DISSENTING OPINION BY ACOBA, J.

I believe that Article I, section 4 of the Hawaiʻi Constitution protects Defendant-Appellant Frances Viglielmo's expressional rights of leafleting and sign holding at community shopping centers like Ala Moana Shopping Center (Ala Moana Center). Therefore, I would reverse the October 9, 2003 judgment and sentence of the district court (the court).

I.

The United States Supreme Court has interpreted the words "[n]o law shall be enacted . . . abridging the freedom of speech" contained in the federal constitution, U.S. Const. amend. I, as affording a person freedom of speech rights in a privately owned "company town" or "community business block," Marsh v. Alabama, 326 U.S. 501 (1946), and in a privately owned shopping center,[1] Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968). The same words are mirrored in Article I, section 4 of the Hawaiʻi Constitution. In Logan Valley, the Court said that "under some circumstances property that is privately owned may, at least for First Amendment purposes, be treated as though it were publicly held." Id. at 316. This is because, "'[o]wnership does not always mean

[1] Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc. described the "suburban shopping center" as "typically a cluster of individual retail units on a single large privately owned tract." 391 U.S. 308, 324 (1968). A "mall" is defined as a "shopping mall." Webster's Third Int'l Dictionary 91a (1993). "Shopping Mall" is defined as "a large usu[ally] suburban building or group of buildings containing various shops with associated passageways[.] Id. at 109a.

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 statutory and constitutional rights of those who use it.'" Id. at 325 (quoting Marsh, 326 U.S. at 506). The "similarities between the business block in Marsh and the shopping center in [Logan Valley] . . . [render t]he shopping center . . . the functional equivalent of the business district" for First Amendment purposes. Id. at 317-18. Consequently,

> because the shopping center serves as the community business block and is freely accessible and open to the people in the area and those passing through, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.

Id. at 319-20 (internal quotation marks and citation omitted). The Court held, then, that a shopping center that is "the functional equivalent of a 'business block'. . . must be treated in substantially the same manner[,]" and individuals wishing to exercise their right to free speech may not be excluded through the use of trespass laws. Id.

However, in a 5-4 split decision in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), a majority of the Supreme Court receded from this position, indicating that distribution of handbills in a shopping center was not protected under the First Amendment because "there has been no such dedication of [petitioner's] privately owned and operated shopping center to

public use as to entitle respondents to exercise therein the asserted First Amendment rights." Id. at 570. See id. at 584 (noting that although the decision in Logan Valley "is only four years old[,] . . . the composition of this Court has radically changed in [those] four years") (Marshall, J. dissenting, joined by Douglas, J., Brennan, J., and Stewart, J.).

II.

While textual differences may be a factor in determining whether we follow federal court construction of the same or similar words found in our constitution, such differences are plainly not determinative. The Supreme Court has recognized that "[i]t is fundamental that state courts be left free and unfettered by [the Court] in interpreting their state constitutions." Bock v. Westminster Mall Co., 819 P.2d 55, 58 (Colo. 1991) (quoting Minnesota v. Nat'l Tea Co., 309 U.S. 551, 557 (1940)). Hence, despite Hawaiʻi "adopt[ing] language nearly identical to that of the First Amendment for the protection [of] free speech," Estes v. Kapiolani Women's & Children's Med. Ctr., 71 Haw. 190, 197, 787 P.2d 216, 221 (1990), a state has a "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." PruneYard Shopping Center v. Robins, 447 U.S. 74, 81 (1980).

Thus, we need not adopt the federal courts' narrow application of language in the federal constitution that is the

same or similar to that in the Hawaiʻi Constitution, but may afford persons in our state broader protections. See e.g., State v. Custodio, 62 Haw. 1, 4, 607 P.2d 1048, 1050 (1980) ("Our state constitution, Article I, section 7, contains a similar provision [to the Fourth Amendment of the United States Constitution] which has been interpreted in some instances to afford greater protection than the federal constitution."); State v. Kaluna, 55 Haw. 361, 369, 520 P.2d 51, 58 (1974) ("We have not hesitated in the past to extend the protections of the Hawaii Bill of Rights beyond those of textually parallel provisions in the Federal Bill of Rights when logic and a sound regard for the purposes of those protections have so warranted."); State v. Santiago, 53 Haw. 254, 265, 492 P.2d 657, 664 (1971) ("[T]his court is the final arbiter of the meaning of the provisions of the Hawaii Constitution. Nothing prevents our constitutional drafters from fashioning greater protections for criminal defendants than those given by the United States Constitution.").

Conversely, broader language in Hawaii's Constitution than that found in the U.S. Constitution has not necessarily resulted in an expansion of rights. See State v. Okubo, 67 Haw. 197, 682 P.2d 79 (1984) (holding that the express right of privacy in the Hawaiʻi constitution did not mandate that a warrant be obtained to record a conversation a defendant had with a party who had consented to such a recording). The neutral principle that should guide us is whether in a particular case, a

"sound regard" "for the purpose" of the rights involved, warrants greater protection than that afforded under the federal constitution. Kaluna, 55 Haw. at 369, 520 P.2d at 58 (1974).

III.

Preliminarily, it should be noted that Estes is not an obstacle to the application of free speech rights at a privately owned shopping center. Although it was said that "state action is a prerequisite to a showing that the freedom of speech has constitutionally been abridged," 71 Haw. at 192-93, 787 P.2d at 218-19, Estes expressly affirmed the protection afforded access to business districts and shopping centers that had been recognized in Marsh and Logan Valley: "Unlike sidewalks (*Marsh v. Alabama*) or areas fronting retail stores (*Logan Valley, Hudgens [v. Nat'l Labor Relations Bd.*, 424 U.S. 507 (1976)]), we hold that the interior walkway to the main entrance to the Hospital is not historically nor traditionally associated with the exercise of free speech." Id. at 196, 787 P.2d at 220 (emphases added). As indicated, Estes' holding was limited to a hospital walkway not traditionally open to free speech activity. Hence, the statement in Estes that, "[i]n construing Article I, Section 4 of our Hawaiʻi [C]onstitution we adopt the holdings of the federal cases construing the First Amendment[,]" is not a limitation on our power to construe the free speech provision in our constitution. Id. at 197, 787 P.2d at 221. Moreover, with respect to expressional activity at shopping centers, the Supreme

Court has established that "a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision." PruneYard, 447 U.S. at 81.

IV.

Justice Marshall, who authored Logan, stated in his dissent[2] in Lloyd Corp. v. Tanner, 407 U.S. 551, 580 (1972) (5-4 decision) (Marshall, J. dissenting), that expressional freedom is a preferred value which may in some circumstances outweigh property rights:

> We must remember that it is a balance that we are striking -- a balance between the freedom to speak, a freedom that is given a preferred place in our hierarchy of values, and the freedom of a private property owner to control his property. When the competing interests are fairly weighed, the balance can only be struck in favor of speech.

The view that, in balancing first amendment and private property rights, the state may place restrictions on the latter to

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[2] We have adopted the positions of dissenting justices in United States Supreme Court cases. See e.g. State v. Cuntapay, 104 Hawaiʻi 109, 116, 85 P.3d 634, 641 (2004) (adopting Justice Ginsburg's dissent in Minnesota v. Carter, 525 U.S. 83, 106, 109 (1998), that short term guests have a protected right of privacy, inasmuch as "'a guest should share his [or her] host's shelter against unreasonable searches and seizures'"); State v. Kam, 69 Haw. 483, 748 P.2d 372, 377 (1988) (adopting the dissenting view in Pope v. Illinois, 481 U.S. 497 (1987), that "since the 'government may not constitutionally criminalize [the] mere possession or sale of obscene literature, absent some connection to minors, or obtrusive display to unconsenting adults[,]' the government cannot prosecute the sellers of pornography"); State v. Santiago, 53 Haw. 254, 265-66, 492 P.2d 657, 664 (1971) (adopting the dissent's view in Harris v. New York, 401 U.S. 222, 229-32 (1971), that using tainted Miranda statements interferes with an accused's right to testify in his own behalf, for the Hawaiʻi Constitution's privilege against self-incrimination requires "that before reference . . . at trial to statements made by the accused during custodial interrogation, the prosecutor must first demonstrate that certain safeguards were taken before the accused was questioned").

preserve expressional conduct at shopping centers, has found acceptance even where free expression provisions in a state constitution differ from that of the federal constitution.[3]

The California Supreme Court has recognized that "central business districts apparently have continued to yield their functions more and more to suburban centers." Robins v. PruneYard Shopping Center, 592 P.2d 341, 345 (Cal. 1979). In PruneYard, the California Supreme Court apparently balanced the rights of the shopping center property owner with that of individuals seeking signatures for a petition. Thus, the California court affirmed that "[a] handful of additional orderly

[3] As mentioned, Justice Marshall, in his dissent in Lloyd Corp., advocated "a balance between the freedom to speak, a freedom that is given a preferred place in our hierarchy of values, and the freedom of a private property owner to control his property." 407 U.S. at 580. Similarly, in Pruneyard Revisited: Political Activity on Private Lands, 66 N.Y.U L. Rev. 633, 636 (1991), Professor Curtis J. Berger proposed that "[w]hile state constitutional theory may be an effective way to approach this issue . . . state courts, in their common-law tradition, and state legislatures, in the exercise of their regulatory power, should determine that certain privately owned lands, such as shopping centers, must be open to various forms of political activity."

He argued that "state courts and legislatures may take this action without violating the owner's or the property occupant's federal constitutional rights[]" because "reasonable 'time, place, and manner' controls will suffice to enable the private owner to protect its legitimate economic and autonomy interests." Id. Berger maintained that "land ownership should not become the legal vehicle for closing off appropriate channels of political expression." Id. He asserted that "where the land's configuration and the activity it attracts begin to resemble those of a public forum, the owner's autonomy recedes in the face of a heightened need to find alternative channels for grassroots political activity." Id.

Thus, according to Berger, "[t]he nature of the private property at issue should be an essential part" in balancing "whether the rights of the specific property holder outweigh the interests of the party seeking entry." Id. at 666 (emphasis added). "Persons seeking expressive entry to a mall would have to convince a court to regard the property, despite its private ownership, as the equivalent of a public forum -- a highly appropriate location for the activity in question." Id. at 666-67. Under this approach, the court may "conclude that 'under our State law the ownership of' this shopping mall 'does not include the right to bar access to' persons seeking to enter the mall for enumerated political activities and hence there was no trespass." Id. at 667.

persons soliciting signatures and distributing handbills . . . under reasonable regulations adopted by defendant to assure that these activities do not interfere with normal business operations would not markedly dilute defendant's property rights." PruneYard, 592 P.2d at 348; see also PruneYard, 447 U.S. at 81 (holding that in the exercise of their police power states may adopt reasonable restrictions on private property).

New Jersey has adopted a balancing test for "determining the existence and extent of the State free speech right on privately-owned property."[4] As the New Jersey court explained, its test

> is to measure the strength of the plaintiff's claim of expressional freedom and the strength of the private property owners' claim of a right to exclude such expression -- all for the ultimate purpose of "achiev[ing] the optimal balance between the protections to be accorded private property and those to be given to expressional freedoms exercised upon such property."

New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 772 (N.J. 1994) (emphasis added) (quoting State v. Schmid, 423 A.2d 615, 629 (N.J. 1980)).

The Supreme Judicial Court of Massachusetts employed a balancing test in determining that individuals could gather

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[4] To determine whether free speech rights may be exercised on private property, the New Jersey Supreme Court balances:

> (1) the nature, purposes, and primary use of such private property, generally, its "normal" use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property.

New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 771-72 (N.J. 1994).

signatures at a private shopping center. The Massachusetts court stated that "[c]lose attention must be given to the property interests of a mall owner in determining whether an intrusion is reasonable in time, place, and manner," Batchelder v. Allied Stores Int'l, Inc., 445 N.E.2d 590, 595 (Mass. 1983).

In Bock, the Colorado Supreme Court utilized a balancing test in upholding the right of individuals to distribute political leaflets in the common area of a shopping mall. The Colorado court stated that "[c]onsidering all the facts and circumstances underlying the Mall's operation with the preferred liberty of speech in mind," free speech protections were triggered. Bock, 819 P.2d at 61.

In the exercise of such free speech rights at shopping centers, "those who wish to disseminate ideas [do not] have free rein[,]" but may be subject to time, place and manner rules as reasonably required. PruneYard, 592 P.2d at 347. See Costco Co. v. Gallant, 117 Cal. Rptr. 2d 344, 351, 354 (Cal. Ct. App. 2002) (holding that Costco's "time, place, and manner" restrictions were "narrowly tailored" to its "substantial interests in the smooth operation of its stores" and thus, valid); see also, Slauson P'ship v. Ochoa, 5 Cal Rptr. 3d 668 (Cal. Ct. App. 2003) (upholding stipulated injunction restricting behavior of protestors of strip club).

On the other hand, the approach adopted in State v. Wicklund, 589 N.W.2d 793 (Minn. 1999), is far from kindred to our

situation. First, despite the broader language found in the Minnesota Constitution,[5] the Minnesota Supreme Court adopted the construction given the narrower language of the federal constitution by the majority in Lloyd Corp. Second, unlike in our state,[6] the Minnesota Supreme Court has concluded that "[a] brief historical journey compels the conclusion that the inference cannot be drawn that our framers [of the Minnesota Constitution] intended a more expansive application." Wicklund, 589 N.W.2d at 799. Third, that court indicated a preference for giving its constitution the same construction as the U.S. Supreme Court accords similar provisions of the federal constitution on the ground that it is "'a significant undertaking for any state court to hold that a state constitution offers broader protection than similar federal provisions . . . .'" Id. at 799 (emphasis added) (quoting Women of the State of Minn. by Doe v. Gomez, 542 N.W.2d 17, 30 (Minn. 1995)). Our jurisprudence rests not on any such precommitment but on whether "logic and a sound regard for the purposes of those protections" involved warrant extending such protections in any specific case. Kaluna, 55 Haw. at 369, 520 P.2d at 58.

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[5] "The Minnesota Constitution provides that 'all persons may freely speak on all subjects, being responsible for the abuse of such right.'" Wicklund, 589 N.W.2d at 799 (quoting Minn. Const. art. I, § 3).

[6] The majority points out that "the proceedings of the 1950, 1968, and 1978 Hawaiʻi Constitutional Conventions shed no light on the framers' intent regarding the breadth of Hawaiiʻs constitutional protection of free speech." Majority opinion at 28.

V.

This case is governed by the central principles established in Marsh, Logan Valley, and the state decisions recounted above. In Marsh and Logan Valley, the U.S. Supreme Court construed the same words found in Article I, section 4 of our constitution. In that context, it first is apparent that Ala Moana Center is the functional equivalent of a "business district of a city." Lloyd Corp., 407 U.S. at 581. Ala Moana Center is located in the Honolulu urban center, approximately 1.5 miles from the downtown financial district and 1.25 miles from Waikiki. It occupies fifty acres, with 1.6 million square feet of gross leasable area, more than 200 stores, and 8,500 parking spaces. It "is one of the largest open-air shopping centers in the United States," and is designated a super regional shopping center visited by "over two million people . . . each month." It "employs over 8,000 people, making it a major employment center[,]" "is Honolulu's central bus transfer station[,]" and among its amenities "contains the largest international food court in Hawaii and one of the largest in the United States," and hosts "over 550 performances per year on [its] 'Centerstage'[.]"

We may judicially notice that Ala Moana Center is more than a site where people shop, but is a gathering place where people engage in personal and social activities. It houses a United States Post Office and a Satellite City Hall. It is the site of various and numerous activities, among which are

(1) Aloha Festival events, (2) voter registration, (3) blood bank drives, and (4) tai chi classes. Thus, it may be said of the Ala Moana Center, that

> [a]lthough the ultimate purpose of these shopping centers is commercial, their normal use is all-embracing, almost without limit, projecting a community image, serving as their own communities, encompassing practically all aspects of a downtown business district including expressive uses and community events. . . . [N]o private property . . . more closely resembles public property.

New Jersey Coalition, 650 A.2d at 761 (emphasis added). Ala Moana Center projects an all-embracing community image. It is thus imbued with the characteristics of a public place where the community congregates at the invitation of its occupants.

Second, Viglielmo's activities did not interfere with normal business operations at the Center. Viglielmo was protesting the sale of military toys to children, encouraging passers-by to refrain from patronizing Kay-Bee Toy Store until the store stopped such sales. She was holding a sign and handing out pamphlets. The security officer who cited Viglielmo stated that "she was not yelling or [causing] any type of public disturbance," nor was she physically preventing customers from entering the store.[7]

VI.

A sound regard for the purposes of expressional activity warrants the extension of protection under Article I, section 4 of our constitution to the exercise of free speech

[7] Viglielmo was sixty-nine at the time of the incident. She is 5'6" tall and weighs 132 pounds.

rights at shopping centers that was once secured by the federal constitution.

Justice Marshall foreordained that, "[a]s governments rely on private enterprise, public property decreases in favor of privately owned property." Lloyd Corp., 407 U.S. at 585. "[T]he city reaps the advantages of" an "increased tax base, a drawing attraction for residents, and a stimulus to further growth[,]" by "having such [private shopping areas] without paying for them[.]" Id. With the expansion of private shopping centers, "[i]t becomes harder and harder for citizens to find [effective] means to communicate with other citizens." Id. at 586.

Justice Marshall's statement rings true today. Predictably, shopping centers have increased in number and size. In their evolution, shopping centers have consciously expanded their role far beyond that of simply doing business. Public activities are solicited and invited into shopping malls. The role of traditional "downtown" forums where the public was reached on the streets and sidewalks, and in parks, and squares has been prominently replaced. Community shopping centers have become the new gathering place for the public. In the real world barring free speech activities at shopping centers will concomitantly diminish the exercise of expressional rights.

For many people "who do not have easy access to television, radio, the major newspapers, and the other forms of mass media, the only way they can express themselves to a broad

range of citizens on issues of general public concern is to picket, or to handbill, or to utilize other free or relatively inexpensive means of communication." Id. at 580-81. Justice Marshall warned that "[o]nly the wealthy may find effective communication possible unless we . . . continue to hold that '[t]he 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.'" Id. at 586 (quoting Marsh, 326 U.S. at 506). Thus, "[t]he only hope that these people have to be able to communicate effectively is to be permitted to speak in those areas in which most of their fellow citizens can be found. One such area is the business district of a city or town or its functional equivalent." Id. at 581.

The community shopping malls like the Ala Moana Center strive to "completely satisfy [the community's] wants[.]" Id. at 580. Hence, community members "will have no reason to go elsewhere for goods or services. If speech is to reach these people, it must reach them in [the shopping center]." Id.

As public forums change in nature, form, and location, the preservation of expressional rights demands a reasoned and measured but resolute application of protections in areas which may afford the only "effective means of communication[]" for many. Id. at 586. "One is not to have the exercise of his [or her] liberty of expression in appropriate places abridged on the

plea that it may be exercised in some other place." Logan Valley, 391 U.S. at 323-24 (quoting Schneider v. State of New Jersey, 308 U.S. 147, 163 (1939) (parentheses omitted). Therefore, I would hold that Article I, section 4 of the Hawaiʻi Constitution protects free speech rights such as leafleting and sign holding "reasonably exercised in [community] shopping centers even when [such] centers are privately owned." PruneYard, 592 P.2d at 347.