2004). In 2003, Maryland shopping malls covered a total leasable area of 133.1 million square feet. *Id.*

[111] *Id.*

[112] Andrea K. Walker & Lorraine Mirabella, *Big Deals Alter Face of Mall Industry Acquisition*, BALT. SUN, Aug. 22, 2004, at 1A.

[113] *N.J. Coal.*, 650 A.2d at 767.

business districts as the centers of commercial and social activity."[114]

In an appropriate case, the Maryland judiciary, like the New Jersey Supreme Court, should take judicial notice of the deterioration of Maryland's downtown districts.[115] The decline of numerous Maryland downtown business districts has been documented by a series of articles in the *Baltimore Sun*. For instance, the Dundalk Village Shopping Center, the 3½ blocks that form Dundalk's downtown business district, thrived through the World War II era, housing a movie theater, grocery stores, and clothiers.[116] "Those were the days before regional shopping malls and strip development," whereas today, the village houses only an adult day care center and a day-labor office.[117] Another example of this decline is the Oldtown Mall in East Baltimore, which met a similar fate, "spiral[ing] into decline" in the early 1990s.[118]

The exclusion of free speech from shopping malls jeopardizes Maryland's tradition of offering viable speech forums. The movement from cities to suburbs has diminished the viability of the downtown business district, thereby significantly reducing access to appropriate speech venues. Without such access, the intent of the framers of Article 40 to provide broad speech rights is thwarted. Therefore, access to shopping malls, "the new downtowns,"[119] should be secured.

c. Maryland State Statutes and Case Law

Perhaps reacting to this steady decline of public venues for free speech, the Maryland government has acted to protect speech on private property. The legislature, for example, has passed laws establishing such a right. Furthermore, Maryland courts have

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[114] *Id.*

[115] An appellate court in Maryland may take judicial notice pursuant to Maryland Rule 5-201, which provides that "[j]udicial notice may be taken at any stage of the proceeding." MD. CODE ANN., MD. RULE 5-201 (2004); *see* LYNN MCLAIN, MARYLAND EVIDENCE § 201.1 n.6, at 90 (1987 & Supp. 1995) (citing cases in which Maryland appellate courts have taken judicial notice).

[116] Peter Jensen, Editorial, *The Heart of Dundalk*, BALT. SUN, Mar. 26, 2005, at 12A.

[117] *Id.*

[118] Lorraine Mirabella, *2 Developers Selected to Revitalize Oldtown Shopping Center to Abut Mall in East Baltimore*, BALT. SUN, Mar. 18, 2005, at 1D; *see also* Lorraine Mirabella, *Inner-City Centers a Good Investment; Rundown Retail Areas Draw Investors*, BALT. SUN, Jan. 13, 2005, at 1D (explaining that "since the district's heyday in the 1950s and 1960s, merchants have increasingly faced problems").

[119] *See* Note, *Private Abridgment of Speech and the State Constitutions*, 90 YALE L.J. 165, 168 n.19 (1980).

signaled an interest in safeguarding free expression in shopping malls.

These trends in state law are perhaps not as persuasive as, for example, support from the state common law.[120] Nevertheless, Maryland courts should consider these trends when interpreting Article 40 because they indicate the positions that the people and the State of Maryland have traditionally supported.[121] "Previously established bodies of state law may . . . suggest distinctive state constitutional rights."[122]

At least one state statute shows Maryland's tendency to permit speech rights to trump asserted property rights. Maryland's Anti-Injunction Act states in relevant part:

> A court does not have jurisdiction to grant injunctive relief that specifically or generally . . . prohibits a person from publicizing or obtaining or communicating information about the existence of or a fact involved in a labor dispute by any method that does not involve the act or threat of a breach of the peace, fraud, or violence, including: (i) advertising; (ii) speaking; and (iii) patrolling, with intimidation or coercion, a public street or other place where a person lawfully may be.[123]

As a result, private property owners are prohibited by statute from restricting free speech activities related to labor disputes on

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[120] *See, e.g.*, Hennessey v. Coastal Eagle Point Oil Co., 609 A.2d 11, 27–29 (N.J. 1992) (Pollock, J., concurring) (finding that judicial decisions based on the "common-law . . . smooth[] the path for legislative action" but do not reflect any aspect of the state constitution).

[121] *See, e.g.*, Commonwealth v. Wasson, 842 S.W.2d 487, 493 (Ky. 1992) (recognizing the state's common law tradition of "a legally protected right of privacy" in the process of interpreting Kentucky's constitutional privacy right); Judith S. Kaye, *Foreword: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L.J. 727, 733 (1992) ("[S]tate courts often resolved cases involving transcendent issues without a passing reference to the text of a constitution. The common law was a source no less fundamental."); *see also* United States v. Mound, 157 F.3d 1153, 1153 (8th Cir. 1998) (noting that "[t]he common law, of course, is not embodied in the Constitution, but the fact that a rule has recommended itself to generations of lawyers and judges is at least some indication that it embodies 'fundamental conceptions of justice'" (quoting Dowling v. United States, 493 U.S. 342, 352 (1990))).

[122] State v. Hunt, 450 A.2d 952, 965 (N.J. 1982) (Handler, J., concurring) (citing State v. Schmid, 423 A.2d 615, 626–27 (N.J. 1980). "State law is often responsive to concerns long before they are addressed by constitutional claims." *Id.*; *see also* A. E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 876–77, 935 (1976).

[123] MD. CODE ANN., LAB. & EMPL. § 4-307 (2005). The statute's full name is "Acts Protected from Injunctive Relief." *Id.* The word "with" in subsection (5)(iii) was likely supposed to be "without," as it was not "the intent of the Legislature to allow informational picketing by the use of intimidation or coercion." Weis Mkts., Inc. v. United Food & Commercial Workers Union, Local 400, 583 A.2d 1092, 1094 n.2 (Md. Ct. Spec. App. 1991).

their property, so long as the speech is lawful. The Act originated in Chapter 574 of the Acts of 1935,[124] so for over sixty-five years Maryland law has permitted free speech rights on private property, at least in the context of peaceful labor pickets.[125] This statute, combined with state case law, demonstrates that Maryland law has responded accommodatingly to free speech concerns on private property. This distinctive state right, to speak on private property, forms a basis for interpreting Article 40 more broadly than the federal courts interpret the First Amendment.

In addition to the Maryland legislature, the Maryland judiciary has acknowledged distinctive free speech rights. Admittedly, Maryland courts generally treat Article 40 as being "*in pari materia* with the First Amendment."[126] Nevertheless, Maryland courts have explicitly recognized the possibility of interpreting Article 40 differently than the way in which the U.S. Supreme Court interprets the First Amendment. In *Pack Shack, Inc. v. Howard County*, for example, the Court of Appeals held that a Howard County zoning ordinance on adult entertainment businesses violated Article 40 and the First Amendment because, although the ordinance was content neutral, the County could not demonstrate that the location and distance restrictions left open adequate alternative avenues for communication.[127]

Although the court in *Pack Shack* did not interpret Article 40 differently than the First Amendment, Judge Eldridge explained that "we have . . . emphasized that, simply because a Maryland constitutional provision is *in pari materia* with a federal one . . . does *not* mean that the provision will *always* be interpreted or applied in the same manner as its federal counterpart."[128]

The Maryland courts have indeed interpreted Article 40 more

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[124] *Weis Mkts.*, 583 A.2d at 1094 n.2.

[125] *See* Nat'l Union of Hosp. & Health Care Employees, Dist. 1199E v. Lafayette Square Nursing Ctr., Inc., 368 A.2d 1099, 1105 (Md. Ct. Spec. App. 1977) ("[Maryland's Anti-Injunction Act] was intended to and did abridge substantially the authority of courts of equity to issue injunctions in matters involving labor disputes . . . .").

[126] State v. Brookins, 844 A.2d 1162, 1165 n.2 (Md. 2004) (quoting Pack Shack, Inc. v. Howard County, 832 A.2d 170, 176 n.3 (Md. 2003)). In other words, Maryland courts interpret the "'legal effect of' both provisions [to be] 'substantially the same.'" *Id.* (quoting Sigma Delta Chi v. Speaker, 310 A.2d 156, 158 (Md. 1973)).

[127] 832 A.2d at 188.

[128] *Id.* at 176 n.3 (quoting Dua v. Comcast Cable, 805 A.2d 1061, 1071 (Md. 2002)) (second alteration in original); *see also* DiPino v. Davis, 729 A.2d 354, 367 (Md. 1999) ("[I]n certain contexts the contours of the State Constitutional rights are not precisely those of the Federal . . . ."). *But see* Jakanna Woodworks, Inc. v. Montgomery County., 689 A.2d 65, 70 (Md. 1997) (finding the right protected under Article 40 to be "co-extensive" with the rights protected by the First Amendment).

broadly than the federal counterpart. This willingness to broadly interpret Article 40 is evident where private property owners have sought to restrict speech activities. Although Maryland appellate courts have never adjudicated the conflict between property owners and speech in the context of a shopping mall, in *Weis Markets* the court strongly suggested that speech protections extend to speech activities in shopping malls.[129] Because federal courts do not recognize such a right on private property,[130] Maryland's position reflects a distinctive state right.

In *Weis Markets*, Weis Markets, Inc. owned and operated a supermarket within a shopping mall in Montgomery County, Maryland.[131] On November 2, 1989, Local 400, a labor union, formed a picket line in the porch area of the supermarket. Wearing signs urging customers not to shop at Weis the picketers distributed literature to Weis customers.[132] The pickets continued for several weeks until the circuit court issued a restraining order to limit the number of pickets.[133] "Thereafter, Local 400 filed a motion to dismiss" under the Anti-Injunction Act.[134] The circuit court granted the motion to dismiss.[135]

The Maryland Court of Special Appeals then remanded the case to the circuit court to determine whether the picketing was "lawful" under the Act.[136] In doing so, the Court of Special Appeals conceded that federal decisions were "meaningful" to a determination of free speech rights,[137] but nevertheless described free speech rights more

[129] 583 A.2d at 1096 (concluding that an "accommodation" must be made between free speech and property rights). Admittedly, *Weis Markets* was a Court of Special Appeals decision. Nevertheless, *Weis Markets* is persuasive authority for Maryland's highest court, the Court of Appeals. The Maryland Court of Special Appeals is the second highest court in Maryland and "has exclusive initial appellate jurisdiction over any reviewable judgment, decree, order, or other action of a circuit court or an orphans' court." Court of Special Appeals: Origin & Functions, http://www.mdarchives.state.md.us/msa/mdmanual/30sp/html/spf.html (last visited Mar. 6, 2006).

[130] *See supra* text accompanying notes 24–39 (reviewing the holdings in *Lloyd* and *Hudgens*).

[131] 583 A.2d at 1092.

[132] *Id.* at 1093.

[133] *Id.*

[134] *Id.* Maryland statute title 4, section 307 is discussed above. *See supra* note 123 and accompanying text. At the time *Weis Markets* was decided, title 4, section 307 was codified at article 100, section 65. *Weis Mkts.*, 583 A.2d at 1094 n.2.

[135] *Weis Mkts.*, 583 A.2d at 1093.

[136] *Id.* at 1095–96.

[137] *Id.* at 1094. As part of its general discussion of speech rights on private property, the court cited a handful of Supreme Court cases. However, the citation of federal cases in *Weis Markets* does not diminish its value as an expression of distinct state rights. Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 346 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980) ("The fact

broadly than the federal description of the First Amendment.[138] Specifically, it distinguished between the right of an individual store owner to ban free speech and the right of a shopping mall to do the same.[139]

> We do not suggest that if the trial court on remand decides to issue an injunction that Local 400 would be barred from peaceful picketing of Weis within the shopping plaza property. Obviously, they have such a right subject to regulation as to where their activities take place apart from the store itself.[140]

Thus, the Court of Special Appeals found that free speech in the shopping mall was protected even though the mall was privately owned and had posted signs prohibiting the public from solicitation, loitering, or distribution of handbills.[141] It furthermore explained that "[a]n accommodation must be obtained between the right of peaceful picketing and the property rights of the owner 'with as little destruction of one as is consistent with the maintenance of the other.'"[142] Significantly, the Court of Appeals denied certiorari.[143]

Weis Markets, like Maryland's labor statute, established a speech right on private property that exceeds federal protections. In fact, Justice Black's dissent in *Logan Valley* flatly stated the opposite of *Weis Markets*: "[T]here is no right to picket on the private premises of another . . . ."[144] The difference between the position of the Special Court of Appeals in *Weis Markets* and the position of the U.S. Supreme Court suggests that Maryland has a state tradition that is distinct from federal precedent.

4. The Merit and Relevance of Federal Case Law

For reasons discussed above, Maryland should not presume the

that those [state] opinions cited federal law . . . does not diminish their usefulness as precedent.").

[138] *See Weis Mkts.*, 583 A.2d at 1096.

[139] *Id.* at 1095–96 (discussing the differing rationale of Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968), and Lloyd Corp. v. Tanner, 407 U.S. 551 (1972)).

[140] *Id.* at 1096.

[141] *Id.* at 1093.

[142] *Id.* at 1096 (quoting NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956)); *see also* State v. Shack, 277 A.2d 369, 373–74 (N.J. 1971).

[143] United Food & Commercial Workers Union v. Weis Mkts., 590 A.2d 158, 159 (Md. 1991).

[144] *Logan Valley*, 391 U.S. at 330 (Black, J., dissenting). For a discussion of Justice Black's dissent, see *infra* notes 147–70 and accompanying text.

validity of applicable federal case law.[145] However, the Maryland judiciary must consider the merit and relevance of this federal case law when deciding whether and how to depart from it. If the U.S. Supreme Court opinions limiting free speech rights in shopping malls are convincing, then Maryland courts should view this precedent as persuasive.[146]

The U.S. Supreme Court's rationale for condoning shopping mall speech restriction relies on Justice Black's dissent in *Logan Valley*, in which he argued that private entities need not tolerate free speech on their property.[147] The Court has repeatedly cited Justice Black's rationale in permitting restriction of speech rights in shopping malls. For instance, Justice Powell relied on Justice Black's dissent extensively in writing for the Court in *Lloyd*, citing Black's concern that "the Fifth and Fourteenth Amendment rights of private property owners . . . must be respected and protected."[148] Writing for the majority four years later in *Hudgens*, Justice Stewart followed suit, relying almost exclusively on Justice Black's rationale.[149] Concurring, Justice Powell observed as much: "The Court's opinion today clarifies the confusion engendered by these cases [*Logan Valley*, etc.] by accepting Mr. Justice Black's reading of *Marsh* . . . ."[150] Academia confirms that the majority opinion in *Hudgens* "centered primarily on stare decisis."[151]

Justice Black's rationale, however, on its own terms, is unpersuasive for at least two reasons.[152] First, Justice Black

[145] *See supra* notes 42–61 and accompanying text.

[146] *See, e.g.*, Serrano v. Priest, 557 P.2d 929, 950 (Cal. 1976) ("[D]ecisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law.").

[147] *Logan Valley*, 391 U.S. at 327–33 (Black, J., dissenting).

[148] Lloyd Corp. v. Tanner, 407 U.S. 551, 570 (1972).

[149] Hudgens v. NLRB, 424 U.S. 507, 516–17 (1976).

[150] *Id.* at 524 (Powell, J., concurring)*; see also* Flagg Bros. v. Brooks, 436 U.S. 149, 159 (1978) ("[The] Court ultimately adopted Mr. Justice Black's interpretation of the limited reach of *Marsh* in *Hudgens v. NRLB* in which it announced the overruling of *Logan Valley*." (citation omitted)).

[151] Eule & Varat, *supra* note 14, at 1561 & n.91 (referring, presumably, to Justice Powell's majority opinion in *Lloyd*).

[152] Due to space limitations, this Article considers only two flaws in Justice Black's opinion. A considerable number of flaws have been observed in other articles. For example, Eule and Varat wrote extensively about Justice Black's failure to explore all aspects of the First Amendment interest. *See id.* at 1554–60. They argued that contrary to Justice Black's views, "[m]any of the factors that appeared influential in the treatment of the company town in *Marsh*—appearance, waiver, and government complicity—can be found as well in the shopping center," and concluding that, "[t]o a large extent, the shopping center resembles the business district of a municipality." *Id.* at 1558–59.

confused the need for time, place, and manner regulation of shopping mall speech with the need for an outright ban. Second, Justice Black asserted that shopping mall speech violated the Fifth Amendment, rather than arguing that the First Amendment did not protect such speech. This assertion, though, contradicts subsequent Supreme Court cases such as *PruneYard*, in which the Court held that shopping mall speech does not violate the Fifth Amendment.[153] Because Justice Black's reasoning is erroneous, Maryland courts should depart from it.

a. Justice Black Confused the Need for Time, Place, and Manner Regulation of Shopping Mall Speech with the Need for an Outright Ban

Maryland courts should depart from U.S. Supreme Court doctrine because it repeatedly relies on Justice Black's erroneous *Logan Valley* dissent. Justice Black accurately observed that the First Amendment permitted the petitioner shopping mall supermarket to regulate the location of respondent's picketing. Such regulation was permissible because the pickets occurred in the supermarket's "'pick-up zone'—an area where the frequently numerous bags of groceries bought in the store can be loaded conveniently into the customers' cars."[154] Because the location of this activity interfered with customer shopping, Justice Black explained, the shopping mall could lawfully prohibit picketing in this area.[155] Such a prohibition, falling short of a ban on speech in all shopping mall locations, constituted a mere "time, place and manner" speech regulation, of which the Court has consistently approved.[156]

Justice Black, however, stated, "I would go further," and found that a complete ban on speech in the mall also passed constitutional muster.[157] Nevertheless, Justice Black justified only a time, place,

[153] PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980).

[154] Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 327 (1968) (Black, J., dissenting).

[155] *Id.* at 329.

[156] *See, e.g.*, Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (permitting a municipality to "control the use of its public streets for parades or processions"); *see also* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 54–55 (1986) (upholding a city zoning ordinance regulating the location of adult theaters as satisfying the First Amendment); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 655 & n.16 (1981) (holding that respondent's First Amendment rights were not violated because they "are permitted to solicit funds and distribute and sell literature from within the fairgrounds, albeit from a fixed location").

[157] *Logan Valley*, 391 U.S. at 329–30.

and manner regulation, rather than a complete ban. For example, Justice Black stated, "To hold that store owners are compelled by law *to supply picketing areas for pickets to drive store customers away* is to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country."[158] However, a time, place, and manner regulation ensures free speech in times, places, and manners that do not drive store customers away.[159] The complete ban advocated by Justice Black, and subsequently adopted by the Court's majority, goes much farther than merely prohibiting picketing that drives customers away. It also prohibits peaceful, unobtrusive picketing that is harmonious with customer shopping. Justice Black offered no justification for this additional prohibition. Such an unsatisfactory explanation should not persuade the Maryland judiciary.

b. Justice Black's Position Rested on the Assertion that Shopping Mall Speech Violated the Fifth Amendment, Contradicting PruneYard

Maryland courts should find Justice Black's dissent unpersuasive for a second, though related, reason: Black's reasoning is anchored in the Fifth Amendment in a manner that has subsequently been rejected by the Supreme Court. Justice Black wrote:

> [W]hether [the] Court likes it or not, the Constitution recognizes and supports the concept of private ownership of property. The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." This means to me that there is no right to picket on the private premises of another to try to convert the owner or others to the views of the pickets.[160]

Whereas Justice Black reasoned that the Fifth Amendment conferred on private property owners the right to ban speech, the *PruneYard* majority held the opposite, that shopping malls have no Fifth Amendment "right to exclude others."[161] Accordingly, the

[158] *Id.* at 332–33 (emphasis added).

[159] *See supra* note 156 (citing to the Supreme Court's time, place, and manner jurisprudence).

[160] *Logan Valley*, 391 U.S. at 330 (Black, J., dissenting) (third alteration in the original). Moreover, in the part of his dissent advocating a complete ban on free speech in malls, Justice Black does not recognize the First Amendment as an issue. *See id.* at 329–33.

[161] PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 84 (1980) ("[H]ere appellants have failed to 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.'").

Court found that requiring large shopping malls to permit free speech did not amount to an infringement of property rights under the Takings Clause.[162] "There is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center."[163] In fact, the Court permits property owners to completely ban speech only because it interprets the First Amendment, along with its time, place and manner regulations, to permit a ban, not because the Fifth Amendment ensures the right to such a ban.[164] *PruneYard*, therefore, overruled the logic of Justice Black's dissent and should be considered to have overruled the subsequent decisions that relied on his dissent. For example, in *Lloyd*, Justice Powell echoed Justice Black's concern that "the Fifth and Fourteenth Amendment rights of private property owners . . . must be respected and protected."[165] This contradiction indicates that the Supreme Court has built its shopping mall speech doctrine on the shoulders of an erroneously articulated dissent.

The Court's doctrine in shopping mall cases is not convincing, as it offers little justification for restricting free speech.[166] In finding the Court's reasoning unpersuasive, Colorado's high court described the Court's jurisprudence in these cases as "tortuous."[167] Justice Black's unsatisfying explanation, and the more recent opinions that rely on it, are representative of the Court's overall state action jurisprudence, which often "seem[s] fueled more by history than logic."[168] Indeed, the entire doctrine seems to be driven by the precedent set in 1883 by the *Civil Rights Cases*.[169]

Furthermore, analysis of federal precedent is not helpful because federal courts interpret the Federal Constitution, which requires state action for a violation of the right to free speech. The text of

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[162] *Id.* at 83.

[163] *Id.*

[164] *See id.*

[165] Lloyd Corp. v. Tanner, 407 U.S. 551, 570 (1972).

[166] *See PruneYard*, 447 U.S. at 91 (Marshall, J., concurring) ("'[T]he Court's rejection of any role for the First Amendment in the privately owned shopping center complex stems . . . from an overly formalistic view of the relationship between the institution of private ownership of property and the First Amendment's guarantee of freedom of speech.'") (quoting Hudgens v. NLRB, 424 U.S. 507, 542 (1976) (Marshall, J., dissenting)).

[167] Bock v. Westminster Mall Co., 819 P.2d 55, 58 (Colo. 1991); *see also* Reitman v. Mulkey, 387 U.S. 369, 378 (1967) (observing that the Supreme Court "has never attempted the 'impossible task' of formulating an infallible test" for application of the state action doctrine).

[168] Eule & Varat, *supra* note 14, at 1547.

[169] 109 U.S. 3, 13 (1883). *See* Black, *supra* note 13, at 95 ("The doctrine-in-chief is a slogan from 1883.").

Article 40, on the other hand, should not be interpreted to contain a state action requirement.[170] Consequently, U.S. Supreme Court precedent is neither convincing nor highly relevant, and should not be deemed persuasive by the Maryland courts.

5. The Merit and Relevance of Sister State Case Law

The Maryland judiciary should look to sister state case law for greater assistance in interpreting its own constitution.[171] A handful of states have interpreted the free speech provisions of their state constitutions to confer speech rights in privately owned shopping malls.[172] In support of this position, these courts offer more cogent rationales than those offered by federal precedent. Further, they are more persuasive than those state courts which interpret their constitutions to afford the same limited speech rights in shopping malls as the First Amendment of the Federal Constitution. Maryland courts should adopt the more cogent rationales.

a. State Judges Have Been Cogent and Persuasive in Interpreting State Constitutions to Confer Broad Speech Rights in the Shopping Mall Context

Three states—California, New Jersey, and Colorado—have interpreted their free speech clauses to grant free speech rights at regional shopping centers.[173] For example, in the California Supreme Court case of *Robins v. Pruneyard Shopping Center*, the

[170] *See supra* Part III.B.1 (arguing that Article 40 should be interpreted to apply to private as well as state actors).

[171] For example, the Pennsylvania Supreme Court in *Commonwealth v. Edmunds* listed sister state case law as a factor to consider in independently interpreting its own state constitution. 586 A.2d 887, 895 (Pa. 1991).

[172] *See* Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 347 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980); *Bock*, 819 P.2d at 61; N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 775 (N.J. 1994). Two other states, Massachusetts and Washington, have ruled that shopping center owners cannot prohibit free speech under certain circumstances, but have based these holdings on other parts of their state constitutions than the free speech clause. *See* Batchelder v. Allied Stores Int'l, Inc., 445 N.E.2d 590, 591, 593 n.6 (Mass. 1983) (relying on Massachusetts' free and equal election provision); Southcenter Joint Venture v. Nat'l Democratic Policy Comm., 780 P.2d 1282, 1290 & n.34 (Wash. 1989) (en banc) (citing Alderwood Assocs. v. Wash. Envtl. Council, 635 P.2d 108, 121 (Wash. 1981) (Dolliver, J., concurring)) (interpreting its previous holding that "people have a right under the initiative provision of [Washington's constitution] to solicit signatures for an initiative in a manner that does not violate or unreasonably restrict the rights of private property owners" to include referendums of the people). *But see* Stranahan v. Fred Meyer, Inc., 11 P.3d 228, 243–44 (Or. 2000) (holding that shopping center owners may now prohibit free speech in their mall).

[173] *See infra* notes 174–84 (citing these states' decisions).

Pruneyard Shopping Center had a strict policy of prohibiting public expressive activity.[174] The mall enforced this policy when a group of students handed out pamphlets and sought signatures for a petition against the United Nations' stance on Zionism.[175] After security ordered the group to leave, the students filed suit against Pruneyard, citing a violation of the right to free speech under the U.S. and California Constitutions.[176] Although *Lloyd* and *Hudgens* refused to recognize a federal speech right, the California court held that, though the mall was a private actor, California's own state constitution did not require state action for a violation of the free speech right.[177] The court also noted that "'[a]ll private property is held subject to the power of the government to regulate its use for the public welfare.'"[178] Therefore, the California Constitution protected reasonable speech and petitioning activities even in privately held shopping centers.[179]

The New Jersey Supreme Court arrived at a similar decision in *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*[180] In this case involving facts nearly identical to *Robins*, the New Jersey Court first concluded that its constitutional free speech provision, like California's, obviated state action.[181] The court then balanced three factors to determine the extent of free speech protection in malls: "'(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.'"[182] After considering these factors in the context of malls, the New Jersey high court found, like the California court, that its state constitutional speech provision protected free expression in shopping malls.[183]

In *Bock v. Westminster Mall Co.*,[184] the Colorado Supreme Court

[174] 592 P.2d 341, 342 (Cal. 1979).
[175] *Id.*
[176] *Id.*
[177] *See id.* at 343–44, 347 (discussing *Lloyd* and *Hudgens* but ultimately concluding that these decisions "do[] not prevent California's providing greater protection").
[178] *Id.* at 344 (quoting Agric. Labor Relations Bd. v. Superior Court, 546 P.2d 687, 694 (Cal. 1976)).
[179] *Id.* at 347.
[180] 650 A.2d 757, 780 (N.J. 1994).
[181] *Id.* at 770–71.
[182] *Id.* at 771 (quoting State v. Schmid, 423 A.2d 615, 630 (N.J. 1980)).
[183] *Id.* at 779.
[184] 819 P.2d 55 (Colo. 1991).

addressed another fact pattern similar to those presented in *Pruneyard* and *New Jersey Coalition*.[185] The Colorado court did not decide, as the New Jersey and California courts had, whether state action was required to trigger constitutional protection of speech, because the court held that the mall was a state actor due to the "highly visible governmental presence in the Mall."[186] For example, the court noted that the municipality had financed improvements to meet the shopping center's needs.[187] As a result, the court required the mall to permit speech on its premises.[188]

These courts have articulated a persuasive rationale that the Maryland judiciary should adopt. Although the rationales vary slightly, they all subscribe to three core arguments. First, each state court asserted that the notion of corporate responsibility supported free speech in shopping malls. As congregation in corporate shopping malls increases, free speech at these malls becomes an increasingly important means of communication.[189] In *New Jersey Coalition*, for example, the New Jersey high court observed that if free speech rights were not protected from private infringement, the guarantee of free political expression would be severely diminished.[190] "Their commercial success has been striking but with that success goes a constitutional responsibility."[191] Professor Chemerinsky has elaborated on the notion of corporate responsibility, explaining that "private infringements of basic freedoms can be just as harmful as governmental infringements. . . . [T]he concentration of wealth and power in private hands . . . in large corporations makes the effect of private actions in certain cases virtually indistinguishable from . . . government because its

[185] Ian J. McPheron, *From the Ground to the Sky: The Continuing Conflict Between Private Property Rights and Free Speech Rights on the Shopping Center Front Seventeen Years After* Pruneyard, 16 N. ILL. U. L. REV. 717, 731, 733 (1996) (noting the similarity in facts among the three cases).

[186] *Bock*, 819 P.2d at 62. High visibility was one of three factors leading to identification as a state actor; state financing and a police presence were the other factors. *Id.* at 61–62.

[187] *Id.* at 61.

[188] *Id.* at 63.

[189] *See* McPheron, *supra* note 185, at 746–47, 754–55 (noting that large shopping centers are the functional equivalent of a city's downtown area for many regions).

[190] N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 761–62 (N.J. 1994).

[191] *Id.* at 762; *see also* Southcenter Joint Venture v. Nat'l Democratic Policy Comm., 780 P.2d 1282, 1294, 1297 (Wash. 1989) (en banc) (Utter, J., concurring) (arguing that under the federal system, it is important to note that states have plenary power within their zones of sovereignty, unlike the limited federal government; and that the text and history of Washington's constitutional free speech provision weighs in favor of an interpretation guaranteeing speech against private interference).

power can inflict great injuries."[192]

A second argument underscored by these cases is that issue-oriented speech does not impede the interests of shopping malls, as there is only *de minimis* damage to the property right.[193] Observing that 25,000 people congregated daily in the Pruneyard shopping mall, the court in *Robins* concluded that "[a] handful of additional orderly persons soliciting signatures . . . under reasonable regulations adopted by [the mall] to assure that these activities do not interfere with normal business operations would not markedly dilute [the mall]'s property rights."[194] Similarly, the court in *New Jersey Coalition* found that "carefully regulated leafletting, limited in duration and frequency, and permitted only in selected areas, seems unlikely to have the slightest impact on actual revenues."[195] The New Jersey court also noted that in states permitting leafletting, there had been no obvious "adverse financial consequences."[196] Thus, shopping malls are unconvincing when they claim that free speech will obstruct the commercial purposes to which they have dedicated their property.

Third, these state courts note that courts have traditionally construed the free exercise of speech to be paramount in the hierarchy of rights: such invaluable rights should not be sacrificed to accommodate property rights.[197] Courts cite the utmost protections for speech at both the state and federal level.[198] For instance, the New Jersey Supreme Court found that free speech occupied a "preferred position" in its state system of constitutionally-protected interests.[199] "Where political speech is involved, our tradition insists that government 'allow the widest room for discussion, the narrowest range for its restriction.'"[200] The

[192] Chemerinsky, *supra* note 13, at 510–11.

[193] This argument draws from the Supreme Court's *Logan Valley* decision. Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 319, 323 (1968) ("We see no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited . . . ."); *see also* Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 347–48 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980).

[194] *Robins*, 592 P.2d at 347–48 (citations omitted); *see also* Bock v. Westminster Mall Co., 819 P.2d 55, 62 (Colo. 1991) ("We emphasize that there has been no showing that petitioners' activities will adversely affect the Mall's business operations.").

[195] 650 A.2d at 765 (adding that "[a]t most[,] the impact would be negligible").

[196] *Id.*

[197] Marsh v. Alabama, 326 U.S. 501, 509 (1946).

[198] *See supra* note 2 and accompanying text.

[199] State v. Miller, 416 A.2d 821, 826 (N.J. 1980).

[200] *Id.* (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

Colorado Supreme Court in *Bock* affirmed the "high rank which free speech holds in the constellation of freedoms guaranteed by both the United States Constitution and our state constitution."[201] Accordingly, the Colorado judiciary declined to follow the U.S. Supreme Court's reasoning in *Lloyd* and *Hudgens*, and instead continued Colorado's tradition of preferring free speech over other constitutional rights.[202]

Taken together, these arguments by sister state courts persuasively support the decision to impose upon shopping malls a duty to permit free expression. Moreover, as discussed in the next section, state judges who contend that the applicable state provisions do not protect speech in malls have made less persuasive arguments.

b. State Judges Who Restrict Free Speech Rights in Shopping Malls Struggle to Justify their Restrictions

State judges who make arguments in favor of speech rights in malls are cogent and persuasive. Judges who restrict these rights, on the other hand, struggle to justify their restrictions. The vast majority of these judges explicitly presume in favor of interpreting the state provision to be identical to the federal interpretation of the First Amendment.[203] As noted above, however, federalism and other institutional concerns often convince federal judges to decline to recognize rights.[204] These concerns are less applicable to state judges.[205] Consequently, state judges who presume adherence to federal case law follow a course that is flawed and unadvisable. This presumption is especially troublesome because the operable

[201] Bock v. Westminster Mall Co., 819 P.2d 55, 57 (Colo. 1991).

[202] *Id.* at 58. The court also noted that the *Lloyd* and *Hudgens* decisions diverged from previous U.S. Supreme Court precedent. *Id.*

[203] *See, e.g.*, People v. DiGuida, 604 N.E.2d 336, 342 (Ill. 1992) (explaining the "lockstep doctrine," under which the court "appl[ies] decisions of the United States Supreme Court based on Federal constitutional provisions to the construction of comparable provisions of the State constitution"); Southcenter Joint Venture v. Nat'l Democratic Policy Comm., 780 P.2d 1282, 1292 (Wash. 1989) (perceiving no "persuasive reason why [the federal] doctrine should apply any differently under our state constitution"); *see also* Douglas M. Poland, Note, People v. DiGuida*: Freedom of Expression of Private Property Under the Illinois Constitution*, 24 LOY. U. CHI. L.J. 523, 552–53 (1993) (explaining that the *DiGuida* court "followed a doctrine of constitutional interpretation that contained a rebuttable presumption that provisions of the Illinois Constitution should be construed like analogous provisions of the Federal Constitution").

[204] *See supra* notes 49–57 and accompanying text.

[205] *See id.*

federal precedent is unconvincing.[206]

State judges also rest their speech restrictive stances on separation of powers concerns that have questionable validity. For instance, the Supreme Court of Connecticut worried that striking balances among the interests of competing groups was a function traditionally "performed by the legislature, which has far greater competence and flexibility to deal with the myriad complications which may arise from the exercise of constitutional rights by some in diminution of those of others."[207] Justice Utter's concurrence in *Southcenter*, on the other hand, found statements like this "incomprehensible."[208] Justice Utter's review of both U.S. Supreme Court and Washington state case law demonstrated that a "common function of the judicial system is to weigh competing interests."[209] When a constitutional right is cited by a party, it is the court's duty to interpret the relevant constitutional provisions to determine the nature and breadth of that right.[210] It is therefore plausible that judges who advocate a constrained judicial branch do not in fact promote separation of powers.[211]

These judges also have argued that the "fundamental nature" of the state constitution prohibits applying constitutional protections to private parties.[212] Under the American justice system, they have reasoned, the purpose of a constitution is to protect the citizenry

[206] *See supra* Part III.B.4 (analyzing the applicable federal doctrine). In his dissent in *Bock*, Justice Erickson relied heavily on Justice Black's dissent in *Logan Valley*, as interpreted by *Hudgens* and *Lloyd*. *Bock*, 819 P.2d at 64–65 (Erickson, J., dissenting). However, Justice Black's dissent offers no convincing reason for limiting free speech in shopping malls. *See supra* notes 147–69 and accompanying text.

[207] Cologne v. Westfarms Assocs., 469 A.2d 1201, 1210 (Conn. 1984); *see also Southcenter*, 780 P.2d at 1289 (finding that judicial protection of the speech right in shopping malls would "usurp the power and authority of the Legislature").

[208] *Southcenter*, 780 P.2d at 1299 (Utter, J., concurring).

[209] *Id.*

[210] *See id.* at 1299–1300. The underlying principle was announced by the Supreme Court in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). ("It is emphatically the province and duty of the judicial department to fay [sic] what the law is."); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 36–37 (1997) (explaining that *Marbury* is regarded as a cornerstone of American constitutionalism and the foundation for the broad powers of judicial review now commonly exercised by the judiciary); Sylvia Snowiss, *The* Marbury *of 1803 and the Modern* Marbury, 20 CONST. COMMENT. 231, 235 (2003) ("'To say what the law is' is the judicial responsibility for finality in the application and interpretation of common and statutory law under conventional separation of powers.").

[211] *See* United States v. Nixon, 418 U.S. 683, 705 (1974) (discussing the "supremacy of each branch within its own assigned area of constitutional duties" and noting that "[c]ertain powers and privileges flow from the nature of enumerated powers").

[212] *See, e.g.*, *Southcenter*, 780 P.2d at 1286 ("To adopt the position urged by the [plaintiff] would require us to act contrary to the fundamental nature of our own state constitution.").

from the sovereign power, not from private entities.[213] As Justice Anderson explained in *Southcenter*, "Nearly all of [the guarantees found in the state and federal constitutions] may be traced more or less directly to struggles on the part of the people against the unjust exercise of powers of government in England and in this country."[214] Consequently, judges would flout the fundamental nature of the justice system if they applied a constitutional free speech provision to a private shopping mall. The founding fathers, these judges have explained, neither intended nor anticipated a need for protections from such private entities.[215]

This argument concerning the fundamental nature of constitutions and its inapplicability to the actions of private parties is problematic for a number of reasons. For example, state constitutions do typically protect some rights from infringement by private actors.[216] In *Southcenter*, the Washington high court recognized, in a footnote, that certain provisions in its constitution do protect the rights of private citizens from each other.[217] The court also stated that "it is . . . clear to us that such provisions are exceptions to the rule only, not the rule itself."[218] However, in a concurring opinion, Justice Utter argued that this explanation proved unsatisfying because it offered no "principled basis for distinguishing [between] the provisions they recognize as reaching private activity" and those that do not.[219] He stated that "[u]sing the *Gunwall* criteria, I cannot see why [Washington's free speech provision]—which contains no state action language—should include a hidden state action requirement when the majority's example of [Washington's eminent domain provision]—which also contains no state action language—should not."[220]

Moreover, the assumption that state constitutions should only apply to public actors rests on questionable grounds. In the *Civil Rights Cases*, the U.S. Supreme Court made the assumption that the states would safeguard individual liberties by regulating private activity where the federal government, limited by federalism

[213] *Id.* at 1286–87.

[214] *Id.* at 1287 (quoting E. MCCLAIN, CONSTITUTIONAL LAW IN THE UNITED STATES § 205, at 292–93 (2d ed. 1910)).

[215] *Id.*

[216] *See, e.g.*, *supra* notes 73–76 and accompanying text (noting that some provisions in the Maryland Declaration may apply to private actors).

[217] 780 P.2d at 1286–87 n.17.

[218] *Id.*

[219] *Id.* at 1299 n.10 (Utter, J., concurring).

[220] *Id.*

concerns, could not.[221] The decision in *United States v. Cruikshank* confirmed that the "duty [of protecting the right of citizens to enjoy equal rights] was originally assumed by the States; and it still remains there."[222] This means that if a state's constitutional provisions do not explicitly limit it to protecting citizens against the state, then there is no reason to add such a limitation.[223] As Justice Utter stated in his concurring opinion in *Southcenter*, "The scheme of power in the federal system certainly does not compel such a result; if anything, it requires the opposite."[224] Therefore, the argument relying on the fundamental nature of constitutions is not nearly as compelling as state judges such as those in the *Southcenter* majority claim.

In addition to employing a presumption in favor of federal precedent and attempting to rely on the fundamental nature of state constitutions, these state judges have also interpreted the state's history to exclude free speech rights against private actors. However, these judges' conclusions do not flow naturally from the historical document being interpreted, and are therefore strained and unpersuasive.

The case of *People v. DiGuida*[225] demonstrates this point. There, the Illinois Supreme Court reviewed the debates of the Illinois Constitutional Convention of 1970 to determine the framers' intent in adopting the free speech provision.[226] At the convention, one of the delegates had proposed a free speech amendment that would track the language of the U.S. Constitution.[227] The amendment would have eliminated any potential differences in the way in which the Illinois and federal free speech provisions were construed[228] and would have explicitly required state action. The Bill of Rights

[221] 109 U.S. 3, 13 (1883). The Court found that it was the place of state legislatures "to establish [codes] of municipal law regulative of all private rights between man and man in society." *Id.* Congress was not empowered to make such law under either the Civil Rights Act of 1875 or the Fourteenth Amendment. *Id.* at 11. However, Justice Harlan argued that the Fourteenth Amendment allowed Congress to regulate private discrimination against African-Americans. *Id.* at 46 (Harlan, J., dissenting).

[222] 92 U.S. 542, 555 (1875).

[223] *See, e.g.*, *Southcenter*, 780 P.2d at 1298 (Utter, J., concurring).

[224] *Id.*

[225] 604 N.E.2d 336 (Ill. 1992).

[226] *Id.* at 343.

[227] Michael P. Seng, *Freedom of Speech, Press and Assembly, and Freedom of Religion Under the Illinois Constitution*, 21 LOY. U. CHI. L.J. 91, 114 (1989); *see also DiGuida*, 604 N.E.2d at 343 (noting that there were a number of delegates arguing that the free speech clause in the Illinois Constitution should conform to the Federal Constitution).

[228] Seng, *supra* note 227, at 114.

Committee rejected this proposed language.[229] Members of this committee explained that their rejection was based on the desire to adhere to the principles of federalism and provide broader speech rights than the federal analogue.[230] The convention delegates ultimately agreed with the committee and did not adopt such an amendment mirroring the language of the U.S. Constitution.[231]

The Illinois court, however, did not ascribe much value to this seemingly persuasive history and found that neither the committee nor the delegates had specifically indicated that the Illinois provision's broad protections should "apply to actions taken by private persons, but only to actions by the State."[232] As a result, the court ultimately held that "the State action requirement of the first amendment [was] also present in . . . the Illinois Constitution."[233]

This analysis is unsound. Instead of interpreting the Illinois State Constitution more broadly than the First Amendment, as the 1970 Illinois framers intended, the interpretation of the free speech provision in *DiGuida* is identical to the narrow federal position encompassed in the First Amendment. Moreover, the 1970 debates demonstrate that the delegates to the convention intended the speech provision to be interpreted independently of the First Amendment.[234] Nonetheless, the Illinois court's review focused only on finding affirmative evidence demonstrating the framers' intent to limit the actions of private actors.[235] As such, the *DiGuida* holding did not properly assess the significance of the 1970 convention records; this is typical of state decisions in which the significance of the relevant historical record has been discounted.[236]

Judges have further argued that enforcing constitutional guarantees, like free speech against private shopping malls would

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[229] *Id.* at 114 & n.133.
[230] *Id.* at 113 n.130, 114; *DiGuida*, 604 N.E.2d at 343.
[231] *DiGuida*, 604 N.E.2d at 343.
[232] *See id.* at 344–45.
[233] *Id.* at 344.
[234] *See id.* at 343.
[235] Poland, *supra* note 203, at 552.
[236] Like the Illinois Supreme Court, the Washington Supreme Court in *Southcenter* engaged in a review of history that undervalued some important evidence of Washington's constitutional history. *See* Southcenter Joint Venture v. Nat'l Democratic Policy Comm., 780 P.2d 1282, 1287–88 (Wash. 1989) (en banc) (reviewing Washington's constitutional history). For example, the majority in *Southcenter* discounted the significance of "contemporaneous newspaper articles indicating that early drafts of the state free speech provision . . . contained reference to 'state action.'" *Id.* On the other hand, as Justice Utter noted in his concurrence, these articles suggest that the Preamble and Declaration of Rights Committee later removed this reference; this provides significant evidence that the Committee did not wish to have a state action requirement. *Id.* at 1294 (Utter, J., concurring).

actually restrict liberty because "it would deny [malls] 'the freedom to make certain choices, such as choices of the persons with whom they will associate.'"[237] This rationale, however, has much greater force in contexts where the private property owner extends a limited invitation to the public.[238] Shopping malls, on the other hand, extend an invitation to the public that is all-inclusive.[239] The Supreme Court of New Jersey described this invitation as "almost limitless" in *New Jersey Coalition*, citing "its inclusion of numerous expressive uses" and "its total transformation of private property to the mirror image of a downtown business district."[240] As a result of the sheer breadth of this invitation, malls have undertaken a duty to facilitate rights traditionally enjoyed in downtown districts.[241] With such a duty comes a reduced right to choose those with whom the mall associates.[242]

Finally, in his dissent to the *New Jersey Coalition* decision, Judge Garibaldi discussed some of the practical difficulties that could result when private malls are forced to permit free speech.[243] For example, the owners of these malls would have to devise time, place, and manner regulations.[244] Garibaldi explained that regardless of the standards used, each mall owner would be second-guessed and litigation would ensue. "Public officials may have to face those issues . . . but private-property owners should not be forced to decide those value-laden questions."[245]

Garibaldi's argument, however, failed to account for the notion of corporate responsibility that Professor Chemerinsky and others have so persuasively articulated.[246] The difficulty of responding to lawsuits and developing time, place, and manner policies is a sacrifice that malls may be required to make, considering that they have taken over traditional public forums and have accumulated vast commercial wealth in the process.[247] Moreover, malls are free

[237] Republican Party v. Dietz, 940 S.W.2d 86, 91 (Tex. 1997) (quoting TRIBE, *supra* note 8, at 1691).

[238] *See, e.g.*, N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 772 (N.J. 1994) (holding that the "overall nature and extent of the invitation to the public" is to be considered, including actual conduct and permitted uses).

[239] *Id.*

[240] *Id.* at 774.

[241] *See id.*

[242] *See id.* at 774, 775.

[243] *Id.* at 792–93 (Garibaldi, J., dissenting).

[244] *Id.* at 793.

[245] *Id.* at 792–93.

[246] *See* Chemerinsky, *supra* note 13, at 510–11.

[247] *See N.J. Coal.*, 650 A.2d at 776.

to seek the assistance and expertise of government actors in setting time, place, and manner restrictions and can thus receive valuable advice in tailoring their policies to community values. In addition, Garibaldi's concerns seem unfounded given that California malls experienced no substantial burdens following the *Robins* decision.[248]

Because state judges who favor speech protection in malls have used the most convincing reasoning, the Maryland judiciary should consider the opinions of these judges to be especially persuasive. In doing so, the Maryland judiciary should use this compelling sister state case law as yet another basis for interpreting Article 40 more broadly than the federal interpretations of the First Amendment.

IV. CONCLUSION

After analyzing and assessing the aforementioned bases for departure, the Maryland judiciary should conclude that Article 40 is most accurately interpreted as broader than the First Amendment. Because these bases support broad speech protections even when the result would be disadvantageous to private actors, state judges should safeguard speech activities in shopping malls. Shopping mall owners cannot effectively argue to the contrary.

Unlike Justice Black's belief that property owners can do what they wish regardless of the scope or nature of their property, the Maryland court in *Weis Markets* adhered to a more reasoned principle: "An accommodation must be obtained between the right of peaceful picketing and the property rights of the owner 'with as little destruction of one as is consistent with the maintenance of the other.'"[249] This is the principle embodied by Article 40, and the Maryland courts should interpret it accordingly.

[248] *See id.* at 765–66 (discussing the "negligible" impact of free speech regulation in a large shopping mall).

[249] Weis Mkts., Inc. v. United Food & Commercial Workers Union, Local 400, 583 A.2d 1092, 1096 (Md. Ct. Spec. App. 1991) (quoting NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956)); *see also* State v. Shack, 277 A.2d 369, 373–74 (N.J. 1971) (finding that there must be "an accommodation [made] between the right of the [property] owner" and the interests of the general public); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 24 (3d ed. 1964) (detailing a series of situations in which private necessity justifies entry upon the lands of another). "[T]ime marches on toward new adjustments between individualism and the social interests." *Shack*, 277 A.2d at 373.