CROSS & VAIL

Attorneys at Law

Memorandum

Re: Dogs R Us

To: Alex Associate

From: Jane Whitefield

We represent an animal rights group, Dogs R Us. Dogs R Us has as its purpose the prevention of the use of animals in research, especially research involving cosmetics.

Dogs R Us has targeted several cosmetics firms known to test their products on dogs, and other animals, prior to releasing the products on the market. One of the firms is LucyMae cosmetics, which produces a variety of creams for use by women. Dogs R Us obtained from a disgruntled former LucyMae employee a photograph of several dogs used in LucyMae research. I shall not go into detail, but the photograph was gruesome. Dogs R Us reproduced the photograph in a flyer. The flyer describes LucyMae as an abuser of animals and asks the consumer to boycott LucyMae products.

The local Dogs R Us chapter in central Iowa has been distributing the flyers in shopping centers, but has been turned out of several. The most recent was the Ames Mall in Ames, Iowa. We have been retained to challenge this ouster. Look into this for me. Please.

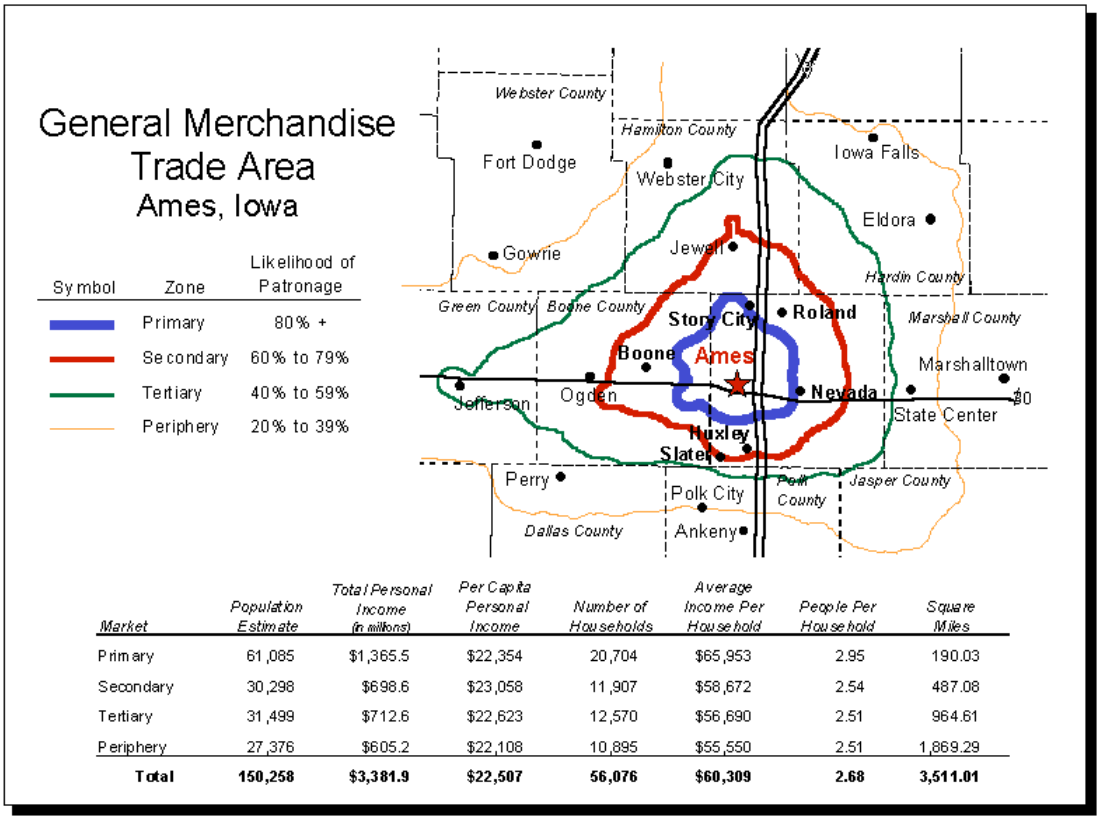
Memorandum

Re: Dogs R Us

To: Alex Associate

From: Perry Paralegal

Ames is about 30 miles north of Des Moines. It is home to Iowa State University, a school well known for agriculture. This will give you a picture of the business market:



Market	Population Estimate	Total Personal Income (in millions)	Per Capita Personal Income	Number of Households	Average Income Per Household	People Per Household	Square Miles
Primary	61,085	$1,365.5	$22,354	20,704	$65,953	2.95	190.03
Secondary	30,298	$698.6	$23,058	11,907	$58,672	2.54	487.08
Tertiary	31,499	$712.6	$22,623	12,570	$56,690	2.51	964.61
Periphery	27,376	$605.2	$22,108	10,895	$55,550	2.51	1,869.29
Total	**150,258**	**$3,381.9**	**$22,507**	**56,076**	**$60,309**	**2.68**	**3,511.01**

The Ames Mall is between the city of Ames and the town of Huxley. It is an enclosed mall, typically housing about 27 stores. Two of the stores are magnet stores—Belt & Lothrup and Squiggles. Both of these stores carry LucyMae products. Some of the products carry the LucyMae label but others are "house brands". The stores have "declined" to pull LucyMae products off the shelves.

The mall has four entrances. On the first occasion when Dogs R Us was ousted by Story county police, members were handing out the leaflets at each of the mall entrances. According to the client, about 60% of the mall customers were willing to look at the leaflet. Of those, it is estimated that 20% turned around and left the mall. The leaflet at this time identified LucyMae but not the stores carrying the product. The leaflet was then revised to identify the two magnet stores, and Dogs R Us asked to hand out the leaflets at the entrance to those stores. Again, permission was refused.

I think the Iowa Supreme Court has doomed our client's case. I put the *Lacey* case first. A New Jersey case summarizes the law elsewhere and I included it so you can decide whether *Lacey* can be distinguished from our case.

STATE OF IOWA v. LACEY

465 N.W.2d 537
Supreme Court of Iowa, 1991

CARTER, J.

Defendants, Edward Joseph Lacey and Robert D. Novak, appeal from convictions of criminal trespass as defined in Iowa Code section 716.8(1) (1989). Defendants were charged after refusing to leave the property of Ryan's Family Steakhouse in Cedar Rapids, Iowa, after being requested to do so by the owner's employees. Their activities on the premises consisted of distributing handbills which urged potential customers to boycott the restaurant because its owners were employing nonunion building contractors at another location.

Defendants were found guilty of these simple misdemeanor violations by a district associate judge. They appealed their convictions to a district judge under Iowa Rule of Criminal Procedure 54. That appeal resulted in an affirmance of the convictions. We granted discretionary review from the judgment of the district court.

Defendants contend that the activity upon which the criminal charges were based was protected as a reasonable exercise of free speech under the first amendment to the federal constitution and article I, section 7 of the Iowa Constitution. They further urge that the activity is protected under the National Labor Relations Act (NLRA), 29 U.S.C. section 158(b)(4). The State asserts that neither the first amendment nor article I, section 7 of the Iowa Constitution provides a defense to the charge of criminal trespass on private property. It also asserts that the NLRA does not protect the type of handbilling on private property which was carried on by these defendants.

I. Protected Activity Under the NLRA.

[The court held that a trespass prosecution was not preempted by the NLRA.]

II. Free Speech Rights.

Defendants urge that their convictions violate free speech protection under both the federal and state constitutions. The first amendment protects speech from being abridged by the government. Frisby v. Schultz, 487 U.S. 474, 479 (1988); U.S. Const. amend. I; see also Iowa Const. art. I, § 7. Careful scrutiny of an abridgment of speech first focuses on the place of the speech. *Frisby*, 487 U.S. at 479. The Constitution does not protect against a private party who seeks to abridge free expression of others on private property. Hudgens v. NLRB, 424 U.S. 507, 513 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551, 568 (1972).

In *Hudgens*, a shopping center manager told union picketers to leave or they would be arrested for trespass. Noting that the first amendment does not protect against this activity by a private entity, the Court rejected the picketers' claim of protection under the federal constitution.

In Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980), the Supreme Court upheld the California Supreme Court's decision that the California Constitution protects speech and petitioning, reasonably exercised, in privately owned shopping centers. Other states have considered whether their own constitutions afford greater free speech rights than the first amendment. The Wisconsin Constitution does not protect against abridgment of speech on private property. State v. Horn, 139 Wis.2d 473, 476, 407 N.W.2d 854, 855 (1987) (abortion protesters trespassed at medical clinic). The Massachusetts Constitution does not extend any further than the first amendment regarding speech on private property. Commonwealth v. Noffke, 376 Mass. 127,

134, 379 N.E.2d 1086, 1090 (1978) (union organizer convicted of trespass for soliciting on employer's parking lot).

The Michigan Constitution has been held not to prohibit property owners from denying access for free speech purposes. Woodland v. Michigan Citizens Lobby, 423 Mich. 188, 193, 378 N.W.2d 337, 339 (1985) (solicitation of signatures in mall areas of privately owned shopping centers). *Woodland* quotes as follows from *Lloyd*:

> [P]roperty [does not] lose its private character merely because the public is generally invited to use it for designated purposes. Few would argue that a freestanding store, with abutting parking space for customers, assumes significant public attributes merely because the public is invited to shop there. Nor is size alone the controlling factor. The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center.

We conclude that defendants' free speech argument must fail under both the federal and Iowa Constitutions. As we observed in State v. Elliston, 159 N.W.2d 503 (Iowa 1968):

> Liberty can only be exercised in a system of law which safeguards order. . . . [T]he right of peaceful protest does not mean that everyone with opinions or beliefs to express may do so at any time and at any place. There is a proper time and place for even the most peaceful protest and a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations.

Id. at 508 (quoting Cox v. Louisiana, 379 U.S. 559, 574 (1965)).

MOSHER v. COOK UNITED, INC.

62 Ohio St.2d 316, 405 N.E.2d 720
Supreme Court of Ohio, 1980

PER CURIAM.

(1) Because appellant either elected to waive, or failed to make other arguably relevant legal challenges, we are confronted here with but one proposition, that being whether appellant, as a business invitee, possessed an irrevocable license to remain on appellee's premises so long as he behaved in an orderly manner. Our answer is that he did not possess such a privilege.

(2) A license has been defined by this court as "an authority to do a particular act or series of acts upon another's land, without possessing any estate therein." Rodefer v. Pittsburg, O. V. & C. Rd. Co. (1905), 72 Ohio St. 272, 281, 74 N.E. 183, 185-186, citing Wolfe v. Frost, 4 Sanford's Chancery 72. One who possesses a license thus has the authority to enter the land in another's possession without being a trespasser. The parties do not dispute that appellant's initial presence on appellee's property was authorized by virtue of a license. The conflict concerns the revocability of the license. If the license was revocable at the will of appellee, appellant became a trespasser at the point of revocation and his basis for relief is unfounded.

5 Restatement of Property 3133-34, Section 519, speaks to revocation of licenses. That section provides:

> (1) Except as stated in Subsections (2), (3) and (4), a license is terminable at the will of the possessor of the land subject to it.

> (2) In the termination of the license of one who has entered upon land under a license, the licensee must be given a reasonable opportunity to remove himself and his effects from the land.
>
> (3) A license coupled with an interest can be terminated only to such an extent as not to prevent the license from being effective to protect the interest with which it is coupled.
>
> (4) A licensee under such a license as is described in § 514 (dealing with licenses analogous to easements) who has made expenditures of capital or labor in the exercise of his license in reasonable reliance upon representations by the licensor as to the duration of the license, is privileged to continue the use permitted by the license to the extent reasonably necessary to realize upon his expenditures."

Appellee was, therefore, entitled to revoke appellant's license for any purpose, reasonable or not, unless any of subsections (2) through (4) were applicable. The record is clear that none of these subsections were applicable. Accordingly, upon the theory propounded by appellant before this court, appellee was legally justified in demanding that appellant leave the premises. Since appellant has failed to establish a basis for relief, the judgment of the Court of Appeals is affirmed.

HOFSTETTER, J., dissenting.

The appellant, in response to "check and compare" advertising, drove a substantial number of miles in anticipation of buying groceries valued at several hundreds of dollars. The issue, as I see it, is not whether the business invitee had an irrevocable license to remain on appellee's premises on the terms noted in the majority opinion, but whether, having been invited to do exactly what he was doing, which consumed considerable time and expense on his part, he could be forced to leave on the day in question, when the record does not reveal that he behaved in a disorderly manner. On the contrary, it follows he was simply checking and comparing prices pursuant to the solicitation.

Clearly, from the evidence elicited in the instant cause, if the appellant had been able to commit to memory all of the prices, he could have remained on appellee's property so long as he behaved in an orderly manner. By reason of his frailty of being unable to commit to memory the prices he wished to compare, he wrote them down on a pad of paper. The real question then is, would all "comparison" shoppers, no matter how they performed their comparisons, be excluded from the appellee's store?

According to the record, there were no posted regulations concerning comparison shopping as conducted by the appellant. Even if there had been, they were vitiated momentarily to allow a reasonable number of days of comparison shopping as urged by the newspaper advertising. To hold as the majority did, it follows that there must be an absolute right to revoke a customer's privilege to be in the store at any time, even if he behaves in an orderly manner.

I would hold that, in this day and age, in order for the common law right to exclude a person from another's premises to become operative, when that person is there by specific invitation to do exactly what the appellant was doing, there must be a reasonable reason to exclude him, and notice must be given him that comports with the effort and expense incurred by the appellant. The rights of the appellant, in my opinion, were violated and the directed verdict should not have been granted.

USTON v. RESORTS INTERNATIONAL HOTEL, INC.

89 N.J. 163, 445 A.2d 370
Supreme Court of New Jersey, 1982

PASHMAN, J.

Since January 30, 1979, appellant Resorts International Hotel, Inc. (Resorts) has excluded respondent, Kenneth Uston, from the blackjack tables in its casino because Uston's strategy increases his chances of winning money. Uston concedes that his strategy of card counting can tilt the odds in his favor under the current blackjack rules promulgated by the Casino Control Commission (Commission). However, Uston contends that Resorts has no common law or statutory right to exclude him because of his strategy for playing blackjack.

We hold that the Casino Control Act, N.J.S.A. 5:12-1 to -152 gives the Commission exclusive authority to set the rules of licensed casino games, which includes the methods for playing those games. The Casino Control Act therefore precludes Resorts from excluding Uston for card counting. Because the Commission has not exercised its exclusive authority to determine whether card counters should be excluded, we do not decide whether such an exclusion would be lawful.

I

Kenneth Uston is a renowned teacher and practitioner of a complex strategy for playing blackjack known as card counting. Card counters keep track of the playing cards as they are dealt and adjust their betting patterns when the odds are in their favor. When used over a period of time, this method allegedly ensures a profitable encounter with the casino.

Uston first played blackjack at Resorts' casino in November 1978. Resorts took no steps to bar Uston at that time, apparently because the Commission's blackjack rules then in operation minimized the advantages of card counting.

On January 5, 1979, however, a new Commission rule took effect that dramatically improved the card counter's odds. N.J.A.C. 19:47-2.5. The new rule, which remains in effect, restricted the reshuffling of the deck in ways that benefitted card counters. Resorts concedes that the Commission could promulgate blackjack rules that virtually eliminate the advantage of card counting. However, such rules would slow the game, diminishing the casino's "take" and consequently its profits from blackjack gaming.

By letter dated January 30, 1979, attorneys for Resorts wrote to Commission Chairman Lordi, asking the Commission's position on the legality of summarily removing card counters from its blackjack tables. That same day, Commissioner Lordi responded in writing that no statute or regulation barred Resorts from excluding professional card counters from its casino. Before the day had ended, Resorts terminated Uston's career at its blackjack tables, on the basis that in its opinion he was a professional card counter. Resorts subsequently formulated standards for identification of card counters and adopted a general policy to exclude such players.

The Commission upheld Resorts' decision to exclude Uston. Relying on Garifine v. Monmouth Park Jockey Club, 29 N.J. 47, 148 A.2d 1 (1959), the Commission held that Resorts enjoys a common law right to exclude anyone it chooses, as long as the exclusion does not violate state and federal civil rights laws. The Appellate Division reversed, 179 N.J.Super. 223, 431 A.2d 173 (1981). Although we interpret the Casino Control Act, N.J.S.A. 5:12-1 to -152 somewhat differently than did the Appellate Division, we affirm that court's holding that the Casino Control Act precludes Resorts from excluding Uston. The Commission alone has the authority to exclude

patrons based upon their strategies for playing licensed casino games. Any common law right Resorts may have had to exclude Uston for these reasons is abrogated by the act. We therefore need not decide the precise extent of Resorts' common law right to exclude patrons for reasons not covered by the act. Nonetheless, we feel constrained to refute any implication arising from the Commission's opinion that absent supervening statutes, the owners of places open to the public enjoy an absolute right to exclude patrons without good cause. We hold that the common law right to exclude is substantially limited by a competing common law right of reasonable access to public places. . . .

III

Resorts claimed that it could exclude Uston because it had a common law right to exclude anyone at all for any reason. While we hold that the Casino Control Act precludes Resorts from excluding Uston for the reasons stated, it is important for us to address the asserted common law right for two reasons. First, Resorts' contentions and the Commission's position concerning the common law right are incorrect. Second, the act has not completely divested Resorts of its common law right to exclude.

The right of an amusement place owner to exclude unwanted patrons and the patron's competing right of reasonable access both have deep roots in the common law. See Arterburn, "The Origin and First Test of Public Callings," 75 U.Pa.L.Rev. 411 (1927); Wyman, "The Law of Public Callings as a Solution of the Trust Problem," 17 Harv.L.Rev. 156 (1904). In this century, however, courts have disregarded the right of reasonable access in the common law of some jurisdictions at the time the Civil War Amendments and Civil Rights Act of 1866 were passed.

As Justice Goldberg noted in his concurrence in Bell v. Maryland, 378 U.S. 226 (1964):

> Underlying the congressional discussions and at the heart of the Fourteenth Amendment's guarantee of equal protection, was the assumption that the State by statute or by "the good old common law" was obligated to guarantee all citizens access to places of public accommodation.

See, e.g., Ferguson v. Gies, 82 Mich. 358, 46 N.W. 718 (1890) (after passage of the Fourteenth Amendment, both the civil rights statutes and the common law provided grounds for a non-white plaintiff to recover damages from a restaurant owner's refusal to serve him, because the common law as it existed before passage of the civil rights laws "gave to the white man a remedy against any unjust discrimination to the citizen in all public places"); Donnell v. State, 48 Miss. 661 (1873) (state's common law includes a right of reasonable access to all public places).

The current majority American rule has for many years disregarded the right of reasonable access, granting to proprietors of amusement places an absolute right arbitrarily to eject or exclude any person consistent with state and federal civil rights laws. See Annot., "Propriety of exclusion of persons from horseracing tracks for reasons other than color or race," 90 A.L.R.3d 1361 (1979); Turner & Kennedy, "Exclusion, Ejection and Segregation of Theater Patrons," 32 Iowa L.Rev. 625 (1947). See also Garifine v. Monmouth Park Jockey Club, 29 N.J. at 50, 148 A.2d 1.

At one time, an absolute right of exclusion prevailed in this state, though more for reasons of deference to the noted English precedent of Wood v. Leadbitter, 13 M&W 838, 153 Eng.Rep. 351, (Ex.1845), than for reasons of policy. In Shubert v. Nixon Amusement Co., 83 N.J.L. 101, 83 A. 369 (Sup.Ct.1912), the former Supreme Court dismissed a suit for damages resulting from plaintiff's ejection from defendants' theater. Noting that plaintiff made no allegation of exclusion on the basis of race, color or previous condition of servitude, the Court concluded:

> In view of the substantially uniform approval of, and reliance on, the decision in Wood v. Leadbitter in our state adjudications, it must fairly be considered to be adopted as part of our jurisprudence, and whatever views may be entertained as to the natural justice or injustice of ejecting a theater patron without reason after he has paid for his ticket and taken his seat, we feel constrained to follow that decision as the settled law.

It hardly bears mention that our common law has evolved in the intervening 70 years. In fact, *Leadbitter* itself was disapproved three years after the *Shubert* decision by Hurst v. Picture Theatres Limited, (1915) 1 K.B. 1 (1914). Of far greater importance, the decisions of this Court have recognized that "the more private property is devoted to public use, the more it must accommodate the rights which inhere in individual members of the general public who use that property." State v. Schmid, 84 N.J. 535, 562, 423 A.2d 615 (1980).

State v. Schmid involved the constitutional right to distribute literature on a private university campus. The Court's approach in that case balanced individual rights against property rights. It is therefore analogous to a description of the common law right of exclusion. Balancing the university's interest in controlling its property against plaintiff's interest in access to that property to express his views, the Court clearly refused to protect unreasonable exclusions. Justice Handler noted that

> Regulations . . . devoid of reasonable standards designed to protect both the legitimate interests of the University as an institution of higher education and the individual exercise of expressional freedom cannot constitutionally be invoked to prohibit the otherwise noninjurious and reasonable exercise of [First Amendment] freedoms.

In State v. Shack, 58 N.J. 297, 277 A.2d 369 (1971), the Court held that although an employer of migrant farm workers "may reasonably require" those visiting his employees to identify themselves, "the employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens." The Court reversed the trespass convictions of an attorney and a social services worker who had entered the property to assist farmworkers there.

Schmid recognizes implicitly that when property owners open their premises to the general public in the pursuit of their own property interests, they have no right to exclude people unreasonably. On the contrary, they have a duty not to act in an arbitrary or discriminatory manner toward persons who come on their premises. That duty applies not only to common carriers, Messenger v. Pennsylvania Railroad Co., 37 N.J.L. 531 (E. & A. 1874), innkeepers, see Garifine, supra, owners of gasoline service stations, Streeter v. Brogan, 113 N.J.Super. 486, 274 A.2d 312 (Ch.Div.1971), or to private hospitals, Doe v. Bridgeton Hospital Ass'n, Inc., 71 N.J. 478, 366 A.2d 641 (1976) (1977), but to all property owners who open their premises to the public. Property owners have no legitimate interest in unreasonably excluding particular members of the public when they open their premises for public use.

No party in this appeal questions the right of property owners to exclude from their premises those whose actions "disrupt the regular and essential operations of the [premises]," State v. Schmid, 84 N.J. at 566, 423 A.2d 615 (quoting Princeton University Regulations on solicitation), or threaten the security of the premises and its occupants, see State v. Shack, 58 N.J. at 308, 277 A.2d 369. In some circumstances, proprietors have a duty to remove disorderly or otherwise dangerous persons from the premises. See Holly v. Meyers Hotel and Tavern, Inc., 9 N.J. 493, 495, 89 A.2d 6 (1952). These common law principles enable the casino to bar from its entire facility, for instance, the disorderly, the intoxicated, and the repetitive petty offender.

Whether a decision to exclude is reasonable must be determined from the facts of each case. Respondent Uston does not threaten the security of any casino occupant. Nor has he disrupted the functioning of any casino operations. Absent a valid contrary rule by the Commission, Uston possesses the usual right of reasonable access to Resorts International's blackjack tables. . . .

NEW JERSEY COALITION AGAINST WAR IN THE MIDDLE EAST v. J.M.B. REALTY CORP.

138 N.J. 326, 650 A.2d 757
Supreme Court of New Jersey, 1994

WILENTZ, C.J.

The question in this case is whether the defendant regional and community shopping centers must permit leafletting on societal issues. We hold that they must, subject to reasonable conditions set by them. Our ruling is limited to leafletting at such centers, and it applies nowhere else.[1] It is based on our citizens' right of free speech embodied in our State Constitution. N.J. Const. art. I, ¶¶ 6, 18. It follows the course we set in our decision in State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980). . . .

Statistical evidence tells the story of the growth of shopping malls. In 1950, privately-owned shopping centers of any size numbered fewer than 100 across the country. Steven J. Eagle, Shopping Center Control: The Developer Besieged, 51 J.Urb.L. 585, 586 (1974). By 1967, 105 of the larger regional and super-regional malls existed. This number increased to 199 in 1972 and to 333 in 1978. Thomas Muller, Regional Malls and Central City Retail Sales: An Overview, in Shopping Centers: U.S.A. 180, 189 (George Sternlieb & James W. Hughes eds., 1981). By 1992, the number expanded to at least 1,835. Shopping Center World/NRB 1992 Shopping Center Census, Shopping Center World, Mar. 1993, at 38. Thus, from 1972 to 1992 the number of regional and super-regional malls in the nation increased by roughly 800%. In New Jersey, the number of malls greater than 400,000 square feet, or, roughly, the number of regional and super-regional malls, has more than doubled over the last twenty years, increasing from 30 in 1975 to 63 in 1992. Shopping Center Census . . ., Shopping Center World, Jan. 1977, at 21; Shopping Center World/NRB 1992 Shopping Center Census, supra, at 46.

The share of retail sales attributable to regional and super-regional malls has demonstrated a similar pattern. Nationally, regional malls' market share of "shopper goods sales" was 13% in 1967 and 31% in 1979. Muller, supra, at 187. In 1991 retail sales in "shopping centers," a category that includes not only regional malls but other types of urban and suburban retail centers, "accounted for over 56% of total retail sales in the United States, excluding sales by automotive dealers and gasoline service stations." International Council of Shopping Centers, The Scope of the Shopping Center Industry in the United States, 1992-1993, at 1 (1992). In New Jersey in 1991, retail sales in shopping centers constituted 44% of non-automotive retail sales. Id. at 34.

Thus, malls are where the people can be found today. Indeed, 70% of the national adult population shop at regional malls and do so an average of 3.9 times a month, about once a week.

[1] As noted and explained infra, our ruling applies to all regional shopping centers. We do not decide if it applies to all community shopping centers.

Id. at 1. Therefore, based on adult population data from the 1990 census, more than four million people on average shop at our regional shopping centers every week, assuming New Jersey follows this national pattern.

The converse story, the decline of downtown business districts, is not so easily documented by statistics. But for the purposes of this case, we do not need statistics. This Court takes judicial notice of the fact that in every major city of this state, over the past twenty years, there has been not only a decline, but in many cases a disastrous decline. This Court further takes judicial notice of the fact that this decline has been accompanied and caused by the combination of the move of residents from the city to the suburbs and the construction of shopping centers in those suburbs. See Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 512 Pa. 23, 515 A.2d 1331, 1336 (1986) ("Both statistics and common experience show that business districts, particularly in small and medium sized towns, have suffered a marked decline. At the same time, shopping malls, replete with creature comforts, have boomed.").

That some downtown business districts have survived, and indeed thrive, is also fact, demonstrated on the record before us. The overriding fact, however, is that the movement from cities to the suburbs has transformed New Jersey, as it has many states. The economic lifeblood once found downtown has moved to suburban shopping centers, which have substantially displaced the downtown business districts as the centers of commercial and social activity.

The defendants in this case cannot rebut this observation. Indeed, the shopping center industry frequently boasts of the achievement. The industry often refers to large malls as " "the new downtowns." " Note, Private Abridgment of Speech and the State Constitutions, 90 Yale L.J. 165, 168 n. 19 (1980) (quoting Shopping Center World, Feb. 1972, at 52). It correctly asserts that "the shopping center is an integral part of the economic and social fabric of America." International Council of Shopping Centers, The Scope of the Shopping Center Industry in the United States, 1992-1993, ix (1992).

Industry experts agree. One recent study asserted "[t]he suburban victory in the regional retail war was epitomized by the enclosed regional mall. . . . [Regional malls] serve as the new "Main Streets' of the region—the dominant form of general merchandise retailing." James W. Hughes & George Sternlieb, Rutgers Regional Report Volume III: Retailing and Regional Malls 71 (1991). Beyond that, one expert maintains that shopping centers have "evolved beyond the strictly retail stage to become a public square where people gather[ ]; it is often the only large contained place in a suburb and it provides a place for exhibitions that no other space can offer." Specialty Malls Return to the Public Square Image, Shopping Center World, Nov. 1985, at 104.

Most legal commentators also have endorsed the view that shopping centers are the functional equivalent of yesterday's downtown business district. E.g., James M. McCauley, Comment, Transforming the Privately Owned Shopping Center into a Public Forum: PruneYard Shopping Center v. Robins, 15 U.Rich.L.Rev. 699, 721 (1981) ("[P]rivately-owned shopping centers are supplanting those traditional public business districts where free speech once flourished."); Note, Private Abridgment of Speech and the State Constitutions, supra, 90 Yale L.J. at 168 ("[T]he privately held shopping center now serves as the public trading area for much of metropolitan America.").

Statisticians and commentators, however, are not needed: a walk through downtown and a drive through the suburbs tells the whole story. And those of us who have lived through this transformation know it as an indisputable fact of life, and that fact does not escape the notice of this Court. . . .

It is now clear that the Federal Constitution affords no general right to free speech in privately-owned shopping centers, and most State courts facing the issue have ruled the same way when State constitutional rights have been asserted. Fiesta Mall Venture v. Mecham Recall Comm., 159 Ariz. 371, 767 P.2d 719 (Ct.App.1989); Cologne v. Westfarms Assocs., 192 Conn. 48, 469 A.2d 1201 (1984); Citizens for Ethical Gov't v. Gwinnett Place Assoc., 260 Ga. 245, 392 S.E.2d 8 (1990); Woodland v. Michigan Citizens Lobby, 423 Mich. 188, 378 N.W.2d 337 (1985); SHAD Alliance v. Smith Haven Mall, 66 N.Y.2d 496, 498 N.Y.S.2d 99, 488 N.E.2d 1211 (1985); State v. Felmet, 302 N.C. 173, 273 S.E.2d 708 (1981); Eastwood Mall v. Slanco, 68 Ohio St.3d 221, 626 N.E.2d 59 (1994); Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 512 Pa. 23, 515 A.2d 1331 (1986); Charleston Joint Venture v. McPherson, 308 S.C. 145, 417 S.E.2d 544 (1992); Southcenter Joint Venture v. National Democratic Policy Comm., 113 Wash.2d 413, 780 P.2d 1282 (1989); Jacobs v. Major, 139 Wis.2d 492, 407 N.W.2d 832 (1987). In most of those decisions, the courts analyzed their state constitutions and concluded that their free speech provisions protected their citizens only against state action. Others relied on federal constitutional doctrine without independently analyzing their state constitutions.

California, Oregon, Massachusetts, Colorado, and Washington, however, have held that their citizens have a right to engage in certain types of expressive conduct at privately-owned malls. Of those five, only California has held that its free speech clause protects citizens from private action as well as state action and grants issue-oriented free speech rights at a regional shopping center. . . .

In New Jersey, we have once before discussed the application of our State constitutional right of free speech to private conduct. In State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980), we held that the right conferred by the State Constitution was secure not only from State interference but—under certain conditions—from the interference of an owner of private property even when exercised on that private property. Specifically, we held that *Schmid*, though lacking permission from Princeton University, had the right to enter the campus, distribute leaflets, and sell political materials. We ruled that the right of free speech could be exercised on the campus subject to the University's reasonable regulations.

We thus held that Article I, paragraph 6 of our State Constitution granted substantive free speech rights, and that unlike the First Amendment, those rights were not limited to protection from government interference. In effect, we found that the reach of our constitutional provision was affirmative. Precedent, text, structure, and history all compel the conclusion that the New Jersey Constitution's right of free speech is broader than the right against governmental abridgement of speech found in the First Amendment. Our holding in *Schmid* relied on all of these factors, presaging the criteria of later cases used to determine whether the scope of state constitutional provisions exceeded those of cognate federal provisions.

In this case, we continue to explore the extent of our State Constitutional right of free speech. We reach the same conclusion we did in *Schmid*: the State right of free speech is protected not only from abridgement by government, but also from unreasonably restrictive and oppressive conduct by private entities. Applying the standard developed in *Schmid* to this very different case, we decide today that defendants' rules prohibiting leafletting violate plaintiff's free speech rights.

Schmid set forth "several elements" to be considered in determining the existence and extent of the State free speech right on privately-owned property. The three factors mentioned in that opinion as the "relevant considerations," have been the focus of the argument before us. As we noted in that case:

> This standard must take into account (1) the nature, purposes, and primary use of such private property, generally, its "normal" use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property. This is a multi-faceted test which must be applied to ascertain whether in a given case owners of private property may be required to permit, subject to suitable restrictions, the reasonable exercise by individuals of the constitutional freedoms of speech and assembly.

In this case, the trial court held that the *Schmid* standard was not satisfied and, therefore, that the plaintiff had no constitutional right to leaflet at defendants' premises. Specifically, after analyzing the proofs, it found that the common areas were not open to the public generally, but rather that "the public's invitation to each of the defendant malls is for the purpose of the owners' and tenants' business and does not extend to the activities of leafletting or the distribution of literature." Furthermore, it found that the plaintiff failed to prove that the proposed activity was not discordant with the "uses to which these shopping malls are dedicated." If one focuses only on the owners' "purpose" and "dedication," these findings are literally correct.

However, the lower courts' holdings and the defendants' view of the second factor of *Schmid*—"the extent and nature of the public's invitation to use that property"—misperceive both its essential meaning and the functional role of the standard in determining the outcome of the constitutional issue. The factual issue is the overall nature and extent of the invitation to the public, not somehow restricted to the subjective "purpose" of defendants' uses, and certainly not limited to whether defendants extended an explicit invitation to plaintiff to speak. The issue is whether defendants' actual conduct, the multitude of uses they permitted and encouraged, including expressive uses, amounted to an implied invitation and, if so, the nature and extent of that invitation. The functional role of the standard and its three elements is to measure the strength of the plaintiff's claim of expressional freedom and the strength of the private property owners' claim of a right to exclude such expression—all for the ultimate purpose of "achiev[ing] the optimal balance between the protections to be accorded private property and those to be given to expressional freedoms exercised upon such property."

We reaffirm our holding in *Schmid*. The test to determine the existence of the constitutional obligation is multi-faceted; the outcome depends on a consideration of all three factors of the standard and ultimately on a balancing between the protections to be accorded the rights of private property owners and the free speech rights of individuals to leaflet on their property. . . .