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## Limited Powers in the Looking-Glass: Otiose Textualism, and an Empirical Analysis of Other Approaches, When Activists in Private Shopping Centers Claim State Constitutional Liberties

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LIMITED POWERS IN THE LOOKING-GLASS:<sup>1</sup> OTIOSE  
 TEXTUALISM, AND AN EMPIRICAL ANALYSIS OF OTHER  
 APPROACHES, WHEN ACTIVISTS IN PRIVATE SHOPPING  
 CENTERS CLAIM STATE CONSTITUTIONAL LIBERTIES

RICHARD J. PELTZ<sup>2</sup>

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I. INTRODUCTION

State constitutions play an important role in the mix of American dual sovereignty. In areas as broad as due process and as narrow as cruel and unusual punishment, state courts have construed their state constitutions to cloak their citizens with protections of liberty that the United States Constitution does not

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<sup>1</sup>Allusions to Lewis Carroll and Humpty Dumpty’s famous discourse on words are not unusual when discussing textualism. See, e.g., Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585, 585-86 & nn.1, 4 (1994); Steven B. Price, Casenote & Comment, *FIRREA’s Statute on the Standard of Liability for Bank Directors and Officers: Through the Looking Glass of New Textualism*, 30 IDAHO L. REV. 219, 219 n.1 (1993). Nor is this connection of recent vintage. See, e.g., ARCHIBALD E. STEVENSON, STATES’ RIGHTS AND NATIONAL PROHIBITION 104 (1927) (quoting CHARLES WARREN, SUPREME COURT AND SOVEREIGN STATES 55 (1924)). Lewis Carroll published *Alice’s Adventures in Wonderland* in 1865 and *Through the Looking-Glass, and What Alice Found There* in 1872.

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provide. While such expansions, or augmentations, of state constitutional prerogative are certainly the exception and not the rule, they are a fertile ground for novel legal theories. Litigants and judges who disagree with federal constitutional doctrine may turn to state constitutional law to strike out in a different direction. Developments in state constitutional law may become especially important as the United States Supreme Court examines individual liberties in presently evolving areas such as drug-testing<sup>3</sup> and same-sex marriage.<sup>4</sup>

This tremendous latitude afforded to the states prompts the question, when and why should courts construe state constitutional liberties more broadly than federal constitutional guarantees? One is tempted immediately to open the interpretivist's toolbox and begin with textualism. Presumably, the state constitutional provision that is worded identically to its federal counterpart carries the same meaning, while differences in wording point to differences in meaning. However, even a cursory examination of state constitutional law reveals that this presumption is gravely flawed.

For example, one might suspect a substantive difference in the free speech guarantee of the Pennsylvania Constitution—"every citizen may freely speak"<sup>5</sup>—and that of the U.S. Constitution—"Congress shall make no law . . . abridging the freedom of speech."<sup>6</sup> The former seems to define an affirmative right, perhaps even placing upon government a duty to protect an individual's free speech interest against all who would infringe upon it, whether a public or private entity. The latter guarantees a right in the negative, operating only as a limitation on state power. Yet the Pennsylvania Supreme Court has rejected such a distinction.<sup>7</sup> In contrast, the Michigan Supreme Court found that nearly identical language in state and federal double jeopardy clauses could be subject to disparate interpretation.<sup>8</sup>

This Article examines closely a narrow range of highly factually analogous cases, in which state constitutional rights are asserted despite a clear lack of entitlement to assert any federal constitutional claim. Specifically, the cases selected are those in which private persons assert a right to conduct expressive activity, including electoral activity, in private shopping centers during hours when the properties are

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<sup>3</sup>For example, student Fourth Amendment rights in the schools were severely curtailed in drug-testing cases *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), and *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002). Courts in Indiana first indulged then abandoned a contrary theory predicated on state constitutional law. See *Linke v. Northwestern Sch. Corp.*, 734 N.E.2d 252 (Ind. Ct. App. 2000), *vacated by* 763 N.E.2d 972 (Ind. 2002).

<sup>4</sup>This issue has not yet come to the U.S. Supreme Court, but the recently famous ruling of the Supreme Judicial Court of Massachusetts, requiring that marriage licenses issue to same-sex couples, was predicated on that state's constitution. See *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>5</sup>PA. CONST. art. I, § 7.

<sup>6</sup>U.S. CONST. amend. I.

<sup>7</sup>*W. Pa. Socialist Workers 1982 Campaign v. Conn. Gen. Life Ins. Co.*, 515 A.2d 1331, 1335 (Pa. 1986).

<sup>8</sup>See *Woodland v. Mich. Citizens Lobby*, 378 N.W.2d 337, 344, 345 & n.22 (Mich. 1985) (en banc).

held open to the general public. These cases may be referred to colloquially as “the mall cases.” Selected here are only those cases that were decided after the federal question became clear. The Article first inquires into the role of textualism in these cases. The Article then examines other interpretivist modes besides textualism, namely originalism, structuralism, and precedentialism, as well non-interpretivist public policy arguments. The purpose of this inquiry is to clarify the role of interpretivism in state courts’ decisions on whether to expand the scope of their state constitutional protections for individual rights.

## II. BACKGROUND: TAKING TEXTBOOK ENUMERATED POWERS TO THE MALL

### A. Federal and State Constitutions

As every American high school student learns, the federal government of the United States is one of enumerated powers. Congress has authority to regulate commerce, for example, by virtue of Article I, section 8, clause 3, which expressly grants the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>9</sup> Congress may raise a Navy only by virtue of the clause which grants that power.<sup>10</sup> Although Article I, section 8, further empowers Congress to make “Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States,”<sup>11</sup> the Necessary and Proper Clause has not been construed as a broad foundation from which Congress may escape the limiting scheme of enumeration.<sup>12</sup>

To further clarify the limited nature of federal power, the Tenth Amendment states, “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.”<sup>13</sup> The present breadth of power reserved to the states under the Tenth Amendment is surely disputed.<sup>14</sup> But the fundamental notion of limited federal power remains intact.<sup>15</sup> Federal sovereignty is carved out from the whole of state

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<sup>9</sup>U.S. CONST. art. I, § 8, cl. 3.

<sup>10</sup>U.S. CONST. art. I, § 8, cl. 13.

<sup>11</sup>U.S. CONST. art. I, § 8, cl. 18.

<sup>12</sup>*McCulluch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (affirming that Congressional powers are limited, even though Congress is to be granted broad discretion in its choice of means).

<sup>13</sup>U.S. CONST. amend. X.

<sup>14</sup>*See, e.g.*, Steven G. Gey, *The Myth of State Sovereignty*, 63 OHIO ST. L.J. 1601, 1642-50 (2002). There is ample literature concerning adoption and construction of the Tenth Amendment. *See, e.g.*, THE TENTH AMENDMENT AND STATE SOVEREIGNTY: CONSTITUTIONAL HISTORY AND CONTEMPORARY ISSUES (Mark R. Killenbeck ed., 2002); RAOUL BERGER, FEDERALISM: THE FOUNDER’S DESIGN 77-99 (1987); CHARLES J. BLOCH, STATES’ RIGHTS: THE LAW OF THE LAND 31-33 (1958); STEVENSON, *supra* note 1, at 37-57.

<sup>15</sup>The present vitality of limited powers doctrine has been amply explored in the literature. *See, e.g.*, ROBERT F. NAGEL, THE IMPLOSION OF AMERICAN FEDERALISM 15-30 (2001) (chapter entitled “The Futile Idea of Limited Powers”). For an interesting comparative review of this

sovereignty, so one may be viewed as the inverse of the other. Otherwise stated, federal and state sovereignty together sum the whole of governmental power.

Supervening in this arrangement are the limitations on governmental power imposed by declarations of rights, namely the Bill of Rights and analogous declarations in state constitutions.<sup>16</sup> The free expression guarantee of the First Amendment in particular is phrased as a limitation on governmental power: “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.”<sup>17</sup> Subsequently extended pursuant to the Fourteenth Amendment to limit state as well as federal power,<sup>18</sup> this “negative” phrasing of the First Amendment is significant because it represents no affirmative grant of power to the government.<sup>19</sup> Congress may not rely on the First Amendment alone to authorize legislation not otherwise “necessary and proper” to further Article I objectives.

Not all declarations of rights, and not all free expression guarantees, are phrased in the negative. For example, the International Covenant on Civil and Political Rights declares, “Everyone shall have the right to freedom of expression . . . .”<sup>20</sup> The American Convention on Human Rights mirrors the language of the ICCPR.<sup>21</sup> Interestingly, the American Convention further provides that “[t]he right of expression may not be restricted by indirect methods or means, such as the abuse of government *or private* controls . . . tending to impede the communication and circulation of ideas and opinions.”<sup>22</sup> Thus a signatory government might rely on the

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federalist division of power in the modern age, see generally CHESTER JAMES ANTIEAU, *STATES’ RIGHTS UNDER FEDERAL CONSTITUTIONS* (1984).

<sup>16</sup>For a review of the origin, scope, and interpretational theory of state constitutional law, see generally *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1326-67 (1982); see also WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS* 63-98 (Rita & Robert Kimber trans., 1980) (describing emergence of first state constitutions). For a similar explication of specifically state freedom of expression guarantees, see Todd F. Simon, *Independent But Inadequate: State Constitutions and Protection of Freedom of Expression*, 33 U. KAN. L. REV. 305, 309-20 (1985).

<sup>17</sup>U.S. CONST. amend. I.

<sup>18</sup>*Gitlow v. New York*, 268 U.S. 652, 666 (1925).

<sup>19</sup>The Fourteenth Amendment of course gives Congress a power of enforcement, U.S. CONST. amend. XIV, § 5, but only to ensure that states respect the prohibition of the First Amendment.

<sup>20</sup>ICCPR art. 19(2); see also Universal Declaration of Human Rights art. 19 (“Everyone has the right to freedom of opinion and expression . . . .”) and art. 20(1) (“Everyone has the right to freedom of peaceful assembly and association.”). The covenant expressly imposes concomitant responsibilities on those who exercise the right. ICCPR art. 19(3) (requiring that persons respect “the rights or reputations of others” and “public order, . . . health or morals”). In ratifying the covenant, the United States was careful to declare that the covenant may not be read to restrict rights that are already construed more broadly under domestic constitutional law.

<sup>21</sup>ACHR art. 13(1). The convention carries a section on responsibilities as well. See ACHR art. 13(2). *But cf.* ICCPR art. 19(3).

<sup>22</sup>ACHR art. 13(3) (emphasis added).

convention, if constitutionally executed in domestic law, as an affirmative source of power to further free expression interests as against other private interests, such as property rights.<sup>23</sup>

In the state constitutions, precise language varies, but they tend to a similar pattern: first providing affirmatively for a right of free expression, then adding that no law may abridge that freedom.<sup>24</sup> For example, the New York Constitution states that “[e]very citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.”<sup>25</sup> The California Constitution contains almost identical language, save splitting the two independent clauses into separate sentences,<sup>26</sup> while the Connecticut Constitution splits the same sentiment into separate sections.<sup>27</sup>

The Massachusetts Constitution is somewhat more circumspect, declaring first that “[t]he liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth,” then adding, by 1948 amendment,<sup>28</sup> that “[t]he right of free speech shall not be abridged.”<sup>29</sup> The Arizona Constitution contains an affirmative statement of free speech rights almost identical to that of New York and California, but no negative counterpart.<sup>30</sup> At the same time, the Arizona Constitution contains no clearly affirmative statement of the right to petition. Rather, it contains a negative statement structured similarly to the Massachusetts amendment: “The right of petition, and of the people peaceably to assemble for the common good, shall never be abridged.”<sup>31</sup> Notably, the latter negative provisions in Massachusetts and Arizona are phrased in the passive voice—“never *be abridged*”—and are unrestricted by any apparent grammatical subject. Thus, the state government is not necessarily the only potential actor within the scope of the prohibition. Arguably, these passive voice provisions, though phrased negatively, are intended to function affirmatively, because only the power of the

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<sup>23</sup>The extent to which the U. S. Congress might augment its power through treaty ratification and enforcement is unclear. See *Missouri v. Holland*, 252 U.S. 416, 433-35 (1920) (suggesting that treaty may empower Congress as against state power reserved by the Tenth Amendment, but not considering countervailing private interests).

<sup>24</sup>Simon, *supra* note 16, at 314. The instant study is not strictly limited to free expression provisions, rather concerns interpretation of whatever state constitutional provisions are invoked in *Pruneyard* circumstances. Other state constitutional provisions bear the same affirmative-to-negative relationship to their federal counterparts, while some state constitutional provisions affirmatively establish individual or electoral rights without clear federal analogs.

<sup>25</sup>N.Y. CONST. art. I, § 8.

<sup>26</sup>CAL. CONST. art. I, § 2.

<sup>27</sup>CONN. CONST. art. I, §§ 4-5.

<sup>28</sup>MASS. CONST. amend. art. LXXVII.

<sup>29</sup>MASS. CONST. pt. 1, art. XVI.

<sup>30</sup>ARIZ. CONST. art. II, § 6 (“Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.”).

<sup>31</sup>ARIZ. CONST. art. II, § 5.

state can restrain private non-speech interests, such as the exclusive enjoyment of private property, from abridging private speech interests, such as picketing.

These distinctions in state law are potentially significant. Constrained by both the enumerated power provisions and the Bill of Rights of the Constitution, the federal government is bound to respect citizens' free expression rights as against government power, but has no independent authority to shield or further citizens' free expression rights as against other citizens' legal interests. That latter power is reserved to the states by the Tenth Amendment. Because federal sovereignty was carved out of state sovereignty, the states presumably retain broad powers of governance, limited in turn by their state constitutions. Insofar as a state constitution imposes limitations akin to those of the federal Constitution, state powers are similarly limited. But insofar as a state constitution imposes no limitations, rather asserts affirmative citizen rights, the state may claim the ability, if not the responsibility, to protect and further those citizen rights as against other legal interests of citizens.

### B. *The State Action Requirement*

This legal background sets the stage for the problem that arises when citizens claim constitutional rights, namely the right to free expression, or concomitant rights to participate in the political process, as against private, or non-state, actors. Under the federal Constitution, these claims are usually doomed by the "state action" requirement.<sup>32</sup> In other words, absent express constitutional authority or a federal statute "necessary and proper" to further enumerated constitutional powers, the federal courts have no basis upon which to enforce one citizen's constitutional rights against the legal interests of another.<sup>33</sup> The state governments are not so constrained. They may seize upon an affirmative constitutional guarantee to secure citizen rights as against contrary private interests,<sup>34</sup> up to the point that the adverse party has a countervailing constitutional interest, such as the right against deprivation of property without due process of law.<sup>35</sup> Upon this theory, the Supreme Court recognized in *Pruneyard Shopping Center v. Robins* that a state may construe its

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<sup>32</sup>For a history of the state action requirement and a call for its reexamination, see Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985). Professor Chemerinsky bemoaned the rapid decline in interest in the state action doctrine from the 1950s and 1960s to 1980, but his call for a resurgence has gone largely unheeded. *Id.* at 503. Similarly, a reliable stream of literature on the promise of state constitutional law to continue the momentum of civil rights development dissipated substantially after the mid-1980s, with few noteworthy works defying the dearth. See, e.g., sources cited *infra* note 66; Berger, *infra* note 52.

<sup>33</sup>*Shelley v. Kraemer* inaugurated a famously broad interpretation of state action under the civil rights laws, which are justified with reference to the enforcement authority granted to Congress by the Fourteenth Amendment. 334 U.S. 1 (1948). There may be other, more limited exceptions. See *Marsh v. Alabama*, 326 U.S. 501 (1946) (compelling company town to respect religious freedom).

<sup>34</sup>See Simon, *supra* note 16, at 311 ("The first amendment . . . provid[ed] a clear prohibition that worked only against government; the majority of state provisions were and still are affirmative grants of personal freedom that act against individuals as well as against government.").

<sup>35</sup>U.S. CONST. amend. XIV § 1.

state constitutional provisions as broader—that is, providing more protection—than the federal Constitution.<sup>36</sup>

*Pruneyard* arose specifically in the context of private citizens engaged in expressive activity—high school students gathering petition signatures—in a privately owned shopping center during hours when the property was held open to the general public. The central question—whether those constitutional rights should be enforceable as against private property interests—has had a peculiar history before the U. S. Supreme Court.<sup>37</sup>

The Court initially opened the door for civil liberties to intrude upon private property in the “company town” case of *Marsh v. Alabama*.<sup>38</sup> Where the privately held Gulf Shipbuilding Corporation owned the very storefronts, sidewalks, streets, and sewers of a Mobile, Alabama, suburb, and employed the town sheriff, the Court in 1946 reversed the trespass conviction of a Jehovah’s Witness distributing religious literature.<sup>39</sup> Thus, on private property that was functionally equivalent and apparently indistinguishable from public property, the Court found it appropriate to balance residents’ rights against the owner’s property interests, concluding that the former “occupy a preferred position.”<sup>40</sup> The Court expanded the doctrine in 1968 in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, by allowing union activists to picket peacefully in the parcel pick-up area and parking lot outside a store in Logan Valley Plaza, a privately held shopping center.<sup>41</sup> The Court found the shopping center to be the “functional equivalent” of the business district in *Marsh*.<sup>42</sup>

But only four years after *Logan Valley*, the Court backed off. In *Lloyd Corp. v. Tanner*, Vietnam War protestors sought to handbill in a shopping center, and the Court sided with the shopping center.<sup>43</sup> The Court distinguished *Logan Valley* on grounds that the subject of the demonstration in that case was related to the store outside of which the demonstration occurred, whereas the antiwar demonstration in *Lloyd* was unrelated to the retail purpose of the shopping center.<sup>44</sup> That content-

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<sup>36</sup> 447 U.S. 74, 81 (1980); *e.g.*, Simon, *supra* note 16, at 313 (“It is axiomatic . . . that a state may grant greater rights than required by the federal minimum.”). This proposition has been amply explored in the literature. *See, e.g.*, *Developments in the Law, supra* note 16, at 1367-1502; William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Barry A. Spevack, Note, *Expanding State Constitutional Protections and the New Silver Platter: After They’ve Shut the Door, Can They Bar the Window?*, 8 LOY. U. CHI. L.J. 186 (1976).

<sup>37</sup>This history has been amply recounted. *See, e.g.*, William Barnett, Note, *A Private Mall Becomes a Public Hall*, 26 LOY. L. REV. 739 (1980).

<sup>38</sup>326 U.S. 501 (1946).

<sup>39</sup>*Id.* at 502, 509.

<sup>40</sup>*Id.* at 509.

<sup>41</sup>*Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

<sup>42</sup>*Id.* at 318.

<sup>43</sup>*Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

<sup>44</sup>*Id.* at 560-63.



based distinction did not withstand the test of time, though. Another four years later, in *Hudgens v. NLRB*, the Court plainly held that *Logan Valley* had been overruled, and bluntly applied the state action requirement to control in such situations subsequently.<sup>45</sup>

Nevertheless, the Court in *Lloyd* left the door cracked for modest state intervention to regulate speech and property, to find the proper balance between both interests, provided First, Fifth, and Fourteenth Amendment rights are respected all around.<sup>46</sup> California took up the charge, and in *Pruneyard Shopping Center v. Robins*,<sup>47</sup> the Court was charged with deciding whether the state had drawn the balance within the constitutionally permissible range. In *Pruneyard*, high school students had set up a table at a California mall to collect signatures in “opposition to a United Nations resolution against ‘Zionism.’”<sup>48</sup> Thus, as in *Lloyd*, the expressive activity was unrelated to the commercial function of the shopping center. Recognizing that the federal First Amendment would not protect the students on private property, the California Supreme Court extended the protection of its state free speech and petition clauses.<sup>49</sup> The court surely anticipated a federal appeal; dissenting Justice Richardson lamented the subordination of “private property rights” to “‘free speech’ claims.”<sup>50</sup> But the U.S. Supreme Court found no impermissible transgression against the mall owners’ Fifth and Fourteenth Amendment interests. Though the Court recognized that “there ha[d] literally been a ‘taking,’” it was not the sort of unreasonable infringement of constitutional proportion that requires compensation.<sup>51</sup>

*Pruneyard* has been amply criticized as an activist interpretation of the California Constitution, and the case has not yielded a majority rule among the states.<sup>52</sup> For example, the Supreme Court of Wisconsin found it “significant that the majority [in *Pruneyard*] did not analyze the constitutional sections. It appears to be more a decision of desire rather than analytical conviction. As the dissent in [*Pruneyard*] points out, the majority ignored entirely findings of fact and conclusions of law of the trial court which would effect a contrary result by the majority.”<sup>53</sup> The Court of Appeals of New York observed that *Pruneyard*—a 4-3 decision with “not much analysis and only tangential discussion, if it can be called that, of the State action

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<sup>45</sup>*Hudgens v. NLRB*, 424 U.S. 507 (1976).

<sup>46</sup>*See Lloyd*, 407 U.S. at 569-70.

<sup>47</sup> 447 U.S. 74

<sup>48</sup>*Robins v. Pruneyard Shopping Center*, 592 P.2d 341, 342 (Cal. 1979).

<sup>49</sup>*Id.* at 347.

<sup>50</sup>*Id.* at 348.

<sup>51</sup>*Pruneyard*, 447 U.S. at 82-84.

<sup>52</sup>*But see* Curtis J. Berger, *Pruneyard Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. REV. 633 (1991). Professor Berger proposes a model statute for legislative recognition of *Pruneyard* principles. *See id.* at 692-94.

<sup>53</sup>*Jacobs v. Major*, 407 N.W.2d 832, 841 (Wis. 1987).

question”—overruled California precedent only five years older<sup>54</sup> and thus attributed the later ruling to an “‘accident of a change of personalities in the Judges of [the] court,’ which this court has correctly condemned as ‘a shallow basis for jurisprudential evolution.’”<sup>55</sup>

State court decisions that subsequently contemplated the same question of expressive activity at private-property shopping centers are compiled in an *American Law Reports* Annotation by attorney Harriet Dinegar Milks.<sup>56</sup> According to the Annotation as updated through 2002, three-quarters of state judiciaries to consider the question have reached a contrary conclusion to that in *Pruneyard*. Colorado, Massachusetts, and New Jersey have followed the California example,<sup>57</sup> while Arizona, Connecticut, Georgia, Iowa, Michigan,<sup>58</sup> New York, North Carolina, Ohio, Oregon,<sup>59</sup> Pennsylvania, South Carolina, and Wisconsin have disagreed with the California position.<sup>60</sup> Not included in these counts of four and twelve is Washington, which straddles the fence, depending on specifically which of its constitutional provisions is at stake—though the Washington Supreme Court’s more recent anti-*Pruneyard* majority ruling seems weightier than its plurality-authored predecessor.<sup>61</sup>

### III. INQUIRIES AND FINDINGS: TWO QUESTIONS, FEW ANSWERS

The dichotomy of state views on this subject offers an opportunity to study the interpretivist modes that state courts employ to construe their constitutional

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<sup>54</sup>SHAD Alliance v. Smith Haven Mall, 488 N.E.2d 1211, 1214 n.5 (N.Y. 1985) (citing *Diamond v. Bland*, 521 P.2d 460 (Cal. 1974)).

<sup>55</sup>SHAD Alliance, 488 N.E.2d at 1214 n.5 (quoting *People v. Hobson*, 348 N.E.2d 894 (N.Y. 1976)).

<sup>56</sup>Harriet Dinegar Milks, Annotation, *Validity, Under State Constitutions, of Private Shopping Center’s Prohibition or Regulation of Political, Social, or Religious Expression or Activity*, 52 A.L.R.5th 195 (1997) (subsequently updated).

<sup>57</sup>See *id.* § 3.

<sup>58</sup>For a review of state action in Michigan constitutional law prior to final decision in the case here studied, see generally Elizabeth Hardy, Note, *Post-Pruneyard Access to Michigan Shopping Centers: The “Malling” of Constitutional Rights*, 30 WAYNE L. REV. 93 (1983).

<sup>59</sup>The decision in Oregon represents an about-face. See *Stranahan v. Fred Meyer, Inc.*, 11 P.3d 228, 243 (Or. 2000), *overruling* *Lloyd Corp. v. Whiffen*, 849 P.2d 446 (Or. 1993). Citing only the intermediate appellate disposition of *Stranahan v. Fred Meyer, Inc.*, 958 P.2d 854 (Or. Ct. App. 1998), which was consistent with the previously announced rule of *Whiffen*, the Milks Annotation fails to recognize the 2000 overruling. See Milks, *supra* note 56, §§ 3-4. This omission cannot be explained as other than a substantive oversight; therefore, the latter, authoritative decision in *Stranahan* will be considered here to the exclusion of its predecessors.

<sup>60</sup>See Milks, *supra* note 56, § 4.

<sup>61</sup>Compare *Southcenter Joint Venture v. Nat’l Democratic Policy Comm.*, 780 P.2d 1282 (Wash. 1989), with *Alderwood Assocs. v. Wash. Envtl. Council*, 635 P.2d 108 (Wash. 1981) (plurality). The term “anti-*Pruneyard*” will be used henceforth to indicate a rejection of the argument to expand state constitutional liberty and should not be confused with the assertion that *Pruneyard* itself was wrongly decided.

provisions when ordinarily supreme federal law is settled and not encumbering.<sup>62</sup> All of the cases in the Milks Annotation are highly analogous factually, involving individual or small-group expressive activity in private shopping centers during hours when they are held open to the public. Thus, facts are narrowly constrained to as nearly a constant as possible in cross-jurisdictional empirical research. The legal provisions at stake in the various state constitutions differ in their particulars—such as text and legislative history—but are all of a kind in that they represent the express and measured preservation of individual liberty in the context of a modern democratic government with an independent judiciary. Thus, the interpretivist modes, or analytical methods, through which each court approaches the same legal problem on the same facts are comparable.

Using the shopping center factual context and the pool of case law suggested by the Milks Annotation,<sup>63</sup> two questions are considered here. First, when did state courts find affirmative state constitutional language significant, and thus a basis to distinguish textually the federal Constitution and augment state governmental power to further individual liberty interests as against competing rights? In other words, when did textualism matter? This analysis reveals that generally, state courts that choose to augment state power to advance liberty interests find distinguishing textualist arguments highly persuasive, while courts that decline to augment such state power either reject textualism outright or stretch textualist arguments to serve the courts' conclusions. Interestingly, there is little or no correlation between the value a court places on textual distinctions, and the affirmative or negative language of the subject constitutional texts, suggesting that textualism is not objectively a useful predictive tool, rather a rationale of convenience that a court may embrace or reject depending on the desired outcome.

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<sup>62</sup>Professor Simon in 1985 researched disparate freedom of expression doctrines according to state constitutional law. Simon, *supra* note 16, at 320-37. The Simon study was not limited to *Pruneyard*-type activity or individual rights vis-à-vis private interests, but did emphasize media concerns (libel, reporter privilege, open courts, and other issues, besides the *Pruneyard* problem). Professor Simon classified state court reasoning with three approaches: The “reactive” decision arises from state court disagreement with federal doctrine. The “primacy” decision construes state law to the exclusion of federal law except in event of conflict. And the “interstitial” decision fills gaps in federal doctrine. *Id.* at 315-17. “From among these groups no clear method emerge[d].” *Id.* at 337. Moreover, Professor Simon unmasked “no absolutists, no social philosophers, no insistent balancers, and few legal historians attempting to resolve free expression issues at the state level.” *Id.* (footnotes omitted).

The author is unaware of any other prior empirical research since *Pruneyard*, though of course there have been many case notes and comments. *E.g.*, Jon A. Mueller, Comment, *Transforming the Privately Owned Shopping Center Into a Public Forum*, 15 U. RICH. L. REV. 699 (1981). For an inquiry prior to *Pruneyard*—and one considerably more thorough than this study in that it surveys all state constitutional variations without limitation by case facts or subject matter—see David J. Fine, et. al, Project Report, *Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. REV. 271 (1973) (with state-by-state appendix at 322-50); *see also* discussion of Fine, et al., *infra* note 66.

<sup>63</sup>Some deviations from the Milks Annotation, *supra* note 56, are here indulged, and explanations are proffered to support those deviations. *See, e.g.*, *supra* note 59 (explaining disregard for Oregon authority cited in Annotation). The consistent intent underlying the methodology is to capture accurately the authoritative rationales operating in each of the 17 cited jurisdictions. To this end, and to simplify the analysis, minority opinions are not treated.

Second, if not textualism, what interpretivist modes<sup>64</sup> do state courts employ in construing state constitutional provisions, or what non-interpretivist policies do the courts profess to honor? None of the post-textualist interpretivist modes emerged as dominant, though a current of originalism ran through about half the decisions. For the *anti-Pruneyard* decisions, when originalism was employed, it was regarded as controlling.<sup>65</sup> Structuralism—specifically the horizontal separation of powers between judiciary and legislature—also was important, but most often appeared in a supportive, not controlling, role. As to precedentialism, trends in state-domestic case law were the most effective predictors of courts' conclusions, though the courts did not advance precedentialism as a controlling mode of analysis. At the same time, trends in other states' (foreign) case law were rejected as often as embraced.

Non-interpretivist public policy arguments tended to follow textualism in that they were embraced only by the minority of courts that employed textualism to augment state power in the name of liberty interests. Courts that declined to augment state power tended to place little or no weight on public policy arguments, if the arguments were recognized at all.

These findings offer few viable generalizations, which might indicate that a legal realist would be a better predictor of expansive construction of a state constitution than an interpretivist or public policy advocate.<sup>66</sup> One can conclude that originalism,

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<sup>64</sup>This study considers the interpretivist modes of textualism, originalism, structuralism, and precedentialism (both state-domestic and state-foreign). These are “the main interpretive strategies that have become prevalent.” Robert J. Pushaw, *Method of Interpreting the Commerce Clause: A Comparative Analysis*, 55 ARK. L. REV. 1185, 1187 (2003); see also, e.g., Ryan E. Mick, *Justifications for a Constitutional Jurisprudence of Deference to the States' Moral Judgments*, 12 KAN. J.L. & PUB. POL'Y 379, 382-90 (2003) (treating textualism, structuralism, and originalism). Each of these modes will be given the barest of definition here, full expositions being well beyond the scope of this work. For more detail, see generally, Pushaw, *supra*, at 1187-1206, and Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675, 774 n.364 (citing PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 3-119 (1982); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997)).

<sup>65</sup>Original intent has long been regarded as supreme, even over textualism. See, e.g., BERGER, *supra* note 14, at 15-16 (“That canon of construction is centuries old, as the Court itself has point out, saying, ‘The intention of the lawmaker is the law,’ rising even above the text.” (quoting *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903) (citing MATTHEW BACON, *A NEW ABRIDGEMENT OF THE LAW OF ENGLAND, Statute I(5)* (3d ed. 1768))).

<sup>66</sup>*Cf.* Simon, *supra* note 16, at 338 (disapproving, generally, of trend in state court activism for “depressing lack of uniformity” in resulting doctrines); Steven M. Kamp, Note, *Private Abridgment of Speech and the State Constitutions*, 90 YALE L.J. 165 (1980) (advocating state constitutional protections); Fine et al., *supra* note 62; Vern Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 454, 485 (1970) (“It is scarcely possible to exaggerate the importance of the role to be played by the state Bill of Rights during the next 100 years.”); Robert Force, *State “Bills of Rights”: A Case of Neglect and the Need for a Renaissance*, 3 VALPARAISO U. L. REV. 125 (1969); Monrad G. Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 VAND. L. REV. 620 (1951) (“State court decisions and state constitutional materials are too frequently ignored by both commentator and counsel when civil liberties questions arise.”).

Fine et al., in 1973, thus before the *Pruneyard* era, offered four points of advice to advocates of expanded state constitutional interests: (1) rely on textualism, (2) rely on foreign precedentialism, (3) consider questions left open in existing federal constitutional doctrine,

structuralism, and domestic precedent are most likely to play a role in a court's decision, so advocates for either position on state constitution litigation should be prepared to advance their positions using these interpretivist modes. Textualism, especially when backed up by public policy, is the better tool of the advocate for expansive state constitutional construction; if the court decides the question to the contrary, textualism and public policy will not likely play supportive roles. Meanwhile, foreign precedent seems to bear dubious value no matter for which position one wishes to advocate. Though courts considering the *Pruneyard* question were likely to contemplate foreign precedent, it proved less than enduring.

#### IV. METHOD AND ANALYSIS: EIGHTEEN OPINIONS AND SIX MODES OF ARGUMENT

Arguments appearing in the eighteen court opinions studied, whether arguments that supported the courts' conclusions or arguments that were rejected, were classified according to interpretivist mode, or as public policy arguments. The modes observed were textualism, originalism, structuralism, and domestic and foreign precedentialism.<sup>67</sup> At the outset of each of the following subsections, each term is defined in the context of this research.<sup>68</sup> Naturally, this classification scheme could not be imposed rigidly on the vagaries of legal reasoning and writing. An effort was made to distinguish distinct legal arguments according to the dominant nature of each, and only arguments that clearly operated under multiple classifications were cross-listed. The analysis begins with textualism, in an effort to determine when, or whether, the textual distinctions in state constitutional terms controlled the courts' decisions. The analysis then moves to other interpretivist modes and non-interpretivist public policy to determine what arguments, if not textualist arguments, animated decisions. Data points are presented in the Table, represented by pinpoint page numbers.

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and (4) rely on novel provisions of state constitutional law that lack federal counterparts. Fine et. al, *supra* note 62, at 315-19. Because the instant study is limited to a review of analytical modes, the latter two points exceed the scope of this inquiry. This study does bolster the first point of Fine for the advocate of expansive construction, but also shows that courts disinclined to such construction are willing to reject textualism. To Fine's credit, their discussion of textualism ("linguistic variation") includes originalism, which may have merit for advocates on both sides. *See id.* at 315-16. Unfortunately for Fine, as to their second point, the instant study shows that courts are willing to reject foreign precedent when they find it disagreeable—though granted, it remains a worthy point for the advocate to address, as it has proven of interest to the courts. Of course, these observations and criticisms of Fine, are limited to the *Pruneyard* fact scenario, the focus of this study, and might not be valid in light of developments in other areas of state constitutional law, such as the broad range Fine studied, including, for example, cruel and unusual punishment, and search and seizure.

<sup>67</sup>The term "precedentialism" is taken from Pushaw, *supra* note 64. The term appears as well in Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995).

<sup>68</sup> *See supra* text accompanying note 64.

Mode	Textualism	Originalism	Structuralism	Domestic Precedent	Foreign Precedent	Public Policy
Case						
<i>Robins</i> , 592 P2d 341 (Cal 1979)	346	346		346-37		347
<i>Alderwood</i> , 635 P2d 108 (Wash 1981) (plural)	114		113	113	115	116
<i>Batchelder</i> , 445 NE2d 590 (Mass 1983)	593				594	595
<i>Bock</i> , 819 P2d 55 (Colo 1991)	58-59	60		59-60		62
<i>JMB</i> , 650 A2d 757 (NJ 1994) [ <i>Schmid</i> , 423 A2d (1980)]	[626 & n.8, 627-28 (mixed)]	[628]		760-61 [625-26]	769-70	761, 766-67, 772-75 [627]
<i>Felmet</i> , 273 SE2d 708 (NC 1981)						
<i>Cologne</i> , 469 A2d 1201 (Conn 1984)	1208-09 (rejected)	1208	1209-10			1209 (rejected)
<i>Woodland</i> , 378 NW2d 337 (Mich 1985) (e'banco)	344-45 (rejected)	346, 348-50	344, 346-47, 357-58	344-45	357 (mixed)	353, 358 (rejected)
<i>SHAD</i> , 488 NE2d 1211 (NY 1985)	1214 (rejected)	1214	1216-17	1215	1214	1216 (rejected)
<i>W. Pa.</i> , 515 A2d 1331 (Pa 1986)	1334				1338-39 (mixed)	1336 (rejected)
<i>Jacobs</i> , 407 NW2d 832 (Wis 1987)	836, 839- 40	837, 841	840	838-39	841-44 (mixed)	845
<i>Fiesta</i> , 767 P2d 719 (Ariz App 1988)	721 (rejected)				722-23	724
<i>Southcenter</i> , 780 P2d 1282 (Wash 1989)	1287-88 (rejected)	1287-88	1288		1289	1290-92 (rejected)
<i>Citizens</i> , 392 SE2d 8 (Ga 1990)					9-10	9 (rejected)
<i>Charleston</i> , 417 SE2d 544 (SC 1992)						
<i>Eastwood</i> , 626 NE2d 59 (Ohio 1994)	61			61	61	
<i>Stranahan</i> , 11 P3d 228 (Or 2000)	239-42	243		242-43		
<i>Engler</i> , 641 NW2d 803 (Iowa 2002)	805-06 (rejected)				805	806

### A. Textualism

Textualism, also called “strict constructionism,” is “[t]he doctrinal view of judicial construction holding that judges should interpret a document or statute . . . according to its literal terms, without looking to other sources to ascertain the meaning.”<sup>69</sup> Textualism is appealing because it does not require debate about the weight to be accorded competing contextual factors, such as the intentions of multiple authors or the understandings of historical readers. At the same time, textualism may be criticized for failing to account for context beyond the four corners of the document. Textualism is typically the first tool employed by the interpretivist, who resorts to other interpretivist tools only when the meaning of a text is not plain on its face. Of course, plain meaning is often a matter of perspective, providing ample wiggle room for interpretivist or activist construction.

The constitutional provisions at issue in the cases vary in the affirmative and negative nature of their guarantees, in comparison with or in contrast to the First Amendment’s negative statement, “Congress shall make no law . . . .” One might therefore expect that textualist analysis would reflect these variations. But generally, the state courts employed textualism only when it served to distinguish the federal Constitution and expand state constitutional rights. Courts construing their state-protected rights in accordance with the federal Constitution tended to reject textualism.

All five of the jurisdictions that expanded state constitutional rights on behalf of activists in shopping centers—California, New Jersey, Massachusetts, Colorado, and Washington—asserted textualist justifications. The constitutions of California, Colorado, and New Jersey contain both affirmative and negative free speech and

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<sup>69</sup>BLACK’S LAW DICTIONARY 1434 (7th ed. 1999). There is ample literature on textualism in a variety of contexts. Though textualism is discussed—and usually disparaged—primarily as a tool of statutory interpretation, much of the literature nonetheless considers specifically constitutional textualism, or regards textualism sufficiently broadly as to describe constitutional textualism. *See, e.g.*, Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002); Nancie G. Marzulla, *The Textualism of Clarence Thomas: Anchoring the Supreme Court’s Property Rights Jurisprudence to the Constitution*, 10 AM. U. J. GENDER SOC. POL’Y & L. 351 (2002); John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE W. RES. L. REV. 489 (2001); Paul E. McGreal, *There Is No Such Thing as Textualism: A Case Study in Constitutional Method*, 69 FORDHAM L. REV. 2393 (2001) (emphasizing textualism, “constitutional law’s Loch Ness monster,” as a non-exclusive tool); Joel K. Goldstein, *Can the Vice President Preside at His Own Impeachment Trial?: A Critique of Bare Textualism*, 44 ST. LOUIS U. L.J. 849 (2000); Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court’s Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819 (1999); *Symposium: Textualism and the Constitution*, 66 GEO. WASH. L. REV. 1081 (1998); George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321 (1995); Bryan H. Wildenthal, *The Right of Confrontation, Justice Scalia, and the Power and Limits of Textualism*, 48 WASH. & LEE L. REV. 1323 (1991); Mark V. Tushnet, Comment, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683 (1985). *See generally*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW: AN ESSAY (1997); LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES (1985).

press provisions. Apparently construing the affirmative provision, the California Supreme Court wrote that the framers of the state constitution deliberately chose not to “adopt[] the words of the federal Bill of Rights.”<sup>70</sup> The Colorado court similarly observed that its affirmative clause “advances beyond the negative command” of its federal counterpart, thus distinguishing the Colorado Constitution from the First Amendment.<sup>71</sup>

The New Jersey Constitution contains provisions almost identical to those of California,<sup>72</sup> and the New Jersey Supreme Court observed that the affirmative language makes New Jersey’s free expression guarantee “more sweeping in scope than the language of the First Amendment.”<sup>73</sup> But the New Jersey court also took on its negative clause. Rejecting textualism amid its very endorsement, the court stated that identical language in state and federal constitutions does not demand like construction.<sup>74</sup> Quoting a pre-*Pruneyard* California Supreme Court decision, the court noted that “[t]he lesson of history is otherwise: the [federal] Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse.”<sup>75</sup> The New Jersey court went so far as to suggest that even constrained by a negative provision, the legislature might be compelled to legislate in furtherance of free speech, “as the Legislature cannot abridge constitutional rights by its enactments [nor] curtail them through its silence.”<sup>76</sup>

The Massachusetts Supreme Judicial Court found no need to reach its free speech and petition provisions—the latter plainly affirmative<sup>77</sup> and the former negative, but

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<sup>70</sup>*Robins*, 592 P.2d at 346 (construing CAL. CONST. art. I, § 2 (“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.”)), *aff’d*, 447 U.S. 74 (1980). The statement is at once a comment on textualism and originalism, reflecting the fact that textualism is rarely used to the exclusion of other analytical modes.

<sup>71</sup>*Bock v. Westminster Mall Co.*, 819 P.2d 55, 58 (Colo. 1991) (construing COLO. CONST. art. II, § 10 (“No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for the abuse of that liberty . . .”)).

<sup>72</sup>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 passed to restrain or abridge the liberty of speech or of the press.”).

<sup>73</sup>*New Jersey v. Schmid*, 423 A.2d 615, 626, 628 (N.J. 1980). This case on its own facts is outside the scope of this study, because it involved trespass on private university property, not on shopping center property. However, the later New Jersey case involving shopping center property incorporated *Schmid* by reference. *N.J. Coalition Against War in the Middle East v. JMB Realty Corp.*, 650 A.2d 757, 760-61, 770 (N.J. 1994). The incorporation of *Schmid* is so thorough and essential to the holding in *JMB Realty* that it is impossible to understand the *JMB Realty* court’s reasoning without *Schmid*. A deviation from the methodology is therefore tolerated here.

<sup>74</sup>*Schmid*, 423 A.2d at 625-27.

<sup>75</sup>*Id.* at 626 n.8 (quoting *California v. Brisendine*, 531 P.2d 1099, 1113 (Cal. 1975)).

<sup>76</sup>*Id.* at 627 (quoting *King v. S. Jersey Nat’l Bank*, 330 A.2d 1, 10 (N.J. 1974)).

<sup>77</sup>MASS. CONST. pt. 1, art. XIX (“The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their



passive and unrestricted, i.e., with no suppressed subject (“shall not be abridged”)<sup>78</sup>—because the court protected a candidate’s signature-gathering as a ballot access right.<sup>79</sup> The operative article 9 of the Massachusetts Declaration of Rights begins simply, “All elections ought to be free,” and goes on to guarantee to “all inhabitants of the Commonwealth . . . an equal right to elect officers, and to be elected, for public employments.”<sup>80</sup> Nevertheless, discussing the Declaration of Rights generally, not just article 9, the court determined that the use of affirmative language “is significant” and “reject[ed] any suggestion that the Declaration of Rights should be read as directed exclusively toward restraining Government action.”<sup>81</sup> That determination served as the basis for rejecting a state action requirement for article 9.<sup>82</sup>

Textualism was at first embraced and then rejected in Washington. Extending the state constitution to protect environmentalist signature-gathering on shopping center property, a supreme court plurality relied on the speech and initiative provisions of the state constitution.<sup>83</sup> Both provisions in Washington are affirmative,<sup>84</sup> with no negative counterparts, and this resemblance to the affirmative language at issue in California and New Jersey was instrumental in reaching the plurality’s conclusion.<sup>85</sup> Eight years later, however, a supreme court majority rejected textualism as impermissibly contravening originalism:

It is a 2-foot leap across a 10-foot ditch . . . to seize upon the absence of a reference to the State as the actor limited by the state free speech provision and conclude therefrom that the framers of our state constitution intended to create a bold new right that conflicts with the fundamental

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representatives, and to request of the legislative body, by way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.”).

<sup>78</sup>MASS. CONST. pt. 1, art. XVI (“The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth. The right of free speech shall not be abridged.”). The latter sentence of this article was added by amendment in 1948. MASS. CONST. amend. LXXVII.

<sup>79</sup>*Batchelder v. Allied Stores Int’l, Inc.*, 445 N.E.2d 590, 593 & n.8, 595 & n.11 (Mass. 1983). The court suggested that state action might not be required under the free speech clause, but declined the question. *Id.* at 593 n.8.

<sup>80</sup>MASS. CONST. pt. 1, art. IX.

<sup>81</sup>*Batchelder*, 445 N.E.2d at 593.

<sup>82</sup>*Id.* at 593-94.

<sup>83</sup>*Alderwood Assocs. v. Wash. Env’tl. Council*, 635 P.2d 108 (Wash. 1981) (construing WASH. CONST. art. I, § 5 (“Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.”), amend. VII (reserving the power of initiative to the people)).

<sup>84</sup>For a discussion regarding the initiative power reserved to the people by Washington Constitution amendment 7, see WASH. CONST. art. II, § 1 (“[T]he people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature . . .”).

<sup>85</sup>*Alderwood Assocs.*, 635 P.2d at 114-15.

premise on which the entire constitution is based. To do so would not be to “interpret” our constitution, but to deny its very nature.

The much more likely and reasonable explanation for the absence of the words in question is that the framers viewed them as redundant and in the interest of simplicity simply deleted them.<sup>86</sup>

The court further speculated that the framers might have departed from the language of the First Amendment (“Congress shall make no law”) to clarify that the provision restrained all state government, not just the legislature.<sup>87</sup> Nevertheless, the court let stand the earlier plurality conclusion, resting it solely on the initiative provision. “[U]nlike the free speech provision,” the court reasoned, “the initiative provision is not part of our state constitution’s Declaration of Rights and does not establish a right against the government but declares that the people are part of the legislative process.”<sup>88</sup>

Of the dozen states that rejected pleas for state constitutional protection of expressive activity in shopping centers, barely three—Pennsylvania, Wisconsin, and arguably Ohio—clearly relied on textualist rationales in reaching conclusions contrary to those of California, et al. Oregon seemed receptive to textualist analysis, but so narrowed its level of abstraction as to discover “silence” on the state action question.<sup>89</sup> An affirmative reservation to the people of the initiative and referendum power in that state<sup>90</sup> said nothing about how signatures should be gathered, propelling the court into other interpretivist modes.<sup>91</sup>

Pennsylvania’s Constitution contains plainly affirmative guarantees of free expression and petition.<sup>92</sup> But the Pennsylvania Supreme Court viewed the provisions not in and of themselves, rather in the context of the entire document: a change in the level of textualist abstraction bolstered by originalist interpretation.<sup>93</sup>

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<sup>86</sup>*Southcenter Joint Venture*, 780 P.2d at 1287-88.

<sup>87</sup>*Id.* at 1288. “Textualistically” speaking, the elimination of an actor altogether hardly clarified the question of what actor is restrained.

<sup>88</sup>*Id.* at 1289 (citing *Alderwood Assocs.*, 635 P.2d 108, 120-21 (Dolliver, J., concurring)).

<sup>89</sup>*Stranahan v. Fred Meyer, Inc.*, 11 P.3d 228 (Or. 2000).

<sup>90</sup>OR. CONST. art. IV, § 1.

<sup>91</sup>*Stranahan*, 11 P.3d at 239-41.

<sup>92</sup>PA. CONST. art. I, § 7 (“The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.”); *id.* § 20 (“The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance.”). Section 7 further contains a negative statement on legislative interference with the use of a printing press specifically “to examine the proceedings of the Legislature or any branch of government[.]” *Id.* § 7.

<sup>93</sup>*W. Pa. Socialist Workers 1982 Campaign v. Conn. Gen. Life Ins. Co.*, 515 A.2d 1331, 1334 (Pa. 1986). The contextual inquiry may be described as structural textualism, involving the structure of a document, a concept apart from structuralism, involving the structure of the governmental system a document describes. *Id.*

At this broader level of abstraction, the court acknowledged that in the state's 1776 constitution, civil liberties were stated in a second part of the document, apart from governmental powers in the first; the second part was designed to serve as a limitation on the first.<sup>94</sup> Thus, the textual design demonstrated a state action requirement in otherwise uncompromising affirmative statements of rights.<sup>95</sup>

In a methodically interpretivist approach to its state constitution, the Wisconsin Supreme Court began with "plain meaning"<sup>96</sup> and found that mixed affirmative and negative clauses<sup>97</sup> could not reasonably be misunderstood to create other than a right against state action.<sup>98</sup> The court perceived the latter negative clause as defining the contours of the former, affirmative clause, rather than viewing the affirmative clause as a separate statement with independent meaning.<sup>99</sup> Ohio seemed to reach a similar result in construing its mixed clauses<sup>100</sup> when it concluded, with little additional elaboration, that "the plain language . . . *when read in its entirety*," contains a state action requirement.<sup>101</sup>

Courts in Michigan, Connecticut, Arizona, Iowa, and New York rejected textualist analyses for state rights unfettered by a state action requirement. Iowa and New York, both with mixed affirmative/negative provisions,<sup>102</sup> did not clearly employ textualist analyses, but followed Michigan and Connecticut, respectively, in rejecting textualist distinctions.<sup>103</sup> The Arizona Court of Appeals implicitly rejected

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<sup>94</sup>*Id.* at 1335.

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

<sup>96</sup>*Jacobs*, 407 N.W.2d at 836.

<sup>97</sup>WIS. CONST. art. I, § 3 ("Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press.").

<sup>98</sup>*Jacobs*, 407 N.W.2d at 837. The court did concede that "[w]hether language of a statute or constitutional provision is clear or ambiguous depends on the mind-set of the reader," but proceeded on its own "mind-set," observing that of alternative reasonable interpretations, one might be the only "correct" interpretation. *Id.*

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

<sup>100</sup>OHIO CONST. art. I, § 11 ("Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press.").

<sup>101</sup>*Eastwood Mall, Inc. v. Slanco*, 626 N.E.2d 59, 61 (Ohio 1994) (emphasis added).

<sup>102</sup>IOWA CONST. art. I, § 7 ("Every person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech, or of the press."); N.Y. CONST. art. I, § 8 ("Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.").

<sup>103</sup>*City of W. Des Moines v. Engler*, 641 N.W.2d 803, 806 (Iowa 2002) (following *Woodland*, 378 N.W.2d at 344, 346); *SHAD Alliance*, 488 N.E.2d at 1214 (following *Cologne v. Westfarms Assocs.*, 469 A.2d 1201, 1207-08 (Conn. 1984)).

textualism in not responding directly to a litigant's textualist arguments<sup>104</sup> based on an affirmative free speech provision and a negative, but passive voice and unrestricted, free petition provision.<sup>105</sup> Meanwhile the courts in Michigan and Connecticut were unequivocal in their rejection of textualism. The Michigan Supreme Court ruled specifically that there is no "significant" distinction in affirmative and negative language choices, observing that the court had previously construed Michigan constitutional text differently from the construction given to identical text in the federal Constitution.<sup>106</sup> Thus, the affirmative language of the Michigan petition guarantee and the mixed language of the free speech clauses<sup>107</sup> were of no importance. The Connecticut Constitution contains only affirmative assertions of free speech and petition rights,<sup>108</sup> but the Connecticut Supreme Court similarly concluded that affirmative/negative variations were unhelpful in discerning the framers' intent.<sup>109</sup>

The Georgia Supreme Court did not address textualism in construing its affirmative petition guarantee.<sup>110</sup> The North Carolina Supreme Court, asked to construe a negative, but passive and unrestricted, free speech provision, declined to

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<sup>104</sup>See *Fiesta Mall Ventures v. Mecham Recall Comm.*, 767 P.2d 719, 721 (Ariz. Ct. App. 1988).

<sup>105</sup>ARIZ. CONST. art. II, § 5 ("The right of petition, of the people to peaceably assemble for the common good, shall never be abridged."); *id.* § 6 ("Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."). The court did reason similarly to the Washington Supreme Court, but with a different result, in concluding that the reservation of initiative and referendum power to the people did not constitute a declaration of right, therefore was subject to a different state action analysis. *Fiesta Mall Ventures*, 767 P.2d at 724-25 (construing ARIZ. CONST. art. IV, pt. 1, § 1).

<sup>106</sup>*Woodland*, 378 N.W.2d at 345.

<sup>107</sup>MICH. CONST. art. I, § 3 ("The people have the right peaceably to assemble, to consult for the common good, to instruct their representatives and to petition the government for redress of grievances."); *id.* § 5 ("Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press.").

<sup>108</sup>CONN. CONST. art. I, § 4 ("Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."); *id.* § 14 (The citizens have a right, in a peaceable manner, to assemble for their common good, and to apply to those invested with the powers of government, for redress of grievances, or other proper purposes, by petition, address or remonstrance.").

<sup>109</sup>*Cologne*, 469 A.2d at 1208-09. Though finding textual analysis unhelpful in this case, the Connecticut court affirmed the importance of "the written document as a shield against the arbitrary exercise of governmental power," stating as follows: "This court has never viewed constitutional language as newly descended from the firmament like fresh fallen snow upon which jurists may trace out their individual notions of public policy uninhibited by the history which attended the adoption of the particular phraseology at issue and the intentions of its authors." *Id.*

<sup>110</sup>See *Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assocs.*, 392 S.E.2d 8 (Ga. 1990) (construing GA. CONST. art. I, § 1, ¶ 9 ("The people have the right to assemble peaceably for their common good and to apply by petition or remonstrance those vested with the powers of government for redress of grievances.")).

do so at all.<sup>111</sup> And the South Carolina Supreme Court simply declared its free expression provision as in harmony with the federal First Amendment;<sup>112</sup> indeed the language is nearly identical.<sup>113</sup>

In sum, textualism only mattered when it mattered; that is to say, generally, the few courts that wished to take advantage of affirmative-negative language distinctions employed textualism to do so, thus distinguishing their state constitutional clauses from the Bill of Rights and augmenting state power to further individual liberty interests. The majority of the courts studied, which chose not to expand their state constitutional rights to protect expressive liberties in private shopping centers, either rejected outright a distinction between affirmative and negative language choices, or stretched textualist doctrine so as to construe affirmative language as having only negative effect.

Interestingly, there was little or no correlation between the value a court placed on textual distinctions and the affirmative or negative language of the constitutional texts subject to construction. Of the five constitutional provisions at issue in the “expansionist,” or pro-*Pruneyard*, states, three were mixed, employing both affirmative and negative language, and only two were plainly affirmative. Of the thirteen provisions<sup>114</sup> that rendered no enhanced state power to further individual liberties, only one—South Carolina—was plainly negative, like the federal First Amendment. Four were mixed. One was passive but unrestricted, and a majority of seven were plainly affirmative, thus distinguishable from the federal First Amendment on their faces, but to no avail. Of the three majority jurisdictions that explored textualism at all, two were in the “plainly affirmative” camp, and the other, Wisconsin, involved mixed language.

Thus when textualism was employed, it enabled opposing results that could not be predicted by reference to the analyzed text. Courts could take or leave textualism regardless of the subject text, but courts that “took” textualism reached expansionist results more often than not, in contravention of the majority rule. One can only conclude that textualism is not a reliable or consistent predictor across jurisdictions.

#### *B. If Not Textualism, What?*

Originalism is the leading interpretivist tool when plain meaning fails. In this study, it appeared in half of the cases; however, its treatment in the pro-*Pruneyard* cases was thin. Structuralism—specifically the separation of powers between judiciary and legislature—appeared frequently in the anti-*Pruneyard* camp, but

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<sup>111</sup>North Carolina v. Felmet, 273 S.E.2d 708, 712 (N.C. 1981) (declining to construe N.C. CONST. art. I, § 14 (“Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person should be held responsible for their abuse.”)).

<sup>112</sup>Charleston Joint Venture v. McPherson, 417 S.E.2d 544, 548 n.7 (S.C. 1992).

<sup>113</sup>Compare S.C. CONST. art. I, § 2 (“The General Assembly 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 or any department thereof for a redress of grievances.”), with U.S. CONST. amend. I.

<sup>114</sup>The reader will recall that Washington counts twice, so there are 17 jurisdictions and 18 constitutional authorities.

hardly at all among pro-*Pruneyard* cases. Trends in state domestic case law were the most effective predictors of courts' conclusions. At the same time, trends in foreign precedent were rejected as often as embraced. Finally, non-interpretivist public policy arguments tended to be embraced by the pro-*Pruneyard* cases and rejected by the anti-*Pruneyard* cases.

### 1. Originalism

According to the theory of originalism, constitutional language "should be interpreted according to the intent of those who drafted and adopted it."<sup>115</sup> Originalism therefore permits inquiry into circumstantial evidence of drafters', or voters', intent, just as legislative committee reports and floor debates are indicative of statutory intent.

Originalism was invoked modestly by the court in *Pruneyard*; the textualist assertion that the framers of the California Constitution deliberately chose not to "adopt[] the words of the federal Bill of Rights"<sup>116</sup> rings simultaneously of originalism. The mode made similarly spare but perceptible appearances in the reasoning of the Colorado and New Jersey courts. The former observed that an expansive interpretation of individual rights under the Colorado Constitution was consistent with "an opinion issued within a few years after the Colorado Constitution was adopted and while its drafting was a living memory."<sup>117</sup> The New Jersey Supreme Court observed that an expansive interpretation of its free speech and assembly guarantees "comports with the presumed intent of those who framed our Constitution."<sup>118</sup> The Supreme Judicial Court of Massachusetts and the Washington Supreme Court plurality did not rely on originalist arguments.

Meanwhile, six of the thirteen anti-*Pruneyard* rulings invoked originalism. The Connecticut court was especially artful in its assertion of originalism as an interpretivist mode superior to any analytical approach that would result in activism:

This court has never viewed constitutional language as newly descended from the firmament like fresh fallen snow upon which jurists may trace out their individual notions of public policy uninhibited by the history which attended the adoption of the particular phraseology at issue and the intentions of its authors. The faith which democratic societies repose in the written document as a shield against the arbitrary exercise of governmental power would be illusory if those vested with the responsibility for construing and applying disputed provisions were free to stray from the purposes of the originators. "If the words have a doubtful meaning, or are susceptible of two meanings, they should receive that

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<sup>115</sup>BLACK'S LAW DICTIONARY 1126 (7th ed. 1999). On the importance of originalism in constitutional interpretation, see generally, BERGER, *supra* note 14, at 3-20.

<sup>116</sup>*Robins*, 592 P.2d at 346. *Cf. supra* text accompanying note 70.

<sup>117</sup>*Bock*, 819 P.2d at 60 (citing *Cooper v. Colo.*, 22 P. 790 (1889)). Arguably this phrase better represents the theory of "original meaning" than "original intent." These two concepts are deliberately conflated in this study, as they are arguably conflated even in the *Black's Law Dictionary* definition of "originalism." BLACK'S LAW DICTIONARY 1126 (7th. ed. 1999).

<sup>118</sup>*Schmid*, 423 A.2d at 628 (citing monograph record of 1947 New Jersey constitutional convention). *Cf. supra* text accompanying note 73.

which will effectuate the intent of the framers of the Constitution and the general intent of the instrument.”<sup>119</sup>

The Washington Supreme Court majority decision similarly trumpeted the superiority of originalism, in that case over textualism. In the passage quoted earlier in reference to textualism,<sup>120</sup> the court declined to infer drafter intent from a textual omission.

The Michigan court referenced records of the 1961 and 1963 state constitutional conventions to determine that a state action requirement was intended for the Michigan free speech guarantee,<sup>121</sup> and to demonstrate that the citizen initiative process “was not intended to be easy to fulfill.”<sup>122</sup> The same records of drafter intent even superseded the effect of plain text. Though not in a dispositive holding, the court wrote that the initiative and referendum provisions of the state constitution, reserving power to the people, are self-executing, despite the constitutional decree that “[t]he legislature shall implement the provisions of this section.”<sup>123</sup>

The courts in New York, Oregon, and Wisconsin also operated in the originalist mode. The New York Court of Appeals, like the Michigan Supreme Court, found a state action requirement for the New York Bill of Rights in the proceedings of the 1821 state constitutional convention. The Oregon court sought evidence both of drafters’ intent and of voters’ understanding<sup>124</sup> of relevant constitutional provisions when they were adopted in 1902 and 1968 elections, but the court found no helpful “objective materials.”<sup>125</sup> The Wisconsin court rated originalist inquiries as secondary to plain meaning, but asserted anyway that the anti-*Pruneyard* analysis accorded with the “accurate and scholarly recitation of the history of [the state free speech provision]” as rendered in an earlier concurring opinion.<sup>126</sup> The court further stated that any novel theory of constitutional interpretation advanced by a litigant must be supported by originalist arguments.<sup>127</sup>

## 2. Structuralism

Structuralism “compar[es] the institutional capabilities of the judiciary with those of legislatures” to determine when “the latter are probably better qualified to decide

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<sup>119</sup>*Cologne*, 469 A.2d at 1208 (quoting *Borino v. Lounsbury*, 86 A. 597 (1913)).

<sup>120</sup>*See supra* text accompanying note 86.

<sup>121</sup>*Woodland*, 378 N.W.2d at 346 & n.25.

<sup>122</sup>*Id.* at 350 & n.33 (quoting the convention record: “It’s tough. We want to make it tough. It should not be easy. The people should not be writing the laws. That’s what we have a senate and house of representatives for.”).

<sup>123</sup>*Id.* at 348.

<sup>124</sup>*See supra* text accompanying note 117 (regarding “original meaning”).

<sup>125</sup>*Stranahan*, 11 P.3d at 243.

<sup>126</sup>*Jacobs*, 407 N.W.2d at 837 (citing *Jacobs v. Major*, 390 N.W.2d 86 (Wis. Ct. App. 1986) (Gartzke, J., concurring)).

<sup>127</sup>*Id.* at 841 (citing *Jacobs*, 390 N.W.2d 86).

morally sensitive questions for the public.”<sup>128</sup> Structuralism is commonly used as a mode to buttress conclusions achieved through other interpretivist modes, namely textualism and originalism,<sup>129</sup> and so it is in the cases studied here.

Among *Pruneyard* and its progeny, only the Washington plurality decision invoked a structuralist rationale. The court cited *Federalist No. 51* in describing dual sovereignty and separation of powers as providing a “double security” to the people against abuse of power by government.<sup>130</sup> Under this system, the judiciary is bound, the court reasoned, to intervene as against the legislature when necessary to protect individual rights.<sup>131</sup> The court attributed “a reluctance by state courts to interpret and to apply their state constitutions” to both “the failure of litigators to claim state constitutional errors” and “the fact that often state and federal constitutions have conferred the state protections.”<sup>132</sup>

Structuralism clearly cuts the other way, limiting judicial power, in five of the anti-*Pruneyard* decisions, including the majority decision in Washington. Sharply differing from the approach of the earlier plurality decision, the Washington Supreme Court explained, quoting the *American Jurisprudence* encyclopedia, that “American courts are constantly wary not to trench upon the prerogatives of other departments of government or to arrogate to themselves any undue powers, lest they disturb the balance of power . . . .”<sup>133</sup> Simply employing a balancing test to reconcile the competing constitutional interests in expression and property would “arrogat[e] to the judicial branch . . . government powers that properly reside with the legislative branch of government.”<sup>134</sup>

The Washington court then quoted the Connecticut court on the undesirability of a balancing solution:

[T]he legislature . . . has far greater competence and flexibility to deal with the myriad complications which may arise from the exercise of constitutional rights by some in diminution of those of others. . . . Statutes would become largely obsolete if courts in every instance of the assertion of conflicting constitutional rights should presume to carve out

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<sup>128</sup>Mick, *supra* note 64, at 380. Structuralism may implicate comparisons between various expressions, or institutions, of government, such as the state with the federal government, but only the judiciary-legislature comparison pertains here. *See, e.g., id.* at 389-91.

<sup>129</sup>*See, e.g.,* Pushaw, *supra* note 64, at 1189 n.16.

<sup>130</sup>*Alderwood Assocs.*, 635 P.2d at 113 (citing ALEXANDER HAMILTON OR JAMES MADISON, THE FEDERALIST NO. 51, at 339 (Modern Library ed. 1937)).

<sup>131</sup>*Id.*

<sup>132</sup>*Id.*

<sup>133</sup>*Southcenter Joint Venture*, 780 P.2d at 1288 (citing Wash. State Motorcycle Dealers Ass’n v. Washington, 763 P.2d 442 (1988) (quoting 16 AM. JUR. 2D *Constitutional Law* § 309, at 829-30 (1979))).

<sup>134</sup>*Id.*



in the immutable form of constitutional adjudication the precise configuration needed to reconcile the conflict.<sup>135</sup>

The Supreme Court of Michigan similarly pointed to the legislature's "superior fact-finding ability and general legislative authority" to solve problems of conflicting rights,<sup>136</sup> and "judicial arrogation" in abrogating the state action requirement also concerned the New York Court of Appeals.<sup>137</sup> Finally, the Wisconsin Supreme Court, warning that courts must not "become mini-constitutional conventions," invoked structuralist reasoning to press the primacy of interpretivism, through textualism and originalism, over activism.<sup>138</sup>

### 3. Precedentialism

Stare decisis, or adherence to precedent, rarely stands as a rationale apart, rather, like structuralism, it tends to bolster conclusions derived through other interpretivist modes. Moreover, reliance on precedents usually means reliance on previous decisions that are in fact derived through other modes of analysis. Thus, precedentialism in a given case might (or might not) in fact represent reliance on a string of authorities that consistently adhere to an original vision. Nevertheless, in time, principles derived from precedent can take on lives of their own, becoming detached from their analytical roots. Such principles may even grow beyond the analytical justifications that created them. Thus, one might argue that "the Constitution can be understood only by uncovering the layers of practices, conventions, and judicial decisions that have accumulated over centuries," even to the exclusion of "the Framers's initial 'commands.'"<sup>139</sup> Reliance upon precedent, therefore, appears in the case law absent any readily demonstrable association with underlying modes of analysis. When this reliance occurs in the cases studied here, the rationale is termed "precedentialist."

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<sup>135</sup> *Southcenter Joint Venture*, 780 P.2d at 1288-89 (quoting *Cologne*, 469 A. 2d at 1210). In *Southcenter Joint Venture*, 780 P.2d at 1289 n.25, the Washington Supreme Court also pointed to the concurring opinion in *Alderwood Associates v. Washington Environmental Council*, in which Justice Dolliver complained that the plurality employed constitutional interpretation to usurp the legislative prerogative and "arrogate[] to the court powers undreamed of by those who wrote and those who adopted our constitution," *Alderwood Assocs.*, 635 P.2d at 119 (Dolliver, J., concurring). The majority in *Southcenter Joint Venture* further observed that the judiciary must avoid infringement of the executive prerogative to propose and veto legislation. *Southcenter Joint Venture*, 780 P.2d at 1289.

<sup>136</sup> *Woodland*, 378 N.W.2d at 358.

<sup>137</sup> *SHAD Alliance*, 488 N.E.2d at 1216-17 (quoting *Montgomery v. Daniels*, 340 N.E.2d 444, 451 (N.Y. 1975); citing *Alderwood Assocs.*, 635 P.2d at 119 (Dolliver, J., concurring)).

<sup>138</sup> *Jacobs*, 407 N.W.2d at 840 ("Courts would be ill-advised to rewrite history and plain, clear constitutional language to create some new rights contrary to history. To do this courts would become mini-constitutional conventions in individual court cases whenever a new theory or philosophy became appealing. . . . That is not the right nor privilege of courts or judges.").

<sup>139</sup> Pushaw, *supra* note 64, at 1202-03 (citing Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (1998); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996)).

In analyzing precedentialist rationales in the cases, it is important to distinguish between reliance on “domestic” precedent, meaning a state court’s reliance on its own prior case law, and perhaps that of subordinate state courts, and reliance on “foreign” precedent, meaning a state court’s reliance on the precedents of other states. The distinction is striking: trends in domestic precedents are effective predictors of how a court solves the *Pruneyard* problem, while foreign precedents are expressly rejected as often as embraced.

In the *Pruneyard* family of cases, four of the five jurisdictions relied on domestic trends. The California and Colorado courts and the Washington plurality all referred to domestic trends of expanded state constitutional rights, in relation to federal counterparts.<sup>140</sup> The Supreme Court of New Jersey embraced its own expansive interpretation of state constitutional rights in a pre-*Pruneyard* criminal trespass case.<sup>141</sup> The fifth jurisdiction, Massachusetts, cited foreign precedent with approval<sup>142</sup>—at the time of that decision in 1983, a majority of state court decisions favored the *Pruneyard* reasoning—while the Washington plurality cited as persuasive the foreign precedents in California and New Jersey.<sup>143</sup> For its part, the New Jersey Supreme Court acknowledged that most, but not all, foreign precedents by 1994 were contrary to its decision.<sup>144</sup>

In the anti-*Pruneyard* family of cases, five of the thirteen jurisdictions—Michigan, New York, Ohio, Oregon, and Wisconsin—observed that their domestic trends disfavored the expansive readings of implicated state constitutional provisions sought by individual rights advocates.<sup>145</sup> Nine of the thirteen jurisdictions referenced foreign precedents. The courts in Arizona, Georgia, Iowa, New York, Ohio, and Washington all recognized that they were following a majority trend.<sup>146</sup> The Michigan Supreme Court, before those six decisions, embraced the Connecticut court’s reasoning and rejected *Pruneyard* and the Washington plurality ruling;<sup>147</sup> the Pennsylvania and Wisconsin courts followed suit.<sup>148</sup>

In review, courts that observed domestic trends to expand or to refrain from expanding state constitutional rights tended subsequently to follow those trends. Foreign trends, on the other hand, seem to lack such a grip. *Pruneyard* initially

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<sup>140</sup>*Robins*, 592 P.2d at 346-47; *Bock*, 819 P.2d at 59-60; *Alderwood Assocs.*, 635 P.2d at 113.

<sup>141</sup>*JMB Realty Corp.*, 650 A.2d at 760-61 (citing *Schmid*, 423 A.2d at 625-26 (also observing domestic trend)). *Cf. supra* text accompanying note 73.

<sup>142</sup>*Batchelder*, 445 N.E.2d at 594.

<sup>143</sup>*Alderwood Assocs.*, 635 P.2d at 115.

<sup>144</sup>*JMB Realty Corp.*, 650 A.2d at 769-70.

<sup>145</sup>*Woodland*, 378 N.W.2d at 344-45; *SHAD Alliance*, 488 N.E.2d at 1215; *Eastwood Mall, Inc.*, 626 N.E.2d at 61; *Stranahan*, 11 P.3d at 242-43; *Jacobs*, 407 N.W.2d at 838-39.

<sup>146</sup>*Fiesta Mall Venture*, 767 P.2d at 722-23; *Citizens for Ethical Gov’t, Inc.*, 392 S.E.2d at 9-10; *Engler*, 641 N.W.2d at 805; *SHAD Alliance*, 488 N.E.2d at 1214; *Eastwood Mall, Inc.*, 626 N.E.2d at 61; *Southcenter Joint Venture*, 780 P.2d at 1289.

<sup>147</sup>*Woodland*, 378 N.W.2d at 357.

<sup>148</sup>*W. Pa. Socialist Workers 1982 Campaign*, 515 A.2d at 1338-39; *Jacobs*, 407 N.W.2d at 841-44.

pulled in its wake the Massachusetts Supreme Judicial Court and the dubious Washington plurality. But once the Connecticut court struck out in a different direction, other courts piled on quickly, distancing themselves without difficulty from the rapidly fading *Pruneyard* trend. Over only a year or two, an anti-*Pruneyard* trend emerged, and approval of foreign precedent again became the fashion.

#### 4. Public Policy

“Public policy” refers to reasoning that describes the best outcome for society. Public policy rationales encompass reasoning based on “living constitutionalism,” which seeks to interpret constitutional language “according to evolving notions of justice, morality, and social progress.”<sup>149</sup> While public policy reasoning radiates the appeal of righteousness, Professor Robert J. Pushaw, Jr., observed that the notion of evolving constitutional norms “seems to subvert the entire idea of a written [c]onstitution, ratified by a supermajority of the People, that establishes a fundamental and supreme law that binds everyone (including . . . judges).”<sup>150</sup> For this want of allegiance to the document being interpreted, or to its authors, public policy is not an interpretivist tool. Nevertheless, public policy arguments may be invoked by interpretivists to bolster decisions reached through interpretivist modes. The legal realist recognizes that when the call is close on a given legal question, public policy can be a strong motivator for a court. In the arena of state constitutional interpretation, where, as thus far demonstrated, courts can disagree sharply about a question as straightforward as difference in meaning between nearly identical text, the calls are often close.

Individual rights advocates seeking state constitutional protection for expressive conduct on private property universally press a single policy argument: that the quasi-public spaces of large private shopping centers in the modern age are analogous to the public squares of yore, so should be treated constitutionally as public spaces where individuals may exercise civil liberties. This argument is the same “functional equivalent” argument that drove the U.S. Supreme Court “company town” decision in *Marsh v. Alabama*<sup>151</sup>—but drove it only so far.

Unsurprisingly, the *Pruneyard* progeny all followed California’s lead in embracing the “functional equivalent” argument as a matter of desirable public policy.<sup>152</sup> The Colorado Supreme Court, for example, opined eloquently upon the danger in “allow[ing] the vagaries of contemporary urban architecture and planning, or the lack thereof, to prevail over our valued tradition of free speech.”<sup>153</sup>

<sup>149</sup>Pushaw, *supra* note 64, at 1205 (citing William J. Brennan, Jr., Address to the Text and Teaching Symposium, Georgetown Univ. (Oct. 12, 1985), reprinted in THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 11, 11, 14-17, 19-25 (1986)); see also Brennan, *supra* note 36, at 503 (inviting “state courts to step into the breach”).

<sup>150</sup>Pushaw, *supra* note 64, at 1205 (citing LINO A. GRAGLIA, COURTING DISASTER: THE SUPREME COURT AND THE DEMISE OF POPULAR GOVERNMENT 5-38 (1997); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38-47 (1997)).

<sup>151</sup>326 U.S. 501 (1946).

<sup>152</sup>*Robins*, 592 P.2d at 347; *Bock*, 819 P.2d at 62; *JMB Realty Corp.*, 650 A.2d at 761, 766-67, 772-75; *Batchelder*, 445 N.E.2d at 595; *Alderwood Assocs.*, 635 P.2d at 116.

<sup>153</sup>*Bock*, 819 P.2d at 62.

Among the anti-*Pruneyard* cases, nine of the thirteen decisions clearly contemplated policy arguments. The courts in Arizona, Iowa, and Wisconsin found simply that shopping centers are not the equivalent of public property or company towns, the Wisconsin court observing that a shopping center “concerns itself only with one facet of its patrons’ lives—how they spend their money.”<sup>154</sup> The courts in Connecticut, Georgia, Michigan, New York, Pennsylvania, and Washington went further, rejecting public policy ends per se when they cannot be achieved through legal means.<sup>155</sup> Those courts struck at the Achilles heel of public policy arguments: courts’ refusal to substitute judicial preferences for constitutional interpretations.

V. CONCLUSION: NOT TEXTUALISM, BUT NO CLEAR RULE;  
AND A NEED FOR FURTHER RESEARCH

In the cases considered here, textualism tended to weigh heavily only when it was consistent with courts’ conclusions on other grounds. Whether the language of state constitutional provisions is affirmative or, like the First Amendment, negative, is not, then, by itself helpful in predicting whether a state court will read the state language expansively to protect individual liberties when federal constitutional guarantees do not. The court that favors expansive construction likely will contemplate textualist reasoning, whether or not the language is plainly distinguishable, while the court disposed to restrictive construction of state-protected liberties likely will either reject textualism or stretch textualist reasoning, perhaps by changing the level of abstraction, to support the court’s conclusion.

If textualism did not drive these state court decisions, what did? The courts expanding individual liberties under state constitutions treated originalism sparingly, if at all. Meanwhile about half of jurisdictions declining to augment state constitutional authority advanced originalism as a controlling mode of analysis. Horizontal structuralism—particularly regarding the relationship of state judiciary and legislature—appeared almost not at all in the pro-*Pruneyard* cases, but appeared in five of the thirteen anti-*Pruneyard* decisions.

Domestic precedentialism was important to almost all of the *Pruneyard* cases and to five of the thirteen anti-*Pruneyard* cases. Trends in domestic precedent concerning the construction of state constitutional provisions were therefore better correlated across the board to courts’ conclusions than any other mode of analysis. Foreign precedentialism carried some weight in the few years following *Pruneyard*, but courts readily abandoned the *Pruneyard* trend once a contrary example was set. Foreign precedentialism soon thereafter regained momentum in the opposite direction, suggesting that the rationale is pliable and unpredictable.

Finally, non-interpretivist public policy arguments tracked textualism in significance. The pro-*Pruneyard* courts embraced both, while three anti-*Pruneyard*

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<sup>154</sup> *Fiesta Mall Venture*, 767 P.2d at 724 (quoting *Jacobs*, 407 N.W.2d at 845); *Engler*, 641 N.W.2d at 806.

<sup>155</sup> *Cologne*, 469 A.2d at 1209-10; *Citizens for Ethical Gov’t, Inc.*, 392 S.E.2d at 9; *Woodland*, 378 N.W.2d at 353, 357-58; *SHAD Alliance*, 488 N.E.2d at 1216; *W. Pa. Socialist Workers 1982 Campaign*, 485 A.2d at 1336 (“Law and sociology are not coextensive.”); *Southcenter Joint Venture*, 780 P.2d at 1290-92 (“[W]hether [the “state action” requirement] is good or bad policy, it is a fundamental fact of our political order.” (emphasis removed) (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982))).

decisions rejected the very same policy arguments on their merits. Six other anti-*Pruneyard* courts rejected public policy arguments per se, regarding them as unpersuasive in state constitutional interpretation—much like the Michigan Supreme Court rejected textualism, whether to read identical language similarly or to construe affirmative language differently from negative.

This Article reviews a narrow range of case law in an effort to make generalizations about state constitutional interpretation. In the end, one can say that generally, from a multi-state perspective, textual distinction between affirmative and negative language in state constitutional provisions is not indicative of the import of those provisions relative to their federal constitutional counterparts. This conclusion begs for further research to ask, why not? How can some courts acknowledge that the plain difference between affirmative and negative language is all-important, while other courts can find it utterly insignificant? Courts point to other interpretivist tools, such as originalism, to bolster anti-textualist conclusions. Historical research is required to determine whether in fact the nearly identical language in various state constitutions is properly understood to have been implanted with such diverse intentions.<sup>156</sup>

In examining modes of analysis besides textualism, generalizations are difficult to draw.<sup>157</sup> Other interpretivist tools—originalism, structuralism, and precedentism—and public policy are each at times highly influential. But none of these approaches dominates. True, trends in domestic precedent seem best predictive of a court's ultimate decision. But that result is disappointing. Domestic precedent by itself is something of an empty rationale, as one might expect that principles repeated in domestic precedent must have emerged historically from some other analytical approach. Thus, this dependence on domestic precedent invites further research: Where does California and New Jersey activism come from?<sup>158</sup> Why is no similar trend apparent in South Carolina (nor in any southern state)? And ultimately, how are activist trends started or stopped?

Most importantly, with regard to needed further research, the generalizations drawn in this study should be tested against other pools of case law. Are the same trends evidenced in state decisions on search and seizure? Cruel and unusual punishment? Due process and equal protection? Through these additional inquiries, one can refine these results and eliminate variations that might depend on the subject matter of the constitutional question at issue.<sup>159</sup>

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<sup>156</sup>*Cf.* Simon, *supra* note 16, at 309-20. A correct answer might evade even the most vigorous originalist inquiry, as, according to Professor Simon, “these early state constitutional provisions were adopted virtually without discussion or analysis. Their meanings and applications apparently were considered universally understood.” *Id.* at 310 (footnote omitted). Nevertheless, Professor Simon concluded in 1985 that “[a] logical starting point for a solution to disparate decisions would be intense study and reflection on the actual differences in various state provisions. Opposite results on similar language are difficult to accept.” *Id.* at 339.

<sup>157</sup>This result is consistent with the findings of Professor Simon. *See* Simon, *supra* note 62, at 320-37.

<sup>158</sup>*See, e.g.,* Brennan, *supra* note 149, at 498-99 (discussing innovations in state constitutional rights in, *inter alia*, California and New Jersey: “Enlightenment comes also from the New Jersey Supreme Court”).

<sup>159</sup>*Cf. supra* discussion of Fine et al., accompanying note 66.

At least in the narrow realm of expressive activity in private shopping centers, the present trend in state decisions disfavors the augmentation of state constitutional liberties. Nevertheless, under the system of dual sovereignty, in part preserved through the Tenth Amendment, states retain the power to buck that trend. Perhaps, as the Washington plurality suggested, state courts are reluctant to apply their state constitutions because litigators fail to raise the claims. Perhaps state courts simply do not want the aggravation of litigation that might result from new doctrines in state constitutional law.

In Arkansas, it appeared that aggravation with a U.S. Supreme Court remand, rather than with litigants, led to expansive construction of state constitutional equivalents to the Fourth Amendment.<sup>160</sup> In two cases in 2002, the ordinarily decorous Arkansas Supreme Court surprised criminal defense attorneys when it departed from precedent that had regarded state constitutional liberties as coextensive with federal constitutional law.<sup>161</sup> Advocates who desire such outcomes, and those who do not, stand to gain from continuing research into the reasoning of state courts in cases of individual liberties under state constitutions.

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<sup>160</sup>See *Arkansas v. Sullivan*, 74 S.W.3d 215, 216-22 (Ark. 2002), *on remand from* 532 U.S. 769 (2001) (per curiam), *rev'g* 16 S.W.3d 551, *denying reh'g on* 11 S.W.3d 526 (Ark. 2000). In Professor Simon's typology, *see supra* note 62, this state decision is clearly "reactive." *See* Simon, *supra* note 16, at 315-17.

<sup>161</sup>*Sullivan*, 74 S.W.3d at 216-21 (distinguishing, among other things, *Stout v. Arkansas*, 898 S.W.2d 457 (Ark. 1995)); *Griffin v. Arkansas*, 67 S.W.3d 582, 584-85 (Ark. 2002).