The Right to Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgment

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I. INTRODUCTION

State constitutions often provide much stronger and more complete protection for fundamental human rights than does the United States Constitution.[1] Paradoxically, however, more judicial and scholarly effort has been devoted to divining the meaning and scope of the United States Bill of Rights than has been expended on all fifty state bills of rights combined. This trend has been especially pronounced in certain "core areas" relating to the rights of free speech and press. The limited protection provided to freedom of expression in the federal Constitution has so overshadowed the corresponding and often stronger state constitutional guarantees that freedom of expression is almost universally referred to as a "first amendment"

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1. *See, e.g.*, State v. Ringer, 100 Wash. 2d 686, 699-700, 674 P.2d 1240, 1247-48 (1983) (search of vehicles unconstitutional under Washington State Constitution while probably constitutional under United States Constitution); Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 246, 635 P.2d 108, 117 (1981) (Washington State Constitution provides greater speech rights on private property than does first amendment of United States Constitution). *See also* Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 910, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860 (1979) (California Constitution provides broader speech rights than does the United States Constitution), *aff'd*, 447 U.S. 74 (1980); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977); Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 493 (1984).

right.[2] One unfortunate consequence of the excessive emphasis on the federal Bill of Rights, however, is that it has led many lawyers and judges to assume, with little evidence or analysis, that state constitutions are bound by the same constraints that the founders of our nation chose to incorporate into the federal Constitution.

This Article makes no such assumptions. Instead, it presents an independent analysis of a fundamental aspect of the free speech provision of the Washington Declaration of Rights, which closely resembles the free speech provisions of many other state constitutions.[3] The focus is on whether the Washington free speech provision protects Washingtonians against abridgment of their speech and press rights by private individuals and organizations. To answer this question, this Article examines the nature of state constitutions and government, the case law of other jurisdictions interpreting similar provisions, the text of the Washington provision, the origins of the provision, the historical background of the Washington Constitutional Convention, Washington case law, current social values, and public policy considerations. Analysis of these factors reveals that the Washington Constitution can, was intended to, and does protect free speech rights against many forms of abridgment by private individuals and organizations.[4]

II. THE FEDERAL "STATE ACTION" DOCTRINE

To understand the importance of state constitutional pro-

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2. In this Article such rights will be referred to as "free speech" rights or "freedom of expression," terms that are intended to encompass all the speech and press rights guaranteed by the 50 state constitutions and by the federal Constitution.

3. Note, *Freedom of Expression Under State Constitutions*, 20 STAN. L. REV. 318, 318 n.2 (1968) (constitutional free speech provisions in 38 states are at least partially identical to Washington's); Note, *Free Speech, the Private Employee, and State Constitutions*, 91 YALE L.J. 522, 541 n.94 (1982) (free speech provisions in 41 state constitutions conform to the New York model, which is nearly identical to the Washington provision) [hereinafter cited as Note, *Free Speech*]; Note, *Private Abridgment of Speech and the State Constitutions*, 90 YALE L.J. 165, 180 n.79 (1980) (listing 43 state constitutional free speech provisions that are "linguistically similar" to the California and Washington affirmative free speech guarantees) [hereinafter cited as Note, *Private Abridgment*].

4. There are many other potential sources of evidence regarding the meaning and scope of a state constitutional provision. *See* Utter, *supra* note 1, at 508-24. Not all potential sources, however, exist or can be located for every provision of every state constitution. For instance, Washington's enabling act was silent on the subject of freedom of expression, and none of the members of the Preamble and Declaration of Rights Committee of the Washington Constitutional Convention appears to have written any articles relevant to the state free speech provision. *Id.* at 510-11, 512, 513.

tection against private abridgment of fundamental rights, one must examine the federal "state action" doctrine. The language of the first and fourteenth amendments[5] to the United States Constitution indicates a clear intent to protect speech rights only against abridgment by the federal and state governments,[6] although the framers may have intended otherwise.[7] State action was recognized first as a prerequisite for a cause of action under the fourteenth amendment in the *Civil Rights Cases* in 1883.[8] Since then, the federal courts have adopted various theories under which essentially private activities have been deemed to be "state action"[9] and, consequently, subject to constitutional limitations. These theories, which the federal courts have gradually restricted to very narrow applications, find "state action" when a private actor performs a traditional and exclusively public function, acts under government command or encouragement, or is significantly entwined with the government in some fashion.[10]

The public function doctrine requires that the private person or entity be engaged in an activity that is a traditional and exclusive function of government.[11] The United States Supreme

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5. The first amendment states: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

The fourteenth amendment provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

6. *See* The Civil Rights Cases, 109 U.S. 3 (1883) (Court held that Congress had exceeded its powers in passing the Civil Rights Act of 1875 because § 5 of the fourteenth amendment, which authorized enforcement of § 1, could not go beyond § 1, which was limited to enforcing the prohibition against state actions that deprived persons of rights).

7. *See generally* H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908); J. TENBROEK, EQUAL UNDER LAW (1965); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 13 (1950).

8. 109 U.S. 3 (1883).

9. As used in this Article, "state action" and state action have two different meanings. "State action" refers to a private entity's action that is considered equivalent to action by the state because of the private entity's function or relationship with the state. State action, without quotation marks, designates action by governmental bodies or governmental officials.

10. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 497-525 (2d ed. 1983); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1147-1174 (1978 & Supp. 1979). For a more detailed analysis of the development of the "state action" doctrine, see Skover, *The Washington Constitutional "State Action" Doctrine: A Fundamental Right to State Action*, 8 U. PUGET SOUND L. REV. 221 (1985).

11. Flagg Bros. v. Brooks, 436 U.S. 149, 157-58 (1978) (no "state action" found when

Court has expressly refused to expand the narrow public function doctrine to include any private actor who opens his or her property to the public.[12] Yet, in *Marsh v. Alabama*,[13] the Court seemed to imply such an expansion, noting that "the more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[14] In *Amalgamated Food Employees Union v. Logan Valley Plaza*,[15] the Court applied *Marsh* to protect a union's right to picket a private business, emphasizing both that the private property was open to the public[16] and that the property was the functional equivalent of a business district.[17] In *Lloyd Corp. v. Tanner*,[18] however, the Court repudiated the expansive interpretation of the public function doctrine suggested by the *Marsh* and *Logan Valley* decisions:

> There is some language in *Logan Valley*, unnecessary to the decision, suggesting that the key focus of *Marsh* was upon the "business district," and that whenever a privately owned business district serves the public generally its sidewalks and streets become the functional equivalents of similar public facilities . . . . [T]his would be an incorrect interpretation of the Court's decision in *Marsh*.[19]

Thus, although the United States Supreme Court may have briefly recognized a broader "public place" theory of state action in the past, the current public function doctrine seems to be narrowly limited to such clearly governmental activities as the management of elections[20] and the maintenance of company

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warehouse owner invoked a statute to sell stored goods to cover storage costs).

12. *See* Hudgens v. NLRB, 424 U.S. 507, 518-20 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551, 562 (1972).

13. 326 U.S. 501 (1946) (restrictions on distributing religious literature in company town invalid under first and fourteenth amendments).

14. *Id.* at 506.

15. 391 U.S. 308 (1968).

16. *Id.* at 318.

17. *Id.* at 318-19.

18. 407 U.S. 551 (1972).

19. *Id.* at 562. *Accord* Hudgens v. NLRB, 424 U.S. 507, 520 (1976) (no first amendment right to enter private shopping center to advertise a strike against an employer in the center).

20. Terry v. Adams, 345 U.S. 461, 470 (1953) (political association created to deny blacks the right to vote invalid under fourteenth and fifteenth amendments); Nixon v. Condon, 286 U.S. 73, 88 (1932) (limitation of political party membership to whites invalid under fourteenth amendment).

towns.[21]

The United States Supreme Court has also determined that when legislation compels or encourages certain private activity, the private activity may be characterized as "state action."[22] Similarly, the Court has held that when a judge commands a private person to honor a will or contract, such private activity may also be considered "state action."[23] Recently, however, the Court has neglected and narrowed,[24] though not entirely abandoned,[25] these theories.

When significant entwinement exists between the government and a private entity, the Court has sometimes held that actions by the private entity constitute "state action."[26] More recent cases, however, greatly restrict application of this doctrine. For instance, the Court once intimated that government licensing and regulation of private entities would be sufficient to subject the private entity to constitutional restraints,[27] but subsequent cases have consistently held that government licensing

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21. Marsh v. Alabama, 326 U.S. 501, 509 (1946). The United States Supreme Court has rejected arguments that public utilities, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358 (1974), and nursing homes, Blum v. Yaretsky, 457 U.S. 991, 1003 (1982), perform public functions. The Court has also held that dispute resolution between debtors and creditors is not a traditional and exclusive governmental function. Flagg Bros. v. Brooks, 436 U.S. 149, 161 (1978).

22. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369, 379 (1967) (striking down a state constitutional amendment repealing fair-housing laws because it encouraged discrimination).

23. Evans v. Newton, 382 U.S. 296, 301 (1966) (enforcement of a will providing lands to establish a racially restricted park under the trusteeship of a city held to constitute "state action"); Shelley v. Kraemer, 334 U.S. 1, 18 (1948) (holding enforcement of a racially restrictive covenant to constitute "state action").

24. *See, e.g.*, Flagg Bros. v. Brooks, 436 U.S. 149, 166 (1978) (no "state action" when a warehouse owner relied on a statute to sell customer's stored goods to pay for storage charges); Palmer v. Thompson, 403 U.S. 217, 226 (1971) (no encouragement and, therefore, no "state action" when a city closed its public pool in response to a desegregation order); Evans v. Abney, 396 U.S. 435, 445 (1970) (allowing land, established by will as a racially restricted park, to revert to heirs rather than requiring it to be used without racial restriction).

25. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 (1982) (when an oil company sued to recover a debt and obtained a prejudgment attachment that was later found to be unconstitutional, the court's authorization and supervision of the attachment caused the oil company's actions to constitute "state action").

26. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 724-26 (1961) (because both government and restaurant benefited from restaurant's location in government building, the restaurant's discriminatory actions created a cause of action under the fourteenth amendment).

27. *See* Public Util. Comm'n v. Pollak, 343 U.S. 451, 461-63 (1952) (permitting radios on street cars in the District of Columbia held to be federal government action under first and fifth amendments).

and regulation alone are insufficient to imply "state action,"[28] unless the government directly causes or is connected with the challenged practice.[29] When the government has subsidized a private entity, the Court has been inconsistent, finding "state action" in some cases[30] but not in others.[31] If the affairs of government and a private entity were entwined for the economic benefit of both, the Court previously found the entity's acts to constitute "state action,"[32] but more recently, the Court has refused to extend constitutional protections in similar situations.[33]

The United States Supreme Court has apparently curtailed substantially the doctrines that may be used to apply federal constitutional restraints to private conduct. Even in situations in which constitutional protections were previously theoretically available, the federal courts have displayed increasing reluctance to apply such protection when activities of nongovernmental persons or entities are concerned. This reluctance has led some state courts and commentators to ask whether state constitutions are subject to similar state action limitations, or whether state constitutions may serve to restrain directly any person from infringing on another's fundamental rights.

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28. *See* Blum v. Yaretsky, 457 U.S. 991, 1003 (1982) (reduction of benefits by private nursing homes receiving state funds not "state action" without encouragement by state); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358 (1974) (termination of electrical service by private utility not "state action" simply because of state regulation); Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 114 (1973) (refusal to broadcast paid editorial advertisements not "state action" solely because of federal licensing); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171 (1962) (grant of liquor license to racially discriminatory private club not "state action" because state did not intend to discriminate).

29. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974).

30. *See* Norwood v. Harrison, 413 U.S. 455, 468 (1973) (striking down a program granting books to students who attended racially discriminatory schools because such assistance would aid and encourage discrimination).

31. Blum v. Yaretsky, 457 U.S. 991, 1003 (1982) (no "state action" in the discharge of patients from a nursing home even though both patients and facility received state funds); Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982) (no "state action" in the discharge of employees from a private school even though virtually all of the school's income was derived from government funding).

32. *See* Evans v. Newton, 382 U.S. 296, 309 (1966) ("state action" when a city acted as a trustee for a racially restricted park); Burton v. Wilmington Parking Auth., 365 U.S. 715, 724-26 (1961) (holding that actions of a restaurant owner constituted "state action" because owner leased space in a government building, benefiting from the patronage of government workers and from the building's tax-exempt status and because the government benefited from having the income from the restaurant's rent).

33. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974).

III. The Nature of State Constitutions and Governments

State constitutions and governments are not subject to the same inherent constraints that prevent the federal Constitution and government from protecting individual rights from private abridgment.[34] The United States Constitution is a limited grant of power, authorizing the federal government to exercise only those powers that have been expressly or impliedly delegated to it in the Constitution.[35] When any branch of the federal government acts, it must rely on an enumerated power to make its acts constitutional.[36]

State constitutions, on the other hand, serve as limitations on the otherwise plenary power of state governments, which can do anything that is not expressly forbidden by the state constitution or by federal law.[37] Because it is not generally forbidden,

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34. *See* The Civil Rights Cases, 109 U.S. 3, 10-13, 17-18 (1883) (fourteenth amendment held to prohibit state discrimination, but not private discrimination); Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 242-43, 635 P.2d 108, 115-16 (1981) (fourteenth amendment "state action" analysis not required by language of the Washington State Constitution); Note, *Free Speech*, *supra* note 3, at 542 n.95.

35. Utter, *supra* note 1, at 494-95 (footnotes omitted) (citing Fain v. Chapman, 89 Wash. 2d 48, 53, 569 P.2d 1135, 1139 (1977), and cases cited therein). *See, e.g.*, Union High School Dist. No. 1 v. Taxpayers of Union High School, 26 Wash. 2d 1, 7, 172 P.2d 591, 594 (1946) (Washington State Constitution considered a limitation on legislative power, distinguished from the federal Constitution grant of power).

36. *See, e.g.*, United States v. Butler, 297 U.S. 1, 63 (1936); United States v. Cruikshank, 92 U.S. 542, 551 (1875). This requirement historically has prevented Congress from regulating much private action. *See* James v. Bowman, 190 U.S. 127, 142 (1903) (civil rights legislation invalidated because the fourteenth and fifteenth amendments authorized only legislation that affected state action); The Civil Rights Cases, 109 U.S. 3, 10-11 (1883); United States v. Harris, 106 U.S. 629, 640 (1882) (no private action under fourteenth amendment for conspiracy to deprive citizens of equal protection).

However, recent broad interpretations of Congress' enumerated powers have enabled Congress to use its commerce, taxing, and spending authority to protect individual rights against private abridgment. *See, e.g.*, The Civil Rights Act of 1964, 42 U.S.C. §§ 2000(a)-(h) (1978 & Supp. 1984); National Labor Relations Act of 1947, 29 U.S.C. §§ 141-197 (1975); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982). *See also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437 (1968). *Cf.* Civil Rights Act of 1866, 42 U.S.C. §§ 1981-1982 (1978) (protecting the right to contract and the right to inherit, purchase, hold, and convey property against private action based on the thirteenth amendment).

37. *See, e.g.*, Gruen v. State Tax Comm'n, 35 Wash. 2d 1, 7, 211 P.2d 651, 656 (1949) (cigarette tax not prohibited by Washington State Constitution, thus within power of the legislature); State *ex rel.* Billington v. Sinclair, 28 Wash. 2d 575, 583, 183 P.2d 813, 817 (1947) (regulation of city charters within legislative powers); James v. McMillan, 113 Wash. 644, 652-53, 194 P. 823, 826 (1921) (calculation of county officers' salaries within legislative powers). This principle was generally recognized in 1889. The Tacoma Daily Ledger noted that bills of rights "are more important to state governments which are governments of general powers—vested by the people of the union with all such powers

states have always had the power to regulate private conduct.[38]

The use of this power to grant citizens constitutional rights against other private individuals and corporations was well accepted in both theory and fact by the time the Washington Constitution was adopted in 1889.[39] One scholar who researched the Washington Constitutional Convention early in this century noted that although regulation of private conduct was not within the "legitimate province" of the federal Constitution, it was often included in state constitutions.[40]

This concept was recognized and repeated in various forms by the newspapers that covered the convention. One newspaper

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as they had to give except where the contrary was expressed . . . or implied." Tacoma Daily Ledger, June 6, 1889, at 2, col. 1. *See infra* note 136. Further, nothing in the Washington Constitution generally, or in art. I, § 2 specifically prohibits the state from enforcing the free speech provision against the private sector. *See infra* text section V.

38. *See* Maple Leaf Investors, Inc. v. Department of Ecology, 88 Wash. 2d 726, 729-30, 565 P.2d 1162, 1164 (1977) (prohibition of structures built on a floodway); State v. Dexter, 32 Wash. 2d 551, 554, 202 P.2d 906, 907 (1947) (regulation of reforestation practices). *See also generally* E. FREUND, THE POLICE POWER, PUBLIC POLICY AND CONSTITUTIONAL RIGHTS (1904); A. RUSSELL, THE POLICE POWER OF THE STATE (1900); 1 C. TIEDEMAN, STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY (1900).

39. *See* F. STIMSON, THE LAW OF THE FEDERAL AND STATE CONSTITUTIONS OF THE UNITED STATES 68-72 (1908); Utter, *supra* note 1, at 496; *Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 1058 n.26 (1963). This principle was well known to the delegates at the Washington Constitutional Convention. *See, e.g.*, Knapp, *The Origin of the Constitution of the State of Washington*, 4 WASH. HIST. Q. 227, 230 (1913) (thesis based on interviews with delegates to the Washington Constitutional Convention). Some observers criticized the delegates for including too much "legislation" in the constitution. *See id.* at 228. *See also* Thorpe, *Washington and Montana: Have They Made a Mistake in Their Constitutions?*, CENTURY MAGAZINE, Feb. 1890, at 504-05; Yakima Herald, Aug. 1, 1889, at 2, col. 2. But many contemporary newspapers and groups urged the delegates to regulate private conduct constitutionally. *E.g.*, Tacoma Daily Ledger, July 27, 1889, at 2, col. 2 (urging a constitutional provision making corporations and private enterprises that are "affected with a public interest subject to legislative control"); Seattle Post-Intelligencer, July 5, 1889, at 3, col. 1 (urging state constitutional regulation of various private corporate activities and property and contract rights); Seattle Post-Intelligencer, May 31, 1889, at 4, col. 1 (repeating "the commonplace remark that this constitution, when approved by the people, will bind not only individuals but the people's representatives in legislation").

40. Constitutions are supposed to be bodies of laws by which government is constituted and given its organization and foundation. The regulation of the relation of citizens in their private capacity does not fall within their legitimate province. The principle is fully recognized in the construction of our federal Constitution, which is strong and flexible because of its admirable simplicity and its strictly constitutional scope. *Constitution making in the states has proceeded upon no such idea.*

Knapp, *supra* note 39, at 230 (emphasis added). *But cf. id.*, at 234 (careful consideration of state constitutions reveals that they contain safeguards against legislative encroachment on private rights).

stated: "The commonplace remark that this constitution when approved by the people, will bind *not only individuals* but the people's representatives in legislation cannot be repeated too often . . . ."[41] Similarly, another observed that "[t]he people of the United States are dependent upon their respective state governments for the protection of life, liberty, property, and the enjoyment of social, political and religious privileges."[42]

By 1889 numerous state constitutions contained provisions regulating private conduct. These included provisions prohibiting slavery,[43] outlawing imprisonment for private debts,[44] and granting individuals the right to compel other individuals to testify in criminal trials.[45] The North Dakota Constitution outlawed the apparently common employer practice of blacklisting

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41. Seattle Post-Intelligencer, May 31, 1889, at 4, col. 1 (emphasis added). The Post-Intelligencer also stated:

> [t]o preserve and secure to every individual the largest liberty that is compatible with the good order of society, and the advance of the whole community along legitimate paths to the highest realization of civilized life, is the central thought of a well considered constitution, and the object of constitutional government.

Id.

42. Tacoma Daily Ledger, July 19, 1889, at 3, col. 1. The *Ledger* also stated that "[g]overnments . . . have been formed to protect the weak against the strong in the pursuit of life, liberty and property," *id.*, Aug. 2, 1889, at 4, col. 1, and that the state's "business is to protect each and every individual in the enjoyment of his rights and property." *Id.*, July 6, 1889, at 2, col. 1.

43. *See, e.g.*, ARK. CONST. art. II, § 27 (provision adopted in 1874 and still in force); CAL. CONST. of 1879, art. I, § 18 (now art. I, § 6); GA. CONST. of 1877, art. I, § 2-117; (now at art. I, § 2-122); IND. CONST. art. I, § 37 (provision adopted in 1851 and still in force); IOWA CONST. of 1846, art. I, § 23; LA. CONST. BOR art. V (1879, amended 1974); MICH. CONST. of 1850, art. XVIII, § 11 (now at art. I, § 9); WIS. CONST. art. I, § 2 (provision adopted in 1848 and still in force). The United States Constitution also contains such a provision. U.S. CONST. amend. XIII, § 1. *See* Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 243 n.8, 635 P.2d 108, 116 n.8 (1981) (citing Runyon v. McCrary, 427 U.S. 160 (1976)).

44. *See, e.g.*, CAL. CONST. of 1879, art. I, § 15 (now at art. I, § 10); GA. CONST. of 1877, art. I, § 2-121 (now at art. I, § 2-123); IND. CONST. art. I, § 22 (provision adopted in 1851 and still in force); IOWA CONST. of 1846, art. I, § 19; N.J. CONST. of 1844, art. I, ¶ 17 (now at art. I, § 13); WIS. CONST. art. 1, § 16 (provision adopted in 1848 and still in force).

45. *See, e.g.*, ARK. CONST. art. II, § 11 (provision adopted in 1864 and still in force); CAL. CONST. of 1879, art. I, § 13 (now at art. I, § 15); CONN. CONST. art. I, § 9 (provision adopted in 1818 and still in force); GA. CONST. of 1877, art. I, § 2-105 (now at § 2-114); IND. CONST. art. I, § 13 (provision adopted in 1851 and still in force); IOWA CONST. of 1846, art. I, § 10; LA. CONST. BOR art. VIII (1879, amended 1974) (now at art. I, § 13); N.J. CONST. of 1846, art. I, ¶ 9 (now at art. I, § 10); W. VA. CONST. art. III, § 14 (provision adopted in 1872 and still in force); WIS. CONST. art. I, § 7 (provision adopted in 1847 and still in force).

troublesome employees.[46] California and Georgia included provisions disenfranchising duelers in their constitutions.[47] California also granted workers constitutional liens on the property of other individuals[48] and prohibited disqualification from any business, vocation, or profession on the basis of sex.[49] In addition, numerous state constitutions contain detailed provisions regulating corporations.[50]

The many provisions regulating private action indicate that late nineteenth-century constitution makers were well aware of the broader nature of state constitutions and governments and, thus, did not feel constrained to include any state action limitations in their charters. The framers therefore enacted numerous provisions that directly regulated private conduct and granted private parties constitutional rights against each other.

IV. Case Law from Other States Interpreting Provisions Similar to the Washington Free Speech Provision

A brief review of some of the cases interpreting state free speech provisions similar to the Washington provision reveals that these provisions may protect individual freedom against private abridgment.[51] In *Spayd v. Ringing Rock Lodge No. 665*,[52] the Supreme Court of Pennsylvania held that a private union could not, even pursuant to a union rule, expel a member for signing a petition urging the legislature to repeal a statute strongly supported by the union. The court rested its decision

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46. N.D. Const. art. I, § 23 (provision adopted in 1889 and still in force). *See* J. Hicks, The Constitutions of the Northwest States 56 (1923) (reprinted in 1971).

47. Cal. Const. art. XX, § 2 (provision adopted in 1879 and still in force); Ga. Const. of 1877, art. II, § 2-902 (repealed 1945).

48. Cal. Const. art. XX, § 15 (provision adopted in 1879 and still in force).

49. *Id.* § 18.

50. *See, e.g.*, Ark. Const. art. XII; Cal. Const. art. XII; Ga. Const. of 1877, art. IV, § 2-502 (now at art. III, § 2-105); Ill. Const. art. XI; Ind. Const. art. XI; Iowa Const. of 1846 art. VIII; La. Const. arts. 234-248 (1879, amended 1974) (now at art. XII, § 12); Mich. Const. art. XV, §§ 1-12 (1850, repealed 1963); N.Y. Const. of 1838, art. VIII (now at art. X); Pa. Const. art. XVI (1874, amended 1967) (now at art. X); W. Va. Const. art. XI; Wis. Const. art. XI.

51. This discussion includes only cases that interpret similarly worded constitutional provisions. There are other cases interpreting constitutional provisions with different wording not analyzed here. *See, e.g.*, Batchelder v. Allied Stores Int'l, 388 Mass. 83, 94, 445 N.E.2d 590, 595 (1983) (holding that individuals had a state constitutional right to solicit signatures in a privately owned shopping center mall); State v. Felmet, 302 N.C. 173, 178, 273 S.E.2d 708, 711-12 (1981) (holding that there was no state constitutional right to solicit signatures in the parking lot of a privately owned shopping center).

52. 270 Pa. 67, 113 A. 70 (1921).

solely on the free speech and petition provision of the Pennsylvania Constitution,[53] asserting that individuals, corporations, and unincorporated associations could not infringe free speech rights or other constitutional rights, any more than could the state.[54]

In *Zelenka v. Benevolent & Protective Order of Elks*,[55] a New Jersey court considered an Elks Club regulation that prohibited Elks lodges and members from circulating any writing regarding Elks' affairs without first submitting such writing to the national Grand Exalted Ruler for his approval.[56] The plaintiff was expelled from the Elks Club because he failed to obtain prior approval for a newspaper advertisement soliciting Elk members' support for a formal effort to open membership in the

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53. *Id.* at 69, 113 A. at 71. The provision reads: "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 . . . ." PA. CONST. art. I, § 7. The case was decided in 1921, prior to the enactment of the National Labor Relations Act, 29 U.S.C. §§ 151-68 (1975) (originally enacted in 1935), or any other legislation that arguably might have conferred some form of governmental authority on the union.

54. The rights above noted cannot lawfully be infringed, even momentarily, by individuals, any more than by the state itself . . . and least of all can they be breached by corporations and unincorporated associations, which function solely by grace of the state, and the "supervision and control" of which are specifically vested in courts of equity . . . . We have often said that the by-laws, rules, and regulations of these artificial bodies will be enforced only when they are reasonable . . . and they never can be adjudged reasonable when, as here, they would compel the citizen to lose his property rights in accumulated assets, or forego the exercise of other rights which are constitutionally inviolable.

Spayd, 270 Pa. at 69-70, 113 A. at 72 (citations omitted). The court reasoned that:

[s]ince the fundamental law forbids the violation of such a prerogative by the government itself, neither the courts nor any [union] tribunal may ignore the inhibition. . . . [Y]et here, were appellants' contentions to be sustained, the [union] tribunals, or courts, of their organization could ignore the state Constitution, which guarantees the citizen's right of petition, and, by so functioning, deprive plaintiff of his membership in defendant order.

Id. at 71, 113 A. at 72.

The court also quoted an earlier Pennsylvania case protecting a state constitutional right against private abridgment, which stated:

This [right of acquiring property] is one of the rights guaranteed [a workman] by our "Declaration of Rights"; it is a right of which the Legislature cannot deprive him, one which the law of no trades union can take from him, and one which it is the bounden duty of the courts to protect.

Id. at 72, 113 A. at 72 (quoting Erdman v. Mitchell, 207 Pa. 79, 91, 56 A. 327, 331 (1903)).

55. 129 N.J. Super. 379, 324 A.2d 35, *cert. denied*, 66 N.J. 317, 331 A.2d 17 (1974).

56. *Id.* at 381, 324 A.2d at 36.

Order to nonwhites.[57] The court ordered the wayward Elk reinstated to his lodge on the ground that the expulsion and the rule on which it was based violated the public policy of free expression embodied in article I, paragraph 6 of the New Jersey Constitution,[58] and because the association could advance no sufficiently compelling countervailing interest in restricting public discussion of Elks' affairs.[59] The court did not expressly state that the free speech provision applied directly to a voluntary private organization, but this conclusion is implicit.

In the past few years, a number of state courts, interpreting free speech provisions similar to Washington's, have addressed the question whether their state constitutions protect the exercise of free speech and petition rights in privately owned universities and shopping centers. Some courts have expressly rejected a state action requirement for state free speech provisions, and other courts have avoided expressly addressing the issue while reaching a result that is consistent only with the elimination of any state action requisite.

In *State v. Schmid*,[60] for example, the New Jersey Supreme Court concluded that a private university could not evict a person for distributing political literature on its campus. Interpreting a free speech provision that was derived from the ultimate source of the Washington provision,[61] the New Jersey high court stated:

> [T]he rights of speech and assembly guaranteed by the State Constitution are protectable not only against governmental or public bodies, but under some circumstances against private persons as well. It has been noted that in our interpretation of fundamental State constitutional rights, there are no constraints arising out of principles of federalism . . . . Hence, federal requirements concerning "state action," founded primarily in the language of the Fourteenth Amendment and in principles of federal-state relations, do not have the same force

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57. *Id.* at 386-87, 324 A.2d at 39.

58. The New Jersey free speech provision reads: "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." N.J. CONST. art. I, ¶ 6. The original New Jersey provision was modeled after N.Y. CONST. of 1821 art. VII, § 8 (now at art. I, ¶ 8). *See* N.J. CONST. of 1844, art. I, ¶ 6.

59. *Zelenka*, 129 N.J. Super. at 383-87, 324 A.2d at 37-39.

60. 84 N.J. 535, 423 A.2d 615 (1980), *appeal dismissed*, 455 U.S. 100 (1982).

61. *See supra* note 58 (source of New Jersey provision) and *infra* note 90 (source of Washington provision) and accompanying text.

when applied to state-based constitutional rights.[62]

The court also pointed out that "one of the most important functions performed by state constitutional bills of rights which is not performed by the federal constitution is the protection of citizens against private oppression as well as oppression by the state."[63] The New Jersey Supreme Court concluded that the New Jersey Constitution provides individuals with the complementary freedoms of speech and assembly and protects the reasonable exercise of those rights against infringement by private entities that have "assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property."[64] The court then applied a balancing test and decided that the speech interests of those distributing leaflets outweighed the privacy and property interests of the private university.[65]

In another case, *Robins v. Pruneyard Shopping Center*,[66] the California Supreme Court held that "sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned."[67] Although the court did not expressly state that the California Constitution had no state action requirement, the Washington court has interpreted *Robins* as impliedly abandoning any state action requirement for the California Constitution.[68]

In *Equitable Assurance Society of the United States v. Michigan Citizens Lobby Coalition for Affordable Heat*,[69] a

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62. *Schmid*, 84 N.J. at 559-60, 423 A.2d at 628 (citations omitted).

63. *Id.* at 559 n.9, 423 A.2d at 628 n.9 (quoting King v. South Jersey Nat'l Bank, 66 N.J. 161, 193, 330 A.2d 1, 18 (1974) (Pashman, J., dissenting)).

64. *Schmid*, 84 N.J. at 560, 423 A.2d at 628.

65. Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 241, 635 P.2d 108, 114-15 (1981) (Washington Supreme Court used the *Schmid* court's explicit rejection of a state action requirement as one of the precedential bases for the Washington court's similar decision).

66. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 447 U.S. 74 (1980).

67. *Id.* at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860. The California free speech provision reads in pertinent part: "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." CAL. CONST. art. I, § 2. To compare with the original language adopted in 1879, see *infra* notes 80 and 88 and accompanying text.

68. Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 241, 635 P.2d 108, 114-15 (1981).

69. No. 82-66134-CZ (Mich. Cir. Ct. Mar. 14, 1983) (currently on appeal). Note, however, that in People v. Hubbard, 115 Mich. App. 73, 81, 320 N.W.2d 294, 298 (1982),

lower court in Michigan concluded that the Michigan free speech and petition provisions[70] do not have a state action requirement. The court held that solicitation of signatures for initiative proposals is protected in some privately owned places because of their public nature.

State courts in New York and Pennsylvania have also held that their state constitutions protect the exercise of free speech rights in shopping centers and private colleges against what federal law would define as purely private action, without expressly addressing whether their state charters retain some vestigial form of state action requirement.[71] These courts and those pre-

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the Michigan Court of Appeals held, without analysis, that the Michigan Constitution did not afford to individuals the right to refuse to leave the premises of a nuclear power facility as an expression of their fear of and opposition to nuclear power.

70. MICH. CONST. art. I, § 5 provides: "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." MICH. CONST. art. I, § 3 provides: "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."

71. *See* Shad Alliance v. Smith Haven Mall, 118 Misc. 2d 841, 848-49, 462 N.Y.S.2d 344, 349 (Suffolk County Sup. Ct. 1983) (shopping mall) (relying on N.Y. CONST. art. I, § 8, which reads: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right . . . ."); Commonwealth v. Tate, 495 Pa. 158, 175, 432 A.2d 1382, 1391 (1981) (private college) (relying on PA. CONST. art. I, § 7, which reads: "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 . . . .").

Because of the attachment many courts have to the "state action" doctrine, some courts that wish to reach private action go to great lengths to find "state action" when none exists, rather than explicitly rejecting the state action requirement. A good example of this approach is Laguna Publishing Co. v. Golden Rain Found., 131 Cal. App. 3d 816, 182 Cal. Rptr. 813 (1982), *appeal dismissed*, 459 U.S. 1192, (1983), in which the California Court of Appeals ordered the management of a private, walled residential community with no commercial district to permit the distribution within its gates of a local free newspaper. Although the court expressly refused to base its holding on the direct applicability of the California free speech provision to private conduct, leaving that decision to the state supreme court, *id.* at 838, 182 Cal. Rptr. at 825-26, it applied a balancing test that found "state action" where the federal courts would have found none. The balancing test emphasized the town-like characteristics of the private community, while expressly recognizing that it did *not* constitute a company town for purposes of the federal state action requirement. The court also considered the fact that the community's management permitted another free newspaper to be distributed in the community. Thus, the court held that when a private entity with *some* town-like characteristics discriminates against *some* newspapers, "the balance tips to the side of the scale which imports the presence of state action" for purposes of applying free speech protections. *Id.* at 843, 182 Cal. Rptr. at 829. Because discrimination by the management of a private community that does not satisfy the definition of a company town is, by definition, private discrimination, *see supra* notes 11-21 and accompanying text, this case may properly be categorized as a case protecting state constitutional free speech rights against

viously discussed have interpreted free speech provisions similar to Washington's and have firmly established the principle that state constitutions can directly restrict private activity to protect state free speech rights. These decisions support the Washington court's view that a state constitutional free speech guarantee may not be limited by any state action requirement.

V. The Text of the Washington Free Speech Provision

Any attempt to determine the meaning of a particular constitutional provision must consider the text itself. The Washington Constitution, like the constitutions of many states, guarantees that "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."[72]

The Washington provision grants an affirmative right to all persons in plain, unambiguous terms, without any express state action limitation.[73] A fundamental rule of constitutional construction provides that if a constitutional provision is plain and unambiguous on its face, then the words will be given their ordinary meaning and no interpretation is necessary or permissible.[74] The clear wording of the Washington free speech provision hinders a legal or linguistic argument that could justify implying a state action requirement. The unambiguous language supports the conclusion that the Washington free speech provision con-

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purely private infringement. This illustrates how some courts will apply convoluted reasoning to avoid abandoning the state action requirement, but still reach private action. *But see* Cologne v. Westfarm Assocs., 192 Conn. 48, 62, 469 A.2d 1201, 1208 (1984) (adopts federal analysis of shopping center as private property and declines to read Connecticut Constitution not to require state action).

72. Wash. Const. art. I, § 5. In contrast, the federal free speech guarantee states that: "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 a redress of grievances." U.S. Const. amend. I. No clearer statement of a state action requirement could be imagined. Although the first amendment only purports to prohibit congressional legislation, the federal courts have extended its reach to the states and all the branches of the federal government. *See* New York Times Co. v. United States, 403 U.S. 713, 716 (1971) (first amendment applies to all branches of the federal government); Gitlow v. New York, 268 U.S. 652, 666 (1925) (first amendment applied to states via the fourteenth amendment due process clause).

73. Wash. Const. art. I, § 5. The provision contains no reference to the "government" or "laws" or any other language that would indicate a state action requirement.

74. Anderson v. Chapman, 86 Wash. 2d 189, 191, 543 P.2d 229, 230 (1975); Utter, *supra* note 1, at 509. The ordinary meaning is the meaning that the words would have had for the majority of voters at the time the constitution was adopted. *See* State *ex rel.* O'Connell v. Slavin, 75 Wash. 2d 554, 557, 452 P.2d 943, 945 (1969); B.F. Sturtevant Co. v. O'Brien, 186 Wis. 10, 19, 202 N.W. 324, 327 (1925). *See also* Utter, *supra* note 1, at 509-10.

tains no state action requirement.[75]

VI. The Origin of the Washington Free Speech Provision

The implication of the text, that no state action requirement was intended, is supported by the origin and development of the Washington free speech provision. Members of the Preamble and Bill of Rights Committee[76] considered several different proposals, borrowed from several other state constitutions, and produced at least two formal drafts before choosing the present wording of the Washington free speech provision.[77] The third and final version was reported to the convention and adopted without debate or amendment.[78]

The first draft of the free speech provision by the Bill of Rights Committee was leaked to the press shortly after the convention opened. In a story dated July 13, 1889, the Tacoma *Daily Ledger* reported that the Preamble and Bill of Rights Committee had virtually decided on a preamble and six sections of the bill of rights. Among those decided upon was the free speech provision, which decreed: "That *no law shall be passed* restraining the free expression of opinion or restricting the right to speak, write or print freely on any subject."[79]

The origins of the committee's first draft, with its explicit state action requirement, are easy to determine. Although the *Ledger* story indicated that the committee closely followed the

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75. A number of other courts and commentators have reached the same conclusion in analyzing similarly worded state free speech provisions. *See, e.g.*, Note, *Free Speech*, *supra* note 3, at 541-42; Note, *Private Abridgment*, *supra* note 3, at 178-82. *See also* cases cited *supra* notes 52-71 and accompanying text. *But see* Cologne v. Westfarm Assocs., 192 Conn. 48, 469 A.2d 1201 (1984) (court adopted the federal analysis and declined to interpret the Connecticut Constitution to not require state action).

76. The Committee included C. H. Warner from Whitman County, *see* The Journal of the Washington State Constitutional Convention, 1889, at 488 (B. Rosenow ed. 1962) [hereinafter cited as Journal]; Gwin Hicks from Pierce County, *id.* at 475; George Comegys from Whitman County, *id.* at 469; Francis Henry from Thurston County, *id.* at 475; Frank M. Dallam from Lincoln County, *id.* at 470; J. C. Kellogg from Island County, *id.* at 477; and Louis Sohns from Cowlitz County, *id.* at 485.

77. This information was gathered from Journal, *supra* note 76, and from a survey of newspapers reporting on the Washington Constitutional Convention of 1889. Papers surveyed include: The Seattle Times, The Seattle Post-Intelligencer, The Tacoma Daily Ledger, The Tacoma Morning Globe, The Morning Oregonian (Portland), The Yakima Herald, The Anacortes Progress, The Chehalis Nugget, The Puget Sound Weekly Argus (Port Townsend), The Spokane Falls Review (weekly and daily), The Walla Walla Weekly Union, and The Washington Standard (Olympia).

78. Journal, *supra* note 76, at 496-97.

79. Tacoma Daily Ledger, July 13, 1889, at 4, col. 3 (emphasis added).

California Constitution[80] in drafting the Declaration of Rights, the first draft of the Washington free speech provision was more similar to and, in fact, nearly identical to the pertinent portion of the proposed model constitution written by W. Lair Hill, a noted Northwest lawyer and constitutional scholar.[81] This provision, which was borrowed from article I, section 8 of the 1857 Oregon Constitution,[82] contained an express state action requirement.[83]

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80. *Id.* The California free speech provision reads:

> Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact. Indictments found, or information laid, for publications in newspapers, shall be tried in the county where such newspapers have their publication office, or in the county where the party alleged to be libeled resided at the time of the alleged publication, unless the place of trial shall be changed for good cause.

CAL. CONST. art. I, § 9 (1879, amended 1974) (original wording).

81. Hill's proposed constitution was printed in the Morning Oregonian on the opening day of the convention, and a copy was placed on the desk of each delegate. The delegates' respect for Mr. Hill's work is evidenced by the fact that fifty-one of its provisions were adopted by the convention without change. State v. Rinaldo, 36 Wash. App. 86, 92, 673 P.2d 614, 617 (1983), *aff'd*, 102 Wash. 2d 749, 689 P.2d 392 (1984); Morning Oregonian, July 4, 1889, at 9; JOURNAL, *supra* note 76, at v-vii; J. Fitts, The Washington Constitutional Convention of 1889, at 21-22 (1951) (unpublished Master's thesis available at the Washington State Library, Olympia); Beardsley, *The Sources of the Washington Constitution as Found in the Constitutions of the Several States*, in CONSTITUTION OF THE STATE OF WASHINGTON iv (1939); *see also* M. AVERY, HISTORY AND GOVERNMENT OF THE STATE OF WASHINGTON 317 (1961). Hill's proposed free speech provision read as follows: "*No law shall be passed* restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever, but every person shall be responsible for the abuse of this right." W. Hill, Washington: A Constitution Adapted to the Coming State 3 (1889) (available at the Washington State Law Library, Olympia) (emphasis added) (Hill Proposed Const. art. I, § 5).

82. OR. CONST art. I, § 8 reads: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." The Hill free speech provision has been identified, along with its antecedents, the Oregon and Indiana provisions, as a "source" of the Washington provision, and one appellate judge has called it the "first version" of the Washington free speech provision. State v. Rinaldo, 36 Wash. App. 86, 92, 673 P.2d 614, 617 (1983), *aff'd*, 102 Wash. 2d 749, 689 P.2d 392 (1984). *See* Beardsley, *supra* note 81, at vi. However, many people were opposed to using the Oregon Constitution as a model. The Yakima Herald warned: "Oregon . . . should not direct nor should we be guided by her in the building of our constitution, for a state that has builded [sic] as she has is not a suitable one to pattern after. Her laws are fossilized . . . and . . . her law reports are less quoted as authority than those of most any other state." Yakima Herald, July 18, 1889, at 2, col. 1.

83. Beardsley, *supra* note 81, at iv, vi.

At or shortly after the July 13 meeting referred to in the *Ledger* story, the Bill of Rights Committee substantially altered the first draft of the free speech provision to eliminate the state action language.[84] The committee's second draft was published in a Tacoma newspaper shortly before it was to be reported to the convention. That draft read:

> Every person may fully speak, write and publish on all subjects, being responsible for an abuse of that right; in all trials for libel, both civil and criminal, the truth when published with good motives and for justifiable ends, shall be sufficient defense. A jury shall have the right to determine the fact and law under direction of the court.[85]

This language is similar to the free speech provision of the 1878 Washington Constitution, which had been adopted by the people of Washington in an earlier unsuccessful bid for statehood.[86]

Both the second draft and the 1878 Washington free speech provision were similar to the free speech provision of the 1879 California Bill of Rights, which apparently served as the model

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84. The change may have been prompted by the free speech provision of an alternative Bill of Rights proposed to the convention by Delegate Weir of Port Townsend on July 11, and subsequently referred to the Bill of Rights Committee. State v. Rinaldo, 36 Wash. App. 86, 92-93, 673 P.2d 614, 617-18 (1983), *aff'd*, 102 Wash. 2d 749, 689 P.2d 392 (1984); JOURNAL, *supra* note 76, at 50-53. The Weir free speech provision contained no state action requirement: "The right of free speech written, printed or spoken, when not infringing the rights of others, shall forever remain inviolate, and shall be secured to every citizen." *Rinaldo*, 36 Wash. App. at 92, 673 P.2d at 617-18, *aff'd*, 102 Wash. 2d 749, 689 P.2d 392 (1984) (quoting Weir Proposed Const. art. I, § 4); JOURNAL, *supra* note 76, at 51, 496-97.

85. Tacoma Morning Globe, July 17, 1889, at 1, col 1.

86. The 1878 provision read:

> Every person may freely speak, write and publish his opinions on all subjects, being responsible for the abuse of that liberty; and no law shall be passed to restrain or abridge the liberty of speech or the press. In all prosecutions for libel, the truth may be given in evidence to the jury, and if it appears that the matter charged as libelous be true, and was published with good motives and for justifiable ends, the party accused shall be acquitted; and the jury shall have the right to determine the law and the fact.

Proposed Wash. Const. art. V, § 7 in WASHINGTON'S FIRST CONSTITUTION, 1878, AND PROCEEDINGS OF THE CONVENTION 66 (E. Meany & J. Condon ed. 1919) [hereinafter cited as WASHINGTON'S FIRST CONSTITUTION]. This provision may well have affected the committee's second draft since the 1878 constitution still had influential backing in 1889, and one of the members of the 1889 Bill of Rights Committee had served on the Bill of Rights Committee that drafted the 1878 provision. *See id.* at 10; W. Airey, A History of the Constitution and Government of Washington Territory 439 (1945) (unpublished Ph.D. thesis available at the Washington State Library, Olympia); B. Parkany, "Religious Instruction" in the Washington Constitution 4 (1965) (unpublished Master's thesis available at the Washington State Library, Olympia).

for much of the committee's early work on the Washington Declaration of Rights.[87] The pertinent part of the California provision reads:

> Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact . . . .[88]

This language was adopted with only minor changes from the free speech provision of the 1849 California Constitution,[89] which was in turn borrowed verbatim from the corresponding provision of the 1846 New York Constitution.[90] The 1846 New

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87. *See* Tacoma Daily Ledger, July 17, 1889, at 4, col. 2; Tacoma Daily Ledger, July 13, 1889, at 4, col. 3. *See also* Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 240-41, 635 P.2d 108, 114 (1981) (stating that the Washington free speech provision was "modeled after" the California provision). The contemporary press also considered the California Constitution to be a good model for the Washington Constitution. The Tacoma Daily Ledger stated:

> California being a new western state with seaport cities, its interests are largely identical with our own and its constitution thus makes provisions that are liable to be considered in the convention . . . . That the California constitution will be frequently cited and quoted during the work of forming our own constitution is certain.

Tacoma Daily Ledger, July 3, 1889, at 2, col. 2.

88. CAL. CONST. art. I, § 9 (1879, amended 1974) (venue clause omitted). This provision was adopted with debate only on the libel clause. *See* E. WILLIS & P. STOCKTON, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA OF 1879, at 340-43 (1880).

89. CAL. CONST. art. I, § 8 read:

> Every citizen may freely speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelious [sic] is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

The provision was adopted without debate. *See* J. BROWNE, THE FAR WESTERN FRONTIER: REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION IN SEPT. AND OCT. 1849, at 30-31 (1850).

90. J. BROWNE, *supra* note 89, at 31. It should be noted that this provision has mistakenly been said to have originated with the Iowa Constitution of 1846. *See* Comment, *Rediscovering the California Declaration of Rights*, 26 HASTINGS L.J. 481, 495 (1974). The author of the Comment misinterpreted the framers' declaration that "the first eight

York provision originated in the almost identical free speech provision of the 1821 New York Constitution.[91] Thus, the second draft was most likely the result of the committee's examination of the Washington, California, and New York constitutional free speech clauses.

Two separate and distinct guarantees were contained in the California and New York provisions: first, an affirmative grant of a free speech right, valid by its own terms against all the world;[92] and second, a guarantee against laws that might abridge this right.[93] The latter guarantee was eliminated from the second

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sections of the report submitted . . . were from the Constitution of New York; all the others were from the Constitution of Iowa." J. BROWNE, *supra* note 89, at 31. He failed to note that the free speech provision was numbered art. I, § 8 in the 1849 constitution, not art. I, § 9 as it was numbered in the 1879 constitution and, therefore, originated with the New York Constitution.

The New York provision reads:

> Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

N.Y. CONST. of 1846, art. I, § 8. *See also* W. BISHOP & W. ATTREE, REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 7 (1846); W. CARROLL & J. COOK, JOURNAL OF THE [CONSTITUTIONAL] CONVENTION OF THE STATE OF NEW YORK 285 (1846).

91. N.Y. CONST. of 1821, art. VII, § 8. The 1821 provision was the same except "criminal" had not yet been added. *See* W. CANTEREL & C. LEAKE, JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 32 (1821); N. CARTER, W. STONE & M. GOULD, REPORTS OF THE PROCEEDINGS AND DEBATES OF THE [NEW YORK CONSTITUTIONAL] CONVENTION OF 1821, at 102-03 (1821). The only debates on this provision concerned libel.

The sources of the 1821 New York free speech provision are unknown. The debates of the 1821 convention do not disclose any source for the provision, and the clause "[e]very citizen may freely speak, write, and publish his sentiments on all subjects being responsible for the abuse of that right" did not change from the first reported draft. *Id.* at 32. The 1777 New York Constitution, which was the immediate predecessor of the 1821 constitution, had no free speech or press provision.

92. "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right . . . ." CAL. CONST. art. I, § 9 (1879, amended 1974). "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right . . . ." N.Y. CONST. of 1846, art. I, § 8.

93. "[A]nd no law shall be passed to restrain or abridge the liberty of speech or of the press . . . ." CAL. CONST. art. I, § 9 (1879, amended 1974). "[A]nd no law shall be passed to restrain or abridge the liberty of speech or of the press . . . ." N.Y. CONST. of 1846, art. I, § 8.

draft, probably because it was redundant.[94] In any event, the adoption and subsequent deletion of the express state action requirement in the Washington committee's first draft strongly suggest an awareness and rejection of such a requirement for the state free speech provision.

Other evidence also suggests that the provision was intended to protect against private action. The committee's second draft contained a constitutional defense against *civil suits* for libel.[95] This apparently reflected a belief that false and malicious civil libel was an abuse of the free speech right. Such an exception permitting civil libel actions would be necessary only if the initial clause of the provision was intended to protect against private abridgment of free speech rights.[96]

When the committee reported its third and final draft to the convention on July 25, the provision was in its present form:

> Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.[97]

This draft was adopted by the convention without debate or amendment.[98] It is unknown why the language on libel was removed, or why the word "fully" was changed to "freely," the word used in the California and New York provisions. In its final form, the Washington provision is quite similar to and probably derived from the relevant portions of the California and New York free speech provisions, neither of which explicitly requires or has been interpreted to require state action.[99]

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94. Because the affirmative right protects against abridgment by all the world, it includes protection against legislative abridgment as well. The Bill of Rights Committee consciously attempted to make art. I as brief and concise as possible. Tacoma Daily Ledger, July 11, 1889, at 4, col. 4.

95. *See supra* note 85 and accompanying text.

96. The participants in the various constitutional conventions who produced the predecessors of the Washington provision also demonstrated a great concern with how the provision would affect liability, both criminal and civil, for libel. *See, e.g.*, WASHINGTON'S FIRST CONSTITUTION, *supra* note 86, at 20; W. CANTEREL & C. LEAKE, *supra* note 91, at 167-69; E. WILLIS & P. STOCKTON, *supra* note 88, at 340-43; *see also* Marlin Firearms Co. v. Shields, 171 N.Y. 384, 391, 64 N.E. 163, 165 (1902) (declaring slander and civil libel to be abuses of the state constitutional right of free speech and, therefore, subject to subsequent prosecution or civil suit, but not subject to prior restraints).

97. JOURNAL, *supra* note 76, at 154.

98. *Id.*

99. *See supra* notes 66, 67, 71 and accompanying text. *See also* Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 910, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860 (1979), *aff'd*, 447 U.S. 74 (1980); Laguna Publishing Co. v. Golden Rain Found., 131 Cal. App. 3d 816, 843, 182 Cal. Rptr. 813, 829 (1982), *appeal dismissed*, 459 U.S. 1192 (1983); Shad

VII. The Historical Background of the Washington Constitutional Convention

The events surrounding the Constitutional Convention also suggest that the Washington Constitution was intended to restrict private activity. Many of the delegates to the convention supported the developing populist movement of the 1880s and 1890s and distrusted both state government and large corporations.[100] The delegates' attitudes were reflected in their campaigns for seats at the convention.[101] Delegates from all sections of the territory and from both political parties campaigned on the principle that the constitution should correct abuses by both government and corporations and protect the rights of the common people.[102] For example, the Republican candidates in King County drew up a platform advocating restraint of corporate activity.[103] Similarly, one Olympia newspaper asserted that the relationship between capital and labor and the conflict between the interests of corporations and the rights of the people were the most important questions to be decided at the constitutional convention.[104]

Alliance v. Smith Haven Mall, 118 Misc. 2d 841, 848-49, 462 N.Y.S. 2d 344, 349 (Suffolk County Sup. Ct. 1983); Gallaher v. American Legion, 154 Misc. 281, 284-85, 277 N.Y.S. 81, 84 (N.Y. County Sup. Ct.), *aff'd*, 242 A.D. 604, 271 N.Y.S. 1012 (1934).

100. *See generally* D. Johansen & C. Gates, Empire of the Columbia: A History of the Pacific Northwest 408-09, 417 (1957); Hicks, *Six Constitutions of the Far Northwest*, 9 Miss. Valley Hist. A. Proc. 360-79 (1917-1918); Knapp, *supra* note 39, at 239-40, 251-52, 254, 263-64; Walla Walla Weekly Union, May 11, 1889, at 2, col. 3; W. Airey, *supra* note 86, at 403-04, 450-51; J. Fitts, *supra* note 81, at 9; J. Smurr, A Critical Study of the Montana Constitutional Convention of 1889, at 261-81 (1951) (unpublished Master's thesis available at the Washington State Library, Olympia).

101. *See, e.g.*, M. Avery, *supra* note 81, at 200.

102. Walla Walla Weekly Union, May 11, 1889, at 2, col. 3-4; J. Fitts, *supra* note 81, at 9.

> 103. *Whereas*, The corporations are creatures of the law, and the history of the past has shown them to be aggressive and often acting in a manner regardless of the rights and interests of the people; therefore be it *Resolved*, That our delegates to the constitutional convention . . . use their influence for inserting in the constitution of the state of Washington reasonable provisions for the restraint and control of all corporations . . . within the limits of the state . . . and to insist that the heritage of the people shall not be taken from them for the advantage of corporations or private speculators.

See Morning Oregonian, May 8, 1889, at 2, col. 1; J. Fitts, *supra* note 81, at 9 n.1.

104. Washington Standard, April 19, 1889, at 2, col. 1. *See* J. Fitts, *supra* note 81, at 10 n.1. This is substantiated by Lebbeus Knapp, who stated: "The growth of power, and the arrogant disregard of laws and *the rights of people*, by corporations made the question of limiting corporate power one of the most vital and earnestly discussed questions before the constitutional convention." Knapp, *supra* note 39, at 239 (emphasis added). John Hicks, an early 20th-century scholar, agreed: "It is clear also that the delegates

The desire to protect the rights of the common person against the perceived rapacity of big business was reflected in numerous proposed constitutional provisions. Delegate Turner proposed a provision protecting the health of those employed in mines and factories.[105] Delegate Dyer proposed that children under fourteen be prohibited from working in mines, manufacturing, or other dangerous businesses.[106] Delegate Kinnear submitted a provision making it unlawful to import armed detectives into Washington because they had previously been used to crush labor strikes.[107] A similar proposal was submitted by a Tacoma union to prohibit private detective agencies from operating within the state.[108] The Seattle *Post-Intelligencer* advocated a provision prohibiting compulsory employment on election days.[109] The newspaper also suggested a provision that would require businesses "affected with a public interest" to serve everyone on equal terms.[110] The Tacoma *Daily Ledger* agreed:

> It is proper that the constitution for this state should declare that corporations and aggregations of capital are subject to legislative control . . . . A provision in the constitution that all corporations and private enterprises which are affected with a public interest are subject to legislative control . . . would give the public sufficient protection . . . .[111]

The *Ledger* also asserted that the state is "entitled to regulate and protect modes of transportation."[112] This attitude was shared by W. Lair Hill, whose model constitution included an article devoted to corporations, which specified that corporations are subject to regulation and cannot charge excessive or discrim-

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desired more government, and not less. Wherever possible, corporations of all kinds . . . must be controlled and regulated by the state . . . . The interests of the working classes—'their material, social, intellectual, and moral prosperity'—must be protected by the State." Hicks, *supra* note 100, at 377.

105. Tacoma Daily Ledger, July 12, 1889, at 4, col. 4. *See* JOURNAL, *supra* note 76, at 58-59. This proposal was adopted as WASH. CONST. art. II, § 35. *Id.* at 552.

106. *See* JOURNAL, *supra* note 76, at 77.

107. Tacoma Daily Ledger, July 16, 1889, at 4, col. 1. *See* JOURNAL, *supra* note 76, at 96; Knapp, *supra* note 39, at 267.

108. Tacoma Daily Ledger, July 18, 1889, at 4, col. 1. *See also* JOURNAL, *supra* note 76, at 109. These proposals were adopted, in part, in art. I, § 24. *Id.* at 512-13.

109. Seattle Post-Intelligencer, July 5, 1889, at 3, col. 1.

110. *Id.*

111. Tacoma Daily Ledger, July 27, 1889, at 2, col. 2-3.

112. Tacoma Daily Ledger, July 6, 1889, at 2, col. 1.

inatory rates.[113]

The Washington Constitutional Convention adopted a number of constitutional provisions granting rights against private individuals and corporations. For instance, the Washington Constitution guarantees criminal defendants the right to compel testimony by private individuals in criminal trials[114] and other proceedings[115] and prohibits imprisonment for private debts.[116] It also grants individuals and corporations the right to take private land by eminent domain for certain private purposes and guarantees the owners of condemned land a right to just compensation from the private taker.[117]

Article XII of the Washington Constitution contains extensive provisions regulating the relations between private corporations and their shareholders and customers and between corporations and the public in general.[118] Among these provisions is the express guarantee protecting individuals against discrimination in charges or facilities by any transportation company.[119]

The historical background of the convention, as reflected in statements by both the campaigning delegates and the press, and in numerous proposed and adopted constitutional provisions, demonstrates that the framers intended to regulate private action that might infringe on constitutionally protected rights.

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113. All railway companies are common carriers, and as such are and shall always be subject to the control and regulation of law. They shall not charge extortionate or excessive rates for transportation, nor unjustly discriminate in their charges or the rendering of services against or among persons or places. Laws shall be enacted prohibiting under adequate penalties, violations of this provision.

W. Hill, *supra* note 81, at 44 (Hill Proposed Const. art. X, § 7).

114. WASH. CONST. art. I, § 22.

115. WASH. CONST. art. II, § 30.

116. WASH. CONST. art. I, § 17.

117. WASH. CONST. art. I, § 16.

118. *See* JOURNAL, *supra* note 76, at 733-71.

119. WASH. CONST. art. XII, § 15. Also, corporations are granted the right to sue and be sued, WASH. CONST. art. XII, § 5, and stockholders are made personally liable for certain corporate debts. WASH. CONST. art. XII, §§ 4, 11. Corporations are prohibited from fixing prices, limiting production, or otherwise combining for monopoly purposes, and railroad corporations are specifically prohibited from consolidating their stock, property, or franchises with those of competing railroads. WASH. CONST. art. XII, §§ 16, 22. Constitutional provisions also protect shareholder rights in the issuance of stock. WASH. CONST. art. XII, § 6. The right of eminent domain against private property is extended to private telegraph and telephone companies, and such companies are granted rights of way over private railroad land. WASH. CONST. art. XII, § 19.

VIII. The Current State of Washington Law

Although the text and historical evidence indicate that the Washington free speech provision protects against private abridgment of free speech rights, the case law on this point is still largely undeveloped. Only one Washington Supreme Court case is directly on point,[120] and that case reveals a badly fragmented court.

In *Alderwood Associates v. Washington Environmental Council*,[121] a four-judge plurality[122] construed the Washington free speech and initiative guarantees[123] as containing no state action limitation. The plurality held that the owners of privately owned shopping centers must permit reasonably exercised speech and petition activity on their property whenever a "balancing" of the competing interests indicates that the speech interests outweigh the competing interests of the property owner.[124] Although the plurality used the term "balance," the analysis was a process of accommodation between apparently competing constitutional rights.

The court relied on a number of factors to conclude that the state free speech and initiative guarantees are not limited by any state action requirement. First, the plurality opinion noted that "Const. art. I, § 5, is not by its express terms limited to governmental actions. In this regard, it is like amendment 7 [the initiative provision] of the Washington Constitution."[125] Second, the plurality observed that two other states with very similar speech guarantees had effectively abolished the state action requirement for speech protection under their constitutions.[126] Third, the plurality observed that the federal state action requirement resulted from factors inherent in the federal system that restrain the federal courts but do not limit the state courts.[127] For instance, the United States Supreme Court must establish rules that could be effectively enforced in all parts of the country.

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120. Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 635 P.2d 108 (1981).

121. 96 Wash. 2d 230, 635 P.2d 108 (1981).

122. The plurality opinion was written by the author of this Article.

123. Wash. Const. art. I, §§ 4, 5; art. II, § 1 (amended 1981); *see* Note, Alderwood Associates v. Washington Environmental Council: *State Action and the Washington State Constitution*, 5 U. Puget Sound L. Rev. 331, 332-34 (1982).

124. *Alderwood Assocs.*, 96 Wash. 2d at 244-46, 635 P.2d at 116-17.

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

126. *Id.* at 240-41, 635 P.2d at 114-15.

127. *Id.* at 241-42, 635 P.2d at 115.

Consequently, that Court can only provide the "lowest common denominator" of individual freedom.[128] Similarly, the plurality noted that the United States Supreme Court must leave the states free to experiment.[129] Finally, the plurality's approach emphasized the special preference given to speech rights in our state's jurisprudence[130] and the growing importance of shopping centers as public forums in Washington.[131]

The plurality opinion recognized, however, that no constitutional provision could strictly apply to all public and private conduct without becoming impracticable or violating competing rights, such as the rights of private property owners.[132] To avoid these problems, the plurality adopted a method of accommodating the rights and interests of those who wish to restrain speech with the rights and interests of those who wish to engage in speech and petition activity.[133]

This approach is not only consistent with the absence of any state action requirement in the text and history of Washington's free speech guarantee, but it also creates a simple, flexible, and workable framework for accommodating and protecting competing interests on a case-by-case basis. Because there is no distinction under the Washington free speech provision between governmental and private action or between different types of speech, all conflicts between speech and competing rights can be resolved by accommodation of competing rights.

The federal Constitution, in contrast, divides infringement of speech rights into private infringements, which are not protected, and governmental infringements, which are sometimes protected.[134] If the speech falls into a protected category of expression, federal courts classify the exercise of such speech

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128. *Id.* at 237, 242, 635 P.2d at 112, 115. This allows states that desire to give more protection to civil liberties that opportunity, but does not require a standard so high as to cause political discord among the states.

129. *Id.* at 242, 635 P.2d at 115.

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

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

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

133. *Id.* at 243-44, 635 P.2d at 116. The court outlined the factors to be balanced in the shopping center context: the nature and use of the private property, and particularly the extent to which it is open to the public; the nature of the speech activity, including whether the speech also involves the initiative process; the potential for reasonable time, place, and manner regulations; and the extent to which the speech, as regulated, impairs the value or use of the property.

134. *See supra* notes 11-21 and accompanying text. *See also* L. TRIBE, *supra* note 10, at 694-99, 1165-67, 1173.

activity as a "fundamental right" and apply "strict scrutiny" to determine if the governmental infringement is valid.[135] Accommodation eliminates the need for any such complex distinctions and for a threshold determination of the presence or absence of state action because the court is able to decide every free speech case whether or not state action is present.

Although no higher level of scrutiny is required for governmental action than for private action under the plurality's approach, governmental interests will necessarily be given somewhat lesser value in the accommodation process than private interests. Because the state government's powers are expressly limited by the state constitution, including those rights enumerated in the Declaration of Rights, the governmental interest would not outweigh the rights of private individuals.[136] Thus, the question will not be "What is the type of government interest involved?" but rather "Has the individual's right been violated?" This approach must take into consideration that the right may be subject to reasonable time, place, and manner regulations[137] and that the speaker or writer is responsible for the "abuse of that right."[138]

In addition, even if examination could reveal that govern-

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135. *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 362 (1976) (discharge of public employee based on partisan political affiliation); Buckley v. Valeo, 424 U.S. 1, 64-65 (1976) (requirement of public disclosure of political contributors); NAACP v. Alabama, 357 U.S. 449, 460-61 (1958) (disclosure of membership lists of association to the state).

136. See WASH. CONST. art. I, § 29, which declares that "[t]he provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise." This principle has been affirmed by case law. *See, e.g.*, State *ex rel.* Anderson v. Chapman, 86 Wash. 2d 189, 192, 543 P.2d 229, 230-31 (1975); State *ex rel.* Lemon v. Langlie, 45 Wash. 2d 82, 97, 273 P.2d 464, 473 (1954). Also, it is well established that the state constitution is a limitation upon governmental powers, and laws in violation of the constitution are prohibited. *See, e.g.*, Fain v. Chapman, 89 Wash. 2d 48, 53, 569 P.2d 1135, 1139 (1977); Moses Lake School Dist. No. 161 v. Big Bend Community College, 81 Wash. 2d 551, 555, 503 P.2d 86, 89 (1973); State *ex rel.* Morgan v. Kinnear, 80 Wash. 2d 400, 402, 494 P.2d 1362, 1363 (1972). *See supra* note 37 and accompanying text.

It is well established that the government has no power to restrict expression because of the message, ideas, subject matter, or content. *See, e.g.*, Police Dept. v. Mosley, 408 U.S. 92, 95 (1972); State v. Hamilton, 24 Wash. App. 927, 934, 604 P.2d 1008, 1013 (1979). Also, any government restraint on speech bears a heavy presumption against its constitutionality. State v. Lotze, 92 Wash. 2d 52, 57, 593 P.2d 811, 813, *appeal dismissed*, 444 U.S. 921 (1979); City of Seattle v. Bittner, 81 Wash. 2d 747, 750-51, 505 P.2d 126, 128 (1973).

137. *See Alderwood Assocs.*, 96 Wash. 2d at 245, 635 P.2d at 116; State v. Lotze, 92 Wash. 2d 52, 58, 593 P.2d 811, 814, *appeal dismissed*, 444 U.S. 921 (1979); King County *ex rel.* Sowers v. Chisman, 33 Wash. App. 809, 814-15, 658 P.2d 1256, 1259 (1983).

138. *See* WASH. CONST. art. I, § 5.

mental interests prevail over free speech rights because the court finds that the individual's right has not been violated, the analysis does not end with a determination that the state constitution offers no protection to the expressive activity. The court must then proceed to determine whether any federal constitutional rights have been violated. Once the first amendment is invoked against a *governmental* official or entity, strict scrutiny will weed out all but the most compelling justifications for governmental restraints on speech activity.[139] Thus, under the plurality's approach, the Washington Constitution provides far more protection than does the federal Constitution against suppression of speech by private entities and individuals, but the federal Constitution may in some rare instances provide greater protection against infringement of fundamental speech rights by laws and governmental officials.[140]

Professor Sanford Levinson of the University of Texas Law School has expressed concern that a balancing approach to state constitutional free speech provisions may put courts in the position of examining the content of speech, the identity of the speakers, and the effects of the speech.[141] He suggests that the theory of free speech a court embraces and the normative values protected by the particular theory will shape the court's decision regarding what type of speech receives protection.[142] The consequence could then be state use of its power to protect some

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139. *See, e.g.*, New York Times v. United States, 403 U.S. 713, 714 (1971) (quashed the federal government's attempt to prevent publication of information allegedly dangerous to national security); Keyishian v. Board of Regents, 385 U.S. 589, 609-10 (1967) (struck a regulation that required dismissal of teachers associated with the Communist Party). *See also supra* note 135 and accompanying text.

140. State constitutions may provide more protection for civil liberties than is provided under the federal Constitution, but if they provide less, the state courts must also rely on the federal Constitution and provide the amount of protection required under that document. *See* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980); *Alderwood Assocs.*, 96 Wash. 2d at 237, 635 P.2d at 112; Comment, *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 284 (1973); Note, *Robins v. Pruneyard Shopping Center: Federalism and State Protection of Free Speech*, 10 GOLDEN GATE 805, 817 (1980).

141. Address by Professor Sanford Levinson, *Freedom of Speech and the Right of Access to Private Property Under State Constitutional Law*, at the National Conference on Developments in State Constitutional Law, Williamsburg, Va. (Mar. 10, 1984).

142. Levinson suggested, for example, that a "marketplace of ideas" approach would protect all information equally. A "freedom of expression" approach would protect behavior such as draft card burning. And a third approach, emphasizing safeguarding a republican form of government, offers special protection to political speech. *Id.*

groups and not others.[143] In view of Professor Levinson's comments, it is important to remember that the *Alderwood Associates* decision is a benchmark. How courts will resolve the difficult issues he raises remains to be seen.

Another criticism of the plurality's "balancing" test is that, by considering the extent to which the property is open to the public and the extent to which it becomes the functional equivalent of a downtown area or other public forum,[144] the court essentially is introducing a state action requirement.[145] This criticism misconstrues both the federal "state action" doctrine and the *Alderwood Associates* plurality's "balancing" approach.[146] Under the federal public function doctrine, the court will find "state action" only when the private person or entity is engaged in an activity that is a *traditional and exclusive function of government.*[147] Under that doctrine, the fact that property is merely open to the public and has become a public place is not sufficient.[148]

In contrast, the plurality's analysis does not require any such government-like activity. Rather, the accommodation test simply allows the court to consider as one factor the extent to which private property resembles a public *place.*[149] Not only may speech rights be protected on property that is used for activities that have never been traditional or exclusive functions of government, but the property need not even be particularly public for speech to be protected thereon if other factors militate in favor of protection.[150] Similarly, speech activity on property that is dedicated to almost unrestricted public use or is utilized to perform a traditional and exclusive governmental function might not be protected by the Washington Constitution

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143. *Id.*

144. *Alderwood Assocs.*, 96 Wash. 2d at 244, 635 P.2d at 116.

145. *See* Note, *Free Speech, Initiative and Property Rights in Conflict—Four Alternatives to the State Action Requirement in Washington*, 58 WASH. L. REV. 587, 599-604 (1983).

146. The Washington court's use of the phrase "traditional public function" refers to the shopping center's function as a public forum and is not a reference to any government function. *See Alderwood Assocs.*, 96 Wash. 2d at 246, 635 P.2d at 117 ("The shopping center now performs a traditional public function by providing the functional equivalent of a town center or community business block.").

147. Flagg Bros. v. Brooks, 436 U.S. 149, 164 (1978) (emphasis added).

148. Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1977). *See supra* notes 11-21 and accompanying text.

149. *Alderwood Assocs.*, 96 Wash. 2d at 244, 246, 635 P.2d at 116-17.

150. *Id.* at 244-45, 635 P.2d at 116-17.

if, for example, the owner had no effective means of enforcing reasonable time, place, and manner regulations, or if the speech activity was so unreasonable that it would seriously impair the value of the property.[151] Thus, the *Alderwood Associates* accommodation approach does not incorporate any implicit state action requirement, in spite of a superficial linguistic resemblance to one element of a narrowly construed federal doctrine.

The accommodation approach described above was only adopted by four justices, with Justice Dolliver concurring in the plurality's result.[152] Justice Dolliver relied on the state's police powers, rather than on the free speech provision, to protect the right to gather initiative signatures at privately owned shopping centers. Justice Dolliver wrote:

> The police power of the State is an attribute of its sovereignty, an essential element of the power to govern. The power exists without declaration, and the only limitation upon it is that it must reasonably tend to promote some interest of the State, and not violate any constitutional mandate.[153]

The state historically has used the police power to regulate the private sector to promote the public health, safety, and welfare.[154] Because the state has a strong welfare interest in protecting the fundamental rights of individuals, the police power may be used to require certain private actors to honor fundamental individual rights. In the case of initiative rights, Justice Dolliver found no need for implementing legislation because the initiative provision of the Washington Constitution is self-executing.[155] The same reasoning would support making the free speech provision directly applicable to private action without the need for implementing legislation.[156]

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151. *Id.* at 245, 635 P.2d at 116-17.

152. *Id.* at 247, 635 P.2d at 118. Four Justices dissented from the "abrogation" of the state action requirement. Justice Stafford wrote the dissent, joined by Chief Justice Brachtenbach and Justices Hicks and Dimmick. *Id.* at 253, 635 P.2d at 121.

153. *Id.* at 252, 635 P.2d at 120 (Dolliver, J., concurring).

154. *See* Maple Leaf Investors, Inc. v. Department of Ecology, 88 Wash. 2d 726, 729-30, 565 P.2d 1162, 1164 (1977); State v. Dexter, 32 Wash. 2d 551, 554, 202 P.2d 906, 907 (1941). *See also generally* E. FREUND, *supra* note 38; A. RUSSELL, *supra* note 38; 1 C. TIEDEMAN, *supra* note 38.

155. *Alderwood Assocs.*, 96 Wash. 2d at 251-53, 635 P.2d at 120 (Dolliver, J., concurring). *See* State *ex rel.* Case v. Superior Court, 81 Wash. 623, 632, 143 P. 461, 463-64 (1914). *See also* WASH. CONST. art. II, § 1(a) (amended 1981).

156. WASH. CONST. art. I, § 29 states: "The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise." Because the free

Thus, Justice Dolliver agreed with the plurality's emphasis on the importance of protecting freedom of speech, even against private individuals and entities, although he used a different method to reach the same result. While Justice Dolliver chose to rely on the police power, the plurality opted to address the issue directly and expressly refused to adopt any state action requirement for the Washington free speech provision. Rather, it chose to protect the values promoted by free speech by an accommodation test to determine whether the speech activity merited constitutional protection. *Alderwood Associates* is the Washington Supreme Court's first decision accommodating competing rights protected by the Washington Constitution. As the court is presented with new situations, new perspectives will arise and will naturally inform the court's approach to the process.

IX. Values of Free Speech Promoted Under the Washington Constitution

Freedom of speech is a preferred right under the Washington Constitution[157] because of its importance as a value in itself and as a means to further other normative values. Some values served by free speech include attainment of individual self-realization and fulfillment,[158] advancement of knowledge and discovery of truth,[159] the practice of democratic self-government,[160]

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speech provision does not include wording that implies implementing legislation is needed, the provision must be self-executing. *See supra* note 136.

157. State v. Coe, 101 Wash. 2d 364, 375, 679 P.2d 353, 360 (1984); *Alderwood Assocs.*, 96 Wash. 2d at 244, 635 P.2d at 116; Sutherland v. Southcenter Shopping Center, 3 Wash. App. 833, 846, 478 P.2d 792, 799 (1972). See also Tacoma Daily Ledger, May 9, 1889, at 3, col. 1, in which a letter to the editor of the Tacoma Daily Ledger asserted that "[a]gitation is the first step in the ladder of progress. All movements have succeeded by bringing [their arguments] before the people. Silence has always been the cry of all moral cowards."

158. The self-realization and fulfillment concept is derived from core democratic values: the right of individuals to control their own destinies and develop their faculties. Free speech helps individuals control their own destinies by allowing them to make intelligent choices in life's decisions. Free speech also fosters the development of human faculties directly because speaking, writing, creating, and learning involve the use and development of an individual's unique talents.

Under the self-realization ideal, one type of expression cannot be given more constitutional protection than others because self-realization precludes any external determination that some expression fosters self-realization more than does other expression. However, in extreme cases, full constitutional protection may be forced to give way to prevent infringement on others' rights to self-realization. *See generally* J. Mill, Representative Government ch. 3 (1861); Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591 (1982).

159. Free trade in the "marketplace of ideas" is the best test of truth because com-

and the retention of a stable community in a heterogeneous and changing society.[161]

All four of these values are reflected in or protected by the Washington Supreme Court's decision in *Alderwood Associates*. The court recognized the value of participation in democratic self-government by noting that "[i]t is undisputed that gathering initiative signatures . . . is a constitutionally guaranteed practice. It is at the core of both the first amendment and Const. art. I, § 5."[162] The court also stated that "signature gathering in a shopping mall furthers the exchange of ideas[,]"[163] thus recognizing the value of free speech in the advancement of knowledge and the discovery of truth.

The other values were also implicitly protected by the *Alderwood Associates* court. With the right to free speech guaranteed in private shopping centers and other places similar to

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petition will eventually result in acceptance of the most truthful ideas and rejection of false ideas. Because human beings can never be certain of what truth is, accepted doctrines must be continually barraged by challenging ideas. These challenges are necessary to prevent non-truth from becoming entrenched as truth and accepted as unquestioned dogma. Because truth cannot be determined, censorship may result in the exclusion of truth. Therefore, all ideas, even those believed by most to be false or offensive, must be constitutionally protected. *See generally* J. MILL, ON LIBERTY 1-48 (Oxford ed. 1946).

160. Free speech is necessary for perpetuation of a democratic system. Speech is vital to both individual participation in the political process and the checking of official abuses. Citizens must be informed in order to formulate intelligent opinions on current issues, to vote, and to advocate change in government policies. Citizens must also be informed of abuses by government officials so that they can show their disapproval by removing them from office. To ensure that the electorate will be informed, individuals must be able to speak freely about government policies, official abuses, and other current issues. Although "political" speech most directly fosters this value, education in all subjects aids the creation of an informed electorate and, therefore, all forms of speech ought to be given constitutional protection. *See generally* Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH J. 523; Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245.

161. Free speech also serves to stabilize a heterogeneous and changing society. Free speech allows for diversity of opinions. Individuals and groups may teach and learn these diverse ideas, and free speech enables them to reevaluate and change their attitudes when they desire. Free speech also prevents the majority from imposing its ideas on the minority. It allows the minority to disagree openly with the majority's political, social, economic, or religious ideas. They may criticize the government and attempt to change governmental policies via peaceful advocacy and will be less likely to use more disruptive means to achieve change. Thus, civil unrest, one symptom of an oppressive society, may be prevented by freedom of speech. *See generally* J. ELY, DEMOCRACY AND DISTRUST 73-87, 105-25 (1980); T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966); J. MILL, *supra* note 159; Meiklejohn, *supra* note 160.

162. *Alderwood Assocs.*, 96 Wash. 2d at 239, 635 P.2d at 114. *See also id.* at 244-45, 635 P.2d at 116.

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

traditional public forums, individuals and groups will be able to speak and hear different opinions on current issues and other subjects. This promotes individual self-realization and fulfillment. The *Alderwood Associates* decision also serves to prevent those in control of certain public forums from muffling those with minority opinions, thereby encouraging diversity and tolerance and lessening the likelihood that those with minority viewpoints will feel the need to turn to more disruptive methods to make themselves heard.[164]

X. Application of the *Alderwood Associates* Doctrine to Other Contexts

In *Alderwood Associates*, the accommodation of conflicting constitutional rights established that the exercise of speech rights in shopping centers is protected because the right to engage in free speech activity is more important than the competing interests of shopping center owners. The same balancing test could establish that free speech rights deserve protection in other private contexts as well, though additional factors may also have to be considered.

It may be argued, for example, that speech rights should prevail over the interests of the owners of private schools, colleges, and universities[165] in restricting speech activity on campuses. In addition to the factors discussed in *Alderwood Associates*, an important factor that courts may consider when speech activity has been suppressed by a private college is that colleges have traditionally been a central forum in the marketplace of ideas and serve as a source of intellectual stimulation for the outside community as well as for students and faculty.[166] In

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164. *Id.* at 239-40, 244-46, 635 P.2d at 113-14, 116-17.

165. *See* State v. Schmid, 84 N.J. 535, 567-69, 423 A.2d 615, 632-33 (1980) (holding that a private university violated a similar state free speech provision by evicting and procuring the arrest of an individual for distributing literature on the university campus). *See supra* notes 60-65 and accompanying text. *See also* Commonwealth v. Tate, 495 Pa. 158, 175, 432 A.2d 1382, 1391 (1981) (reversing the trespassing convictions of individuals arrested for attempting to distribute literature protesting a speaker at a public meeting held on a private university's campus). The Pennsylvania Supreme Court relied on the Pennsylvania free speech provision, which is similar to the Washington provision. *See supra* note 71. *See generally* Cohen, *The Private-Public Legal Aspects of Institutions of Higher Education*, 45 Den. L.J. 643 (1968); Schubert, *State Action and the Private University*, 24 Rutgers L. Rev. 323 (1970).

166. *See* State v. Schmid, 84 N.J. 535, 563-64, 423 A.2d 615, 630-31 (1980); Commonwealth v. Tate, 495 Pa. 158, 170-71, 432 A.2d 1382, 1387 (1981). *See also* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 512 (1969); Keyishian v.

reaching their decisions, courts will need to accommodate the rights of students, faculty, and others to receive as well as to disseminate information.[167] In addition to the college's property rights, courts will examine the extent to which the speech activity interferes with the operation or goals of the school.[168]

A second area likely to be litigated concerns speech in private residential communities. The exercise of free speech rights may be especially vulnerable in privately owned or managed communities such as apartment and condominium complexes,[169] planned communities,[170] mobile home parks,[171] nursing homes,[172] and agricultural labor camps.[173] In these communities, all the common areas, including halls, stairs, elevators, paths, streets, parking lots, and other community facilities, are usually owned by a private corporation or individual. If left unregulated, the

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Board of Regents, 385 U.S. 589, 603 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); Stastney v. Board of Trustees, 32 Wash. App. 239, 249, 647 P.2d 496, 504 (1982). *See generally* Fuchs, *Academic Freedom—Its Basic Philosophy, Function, and History*, 28 LAW & CONTEMP. PROBS. 431 (1963). *See also supra* notes 158-61.

167. *See, e.g., Alderwood Assocs.*, 96 Wash. 2d at 244-46, 635 P.2d at 116-17. *See* State v. Schmid, 84 N.J. 535, 562, 423 A.2d 615, 629-30 (1980); Commonwealth v. Tate, 495 Pa. 158, 170-71, 432 A.2d 1382, 1387-88 (1981). *See also* Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756-57 (1976); Fritz v. Gorton, 83 Wash. 2d 275, 296-98, 517 P.2d 911, 924-25 (1974). *See generally* Comment, *Freedom to Hear: A Political Justification of the First Amendment*, 46 WASH. L. REV. 311 (1971).

168. *See, e.g., Alderwood Assocs.*, 96 Wash. 2d at 245, 635 P.2d at 116-17. *See* State v. Schmid, 84 N.J. 535, 563-64, 423 A.2d 615, 630-31 (1980); Commonwealth v. Tate, 495 Pa. 158, 171-73, 432 A.2d 1382, 1390 (1981). For instance, a private fundamentalist religious college may have a greater interest in regulating proselytizing by competing religions on its campus than would a state university.

169. *See* Note, *Freedom of Religion as Basis for Access to Private Apartment Buildings*, 48 COLUM. L. REV. 1105, 1107 (1948); Note, *Private Abridgment*, *supra* note 3, at 169-71.

170. *See* Laguna Publishing Co. v. Golden Rain Found., 131 Cal. App. 3d 816, 844, 182 Cal. Rptr. 813, 829 (1982), *appeal dismissed*, 459 U.S. 1192 (1983). *See also supra* note 71; State v. Kolcz, 114 N.J. Super. 408, 276 A.2d 595 (1971).

171. *See* Note, *Private Abridgment*, *supra* note 3, at 169-71.

172. *See* Comment, *Access to Private Fora and State Constitutions: A Proposed Speech and Property Analysis*, 46 ALB. L. REV. 1501, 1527 (1982); Comment, *Nursing Home Access: Making the Patient Bill of Rights Work*, 54 U. DET. J. URB. L. 473, 493-94 (1977); Note, *Private Abridgment*, *supra* note 3, at 169-71 (1980).

173. *See* Freedman v. New Jersey State Police, 135 N.J. Super. 297, 302-03, 343 A.2d 148, 151 (1975) (holding that a reporter and photographer could not be barred from entering a privately owned labor camp); Sherman and Levy, *Free Access to Migrant Labor Camps*, 57 A.B.A. J. 434, 435-46 (1971); Note, *Access to Migrant Labor Camps:* Marsh v. Alabama *Revisited*, 55 CHI.[-]KENT L. REV. 285, 291-92 (1979); Note, *First Amendment and the Problem of Access to Migrant Labor Camps After* Lloyd Corporation v. Tanner, 61 CORNELL L. REV. 560, 561-63 (1976); Note, *Private Abridgment*, *supra* note 3, at 169-71.

owner could restrict the rights of the residents to assemble, speak, demonstrate, or advocate within their own community. Also, canvassers disseminating information or seeking signatures for political petitions, political and labor organizers, and even newspapers could be excluded from the community.[174]

When speech is curtailed by the owner or manager of a private residential community, courts may be asked to consider the speaker's right to speak and the right of the residents to receive information.[175] Other relevant factors include the residents' right to privacy,[176] the extent to which the speech interferes with residents' use of their property,[177] and the extent to which residents' property values are diminished.[178]

The speech rights of persons who belong to unions and other private associations may also, under certain circumstances, be found to prevail over the interests of such associations in regulating the speech of members.[179] When a private association

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174. *See supra* notes 169-73.

175. *See, e.g., Alderwood Assocs.*, 96 Wash. 2d at 244-46, 635 P.2d at 116-17. *See* Freedman v. New Jersey State Police, 135 N.J. Super. 297, 302, 343 A.2d 148, 151 (1975); State v. Kolcz, 114 N.J. Super. 408, 412-16, 276 A.2d 595, 597-99 (1971). *See also* Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756-57 (1976); Fritz v. Gorton, 83 Wash. 2d 275, 296-98, 517 P.2d 911, 924-25 (1974). *See also supra* notes 158-61. *See generally* Comment, *supra* note 167.

176. *See, e.g., Alderwood Assocs.*, 96 Wash. 2d at 244, 635 P.2d at 116. *See* Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 908-10, 592 P.2d 341, 346-47, 153 Cal. Rptr. 854, 859-60 (1979); State v. Kolcz, 114 N.J. Super. 408, 412-16, 276 A.2d 595, 597-99 (1971).

177. *See, e.g., Alderwood Assocs.*, 96 Wash. 2d at 244-45, 635 P.2d at 116-17. *See* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 82-85 (1980); Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 904-08, 592 P.2d 341, 343-45, 153 Cal. Rptr. 854, 856-59 (1979).

178. *See, e.g., Alderwood Assocs.*, 96 Wash. 2d at 244-45, 635 P.2d at 116-17. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 82-85 (1980); Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 904-08, 592 P.2d 341, 343-45, 153 Cal. Rptr. 854, 856-59 (1979).

179. *See* Zelenka v. Benevolent & Protective Order of Elks, 129 N.J. Super. 379, 386-87, 324 A.2d 35, 39, *cert. denied*, 66 N.J. 317, 331 A.2d 17 (1974) (private association's requirement that members obtain permission from the association's leader to write about the association was held unconstitutional); Gallaher v. American Legion, 154 Misc. 281, 284-85, 277 N.Y.S. 81, 84 (New York County Sup. Ct. 1934) (private association's regulation prohibiting members from criticizing the association found unconstitutional by a New York court interpreting a similar free speech provision); Dudek v. Pittsburgh City Firefighters, 425 Pa. 233, 242, 228 A.2d 752, 756 (1967) (holding unconstitutional a union's order requiring members to picket and the levy of fines on those who refused); Spayd v. Ringing Rock Lodge No. 665, 270 Pa. 67, 69-70, 113 A. 70, 71-72 (1921) (court prohibited a private association from invading members' right to speak about and criticize the association under a free speech provision similar to Washington's). *See supra* notes 52-54 and accompanying text.

attempts to suppress the speech of its members, courts are likely to examine such factors as the right of the speaker to speak,[180] the rights of other association members or the public to receive information,[181] whether members' associational rights are violated,[182] whether the speaker acts as a representative of the association or as an individual,[183] the extent to which the speech is inconsistent with the purpose and function of the association,[184] and the extent to which secrecy or public solidarity, if legitimately important to the association, may be violated.[185]

Another potential area of conflict concerns private employers. Employers can exert great control over the private as well as the working lives of their employees and can significantly impede their freedom of expression.[186] Because of the economic

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180. *See, e.g., Alderwood Assocs.*, 96 Wash. 2d at 244-46, 635 P.2d at 116-17. *See* Zelenka v. Benevolent & Protective Order of Elks, 129 N.J. Super. 379, 385, 324 A.2d 35, 37-38, *cert. denied*, 66 N.J. 317, 331 A.2d 17 (1974); Gallaher v. American Legion, 154 Misc. 281, 286, 277 N.Y.S. 81, 85 (New York County Sup. Ct. 1934); Dudek v. Pittsburgh City Firefighters, 425 Pa. 233, 240, 228 A.2d 752, 755 (1967); Spayd v. Ringing Rock Lodge No. 665, 270 Pa. 67, 69-70, 113 A. 70, 71-72 (1921). *See also supra* notes 158-61; *Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 1006-07 (1963) [hereinafter cited as *Developments in the Law*].

181. *See Alderwood Assocs.*, 96 Wash. 2d at 244-46, 635 P.2d at 116-17 (1981). *See also* Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756-57 (1976); Fritz v. Gorton, 83 Wash. 2d 275, 296-98, 517 P.2d 911, 924-25 (1974). *See also supra* notes 158-61. *See generally* Comment, *supra* note 167.

182. *See* Zelenka v. Benevolent & Protective Order of Elks, 129 N.J. Super. 379, 384-85, 324 A.2d 35, 37, *cert. denied*, 66 N.J. 317, 331 A.2d 17 (1974); *Developments in the Law*, *supra* note 180, at 1056-57. *See also* NAACP v. Button, 371 U.S. 415, 431 (1963); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958); Abernathy, *The Right of Association*, 6 S.C. L. REV. 32, 44 (1953).

183. *See generally* Zelenka v. Benevolent & Protective Order of Elks, 129 N.J. Super. 379, 324 A.2d 35, *cert. denied*, 66 N.J. 317, 331 A.2d 17 (1974) (member acting as individual in communication to other members); Gallaher v. American Legion, 154 Misc. 281, 277 N.Y.S. 81 (New York County Sup. Ct. 1934) (post publicly took a stand contrary to national body); Spayd v. Ringing Rock Lodge No. 665, 270 Pa. 67, 113 A. 70 (1921) (member acting as an individual in communication to legislature in petition).

184. *See* Zelenka v. Benevolent & Protective Order of Elks, 129 N.J. Super. 379, 386, 324 A.2d 35, 38, *cert. denied*, 66 N.J. 317, 331 A.2d 17 (1974); Gallaher v. American Legion, 154 Misc. 281, 286, 277 N.Y.S. 81, 85 (New York County Sup. Ct. 1934). *See also Developments in the Law*, *supra* note 180, at 996-97, 1009, 1011-19.

185. *See* Zelenka v. Benevolent & Protective Order of Elks, 129 N.J. Super. 379, 388, 324 A.2d 35, 39, *cert. denied*, 66 N.J. 317, 331 A.2d 17 (1974); Gallaher v. American Legion, 154 Misc. 281, 286, 277 N.Y.S. 81, 85 (New York County Sup. Ct. 1934); Dudek v. Pittsburgh City Firefighters, 425 Pa. 233, 244, 228 A.2d 752, 757 (1967). *See also Developments in the Law*, *supra* note 180, at 1008.

186. *See* Blades, *Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1406-07 (1967); Carroll, *Protecting Private Employees' Freedom of Political Speech*, 18 HARV. J. ON LEGIS. 35, 38-39 (1981); McCarry, *The Contract of Employment and Freedom of Speech*, 9 SYDNEY L.

and social dependence of employees on their jobs and the imbalance in the employer-employee bargaining position, employees may be unable to protect their own rights when, as is often the case, the option to quit and find comparable work elsewhere is not a viable alternative.[187] Thus, the extent of employees' speech rights is an area that is likely to be litigated in the future. When a private employer suppresses speech, courts may be asked to consider the rights to speak and receive information[188] as well as such factors as whether the speech seriously interferes with the management of the employer's business[189] and whether the exercise of speech is on company time or at company expense.[190]

These are only a few examples of situations in which courts may have to consider whether speech rights will prevail over the interests of a private party in suppressing speech and only a few of the factors that courts may take into account in deciding such cases. Whether the speech interests will prevail over the interests of the person who suppresses the speech or vice versa will, of course, depend on the facts of each case.

XI. Conclusion

The textual, historical, and public policy considerations discussed in this Article support the view that the Washington Constitution does and should protect against private infringement of free speech rights. The *Alderwood Associates* plurality employed an accomodation test that provides a workable and highly flexible framework for determining when such protection

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Rev. 333, 333-34 (1981); Note, *Freedom of Speech in Private Employment: Overcoming the "State Action" Problem*, 20 Am. Bus. L.J. 102, 103 (1982) [hereinafter cited as Note, *Freedom of Speech*]; Note, *Free Speech*, *supra* note 3, at 526-28. *See generally* O'Connor, *Accommodating Labor's Section 7 Rights to Picket, Solicit, and Distribute Literature on Quasi-Public Property with the Owners' Property Rights*, 32 Mercer L. Rev. 769 (1981).

187. *See* Blades, *supra* note 186, at 1404-06; Carroll, *supra* note 186, at 38-39; McCarry, *supra* note 186, at 337; Note, *Freedom of Speech*, *supra* note 186, at 103; Note, *Free Speech*, *supra* note 3, at 528, 553. *See generally* O'Connor, *supra* note 186.

188. *See, e.g.*, *Alderwood Assocs.*, 96 Wash. 2d at 244-46, 635 P.2d at 116-17. *See* Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 908-10, 592 P.2d 341, 346-47, 153 Cal. Rptr. 854, 859-60 (1979). *See also* Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 757 (1976); Fritz v. Gorton, 83 Wash. 2d 275, 296-98, 517 P.2d 911, 924-25 (1974). *See generally* Comment, *supra* note 167.

189. *See* Note, *Freedom of Speech*, *supra* note 186, at 109; Note, *Free Speech*, *supra* note 3, at 533-36, 547-48.

190. *See* Note, *Freedom of Speech*, *supra* note 186, at 109; Note, *Free Speech*, *supra* note 3, at 537-38, 547-48.

is appropriate while avoiding unreasonable infringement on other potentially conflicting rights and interests. Concepts mature and the process of accommodation will be influenced and honed as new perspectives arise. This approach provides one effective way of implementing our founders' promise that every Washingtonian may "freely speak, write and publish on all subjects."[191]

191. *See* WASH. CONST. art. I, § 5.