Alderwood Associates v. Washington Environmental Council: State Action and The Washington State Constitution

In *Alderwood Associates v. Washington Environmental Council*,[1] the Washington Supreme Court reversed a temporary restraining order forbidding the defendant's solicitation or demonstration on plaintiff's privately owned shopping mall. Although there was no majority opinion because the court split four-one-four, the result of the several opinions is that the Washington constitution now bars private as well as state action[2] that interferes with the gathering of initiative signatures on certain private property. However, four justices also concluded that the free speech section[3] of the Washington constitution restricts private as well as state action. The *Alderwood* result is desirable, but could have been reached without an abandonment of the state action requirement. Such an abandonment, although subscribed to by less than a majority, strays from principled constitutional analysis and inhibits further reasoned development of the state constitution.

Defendant, the Washington Environmental Council, sponsored Initiative 383, entitled The Radioactive Waste Storage and Transportation Act of 1980.[4] In order to have the initiative placed on the November 1980 ballot, the defendant needed 123,700 registered voters' signatures.[5] To further its signature

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1. 96 Wash. 2d 230, 635 P.2d 108 (1981).

2. The state action requirement arises out of the language of the first amendment. In Gitlow v. New York, 268 U.S. 652 (1925), the Supreme Court held that the first amendment applied to state as well as federal actions through the due process clause of the fourteenth amendment. The United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the 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. Thus, when a party invokes the guarantee of free speech he must show that he is protesting actions by the government not those of private individuals. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1147 (1978). The *Alderwood* case is the first to address the question of state action under the Washington constitution.

3. WASH. CONST. art. I, § 5. "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."

4. 96 Wash. 2d at 232, 635 P.2d at 110.

5. *Id.*

drive, the council sought permission to solicit on the Alderwood Mall. The Alderwood Associates, owner and operator of the mall,[6] denied the council's request to solicit signatures on the premises. Nevertheless, the council entered the mall and solicited passersby in a "nonobstructive manner."[7] The Alderwood Associates obtained a temporary order restraining the petitioners from entering the mall.[8]

In deciding that the Washington constitution protected the exercise of free speech and the exercise of the initiative process on a privately owned shopping center, Justice Utter, joined by Justices Rosellini, Williams and Dore, acknowledged that, in contrast to the state constitution, the first amendment to the federal Constitution does not protect individuals seeking to exercise their right to free speech on privately owned shopping centers. Rather, federal first amendment rights are limited by the concept of state action.[9] However, the four justices reasoned that the United States Supreme Court's recent decision, *PruneYard Shopping Center v. Robins*[10] left state courts free to interpret the state constitution independently of and more expansively than the federal constitution as long as such an interpretation would not deprive state citizens of federally guaranteed rights.

With this foundation laid, the Utter opinion examined article 1, section 5 of the Washington constitution and found three reasons why the state constitution did not require state action. First, the justices reasoned that a literal interpretation of the provision would not require limiting its protections to governmental action.[11] Second, they found that the free speech provisions of the California[12] and New Jersey[13] constitutions were

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6. *Id.* The Utter opinion stated that the mall was a "regional shopping center" and noted that impact statements estimated that in 1978, 22,000 automobiles would enter the 110 acre mall on an average day.

7. *Id.* at 233, 635 P.2d at 110. The court noted that no one alleged the signature gatherers were being annoying, or harassing or interfering with business activity on the mall.

8. *Id.* at 232, 635 P.2d at 110.

9. *Id.* at 234-35, 635 P.2d at 111.

10. 447 U.S. 74 (1980).

11. 96 Wash. 2d at 240, 635 P.2d at 114.

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

13. N.J. CONST. art. I, § 6. "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be

similar to article 1, section 5 of the Washington constitution. Thus, article 1, section 5 could be interpreted as *Robins v. PruneYard*[14] and *State v. Schmid*[15] had interpreted the free speech provisions of the California and New Jersey constitutions.[16] Finally, the Utter opinion stated that the state action doctrine, under the United States Constitution, involves balancing the right to free speech and the right to control private property. At the federal level this balancing process is restrained by a "conservative theoretical approach" not present at the state court level.[17]

Although concluding that article 1, section 5 restricts private as well as state interference with expression, the Utter opinion nonetheless places limitations on the exercise of speech and initiative rights on private property.[18] The justices used a balancing test to define the limits of the article 1, section 5 rights of the signature gatherers and the property rights of the Alderwood Associates.[19] On the free speech side of the balance, the factors included the extent to which the property is the functional equivalent of a public forum,[20] the nature of the speech activity,[21] the possibility of reasonable regulation by the

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passed to restrain or abridge the liberty of speech or of the press."

14. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979). This opinion is the California Supreme Court decision preceding the Supreme Court determination in PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980). This article will refer to the California decision as *Robins* and the United States Supreme Court decision as *PruneYard*.

15. 84 N.J. 535, 423 A.2d 615 (1980), *appeal dismissed*, 50 U.S.L.W. 4159 (U.S. Jan. 12, 1982).

16. 96 Wash. 2d at 240-41, 635 P.2d at 114-15.

17. *Id.* at 242, 635 P.2d at 115. The Utter opinion explained that this conservative theoretical approach was necessary at the federal level because the Supreme Court must fashion a rule governing the state action issue for the entire country, and because "federalism prevents the court [sic] from adopting a rule which prevents states from experimenting."

18. *Id.* at 243, 635 P.2d at 116.

19. *Id.* at 244, 635 P.2d at 116.

20. The justices stated,

> As property becomes the functional equivalent of a downtown area or other public forum, reasonable speech activities become less of an intrusion on the owner's autonomy interests. When property is open to the public, the owner has a reduced expectation of privacy and, as a corollary, any speech activity is less threatening to the property's value.

Id.

21. "The exercise of free speech is given great weight in the balance, because it is a preferred right. And where the exercise of the speech also involves the initiative process, the activity takes on added constitutional significance." *Id.* at 244-45, 635 P.2d 116.

time, place, and manner of speech,[22] and the involvement of other constitutional rights.[23] On the other side, the justices balanced the due process rights of the property owner and the possibility that the exercise of speech on the property amounted to a taking of property without compensation.[24] Under the *Alderwood* facts, the four justices concluded that the balance favored the exercise of free speech and initiative rights and that such activities did not infringe on the rights of the property owners.

Justice Dolliver concurred in the result but not in the rationale of the Utter opinion. He found no state precedent for using article 1, section 5 "as a sword by individuals against individuals." Rather, the provision was designed "as a shield against the actions of the state."[25] Acknowledging that in the past the Washington Supreme Court had construed similar federal and state constitutional provisions differently, he stated that article 1, section 5 had not been subject to independent scrutiny concerning state action.[26] He perceived the Utter opinion's rationale as an unwarranted expansion of the state constitution, more properly achieved through legislation than judicial interpretation.[27]

Nevertheless, Justice Dolliver found the presence of the signature gatherers on the mall permissible under the initiative provision of the Washington constitution.[28] This provision gives Washington State citizens the right to initiate legislative action through a petition process.[29] Relying on the police power of the state, Justice Dolliver reasoned that the state could reasonably promote the availability of the initiative process to all citizens by allowing signature gatherers to enter the private property.[30]

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22. *Id.* at 245, 635 P.2d at 116.

23. *Id.* at 246, 635 P.2d at 117.

24. *Id.* at 245-46, 635 P.2d at 117. The justices also considered the issues of mootness, scope of review and attorney's fees. On the issue of mootness, the justices held "the question presented by this case is one which is likely to recur and, given its importance, an authoritative determination is needed." *Id.* at 233, 635 P.2d at 110-11. The scope of review was limited to the question of whether there was a clear legal right to the temporary restraining order. *Id.* at 233-34, 635 P.2d at 111. Finally, the majority remanded the case to the trial court for a determination on attorney's fees. *Id.* at 247, 635 P.2d at 117-18.

25. *Id.* at 250, 635 P.2d at 119 (Dolliver, J., concurring).

26. *Id.* at 248-49, 635 P.2d at 118.

27. *Id.* at 250, 635 P.2d at 119.

28. *Id.* at 251, 635 P.2d at 120.

29. This section provides in part: "Initiative. The first power reserved by the people is the initiative." WASH. CONST. art. 2, § 1(a) (amend. 7).

30. 96 Wash. 2d at 252-53, 635 P.2d at 120-21.

He distinguished the initiative process from other forms of petitioning, noting that under article 2, section 1(a), the petitioners are "part of the apparatus of government—the legislative branch."[31]

The remaining four justices dissented, in an opinion Justice Stafford authored, disagreeing with both the Dolliver and Utter opinions. Acknowledging that the police power would allow the state legislature to subordinate the Associates' property rights to the council's speech rights, the dissenting justices found no such legislative intent in the initiative clause itself.[32] Furthermore, the justices stated that the abrogation of the state action requirement removed reasonable limitations on the exercise of free speech and inappropriately deviated from the reasoned principles of federal constitutional law.[33]

As Justice Utter recognized,[34] state courts may interpret their constitutions without regard to the Supreme Court's interpretation of the federal Constitution, providing that the states do not deny their citizens liberties that the federal Constitution guarantees.[35] Despite this freedom of construction, state courts have often relied upon federal precedent for interpretation of state constitutional provisions with federal counterparts.[36] The public function analysis is a method of establishing state action that states have borrowed from federal case law and used to interpret their own constitutions, thereby incorporating the analysis into their own body of precedent.

Under the public function doctrine, private parties perform-

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31. *Id.* at 253, 635 P.2d at 121.

32. If the State had in any manner imposed such a restriction I would reverse the trial court, but no such limitation has ever been enacted. Nevertheless, the concurrence would, without either analysis or construction of [Art. 2, § 1(a) (amend. 7)], establish a new restriction on property rights. The resulting restriction then would be carved into constitutional granite.

Id. at 254, 635 P.2d at 121.

33. *Id.*

34. 96 Wash. 2d at 237, 635 P.2d at 112.

35. PruneYard Shopping Center v. Robins, 447 U.S. 74, 81 (1980); Oregon v. Hass, 420 U.S. 714, 719 (1975); Sibron v. New York, 392 U.S. 40, 60-61 (1968); Cooper v. California, 386 U.S. 58, 62 (1967); Johnson v. New Jersey, 384 U.S. 719, 733 (1966).

36. *See* In re George F. Nord Bldg. Corp., 129 F.2d 173 (7th Cir.), *cert. denied*, 317 U.S. 670 (1942); Pico v. Board of Educ., Island Trees Union Free School Dist., 474 F. Supp. 387 (E.D.N.Y. 1979), *rev'd on other grounds*, 638 F.2d 404 (1980); KPOJ, Inc. v. Thornton, 253 Or. 512, 456 P.2d 76 (1969). *See also* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 878 (1976).

ing "inherently governmental"[37] activities must adhere to constitutional restrictions otherwise applicable only to the government.[38] The Supreme Court began its development of the public function doctrine in *Marsh v. Alabama*.[39] In *Marsh*, the deputy sheriff of a company town[40] arrested a Jehovah's Witness for trespassing[41] when she refused to stop distributing religious literature on the town's sidewalks.[42] The Court reasoned that "the more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[43] Then, the Court balanced the constitutional rights of property owners against the preferred rights of freedom of press and religion,[44] and reversed appellant's conviction.[45] Stressing that the privately owned town functioned indistinguishably from a public municipality,[46] the Court held that citizens of a privately owned town are no less entitled to the freedoms of press and religion than are citizens of a public municipality.[47]

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37. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 18-5 (1978).

38. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 456 (1978).

39. 326 U.S. 501 (1946). Additional cases dealing with reconciliation of free speech and private property claims include Carey v. Brown, 447 U.S. 455 (1980); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, *reh'g denied*, 445 U.S. 972 (1980); Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters, 436 U.S. 180 (1978); Hudgens v. NLRB, 424 U.S. 507 (1976); Central Hardware Co. v. NLRB, 407 U.S. 539 (1972); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Taggart v. Weinacker's, Inc., 397 U.S. 223 (1970).

40. The Gulf Shipbuilding Corporation owned the property on which the town of Chickasaw was situated. The Court compared Chickasaw to other American towns, stating that it was composed of "residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated." 326 U.S. at 502.

41. Title 14, Section 426 of the 1940 Alabama Code made it a crime to enter or remain on another's premises after having been warned not to do so. *Id.* at 503-04. The corporation posted notices in the stores in the business district prohibiting solicitation without permission. Further, appellant had been warned that she could not distribute her literature without a permit and that she would not be granted one. *Id.* at 503.

42. *Id.*

43. *Id.* at 506, *citing* Republic Aviation Corp. v. NLRB, 324 U.S. 793, 802 n.8 (1945).

44. 326 U.S. at 509.

45. *Id.* at 510.

46. *Id.* at 502, 503, 505, 508.

47. *Id.* at 508-09. Justice Black began the Court's analysis by stating that if Chickasaw had been a public municipality, appellant's conviction would clearly have required reversal. *Id.* at 504.

In *Food Employees Local 590 v. Logan Valley Plaza, Inc.*,[48] the Court extended the public function analysis to a privately owned shopping center. *Logan Valley* upheld union picketing of a nonunion market located within a shopping center complex.[49] The Court conceded that the power to exclude was a right traditionally associated with private property ownership,[50] but held that because the shopping center was the functional equivalent of the business district in *Marsh*,[51] "the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the purpose to which the property is actually put."[52]

Four years later, in *Lloyd Corp. v. Tanner*,[53] the Supreme Court severely limited the precedential value of *Logan Valley*.[54] Respondents sought relief after employees of a privately owned shopping center requested that they cease distributing anti-war handbills inside the Center.[55] The Court held for the shopping center,[56] distinguishing *Logan Valley* on two grounds. First,

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48. 391 U.S. 308 (1968).

49. *Id.* at 309. Shortly after opening, Weis, the owner of the market, posted a sign prohibiting trespassing or soliciting by anyone except the market's employees on its porch or parking lot. Nine days later, nonemployee union members began peacefully picketing Weis because it was nonunion. The picketing took place almost entirely in the parcel pickup area and the immediately adjacent portion of the parking lot, and did not congest the parcel pickup area. *Id.* at 311-12.

50. *Id.* at 319.

51. *Id.* at 318. Unlike the Gulf Shipbuilding Corporation in *Marsh*, the Logan Valley Plaza did not own the surrounding residential property. However, the Court did not find this fact determinative. *Id.* The Court found the determinative fact in *Marsh* to have been private property functioning as a public business district. *Id.* Therefore, the Court did not distinguish the business district in a company town surrounded by company owned property of *Marsh* from private property functioning as a business district of *Logan Valley*. *Id.* at 319.

52. *Id.* at 319-20. However, the Court held the exercise of first amendment rights on private property to be subject to reasonable restrictions. Permissible restrictions include those preventing interference with the use to which the property is ordinarily put. *Id.* at 320.

53. 407 U.S. 551 (1972).

54. In Hudgens v. NLRB, 424 U.S. 507, 519 (1976), the Court stated that "the ultimate holding in *Lloyd* amounted to a total rejection of the holding in *Logan Valley*."

55. Lloyd's security guards told the handbillers that they were trespassing and would be arrested unless they stopped distribution. 407 U.S. at 557. Since commencing operations, the Center, a large privately owned shopping complex, had strictly enforced its policy against handbilling. *Id.* at 556.

56. *Id.* at 571. As noted in 30 DRAKE L. REV. 422, 427 n.60 (1980), the *Lloyd* decision may be partially attributed to a change in the Court's composition. Between *Logan Val-*

unlike the picketing in *Logan Valley*, the handbilling in *Lloyd* bore no relation to the Center's purpose.[57] In addition, the picketers in *Logan Valley* were denied all reasonable opportunity to convey their message to the public; the handbillers in *Lloyd* were not.[58] Although the Court did not indicate the weight to which an owner's property rights are entitled,[59] it held that "[i]t would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative means of communication exist."[60] Such an accommodation would diminish the property owner's rights without enhancing the speaker's first amendment rights.[61]

PruneYard Shopping Center v. Robins[62] is the Court's most

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ley in 1968 and *Lloyd* in 1972, Justices Burger, Powell, Blackmun, and Rehnquist replaced Justices Warren, Fortas, Black, and Harlan. In *Lloyd*, the four new justices joined Justice White, who had dissented in *Logan Valley*, and formed a new majority.

57. 407 U.S. at 565. The Court posited that the handbillers' message was not directed toward Lloyd Center patrons exclusively, but to the general public. The handbillers could have distributed their information on any public street or sidewalk or in any park or building in the city. Furthermore, Lloyd's invitation to the public was limited to an invitation to do business with the merchants in the complex. *Id.* at 565-66.

58. *Id.* at 566-67. *See supra* note 57.

59. The Court stated that the due process clauses of the fifth and fourteenth amendments as well as the taking clause of the fifth amendment were relevant. 407 U.S. at 567.

60. *Id.*

61. *Id.* at 568. The Court noted that although the fundamental rights provided by the first, fifth, and fourteenth amendments are not necessarily incompatible, there may be situations in which their accommodation is not easy. *Id.* at 570. However, in this case the Court easily made the required accommodation. *Id.* at 571.

62. 447 U.S. 74 (1980). *PruneYard* has received extensive comment: Cohen, PruneYard Shopping Center v. Robins: *Past Present and Future*, 57 CHI.-KENT L. REV. 373 (1981); Note, *State Constitutions and Freedom of Speech on Private Property*, 18 AM. BUS. L.J. 562 (1981); Recent Development, *Freedom of Speech v. Right to Privacy*, 5 AM. J. TRIAL ADVOC. 717 (1981); *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 169 (1980); Comment, PruneYard Shopping Center v. Robins, 9 HOFSTRA L. REV. 289 (1980); 30 DRAKE L. REV. 422 (1980-81); 32 MERCER L. REV. 637 (1981); XXXII U. FLA. L. REV. 760 (1980); 13 U. WEST L.A. L. REV. 171 (1981); 20 WASHBURN L. J. 453 (1981).

Recently, commentators have urged state courts to focus their attention on state constitutions when contemplating questions concerning personal liberties. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Countryman, *The Role of a Bill of Rights in a Modern State Constitution: Why a State Bill of Rights?* 45 WASH. L. REV. 453 (1970); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976). Foreseeing an end to an era of activism, Justice Brennan has suggested that state courts should be the new guardians of individual liberties. Brennan, *supra* at 491. Another commentator has suggested the following factors for state courts to consider when evaluating state constitutional questions independently of the federal constitution: the textual language of the provision, the history and tradition of the state, the nature of the subject matter and the

recent decision addressing the conflict between a property owner's constitutional rights and a citizen's free speech rights in the context of a privately owned shopping center. The Court held that states may interpret their constitutions broadly[63] to allow their citizens to exercise free speech in a shopping center without violating the property owner's fifth, first, and fourteenth amendment rights.[64] In *PruneYard,* a group of students sought to enjoin a privately owned shopping center from refusing to allow them to distribute handbills and solicit petition signatures inside the mall.[65] The California Supreme Court decided that the California constitution protected reasonably exercised speech and petitioning in a privately owned shopping center.[66]

The United States Supreme Court affirmed,[67] acknowledging that a state may impose reasonable restrictions on private property in exercise of its police power if the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision.[68] Because the students' activity did not impair the property's use as a shopping center, permitting the students to exercise their state protected free expression and petitioning rights in the center did not violate the owner's fifth amendment property rights.[69] In addition, the

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interests affected by the local political process, the extent to which the Supreme Court has shown a "hands-off" attitude toward the subject matter, the ease of amending the state constitution, the extraterritorial effect of any decision, the effect of "constitutionalizing" any area of the law, whether the court is legislating and finally, whether the court is establishing unascertainable standards. Howard, *supra* at 934-44.

63. The Court noted that *Lloyd* had not limited a state's authority to adopt more expansive personal liberties in its own constitution than those provided by the federal Constitution. 447 U.S. at 81, *citing* Cooper v. California, 386 U.S. 58, 62 (1967). The court distinguished *Lloyd* as not involving construction of a state constitutional or statutory provision. 447 U.S. at 81.

64. 447 U.S. at 88.

65. *Id.* at 77. In a peaceful and orderly fashion, the students solicited signatures for their petition opposing a United Nations resolution against "Zionism." The PruneYard had strictly and nondiscriminatorily enforced its policy against public expressive activity unrelated to its commercial purposes. *Id.*

66. *Id.* at 78, *citing* 23 Cal. 3d 899, 910, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860 (1979).

67. 447 U.S. at 88.

68. *Id.* at 81.

69. *Id.* at 83. The Court held that it would recognize as a taking only a regulation which went "too far." *Id.* The Court admitted that a "taking" had occurred to the extent that California allowed its citizens to exercise free speech and petition rights on privately owned property, but advised that not every injury to property is a "taking" in the constitutional sense. *Id.* at 82, *citing* Armstrong v. United States, 364 U.S. 40, 48 (1960). The Court held that the test for whether state action violates the taking clause of the fifth amendment requires an inquiry into "the character of the governmental action, its eco-

property owner failed to establish a denial of due process[70] or a violation of his first amendment right not to be forced to use his property as a forum for the speech of another.[71]

A Washington court relied on the federal courts' public function doctrine as a method of establishing state action in the shopping center context in *Sutherland v. Southcenter Shopping Center, Inc.*[72] In *Sutherland,* the court of appeals addressed the issue "whether an unconsented invasion of the property rights of owners of land to solicit signatures for an initiative is protected by the first and fourteenth amendments of the United States Constitution and by article 1, sections 4, 5, and 9 of the Wash-

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nomic impact, and its interference with reasonable investment-backed expectations." 447 U.S. at 82-83, *citing* Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

Not only are Washington property owners' rights protected by the federal Constitution, they are also protected by the Washington constitution. Article 1, § 3 states: "[N]o person shall be deprived of life, liberty or property, without due process of law." Article 1, § 16 states in part: "[N]o private property shall be taken or damaged for public or private use without just compensation having first been made . . . . Whenever an attempt is made to take private property for use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public . . . ." The *Alderwood* court did not address the issue of whether the Washington constitutional protections of property rights are different from the federal protections under the fifth and fourteenth amendments as defined in *PruneYard* and *Lloyd.* The state constitutional language is substantially similar to that of the federal provisions, and case law indicates the state has deferred to federal interpretations of the fourteenth amendment when interpreting article 1, section 3. In Petstel, Inc. v. County of King, 77 Wash. 2d 144, 153, 459 P.2d 937, 942 (1969), the court stated:

> We note that our constitutional provision, 'No person shall be deprived of life, liberty, or property, without due process of law', is the same as that in the federal constitution; and that the federal cases while not necessarily controlling should be given 'great weight' in construing our own due process provision.

See also Herr v. Schwager, 145 Wash. 101, 258 P. 1039 (1927); Bowman v. Waldt, 9 Wash. App. 562, 513 P.2d 559 (1973).

70. 447 U.S. at 85. The Court noted that due process required "only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Id., citing* Nebbia v. New York, 291 U.S. 502, 525 (1934).

71. 447 U.S. at 85-87. The Court distinguished Wooley v. Maynard, 430 U.S. 705 (1977), upon which the property owner relied for the proposition that a state may not require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that the public observe it. *Id.* Because the PruneYard was not limited to the owner's personal use, the public was not likely to interpret the views of those who exercised their free speech rights on the premises as those of its owner. Additionally, the state of California did not dictate that a specific message be displayed on the owner's property. Finally, the Court asserted that PruneYard's owner could expressly disavow any message by posting signs near the person exercising his free speech rights. *Id.*

72. 3 Wash. App. 833, 478 P.2d 792 (1970).

ington State Constitution."[73] The court reasoned that the privately owned shopping center met the constitutional state action requirement by using deputized security personnel and by invoking the state's authority to establish an action for criminal trespass.[74] Because the court decided *Sutherland* on the basis of *Logan Valley*, it is not surprising that the court upheld petitioners' right to solicit signatures in the privately owned shopping center.[75] The importance of *Sutherland* to *Alderwood*, however, lies in the two fundamental assumptions the *Sutherland* court made in rendering its decision.

First, the *Sutherland* court implicitly assumed that article 1, section 5 of the Washington constitution and the first amendment of the United States Constitution provided identical protections to state citizens.[76] Second, the court applied a state action analysis in order to determine whether the shopping center's activities implicated state and federal protections. It analyzed the state action requirement through the public function doctrine, implying that by using deputized security personnel and by relying on the state's authority to establish an action for criminal trespass, the shopping center was engaging in inherently governmental activities and must therefore adhere to constitutional restrictions.[77] In conjunction, these two assumptions demonstrate that when the court of appeals decided *Sutherland*, it interpreted article 1, section 5 of the state constitution as being identical to the first amendment, thereby incorporating federal precedent concerning the first amendment into Washington's construction of article 1, section 5. In addition, the *Sutherland* court considered article 1, section 5 as including a state action requirement that could be met through a public function analysis. Washington courts did not consider the question again until *Alderwood*.

Justice Utter's *Alderwood* opinion not only failed to account adequately for *Sutherland*'s reliance on federal precedent in the

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73. *Id.* at 835, 478 P.2d at 793.

74. *Id.* at 836, 478 P.2d at 794.

75. *Id.* at 848, 478 P.2d at 800.

76. Even though the court stated the issue as "whether an unconsented invasion of the property rights of owners of land to solicit signatures for an initiative is protected by the first and fourteenth amendments of the United States Constitution and by article 1, sections 4, 5, and 9 of the Washington State Constitution," *Id.* at 835, 478 P.2d at 793, the court analyzed the issue exclusively on the basis of Supreme Court construction of the first amendment.

77. *Id.* at 836, 478 P.2d at 794.

public function arena,[78] but it also failed to account for Washington courts' interpretation of article 1, section 5 in cases not involving shopping centers. Although, unlike its federal counterpart, the literal language of article 1, section 5 does not include a state action requirement,[79] Washington courts have historically implied such a requirement into the section, consistently interpreting section 5 as the state's equivalent of the first amendment.[80] As recently as 1980, the Washington State Supreme Court noted that "[t]he state equivalent of the First Amendment is Const. art. 1, § 5 . . . ."[81]

Although, as Justice Utter recognized in *Alderwood,* Washington courts are free to interpret article 1, section 5 of the Washington constitution without regard to the Supreme Court's interpretation of the first amendment,[82] this power did not originate in *PruneYard.*[83] Until *Alderwood,* Washington courts exercised this choice by interpreting article 1, section 5 as being identical to the federal first amendment.[84] By disposing entirely of the state action requirement in a constitutional provision Washington courts have traditionally considered equivalent to the first amendment, the justices inappropriately disregarded Washington's constitutional precedent.

Furthermore, the Utter opinion maintained that California has a constitutional provision similar to article 1, section 5.[85] It suggested that California's provision provided the model for Washington's article 1, section 5, and implied that similar construction of the sections is appropriate.[86] Utter and those who

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78. Justice Utter discounted the value of *Sutherland* because the court of appeals decided it on the basis of *Logan Valley,* which *Lloyd* and *Hudgens* overruled. 96 Wash. 2d at 239, 635 P.2d at 113. He distinguished *Sutherland* on the ground that "this case is representative of an area where the law has remained constant while society, in both its expectations and behavior, has changed." 96 Wash. 2d at 239, 635 P.2d at 113-14.

79. *Id.* at 240, 635 P.2d at 114.

80. In Fine Arts Guild, Inc. v. Seattle, 74 Wash. 2d 503, 512, 445 P.2d 602, 607 (1968), the court stated: "We have, however, in varying contexts, applied the provisions of Const. art. 1, § 5, and the first amendment to the United States in *pari materia* and inferentially interchangeable." *See also* Nostrand v. Balmer, 53 Wash. 2d 460, 483, 335 P.2d 10, 23 (1959); *infra* text accompanying note 81.

81. Federated Publications, Inc. v. Kurtz, 94 Wash. 2d 51, 58, 615 P.2d 440, 444 (1980).

82. 96 Wash. 2d at 241, 635 P.2d at 113.

83. *See supra* note 35.

84. *See supra* text accompanying notes 80-81.

85. 96 Wash. 2d at 240, 635 P.2d at 114.

86. *Id.* at 240-41, 635 P.2d at 114. "The California constitutional speech guarantee, article 1, section 2, is substantially similar to section 5. In fact, section 5 was modeled

joined in his opinion relied on *Robins v. PruneYard Shopping Center*[87] for the conclusion that the California Supreme Court has held that its constitutional provision does not require state action.

This interpretation of *Robins* may be misleading. The California court did not employ a state action analysis in order to reach the conclusion that the petitioners in *Robins* could enter onto private property.[88] The court overruled California precedent prohibiting free speech activity on shopping center property,[89] reasoning that the state's common law could be used to protect the petitioner's rights. The court stated that under *Hudgens v. NLRB*,[90] a state's statutory or common law may extend an individual's freedom of speech rights even on private property.[91] Reviewing California case law, the court concluded that the state had a history of affording stronger free speech

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after it." The California free speech provision was originally contained in the California constitution at article 1, section 9. It was substantially the same as the current provision stating, "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." The provision was amended in 1974.

87. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979).

88. Comment, Robins v. PruneYard Shopping Center: *Free Speech Access to Shopping Centers Under the California Constitution*, 68 CALIF. L. REV. 641, 656-58 (1980). The author states that the California Supreme Court "has yet to announce any deviation from the federal state action standard" and notes that the *Robins* court did not raise the state action issues. Thus he concludes " . . . given the court's silence, it is more probable that it was reserving judgment on the state action issue." *But see*, Comment, Robins v. PruneYard Shopping Center*: Federalism and State Protection of Free Speech*, 10 GOLDEN GATE L. REV. 805, 806 (1980).

89. 23 Cal. 3d at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860. The court overruled Diamond v. Bland, 11 Cal. 3d 331, 521 P.2d 460, 113 Cal. Rptr. 468 (1974) (Diamond II). In Diamond v. Bland, 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970) (Diamond I), the California Supreme Court held that, under *Marsh* and *Logan Valley*, plaintiffs could solicit signatures for an anti-pollution initiative and distribute leaflets on a privately owned shopping center. In *Diamond II*, decided after *Lloyd*, the court removed the permanent injunction restraining defendants from excluding the signature gatherers from the shopping center property.

90. 424 U.S. 507 (1976). The Supreme Court stated:

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

Id. at 513.

91. 23 Cal. 3d at 905, 592 P.2d at 344, 153 Cal. Rptr. at 857. *See* Brief of Plaintiff at 34, Alderwood Associates v. Washington Environmental Council, 96 Wash. 2d 230, 635 P.2d 108 (1981).

guarantees under its own constitution than those afforded under the federal Constitution.[92] Furthermore, despite the absence of any specific state regulation, the court implied that its holding was supported by the use of the state's police power to subject private property to the rights of individuals.[93]

The Utter opinion advanced substantially the same argument in regard to the New Jersey constitution.[94] Stating that the New Jersey guarantee is similar to the Washington provision,[95] Justice Utter argued that the New Jersey constitution does not contain a state action requirement under the New Jersey Supreme Court holding in *State v. Schmid.*[96] In *Schmid,* the defendant entered the premises of Princeton University, and distributed political materials.[97] Under university regulations, off-campus organizations needed university permission before selling or distributing political materials on campus. Schmid did not receive permission; consequently, he was arrested and con-

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92. 23 Cal. 3d at 908, 592 P.2d at 346, 153 Cal. Rptr. at 860.

93. The court stated, "To protect free speech and petitioning is a goal that surely matches the protecting of health and safety, the environment, aesthetics, property values and other societal goals that have been held to justify reasonable restrictions on private property rights." 23 Cal. 3d at 908, 592 P.2d at 346, 153 Cal Rptr. at 859.

However, Justice Richardson, dissenting in *Robins,* objected to the court's use of the police power to justify its holding. He stated, "The 'zoning for free speech uses' which the majority attempts to accomplish today goes far beyond any traditional police power regulation. Such unprecedented fiat has no support in constitutional, statutory or decisional law." *Id.* at 916, 592 P.2d at 351, 153 Cal. Rptr. at 864.

The justices also relied on Laguna Pub. Co. v. Golden West Pub. Corp., 110 Cal. App. 3d 43, 167 Cal. Rptr. 687 (1980) to support their contention that article 2, section 1, of the California constitution contains no state action requirement. In *Laguna,* the plaintiffs were denied permission to distribute free literature in a privately owned residential community where defendant was allowed to make the same kind of distribution. Plaintiffs alleged their exclusion from the privately owned premises violated their right to free speech under the California constitution article 2, section 1. The court held the private residential community did not perform a public function as defined in *Marsh.* Therefore, excluding plaintiff did not constitute state action. Instead, the court held that, under *Prune Yard,* the private community could exclude all newspaper distributors. However, once they had voluntarily admitted the defendant to the premises, they could not exclude other distributors falling within the same category from exercising the same right.

94. N.J. CONST. art. I, § 6.

95. The Utter opinion states, "New Jersey also has a constitutional provision like ours. The New Jersey Supreme Court has held, like the court in California, that its provision does not require 'state action'." 96 Wash. 2d at 241, 635 P.2d at 114-15.

96. 84 N.J. 535, 423 A.2d 615 (1980), *appeal dismissed,* 50 U.S.L.W. 4159 (U.S. Jan. 12, 1982).

97. 84 N.J. at 538-39, 423 A.2d at 616-17. The defendant was a member of the United States Labor Party. The political materials concerned both the United States Labor Party and the Newark mayoral campaign.

victed of trespass.[98] In holding for Schmid, the New Jersey Supreme Court rejected the argument that the federal first amendment protected Schmid's activities.[99] The court decided, however, that the state constitution article 1, section 6 provided a basis for protection of free speech on a private university's property. Bringing together several strands of analysis, the court stated that freedom of speech had been given strong protection under the New Jersey constitution,[100] and on occasion the state guarantee of free speech had been asserted against private as well as public entities.[101] This was not because the state constitution lacked a state action requirement, but because the doctrine of state action had less force under state constitutions.[102] Furthermore, the court stressed the "mutuality" of the federal first amendment and the New Jersey constitution's article 1, section 6.[103] Although no state regulation was involved in the facts of the case, the court also discussed the ability of the state, through its police power, to reasonably restrict the ability of property owners to limit expressive activity on their property.[104] In resolving the conflict between the university's property rights and Schmid's right to free speech in favor of Schmid, the court

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98. *Id.* at 538-41, 423 A.2d at 617-18.

99. Rejecting Schmid's claim to federal protection, the court held the private university was not an arm of the state government and did not perform a public function under the *Lloyd* decision. Furthermore, the state constitution provided alternatives to federal relief. *Id.* at 551-53, 423 A.2d at 619, 623-24.

100. *Id.* at 556-57, 423 A.2d at 626.

101. Finally, the rights of speech and assembly guaranteed by the State Constitution are protectable not only against governmental or public bodies, but under some circumstances against private persons as well. It has been noted that in our interpretation of fundamental State constitutional rights there are no constraints arising out of principles of federalism.

Id. at 559-60, 423 A.2d at 628.

102. "Hence, federal requirements concerning 'state action,' founded primarily in the language of the Fourteenth Amendment and on principles of federal-state relations, do not have the same force when applied to state based constitutional rights." *Id.* Justice Schreiber stated in his concurring opinion, however, that "[u]nlike its counterpart in the Federal Constitution, the New Jersey constitutional guaranty of free speech is not circumscribed by the need to find state action." *Id.* at 580, 423 A.2d at 639.

103. [T]here nonetheless exist meaningful parallels between the federal Constitution and state constitutions, especially in the areas where constitutional values are shared, such as speech and assembly. Indicative of such mutuality, our State Constitution not only affirmatively guarantees to individuals the rights of speech and assembly, but also expressly prohibits government itself, in a manner analogous to the federal First and Fourteenth Amendments, from unlawfully restraining or abridging "the liberty of speech."

Id. at 560, 423 A.2d at 628.

104. *Id.* at 561-63, 423 A.2d at 629.

used a test with three factors. The factors were: the nature of the property and its primary use, the extent of public invitation to use the property, and the purpose of the expressive activity.[105] Thus, rather than clearly determining that the New Jersey constitutional provision did not contain a state action requirement, the court appeared to expand the concept of state action to include the university.

In addition to its reliance on the California and New Jersey decisions, the Utter opinion maintains that the Washington Supreme Court is not constrained by the "conservative theoretical approach" necessary at the federal court level. While this may be true, it is not a sufficient rationale for abandoning a state action requirement in the state constitution.[106] Not only does the state action requirement of the federal Constitution limit the ability of individuals to assert their first amendment rights against anyone except the government, or entities with certain governmental attributes, it also protects the private property owner's right to exclude those who wish to enter his premises to pursue constitutionally protected speech activity.[107] Justice Stafford recognized that abrogation of the state action doctrine could leave the lower courts free to require private home owners to allow signature gatherers to solicit passersby from the home owner's front yard.[108] Furthermore, without a state action requirement, every conflict between private property rights and free speech rights would be elevated to a constitutional issue. As one commentator suggested, this could result in greater judicial intervention in the regulation of property rights.[109]

Instead of relying on the principled analysis of the state action doctrine as a basis for limiting the exercise of free speech, Justice Utter's opinion unnecessarily confused future interpretations of article 1, section 5 by imposing a balancing test to protect both the rights of the signature gatherers and the property owner.[110] The opinion justified the balancing test by stating

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105. *Id.* at 562-64, 423 A.2d at 630.

106. *See, Project Report, Toward an Activist Role of State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 290 (1973).

107. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 1147 (1978).

108. 96 Wash. 2d at 254 n.10, 635 P.2d at 121 n.1.

109. Comment, Robins v. PruneYard Shopping Center: *Free Speech Access to Shopping Centers Under the California Constitution*, *supra* note 88, at 659.

110. 96 Wash. 2d 243-44, 635 P.2d at 116.

that, freed from the restraints of federal interpretations of the state action requirement, the Washington courts would be better able to protect both speech and property interests.[111] However, the proposed balancing test reflects nearly the same considerations as would a state action analysis. Most importantly, the test would still examine the extent to which the private property serves a public function.[112]

Rather than abandoning state action, the Washington Supreme Court could have relied on *PruneYard* and acknowledged the utility of a state action requirement in the Washington constitution article 1, section 5. The court could have defined the public function attributes necessary to establish state action more liberally to include shopping malls.[113] Recent cases involving shopping centers have demonstrated that they are an important public forum, providing superior access to the large numbers of people who are attracted to the goods and services offered for sale on their premises.[114] The court could have

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111. *Id.*

112. The *Alderwood* approach involves balancing several factors. "The first is the use and nature of the private property. As property becomes the functional equivalent of a downtown area or other public forum, reasonable speech activities become less of an intrusion on the owner's autonomy interest." *Id.* at 244, 635 P.2d at 116. This approach is very similar to the public function analysis outliined in the following cases: Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Amalgamated Food Employees Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1969); Marsh v. Alabama, 326 U.S. 501 (1946).

113. This approach was suggested in *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 300-01.

> A number of commentators have suggested that the public function doctrine ought to be expanded into a general proposition that as an enterprise takes on the characteristics of government, it ought to become subject to the obligations of government. More specifically, it has been proposed that large business and social organizations ought to be regulated by the Bill of Rights not just insofar as they open their real property to the public but in all their quasi-governmental functions. . . . In sum, the regulation of large organizations could prove to be one of the most fertile areas for state bill of rights development.

See also Countryman, *The Role of a Bill of Rights in a Modern State Constitution: Why a State Bill of Rights?* 45 WASH. L. REV. 453, 473 (1970).

114. *See,* Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 310-11 (1968); Robins v. PruneYard Shopping Center, 23 Cal. 3d 899, 902, 592 P.2d 341, 342, 153 Cal. Rptr. 854, 855 (1979); Diamond v. Bland, 3 Cal. 3d 653, 655, 477 P.2d 733, 734, 91 Cal. Rptr. 501, 502 (1970) (Diamond I); Diamond v. Bland, 11 Cal. 3d 331, 342, 521 P.2d 460, 468, 113 Cal. Rptr. 468, 476 (1974) (Diamond II) (Mosk, J., dissenting); Sutherland v. Southcenter Shopping Center, Inc., 3 Wash. App. 833, 835, 478 P.2d 792, 793 (1970); Brief of the Defendants at 27-31, Alderwood Associates v. Washington Environmental Council, 96 Wash. 2d 230, 635 P.2d 108 (1980); Brief Amicus Curiae at 4-5, Alderwood Associates v. Washington Environmental Council, 96 Wash. 2d 230, 635 P.2d 108 (1980).

provided access to these forums and avoided jeopardizing property rights in other factual contexts. By simply returning to a public function analysis as found in *Logan Valley*, the same balance of constitutional rights could have been achieved.

The majority opinions in *Schmid* and *Robins*, and Justice Dolliver's opinion in *Alderwood*, suggest that the state's police power would allow the state legislature to subordinate the shopping mall owner's property rights to the rights of the signature gatherers. While the federal government is one of enumerated powers and must find authority in the Constitution to support its actions, the state government is one of retained powers. Thus, under the state's police power, state regulations are presumptively valid unless forbidden by the state or federal constitution.[115] In Washington, restrictions on constitutionally guaranteed rights are valid if the regulation bears a reasonable relationship to the promotion of the health, peace, morals, education, good order, or welfare of the citizens of the state.[116] A regulation under the police power does not amount to a taking of private property.[117] In *Lloyd*, the Supreme Court indicated that reasonable regulation of access to shopping centers was not offensive to federally protected property rights.[118] However,

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115. U.S. Const. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *See also, Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 298 (1973).

116. State v. Conifer Enterprises, Inc., 82 Wash. 2d 94, 508 P.2d 149 (1973); Conger v. Pierce Cty., 116 Wash. 27, 198 P. 377 (1921); State v. Gossett, 11 Wash. App. 864, 527 P.2d 91 (1974).

117. In *Conger v. Pierce County* the court stated,

> It is easy to understand the principles upon which the police power doctrine is based, but difficult to define in language its limitations. It is not inconsistent with nor antagonistic to the rules of law concerning the taking of private property for a public use. . . . It has been defined as an inherent power in the state which permits it to prevent all things harmful to the comfort, welfare and safety of society. It is based on necessity. It is exercised for the benefit of the public health, peace and welfare. Regulating and restricting the use of private property in the interest of the public is its chief business. It is the basis of the idea that the private individual must suffer without other compensation than the benefit to be received by the general public. . . . Eminent domain takes private property for a public use, while the police power regulates its use and enjoyment, or if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health and general welfare of the public.

116 Wash. at 35-36, 198 P. at 380 (1921).

118. The Court stated:

> This is not to say that no differences may exist with respect to government regulation or rights of citizens arising by virtue of the size and diversity of

none of these cases involve a regulation providing for entrance onto privately owned shopping malls by those who wish to exercise their right to free speech.

The *Alderwood* court has clearly identified a protectable public interest in the free exercise of the initiative and petitioning process. Moreover, the decline of the publicly owned downtown shopping area and the recent rise of the privately owned shopping center have curtailed this interest. The number of cases illustrating the same clash of interests demonstrates the need for legislative regulation of access for the purpose of exercising speech rights, particularly of political speech rights. Such regulation was necessary prior to the decision in *Alderwood* and perhaps, because of the variety of opinions in *Alderwood,* will be forthcoming.

In conclusion, although the Utter opinion correctly interpreted *PruneYard* as an acknowledgment of the states' authority to grant their citizens broader free speech rights than those guaranteed by the first amendment, it imprudently concluded that the Washington Supreme Court was therefore unfettered in its disposal of the state action requirement in Washington's constitutional free speech provision. Examination of Washington's constitutional history reveals an incorporation of the public function analysis as a method of establishing state action in a claim under article 1, section 5 of the Washington constitution. Additionally, the reliance on California and New Jersey supreme court decisions as authority for abandoning the state action requirement in Washington's constitution failed to reveal substantive parallels and is therefore unpersuasive. The court could have relied upon the public function analysis as a basis of establishing state action in *Alderwood* and avoided jeopardizing property rights in other factual contexts. Instead, it established the potential of a constitutional conflict every time private property rights conflict with free speech rights.

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activities carried on within a privately owned facility serving the public. There will be, for example, problems with respect to public health and safety which vary in degree and in the appropriate government response, depending upon the size and character of a shopping center, an office building, a sports arena, or other large facility serving the public for commercial purposes.

Lloyd Corp. v. Tanner, 407 U.S. 551, 569-70 (1972).