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Constitutional Law-State v. Felmet: The Extent of Free Speech Rights on Private Property under the North Carolina Constitution

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NOTES

Constitutional Law—*State v. Felmet*: The Extent of Free Speech Rights on Private Property Under the North Carolina Constitution

Early in 1981 the Supreme Court of North Carolina took a blind step down a relatively uncharted path.[1] In *State v. Felmet*[2] the supreme court held that the free speech provisions of the United States and North Carolina Constitutions do not protect an individual from prosecution for trespassing when he solicits signatures for a petition in the parking lot of a privately owned shopping mall.[3]

On June 4, 1979, Joe Andrew Felmet was arrested for trespassing[4] while gathering signatures in the parking lot of Hanes Mall, a privately owned, regional shopping center located in Winston-Salem.[5] The mall "had a policy of prohibiting . . . solicitation" without prior written permission.[6] After being informed of defendant's activities, the mall security director, aware that defendant had not obtained prior permission, asked him to stop soliciting. Asserting a constitutional right to free speech, defendant refused to leave. The police eventually were summoned and, after some discussion, defendant was arrested.

The issue of free speech rights on private property first surfaced in the

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1. The North Carolina Supreme Court had never before addressed the issue of free speech protection on private property. The United States Supreme Court has considered the issue on several occasions. *See* Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) (states may interpret free speech provisions of state constitutions to protect free speech on private property); Hudgens v. NLRB, 424 U.S. 507 (1976) (first amendment does not protect picketing on privately owned shopping center parking lot); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (first amendment does not protect handbilling in courtyard of privately owned shopping mall); Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (first amendment protects picketing in privately owned shopping center parking lot when picketing is reasonably related to shopping center activities). *See also* People v. Sterling, 52 Ill. 2d 287, 287 N.E.2d 711 (1972) (following *Lloyd Corp.*); State v. Rose, 44 Ohio Misc. 17, 335 N.E.2d 758 (1975) (following *Lloyd Corp.* and *Logan Valley* exception); Lenrich Assocs. v. Heyda, 264 Or. 122, 504 P.2d 112 (1972) (following *Lloyd Corp.*); Homart Dev. Co. v. Fein, 110 R.I. 1372, 293 A.2d 493 (1972) (dictum that court would thereafter follow *Lloyd Corp.*); Rains v. Mercantile Nat'l Bank, 599 S.W.2d 121 (Tex. Civ. App. 1980) (following *Lloyd Corp.*).

2. 302 N.C. 173, 273 S.E.2d 708 (1981) (6-0 decision; Meyers J., not participating).

3. *Id.* at 178, 273 S.E.2d at 712.

4. "If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor he shall be guilty of a misdemeanor." N.C. GEN. STAT. § 14-134 (Cum. Supp. 1979).

5. 302 N.C. at 177, 273 S.E.2d at 711.

6. *Id.* Signs at three entrances to the facility read as follows:

> Notice to the people. The property comprising Hanes Mall is private property. Solicitations or distribution of handbills is absolutely prohibited on this property. Written permission must be obtained from the Manager's Office to use this property in any activity other than shopping.

Id.

1946 case of *Marsh v. Alabama*.[7] A Jehovah's Witness was convicted of trespassing when she failed to leave private property after being asked to do so. The private property was a company town which, except for title,

> ha[d] all the characteristics of any other American town. The property consist[ed] of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which businesses were situated. . . . In short the town and its shopping district [were] accessible to and freely used by the public in general and there [was] nothing to distinguish them from any other town and shopping center except the fact that title to the property belong[ed] to a private corporation.[8]

In reversing the conviction, the United States Supreme Court stated that title to the property did not resolve the issue.[9] "Ownership," the Court said, "does not always mean absolute dominion. 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 . . . constitutional rights of those who use it."[10] The Court thus invoked a balancing test and, with specific recognition of the preferred position that individual liberties hold in our society,[11] struck the balance in favor of free speech.

Over twenty years elapsed[12] before the Supreme Court, in *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*,[13] had occasion to reexamine *Marsh*. Logan Valley Plaza owned a large, newly developed shopping center near Altoona, Pennsylvania. The controversy arose when a supermarket located in the center opened, employing a wholly nonunion staff. Within ten days after opening, union members began picketing the store. Most of the picketing took place in the parcel pickup area and the immediately

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7. 326 U.S. 501 (1946).

8. *Id.* at 502-03.

9. *Id.* at 505.

10. *Id.* at 506.

11. *Id.* at 509.

12. It appears that many of the lower court cases decided in the twenty years between *Marsh* and *Logan Valley* arose in the picketing context. People v. Barisi, 23 L.R.R.M. (BNA) 2190 (N.Y.C. Magis. Ct. 1948), for example, involved the picketing of a newsstand located inside Penn Station. The court recognized that private property was involved but questioned whether it was a private place. Dismissing the complaint, the court relied squarely on *Marsh*, stating that "by opening up their property to the general public, the owners of the station have made it a quasi-public place, and as such their ownership is 'circumscribed by the constitutional rights of those who use it.'" *Id.* at 2191.

The issue also arose, eleven years later, in State v. Williams, 44 L.R.R.M. (BNA) 2357 (Baltimore, Md. Crim. Ct. 1959). *Williams* involved picketing in a privately owned shopping center. Citing *Marsh*, the court stated that "the property involved is not 'private' any more. That is why the competing interest of freedom of speech must be served." *Id.* at 2362. Other courts have expressed approval of, or reached the same result. *See, e.g.*, Marshall Field & Co. v. NLRB, 200 F.2d 375 (7th Cir. 1952) (solicitation protected on company-owned walkway); Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers' Local 31, 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233, *cert. denied*, 380 U.S. 906 (1964) (picketing protected in shopping center parking lot); Moreland Corp. v. Retail Store Employees Local 444, 16 Wis. 2d 499, 114 N.W.2d 876 (1962) (dictum). *But see* People v. Goduto, 21 Ill. 2d 605, 174 N.E.2d 385 (1961) (unlawful to distribute union literature in Sears parking lot).

13. 391 U.S. 308 (1968).

adjoining parking lot. The picketing was at all times peaceful, lacking both violence and threats of violence, although there was sporadic congestion at the parcel pickup area. Nevertheless, the owner of the shopping complex was able to obtain an injunction prohibiting the picketing.

The issue, as the Court saw it, was "whether peaceful picketing of a business . . . located within a shopping center [could] be enjoined on the ground that it constitutes an unconsented invasion of the property rights of the owners of the land on which the center is situated."[14] Relying heavily on *Marsh*, the Supreme Court reversed the Pennsylvania Supreme Court's decision upholding the injunction against picketing.[15] Speaking for the Court, Justice Marshall focused on the "similarities between the business block in *Marsh* and the shopping center"[16] in *Logan Valley*, noting that the only difference between the two cases was that Logan Valley Plaza lacked title to the surrounding property. Believing this difference to be of no constitutional significance, the Court held "that because the shopping center serves as a community business block 'and is freely accessible and open to the people in the area and those passing through,' " the public may exercise their first amendment rights on the private property "in a manner and for a purpose generally consonant with the use to which the property is actually put."[17]

Just four years after *Logan Valley*, the Court was confronted with the issue[18] reserved in that case of "the right of a privately owned shopping center to prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operations."[19] In *Lloyd Corp. v. Tanner*[20] a case whose facts are very similar to the facts in *Felmet*, the defendants were inside Lloyd Center, a large, retail shopping center in Portland, Oregon, distributing handbills in opposition to the draft and the war in Vietnam. The center was open to the public, with a considerable effort being made to attract shoppers and to create customer goodwill in the community. Threatened with an arrest for trespassing, defendants left the mall and subsequently obtained a permanent injunction preventing the Lloyd Corporation from interfering with their first amendments rights.

In a five-to-four decision, the Court held that a privately owned and operated shopping center is not required to be open to the public, and therefore

14. *Id.* at 309. In what later turned out to be a key clarification of the issue, the Court added that it did not "consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center was being put." *Id.* at 320 n.9. Although the question was expressly reserved by the Court, lower courts presumed such first amendment activity could not be enjoined. *See, e.g.*, Wolin v. Port of N.Y. Auth., 392 F.2d 83 (2d Cir. 1968); Blue Ridge Shopping Center, Inc. v. Schleiminger, 423 S.W.2d 610 (Mo. Ct. App. 1968).

15. 391 U.S. at 325.

16. *Id.* at 317 (quoting Marsh v. Alabama, 326 U.S. at 508).

17. *Id.* at 319-20. Justice Marshall also noted that restricting picketing to the streets and sidewalks not only dilutes the effect of the message but also exposes the picketers or distributers to increased and unwarranted hazards. Id. at 322.

18. *See supra* note 14.

19. Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

20. 407 U.S. 551 (1972).

members of the public are not free to exercise their first amendment rights at the shopping center.[21] Reversing the court of appeals, the Supreme Court closely examined both *Marsh* and *Logan Valley* before deciding neither was applicable. The Court believed that in *Logan Valley* it was constitutionally significant that the picketing was directed at a store within the mall.[22] *Marsh* also was distinguished because it involved a company town, "an economic anomaly of the past."[23] Relying heavily on Justice Black's dissent in *Logan Valley*,[24] the Court limited *Marsh* to the company town situation.

Respondents argued that the shopping center had opened itself up for public use generally: "property [does not] lose its private character merely because the public is generally invited to use it for designated purposes."[25] The Supreme Court rejected this position,[26] holding that in the absence of state action, the first amendment rights of respondents must give way to the property rights contained in the fifth and fourteenth amendments.[27]

In its most recent decision in this area, *Pruneyard Shopping Center v. Robins*,[28] the Supreme Court, in a unanimous decision, held that a state may interpret the free speech provision of its constitution to protect speech in a privately owned shopping center without infringing on federally protected property rights of the owner.[29] Respondents in *Pruneyard* were distributing handbills and soliciting signatures for petitions inside the central courtyard of petitioner's mall. After they were asked to leave, respondents sought an injunction in the superior court preventing the center from interfering with their petitioning. The injunction was denied and the California Court of Appeals

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21. *Id.* at 570.

22. *Id.* at 560-61. The Court thus essentially limited *Logan Valley* to its facts.

23. *Id.* at 561.

24. The Court quoted extensively from Justice Black's dissent. *See, e.g.*, 407 U.S. at 562-63. "As Mr. Justice Black was the author of the Court's opinion in *Marsh*, his analysis of its rationale is especially meaningful." *Id.* at 562 n.10.

25. *Id.* at 569.

26. Respondents' argument, even if meritorious, misapprehends the scope of the invitation extended to the public. The invitation is to come to the center to do business with the tenants. It is true that the facilities at the Center are used for certain meetings and for various promotional activities . . . . [But] [t]here is no open-ended invitation to the public to use the Center for any and all purposes, however incompatible with the interests of both the stores and the shoppers whom they serve.

Id. at 564-65.

27. *Id.* at 570. In an anticlimatic decision, *Logan Valley* was specifically overruled in Hudgens v. NLRB, 424 U.S. 507 (1976). *Hudgens* involved peaceful picketing within a privately owned shopping center. The striking picketers were warehouse employees of one of the retail stores located in the shopping center. After threats of arrests for trespassing by the shopping center management stopped the picketing, a charge of unfair labor practices was filed with the National Labor Relations Board. Relying on *Lloyd Corp.*, the NLRB upheld the right to picket; the Fifth Circuit Court of Appeals affirmed. 501 F.2d 161 (5th Cir. 1974). Reversing the NLRB and court of appeals, the Supreme Court reviewed the cases culminating in *Lloyd Corp.* and concluded that "if it was not clear before, . . . the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case . . . . [T]he ultimate holding in *Lloyd* amounted to a total rejection of the holding in *Logan Valley*." 424 U.S. at 518. "[U]nder the present state of the law the constitutional guarantee of free expression has no part to play in a case [involving picketing on private property]." *Id.* at 521.

28. 447 U.S. 74 (1980).

29. *Id.* at 88.

affirmed. The California Supreme Court reversed, invoking a provision of the California Constitution that protects "speech and petitioning, reasonably exercised in shopping centers even when the centers are privately owned."[30]

After holding that *Lloyd Corp.* did not create a federally protected property right,[31] the Supreme Court considered whether the decision of the California Supreme Court amounted to a taking without just compensation under the fifth and fourteenth amendments of the United States Constitution. The Court recognized that the right to exclude others is "one of the essential sticks in the bundle of property rights"[32] but added that not every government intrusion is a taking.[33] The Court then held that the protection of free speech on private property under the state constitution amounted to neither a taking nor a denial of due process.[34]

Throughout this period of Supreme Court decisions, the degree of protection to be afforded free speech on private property remained an unanswered question in North Carolina. Defendant's argument in *Felmet* thus presented the North Carolina Supreme Court its first opportunity to examine closely the free speech provision of the North Carolina Constitution.[35]

To persuade the court not to interpret the North Carolina constitution parallel with the federal Constitution, and thereby to avoid application of *Lloyd Corp.*, defendant offered a two-step argument.[36] First, defendant compared differences in the wording of the North Carolina Constitution[37] and the

30. *Id.* at 78 (citations omitted).

31. *Id.* at 80-81.

32. *Id.* at 82.

33. *Id.*

34. *Id.* at 83. The Court also considered whether the mall owners' first amendment rights were violated by the State's forcing them to adopt the speech of others, under Wooley v. Maynard, 430 U.S. 705 (1977). The *Maynard* Court held that a state may not "require an individual to participate in the dissemination of an ideological message by displaying it on his property [the state motto on a license plate] in a manner and for the express purpose that it be observed and read by the public." *Id.* at 713. The *Pruneyard* Court answered in the negative, noting that the state was not forcing the appellant to adopt any particular message. Moreover, the owner of the shopping center had elected to open his property for other than strictly private use. 447 U.S. at 87. This statement arguably resurrects the *Logan Valley-Marsh* rationale that the more an owner opens his private property to the public, the more his property rights become circumscribed by the constitutional rights of the public. *See* Comment, *Pruneyard Shopping Center v. Robins*, 9 HOFSTRA L. REV. 289, 312 (1980).

35. The free speech provision was added to the North Carolina Constitution in 1970. *See infra* note 61.

In addition to his arguments based on the state constitution, defendant contended that his soliciting was protected under the first amendment to the United States Constitution. The court, relying on *Lloyd Corp.*, rejected the latter contention. Although the soliciting in *Lloyd Corp.* occurred inside the mall, the *Hudgens* decision made it clear that the *Lloyd Corp.* rationale applies to speech anywhere on private property. *See supra* note 27. Because of the correctness of this aspect of the *Felmet* decision, this subsection will focus only on defendant's argument under the North Carolina Constitution.

36. *See* Defendant-Appellant's Brief at 7-16, State v. Felmet, 302 N.C. 173, 273 S.E.2d 708 (1981).

37. The North Carolina Constitution provides that "[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person should be responsible for their abuse." N.C. CONST. of 1970, art. I, § 14.

Constitution of the United States.[38] Since identical words in the state and federal constitutions may be subject to different interpretations,[39] obvious differences in wording should be no less subject to different interpretations.

Defendant then argued that the state constitution should be interpreted to protect speech unprotected by the federal constitution.[40] Specifically, defendant argued that the court should mirror the interpretation given to similar language in the California constitution[41] by the California Supreme Court.[42] Relying on its pre-*Lloyd Corp.* decisions, many of which interpreted the United States Constitution, the California court had held that orderly handbilling and soliciting the courtyard of a privately owned shopping mall was protected speech under the state constitution.[43]

The supreme court's curt response to defendant's contention included little constitutional analysis. The court's entire discussion consisted of the following paragraph:

> Nor were defendant's actions protected under Article I, section 14 of the North Carolina Constitution which reads:
>
> > Freedom of speech and of the press are two of the great balwarks of liberty and therefore shall never be restrained, *but every person should be held responsible for their abuse*.
>
> . . . This Court could, under the Supremacy Clause, interpret our State Constitution to protect conduct similar to that of defendant without infringing on any federally protected property right of the owners of private shopping centers. *Pruneyard Shopping v. Robins* . . . . However, we are not so disposed. Defendant's conviction for trespass is free from prejudicial error. The judgment must therefore be upheld.[44]

The lack of constitutional analysis is a major flaw in the opinion. Generally, a defendant should be informed of the reasons the court found persuasive in reaching its result.[45] A reasoned opinion ensures fairness by showing the

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38. The United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech or of the press." U.S. CONST. amend. I.

39. Bulova Watch Co. v. Brand Distribs. of North Wilkesboro, Inc., 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974).

40. 302 N.C. at 178, 273 S.E.2d at 712.

41. "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. For the corresponding North Carolina provision, *see supra* note 50.

42. Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 909-12, 592 P.2d 341, 346-48, 153 Cal. Rptr. 854, 859-61 (1979), *aff'd*, 447 U.S. 74 (1980).

43. *Id.* at 911, 592 P.2d at 347, 153 Cal. Rptr. at 860. The California Supreme Court also rested its decision on the " 'right to . . . petition government for redress of grievances. . . .' (Art. I, § 3)" under the California Constitution. *Id.* at 908, 592 P.2d at 345, 153 Cal. Rptr. at 858. Although not raised by the defendant in *Felmet*, this argument was presumably available because the North Carolina Constitution contains a similar provision: "The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress or grievances. . . ." N.C. CONST. art. I, § 12.

44. 302 N.C. at 178, 273 S.E.2d at 712 (emphasis in original) (citation omitted).

45. *See, e.g.*, NLRB v. Amalgamated Clothing Workers Local 990, 430 F.2d 966, 970 (5th Cir. 1970); Phelps Dodge Corp., Morenci Branch v. Industrial Comm'n, 90 Ariz. 379, 381, 368

losing party that his case has been treated carefully[46] and that the adjudicating body "has considered the issues . . . in light of relevant statutory and case law."[47] The interests of justice are better served by an opinion that explains the reasons underlying the decision.[48]

Moreover, a detailed decision provides a check on the judge himself.[49] A decision-maker might well change his mind when he sits down and attempts to justify a decision.[50] Thus, a well-written opinion not only forces the decision-maker to examine closely his reasoning, but it opens that reasoning up to independent judicial scrutiny.[51] A final but not unimportant benefit of a well-reasoned opinion is the guidance it provides both the bar and bench.[52]

In addition to these policy considerations, the facts of this particular appeal underscore the need for a better reasoned opinion. Defendant was convicted of trespass in the superior court.[53] He appealed the decision to the North Carolina Court of Appeals, which dismissed the appeal "for failure . . . to show jurisdiction" of the trial court in the record on appeal.[54] Defendant then petitioned for and was granted[55] a writ of certiorari to the supreme court for review of the dismissal.

The supreme court was unwilling to conclude that the court of appeals

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P.2d 450, 452 (1962); Hoult v. Kuhne-Simmons Co., 64 Ill. App. 3d 476, 477-78, 381 N.E.2d 403, 404 (1978). *See also* K. LLEWELYN, THE COMMON LAW TRADITION 289-90 (1960).

46. *See* K. LLEWELLYN, *supra* note 45, at 289.

47. Sarty v. Forney, 12 Or. App. 251, 253, 506 P.2d 535, 536 (1973).

48. *See* United States v. Costa, 356 F. Supp. 606 (D.D.C.), *aff'd*, 479 F.2d 921 (D.C. Cir. 1973); People v. Dupie, 395 Mich. 483, 487 n.2, 286 N.W.2d 494, 496 n.2 (1975). *See also* P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 31 (1976) [hereinafter cited as CARRINGTON & MEADOR].

49. "[A]n articulated discussion . . . reduces, if not eliminates, the easy temptation or tendency to ill-considered or even arbitrary action by those having the awesome power of almost final review." NLRB v. Amalgamated Clothing Workers Local 990, 430 F.2d 966, 972 (5th Cir. 1970); *see also* R. WASSERSTROM, THE JUDICIAL DECISION 160 (1961).

50. *See* Lasky, *Observing Appellate Opinions From Below the Bench*, 49 CALIF. L. REV. 831, 838 (1961); White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 598 VA. L. REV. 279, 288 (1973).

51. *See* WASSERSTROM, *supra* note 49, at 159. *See also*, Northcross v. Board of Educ., 412 U.S. 427 (1973); Taylor v. McKeithen, 407 U.S. 191, 194 n.4 (1972); Cleveland, Cin., Chi. & St. L. Ry. v. United States, 275 U.S. 404, 414-15 (1928); City of Hammond v. Schappi Bus Line, 275 U.S. 164 (1927); Virginian Ry. v. United States, 272 U.S. 658, 675 (1926).

52. *See* NLRB v. Amalgamated Clothing Workers Local 990, 430 F.2d 966, 972 (5th Cir. 1970); *see also* K. LLEWELLYN, *supra* note 45, at 288. The *Felmet* decision is subject to different interpretations that could lead to different consequences, thereby confusing rather than educating the legal community.

53. Record at 1, State v. Felmet, 802 N.C. 173, 273 S.E.2d 708 (1981).

54. 302 N.C. at 174, 273 S.E.2d at 710. Jurisdiction of the superior court in this case was derivative and arose only upon a conviction in the district court. *Id.* at 174-75, 273 S.E.2d at 710. "When the record is silent and the appellate court is unable to determine whether the court below had jurisdiction, the appeal should be dismissed." *Id.* at 176, 273 S.E.2d at 711.

Defendant was not aware of this jurisdictional error until oral arguments in the court of appeals. Rather than argue that the superior court lacked jurisdiction, which if successful would have arrested the judgment entered by the superior court, State v. Hardy, 298 N.C. 191, 257 S.E.2d 426 (1979), defendant "moved to amend the record to include the judgment of the district court and appeal entries therefrom." 302 N.C. at 176, 273 S.E.2d at 711. It was the uncontested motion which the court of appeals denied and from which the defendant appealed.

55. 301 N.C. 99, 273 S.E.2d 303, 303-04 (1980).

had abused its discretion.[56] Rather than dismissing the appeal at this stage, however, the court "decided to allow the amendment to reflect subject matter jurisdiction and then pass upon the substantive issue of the appeal."[57] It is unclear why the court went out of the way to hear the substantive issue if it did not intend to give the issue its full attention.[58] As a result, the court failed defendant in terms of fairness, disillusioned him with the system, and wasted valuable time and resources.[59]

The court's emphasis on the last clause of article I, section 14 of the North Carolina Constitution makes it probable that the decision rested on a finding that defendant had abused the right to free speech. But exactly where the abuse lies in the present case remains a mystery. One interpretation of the opinion is that the abuse in question is the manner of defendant's conduct rather than his mere presence soliciting signatures on the private property. Support for this interpretation is found in the court's statement that "[t]he *accosting* of customers in the private parking lot of Hanes Mall . . . [was not] protected under Article I, section 14 of the North Carolina Constitution . . . ."[60] If the abuse in fact lay in defendant's accosting behavior, then the orderly solicitation of signatures for a petition on private property may still be protected under the North Carolina Constitution.

There is, however, a different interpretation that would not protect the defendant's conduct even if orderly. The court might have been equating abuse of the right with mere presence on private property without the consent or against the wishes of the owner. Under this view, private property rights outweigh protection of free and orderly speech in the court's determination of when conduct constitutes an abuse of the right to free speech. The court may have interpreted the State Constitution in accord with the Supreme Court's interpretation of the United States Constitution,[61] foreclosing all rights to free

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56. 302 N.C. at 176, 273 S.E.2d at 711.

57. *Id.*

58. The supreme court may have wanted to place its imprimatur on the superior court conviction, thereby delineating the extent of free speech protection in North Carolina. If this is the case, the court fell short of its goal.

59. If . . . judges do not perform by a process which is visibly rational, they may as well abandon the enterprise and leave the litigants as they are found after trial courts . . . have made their decisions. The burden and expense of the appeal are not justified if these imperatives are not observed.

CARRINGTON & MEADOR, *supra* note 48, at 11.

60. *Id.* at 178, 273 S.E.2d at 712 (emphasis added). *See supra* text accompanying note 44.

61. *See* Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). Although interpreting the constitutions similarly may be the proper course to pursue, it leaves an important question unanswered. In 1970 the North Carolina General Assembly and populace amended the State Constitution to give Article I, section 14 its present form. Prior to 1970, the constitution did not contain an express free speech provision. INSTITUTE OF GOV'T, U.N.C. CHAPEL HILL, CONSTITUTION OF NORTH CAROLINA 1971 8 (1970). Assuming that the drafters of amended section 14 intended it to be interpreted along the same lines as the first amendment speech provision, then the drafters arguably meant to protect free speech on private shopping centers, because *Logan Valley* was the controlling precedent at that time. When the State Constitution was amended, there was no reason to believe that it would not protect a defendant in the *Felmet* situation.

speech on private property, absent consent of the owners.[62] Support for this interpretation may be found in the court's observation that it could, consistent with the United States Constitution, "interpret [the] State Constitution to protect conduct similar to that of the defendant," coupled with its refusal to do so.[63]

If this second interpretation will be followed in the future,[64] the court's failure to "recognize the modern context in which [free speech] rights are to be exercised"[65] will limit severely the number of forums available for the free exchange of ideas.[66] "Inexpensive and easily utilized channels of public communication are crucial to an effective system of freedom of expression."[67] Shopping centers and malls have replaced downtown commercial districts as the places where members of the public come not only to shop, but to "stroll, sit, meet friends, and participate in community activities as they once did in downtown business districts."[68]

The court has left few inexpensive and easily accessible channels of communication open to the general public.[69] It appears that the court is refusing to take account of the changing American lifestyles in the 1980s. If title is the key to forums of free speech, privately held property—such as apartment complexes, mobile home parks, condominiums—and planned communities—such as labor camps[70] and retirement communities or nursing homes[71]—are inac-

62. This interpretation is most likely the correct one. Thus, in not protecting "conduct *similar* to that of defendant," the court must have meant to prevent all speech on private property without the owner's consent and not only the accosting behavior of the defendant. 302 N.C. at 178, 273 S.E.2d at 712 (emphasis added).

63. *Id.* For the court's evaluation of defendant's free speech claim under the North Carolina constitution see *supra* text accompanying note 44.

64. *See supra* note 62.

65. Comment, *The Exercise of First Amendment Rights in Privately Owned Shopping Centers*, 1973 WASH. U.L.Q. 427, 434 (1973), criticizing the Supreme Court's decision in *Lloyd Corp.* The same attack on *Lloyd Corp.* was made in Note, Lloyd Corp. v. Tanner: *The Demise of* Logan Valley *and the Disguise of* Marsh, 61 GEO. L.J. 1187, 1217 (1973) ("[*Lloyd Corp.*] indicates an unwillingness on the part of the Court to deal with some new and basic changes in American economic life caused by the modern mall shopping center.").

66. *See generally* Note, *Private Abridgement of Speech and the State Constitutions*, 90 YALE L.J. 165 (1980).

67. *Id.* at 165. See United States Labor Party v. Knox, 430 F. Supp. 1359 (W.D.N.C. 1977) (state must tolerate inconvenience of handbilling in public parking lot).

68. Note, *supra* note 66, at 168.

69. It is no answer to say that radios in automobiles and television and newspapers in homes carry enough ideas and opinions to the public. Free speech is not the exclusive province of those with money enough to buy time or space in the news media. Without opportunities for effective handbilling and other direct, inexpensive contracts [sic] with the public, the less powerful will be poorly heard however worthy their speech.

United States Labor Party v. Knox, 430 F. Supp. 1359, 1361-62 (W.D.N.C. 1977).

As an examination of the facts in *Felmet* illustrates, access to the public streets and sidewalks in front of the mall is wholly inadequate. Defendant was seeking signers for his petition. He could not solicit signatures for a petition in the fleeting moment when a car was stopped at the mall entrance. Moreover, the risk imposed on an individual as he runs from the corner to an automobile and back, combined with the danger to those drivers whose attention the individual is trying to attract, counsels against recommending this as an adequate alternative. See Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 322 (1968).

70. *See* Note, *Access to Migrant Labor Camps:* Marsh v. Alabama *Revisited*, 55 CHI.-KENT L. REV. 285 (1979).

cessible under the rule laid down in *Felmet*.[72]

In *State v. Felmet* the North Carolina Supreme Court was faced with an ideal opportunity to balance free speech interests against the interests of private property owners.[73] Unfortunately, the supreme court failed to take advantage of this opportunity to harmonize two great bulwarks of our democratic system. Let us hope that the path the court chooses in the future is better reasoned and more enlightening.

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71. *See* Comment, *Nursing Home Access: Making the Patient Bill of Rights Work*, 54 U. DET. J. URB. L. 473 (1977).

72. Note, *supra* note 80, at 169-70. The forum that the court may be foreclosing is not insubstantial. Rental units account for over 35% of total occupied housing units in America. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1980, at 793 (1980) (Table No. 1408). In addition, "[o]ver four million Americans already live in some form of condominium unit" with estimates that half the population will live in condominiums within twenty years. Note, *supra* note 66, at 170 n.26. As of 1974 it was estimated that there were in excess of one million residents living in the "over 16,500 nursing home facilities eligible for federal Medicare or Medicaid reimbursement . . . ." *Id.* at 170 n.29.

Mr. Justice Brennan, recognizing the trend of restricting individual liberties, has urged states to construe their constitutions broadly to minimize the restriction of liberties. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). The contraction of public forums is a prime example of Mr. Justice Brennan's concern. With five United States Supreme Court justices over the age of seventy—Chief Justice Burger, 74; Justices Brennan, 75; Marshall, 73; Blackman, 73; and Powell, 74—and a conservative President in office, there is no reason to expect this trend to abate. The need for states to examine their constitutions carefully and generously thus becomes even more important. *See* Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) (Marshall, J., concurring) (applauding the California Supreme Court).

73. The Court had the unique opportunity to be innovative yet compromising. It could have protected free speech in the parking lot while at the same time holding that the interests of private property owners would prevail inside the mall. *Cf.* Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 447 U.S. 74 (1980) (handbilling and soliciting under state constitution inside mall courtyard). The New Jersey Supreme Court has subsequently followed the California court's holding. State v. Schmid, 84 N.J. 535, 425 A.2d 615 (1980) (interpreting a constitutional provision virtually identical to the California and the North Carolina provisions, the court ruling that free speech is protected on privately owned Princeton University property). *But see* Hudgens v. NLRB, 424 U.S. 507 (1976) (first amendment does not protect picketing in shopping center parking lot).