

COLOGNE V. WESTFARMS ASSOCIATES: A TURNING POINT FOR
PROTECTIONS AFFORDED TO POLITICAL SPEECH BY STATES'
CONSTITUTIONS

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Although the Connecticut Constitution was originally adopted in 1818, it was only in 1984 that the Connecticut Supreme Court considered perhaps the most important free speech case it has decided, after the Westfarms shopping mall had denied the National Organization for Women (NOW) access to its premises for the purpose of soliciting signatures in support of the pending Equal Rights Amendment to the United States Constitution.¹ The Supreme Court in its *Cologne v. Westfarms Associates* (1984) decision considered the application of Article I, Sections 4, 5, and 14 to the matter of public expression on privately owned land.² Before *Westfarms*, courts in several other states had considered this issue and whether their own state constitutions afforded greater free speech protection than that of the federal Constitution.³ In the substantial majority of those cases, the courts interpreted their state constitutions to provide more expansive rights than did the U.S. Constitution, casting the federal protections as a floor upon which state constitutions could build. Thus, when counsel for NOW came before the Supreme Court of Connecticut to persuade the Justices to broaden civil liberties above this base through an expansive interpretation of Connecticut's free speech clause, precedent was on their side.⁴

At the time *Westfarms* reached the Supreme Court, the issue was ripe for consideration and the trend of decisions pointed in favor of free speech advocates. Arriving on the heels of *Pruneyard Shopping Ctr. v.*

¹ For background, see this volume for Donald Rogers, "Bombshell or Bellwether? The Story of *Cologne v. Westfarms Associates*," *Connecticut Supreme Court History* 7 (2014): 1-28.

² 192 Conn. 48 (1984).

³ See e.g., *Batchelder v. Allied Stores Int'l, Inc.*, 445 N.E.2d 590 (Mass. 1983); *Alderwood Assoc. v. Washington Env'tl. Council*, 635 P.2d 108 (Wash. 1981); *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341 (Cal. 1979).

⁴ NOW was represented by the Connecticut Civil Liberties Union. Christine A. Cologne was the president of the Greater Hartford Area Chapter of NOW. See, e.g., Robert Gettlin, "Property, Free-Speech Rights Collide in NOW Suit for Access to Westfarms," *Hartford Courant*, Sept. 25, 1981, p. B3A.

Robins (1980)⁵ and the recent precedent in other jurisdictions, NOW challenged Westfarms' actions, successfully arguing before Judge Bieluch in the Superior Court that Article I, Sections 4, 5 and 14 of the Connecticut Constitution entitled it to an injunction allowing NOW's members access to the mall, despite Westfarms' policy prohibiting activities unrelated to commercial purposes.⁶ NOW subsequently set up a card table in the mall, subject to time, place and manner restrictions.⁷

Following the nationwide failure to ratify the Equal Rights Amendment, NOW requested to use the mall as a place to gather and solicit the public for support on other of the organization's advocacy goals. Westfarms again denied the request. Upon NOW's renewed court challenge, Judge Spada of the Superior Court granted a narrow injunction in February 1983, authorizing NOW to solicit in the mall, but only regarding specifically enumerated topics, and barring NOW's entry during the crowded Christmas holiday shopping season.⁸ Judge Spada referenced the crowds drawn from the more traditional downtown areas to shopping malls that made malls "the modern counterpart of the New England town green."⁹ Both NOW and Westfarms appealed from Judge Spada's order: Westfarms claiming that it was error to force it to allow NOW any right of access; and NOW arguing that the limitations of the injunction were unwarranted.¹⁰

While this appeal was pending, an unexpected event added further fuel to Westfarms' attempts to keep NOW out of the mall. Following Judge Spada's decision, the Connecticut leader of the Ku Klux Klan, James W. Farrands, announced the Klan's intentions to distribute literature at the mall because "the NOW decision also applied to other

⁵ 447 U.S. 74 (1980).

⁶ *Cologne v. Westfarms Assoc.*, 37 Conn. Supp. 90, 114-117 (Conn. Super. Ct. 1982).

⁷ See *Westfarms*, 192 Conn. at 52; Dick Polman, "Mall Again Trying to Muzzle Free Speech," *Hartford Courant*, July 31, 1982, p. B1A.

⁸ See, e.g., Rogers, "Bombshell or Bellwether?"

⁹ *Westfarms*, 192 Conn. at 52-53; see also Richard L. Madden, "Malls Generating Issues of Access and Economics," *N.Y. Times*, Jan. 22, 1984, p. CN1; Fern Shen, "Judge Opens Mall to NOW Petitioners," *Hartford Courant*, March 3, 1983, pp. A1A, A20.

¹⁰ See *Westfarms*, 192 Conn. at 53; Madden, "Malls Generating Issues of Access and Economics."

political groups.”¹¹ Although Farrands and five other Klan members were turned back by police when they arrived at the mall, a violent clash between police and anti-Klan protestors nonetheless ensued. About 100 protestors intending to confront the KKK instead clashed with police; there were three arrests and several injuries.¹² The crowd, hailing from within Connecticut, New York, and Massachusetts, chanted “death to the Klan” and squeezed a line of police officers and mall officials against the entrance to the mall until close to thirty police charged the crowd, knocking them down with batons.¹³

After this incident with anti-Klan protestors, Westfarms seized on the opportunity to challenge the injunction granted to NOW, returning to court to seek a dissolution. Following Judge Spada’s ruling allowing NOW access to the Mall, lawyers for Taubman Company, the owners of Westfarms, had warned that allowing NOW members in the mall would open a “pandora’s box.”¹⁴ Thus, it was not out of the blue when the

¹¹ Dave Leshner, “Mall Owners Claim Ruling Caused Melee,” *Hartford Courant*, May 28, 1983, p. B1; *see also Westfarms*, 192 Conn. at 54-55. James Farrands, the leader of the Klan protestors, later was elected the Imperial Wizard of the national Ku Klux Klan in 1986, becoming the first Roman Catholic to hold that position. Michael Winerip, “President Obama, Race and the Ku Klux Klan,” *N.Y. Times*, July 22, 2013. Farrands declined to comment for the purposes of this article.

¹² Dave Leshner, “Protesters, Police Clash,” *Hartford Courant*, May 23, 1983, p. A1A. At least some community residents recognized the irony in the events at the mall, as the Klan protestors caused the issue, while the Klan itself agreed to leave Westfarms when the police denied them entrance because they didn’t want to “break laws.” *Ibid.*; *see also* Irving Kravson, “By Resisting NOW, Mall Opened Door for Klan Trouble,” *Hartford Courant*, May 25, 1983, p. C1A (pointing out that the KKK likely “counted on the fanaticism of the protestors to do the dirty work for them. The strategy was successful. Shopping was disruptive, fear spread and a violent confrontation occurred between the anti-Klan demonstrators and the police. . . . If the women’s rights advocacy group had been allowed into Westfarms Mall and permitted to circulate petitions in the first place, the mall wouldn’t be in this mess today.”)

¹³ Leshner, “Protesters, Police Clash.”

¹⁴ Nancy M. Tracy, “Mall Official Vows to Bar Push by Klan,” *Hartford Courant*, May 22, 1983, p. A3A. Prior to the incident with the KKK, Westfarms’ policy was to refuse requests for entry for the purpose of political activity, but twice groups entered without asking permission. *See Westfarms*, 192 Conn. at 54 n.4. On those occasions, Westfarms contacted the police, but the latter refused requests to remove members of the special interest groups from the mall in April, 1983, because of Judge Spada’s prior ruling. *Id.* The mall’s

mall's managing agent stated that "there is no question that the confrontation between political activities and local and state police last weekend ensued as a result of the decision."¹⁵ A third judge, Judge Ripley, refused to dissolve Judge Spada's injunction, but modified it, relegating NOW to the covered entrances outside the mall. Both sides subsequently amended their appeals to challenge Judge Ripley's modification.¹⁶

Amidst this contentious and convoluted backdrop, the appeals reached the Connecticut Supreme Court in October 1983. The direct issue, of course, concerned whether the Connecticut Constitution actually protected the rights of citizens to exercise free speech and to solicit support for various political causes on the private property of a modern day shopping mall. Particularly because the 1970s and 1980s appeared to be a time during which state courts began to recognize and enforce state constitutional rights and liberties, NOW was particularly optimistic about defending the appeal as it seemed certain that the Supreme Court justices were eager for more opportunities to expand Connecticut constitutional freedoms.¹⁷

In its appellate brief, NOW focused on the distinction between the carefully drafted time, place, and manner restrictions in Judge Spada's permanent injunction and the illegal activities of the anti-Klan demonstrators. In the process of laying out the facts relevant to their claims, NOW pointed out that not only was it improper to dissolve the injunction based on the illegal actions of an entirely unrelated group, but

manager, Norman Plourde, testified that an anti-nuclear group and an organization called the Constitutional Revivalists demonstrated at the mall. For their part, NOW's attorneys contended that the police's non-action misconstrued Judge Spada's ruling, as it was specifically tailored to apply only to NOW, not to make the mall a "public forum" for any and all groups, as Taubman Co. had contended. *See, e.g.*, Dave Leshner, "Police, Citing NOW Ruling, Allowed Mall Demonstrations," *Hartford Courant*, Jul 2, 1983, p. B3.

¹⁵ Leshner, "Mall Owners Claim Ruling Caused Melee." Westfarms argued, *inter alia*, that the violent anti-Klan rally demonstrated that treating malls as traditional public forums would unfairly open the door to commotion and property damage. *Ibid.*

¹⁶ *See* Rogers, "Bombshell or Bellwether?"

¹⁷ *See, e.g.*, Martin B. Margulies, "Commentary, *Cologne v. Westfarms Assoc.*: A Blueprint for an Overruling," *Conn. L. Rev.* 26 (1994): 691-92.

also that the Mall had never asked for such relief.¹⁸ Rather, Judge Ripley decided, *sua sponte*, to modify the carefully considered terms and conditions of the permanent injunction to relegate the peaceful NOW solicitors to the space outside the mall near department store entrances.¹⁹ Furthermore, NOW argued, any balancing of the parties' interests tipped in their favor, because relegating them to the mall's entrances reduced their audience by 80%, and the denial of their free speech rights, even for a moment, constituted irreparable injury. On balance, they concluded, Westfarms' interest in avoiding economic loss was outweighed. NOW also contended that Westfarms failed to offer any evidence that their presence at the mall created a danger to the safety of patrons or to the Mall's commercial activities.²⁰

For all of these points, NOW actually started its argument by insisting that Judge Ripley lacked jurisdiction to modify Judge Spada's permanent injunction and even used an improper legal standard in doing so.²¹ In other words, NOW began its Supreme Court argument with a relatively technical claim about court power to act as it did. Given the dialogue surrounding the expansion of free speech under Connecticut's constitution, opening NOW's argument with the issue of the trial court's authority appears to be a choice that avoids, rather than engages, the main issue. Nevertheless, such an approach can be, depending on the case, a sufficient basis to prevail. Here, NOW conceded that a trial court may retain some limited authority to modify permanent injunctions, but claimed that such authority only extended to modifications deemed necessary to preserve the *status quo* pending the decision on appeal. In advancing this argument, NOW relied exclusively on cases from outside Connecticut.²² For their part, counsel for Westfarms did not squarely address the jurisdictional issue, instead choosing to focus on the constitutional questions that the Court in turn would analyze in its

¹⁸ NOW's Supreme Court Brief, 15-19.

¹⁹ *Ibid.*, 5-7.

²⁰ *Ibid.*, 19-22.

²¹ *Ibid.*, 8-15. NOW cited the U.S. Supreme Court's determination that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decided after years of litigation." *Systems Federation No. 91 v. Wright*, 364 U.S. 642, 647 (1961). They argued that the court did not evaluate whether "new and unforeseen conditions" existed, but if it had, would have concluded that the injunction could not be modified.

²² NOW's Supreme Court Brief, 8-11.

decision.²³ Interestingly, the Court's ultimate decision glossed over the issue of the trial court's authority to modify the injunction, as it remanded the case to the trial court with direction to enter judgment for the defendants, completely dissolving the permanent injunction.²⁴

In its brief, Westfarms contended that without state action, there was no right of access for NOW under Art. I, Sections 4 or 14 of the Connecticut Constitution, on the private property of an unwilling owner. Westfarms relied on the history of the constitution, stressing that Judge Bieluch and Judge Spada had mistakenly interpreted the text of Section 4 as granting an affirmative right to free speech that extended to private property. Such application, it argued, was contrary to the principle of republican government, that a constitution defines and limits the powers of *government*.²⁵ Westfarms also maintained that public policy favored a continuation of the state action requirement, and that substantial federal precedent supporting the position that there is no federal constitutional right of access to a privately owned shopping mall was equally persuasive in the state context.²⁶ Westfarms claimed that neither the California Supreme Court's ruling in *Robins*²⁷ nor other state court precedent was controlling or persuasive. California and Connecticut constitutions were different, as California's provided a right to petition that did not exist in Connecticut's constitution. Westfarms insisted that, in contrast to California and Washington, "circumstances in Connecticut do not compel the sacrificing of the rights of private property ownership to preserve the vitality of the structure of our constitutional government."²⁸

Westfarms further claimed that an injunction restraining it from excluding NOW from the Mall would violate its First, Fifth and

²³ Westfarms' Supreme Court Brief, 10-19.

²⁴ See *Westfarms*, 192 Conn. at 66.

²⁵ Westfarms' Supreme Court Brief, 10-19.

²⁶ *Ibid.*, 19-24. The U.S. Supreme Court held in *Lloyd Corp. v. Tanner* that a private shopping center was not the functional equivalent of a municipality or dedicated to public use simply because the owners invited the public to do business there. 407 U.S. 551 (1972). The Court held that "a claim of access to a private shopping center involves no state action that implicates a constitutional guarantee of free speech." The Court also stated that the constitutional guarantee of free expression had no part to play in such a case. Westfarms' Supreme Court Brief, 22-24.

²⁷ *Robins v. Pruneyard Shopping Center*, 592 P.2d 341 (Cal. 1979).

²⁸ Westfarms' Supreme Court Brief, 25-30.

Fourteenth Amendment federal protections, which, under the Supremacy Clause, took precedence over NOW's claims. Westfarms pointed to the analysis in *Pruneyard*, in which the U.S. Supreme Court recognized that granting access to a shopping center implicated Fifth and Fourteenth Amendment protections of the owner's property rights and that there had been a "taking" of those rights.²⁹ In *Pruneyard*, there was insufficient evidence of an adverse economic impact to support a finding of an unconstitutional taking.³⁰ Here, however, Westfarms contended that NOW's access to the mall had unreasonably impaired the value and use of the mall and that Westfarms' owners had foregone rental income that they could have generated from leasing the common areas to kiosks.³¹ Finally, Westfarms contended that even if the Court were to balance its interests with NOW's, the trial court's determination that the mall was the functional equivalent of a downtown or the "New England town green" was improper, because Westfarms was a single-purpose enclosed retail shopping facility that did not perform any of the customary functions of government, and was no different from other similar private entities where the public congregated.³²

When *Westfarms* reached the Connecticut Supreme Court, the justices faced a fundamental decision about, in the words of Professor Richard Kay, the "way in which courts and constitutional rules should interrelate in shaping the law of the constitution."³³ On the one hand, there was an approach that focused on the text of the constitution and the intentions of the founders, while on the other the approach focused on the current "flesh and blood interests at stake."³⁴ Justice David Shea, writing for the majority, emphasized the former, and the Supreme Court

²⁹ *Ibid.*, 36-39; *see also Pruneyard*, 447 U.S. at 82-85.

³⁰ *Pruneyard*, 447 U.S. at 83-85.

³¹ A survey was admitted into evidence that established that 40% of shoppers polled indicated that they would be distracted from shopping by solicitation in the Mall. 26% percent indicated that they would be very likely to avoid the Grand Court if the solicitation were taking place in that area. 42% of shoppers who regularly shop at Westfarms indicated that if there was solicitation being conducted at the Mall, they would very likely shop at another Mall where there was no solicitation. *See Westfarms' Supreme Court Brief*, 45-47.

³² *Ibid.*, 49-59.

³³ Richard S. Kay, "The Jurisprudence of the Connecticut Constitution," 16 *Conn. L. Rev.* 667, 672 (1984).

³⁴ *Ibid.*

acted on the basis of the relatively conventional text and original-intent view of constitutional adjudication. Justice Shea provided three arguments as bases for the ruling in the mall's favor: "(1) the holdings of other state supreme courts interpreting similar state constitutional provisions are distinguishable; (2) the history of our state Declaration of Rights proves that its provisions were intended to protect individual liberties only against infringement by government; and (3) the balancing of state rights of free speech and petition against private rights of property is not a proper judicial function."³⁵

First, the majority distinguished prior California and Washington Supreme Court cases on the basis that they relied on the highly significant role which "initiative, referendum, and recall sponsored directly by citizenry have played in the constitutional schemes in those states," and further distinguished Massachusetts' case law on the ground that a right of access was based on that state's constitutional guaranty of "an equal right to elect officers and to be elected," not upon its freedom of speech provision.³⁶ After acknowledging and distinguishing these precedents, the Court ultimately noted the narrow margins of victories in those cases.³⁷ The Court explicitly recognized that "[f]ederal law... establishes a minimum national standard . . . and does not inhibit state governments from affording higher levels of protection," but declined to extend Connecticut's free speech protection to people on private property.³⁸

Next, the Court considered NOW's arguments related to the language of the Declaration of Rights, Sections 4, 5, and 14 of the Connecticut Constitution.³⁹ In its analysis, the majority emphasized that

³⁵ *Westfarms*, 192 Conn. at 72 (Peters, J., dissenting). Analyzing these arguments, Justice Peters stated that she found them "unpersuasive." *Ibid*.

³⁶ *Westfarms*, 192 Conn. at 58-59, quoting *Batchelder v. Allied Stores Int'l, Inc*, 445 N.E.2d 590, 597 (1983). The Court also noted that other state cases had construed their criminal trespass statutes to be inapplicable to the dissemination of political ideas upon the grounds of private education institutions in light of state constitutional free speech guaranties. *Westfarms*, 192 Conn., at 59-60; *see also Commonwealth v. Tate*, 432 A.2d 1382 (Pa. 1981); *State v. Schmid*, 84 N.J. 535 (1980).

³⁷ *Westfarms*, 192 Conn. at 58.

³⁸ *Westfarms*, 192 Conn. at 57, 63.

³⁹ The Connecticut Constitution provides, in relevant part:

Article I, § 4: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

when “words have doubtful meaning, or are susceptible of two meanings, they should receive that which will effectuate the intent of the framers of the Constitution and the general intent of the instrument.”⁴⁰ Accordingly, in originalist style, Justice Shea rejected the plaintiffs’ literal reading of section 4, instead exploring its historical origins in Connecticut’s Constitution of 1818. Among other sources, Justice Shea cited Richard Purcell’s “Connecticut in Transition” and then state historian Christopher Collier’s article on Connecticut’s Declaration of Rights, as well as limited statements made about speech clauses at the 1818 constitutional convention.⁴¹ The majority concluded that it was “evident that the concern which led to the adoption of our Connecticut Declaration of Rights, as well as the bill of rights in our federal constitution, was the protection of individual liberties against infringement by *government*.”⁴² Justice Shea went on to elaborate that

there is nothing in the history of these documents to suggest that they were intended to guard against private interference with such rights. Similarly, a review of their origin discloses no evidence of any intention to vest in those seeking to exercise such rights as free speech and petition the privilege of doing so upon property of others.⁴³

The majority’s position demonstrated a preference for intentions as the source of the meaning for words, even though this approach entailed the conclusion that any result not contemplated by the drafters in 1818 could not properly issue from the Court in the present day.

Article I, § 5: “No law shall ever be passed to curtail or restrain the liberty of speech or of the press.”

Article I, § 14: “The citizens have a right, in a peaceable manner, to assemble for their common good, and to apply to those invested with the powers of government, for redress of grievances, or other proper purposes, by petition, address or remonstrance.”

⁴⁰ *Westfarms*, 192 Conn. at 62.

⁴¹ *Westfarms*, 192 Conn. at 61-62; *see also* Purcell, Connecticut in Transition: 1775-1818 (2d Ed. 1963), 241-42; Trumbull, Historical Notes on The Constitutions of Connecticut (1901 ed.), 55-56; Connecticut Journal, Sept. 8, 1818, p.2 col. 1 (Remarks by Governor John Treadwell) (Remarks by Judge Mitchell) (similar argument advanced at convention which approved CT constitution); A. Hamilton, “The Federalist”, No. 84 (explaining parallel debate which occurred at time of adoption of federal constitution).

⁴² *Westfarms*, 192 Conn. at 61 (emphasis added.)

⁴³ *Westfarms*, 192 Conn. at 62.

The majority was also not persuaded by NOW's argument that the language in sections 4 and 14 was expressed in affirmative language to create rights, rather than as prohibitions on the government like those contained in section 5. The Court determined that notwithstanding these variations, they were not sufficient to indicate an intention to do anything other than safeguard against state actions. Waxing that "this [C]ourt has never viewed constitutional language as newly descended from the firmament like fresh fallen snow upon which jurists may trace other individual notions of public policy uninhibited by the history. . . ," Justice Shea concluded that democratic societies would fall prey to arbitrary government if courts were to stray from the original purposes of the constitution's founders.⁴⁴ The Court went on to address NOW's claim that private modern shopping malls had in effect assumed a "uniquely public character" due to their social, cultural and economic impact on the larger community. Despite Judge Spada's analogy of modern shopping malls like Westfarms to the "New England town green," the majority was unable to find any legal basis for distinguishing Westfarms from other private property where the public congregate, such as sports stadiums, theaters, fairs, apartment buildings, or grocery stores. Accordingly, shopping malls were not to be vested with the state action that warranted state constitutional protection.⁴⁵

Finally, the Court resisted what it viewed as NOW's request to have it balance the interests of the organization's right to exercise its free speech and Westfarms' interest in controlling and operating its private property. Although Justice Shea noted the trial court judges' assessment of the impact or potential for impact that NOW's solicitation had or may have on the mall's business, the majority determined that it was not the Court's role to "strike precise balances among the fluctuating interests of competing private groups which then become rigidified in the granite of constitutional adjudication."⁴⁶ The Court emphasized that it was the traditional function of the legislature to deal with the complications that might arise from the "exercise of constitutional rights by some in diminution of others."⁴⁷

⁴⁴ *Westfarms*, 192 Conn. at 62.

⁴⁵ *Westfarms*, 192 Conn. at 56-66.

⁴⁶ *Westfarms*, 192 Conn. at 65. At least some commentators, as well as the dissenting minority, viewed the majority's skirting of this issue as "passing the buck to the legislature." See, e.g., H.C. Macgill, "Anomaly, Adequacy, and The Connecticut Constitution," *Conn. L. Rev.* 16 (1983-1984): 702-703.

⁴⁷ *Westfarms*, 192 Conn. at 65.

At least some of the Court's decision to punt this balancing of constitutional guaranties to the legislature appeared to stem from the violent confrontation with the anti-Klan protestors. Although the majority did not expressly base any portion of their reasoning on the anti-Klan demonstration, Justice Shea's opinion did contain two paragraphs of text and a related footnote discussing the efforts by the Klan, its opponents and other controversial groups, to enter Westfarms.⁴⁸ This level of treatment suggests that it had at least some impact on the majority's ruling.

Justice Peters, who would later become Chief Justice of the Court, was joined by Judge Sponzo in a thoughtfully written and strongly worded dissent. Justice Peters sided with NOW, adopting a liberal interpretation of the Declaration of Rights in the Connecticut Constitution.⁴⁹ Peters opened her dissent by remarking that the case gave Connecticut courts the chance to "adapt state constitutional provisions" to modern industrial and commercial society.⁵⁰ Citing the views of recognized constitutional scholars such as the liberal Laurence H. Tribe and the conservative Robert H. Bork, Justice Peters noted that "[c]onstitutional scholars of widely different persuasions agree that the 'discovery and spread of political truth' is central to constitutional democracy."⁵¹ She next pointed to the precedent in other jurisdictions that was discussed and dismissed by the majority. Peters conceded that those cases were not exactly on point with *Westfarms*, but meticulously

⁴⁸ *Westfarms*, 192 Conn. at 54-55; see also Martin B. Margulies, "Westfarms' Unquiet Shade," *U. Bridgeport L. Rev.* 7 (1986): 1, 13. Lamenting the decision, Martha Stone, the CCLU attorney representing NOW joked, "true economic recovery cannot occur in this nation without our God-given right to peaceably shop." Fern Shen, "'Ladies' Poke Fun at Westfarms Mall Decision," *Hartford Courant*, Mar. 4, 1984, at B1.

⁴⁹ See, e.g., Barry R. Schaller, "Commentary, Getting the Stories Right: Reflections on Narrative Voice in State Constitutional Interpretation," *Conn. L. Rev.* 26 (1994): 682-84 (discussing the dissent's broad approach to constitutional adjudication and explaining that Peters' was cognizant of need to make constitutional rules relevant to problems never contemplated by framers).

⁵⁰ *Westfarms*, 192 Conn. at 67 (Peters, J., dissenting).

⁵¹ *Westfarms*, 192 Conn. at 70 (Peters, J., dissenting); Thomas Scheffey, "Demanding Justice: In a Decade of Leading the Connecticut Supreme Court, Chief Justice Ellen A. Peters Has Redefined the Way it Does Work," *CT Law Trib.* 21 (Jan. 30, 1995): 39.

examined the policies and decisions in these other jurisdictions, emphasizing that “their reasoning is nonetheless apt.”⁵²

Regardless of the case law in other jurisdictions, Peters’ main cause for concern with Justice Shea’s majority opinion was the extent to which the intent of draftsmen of the state constitution “should be permitted to introduce ambiguity into constitutional language, that is, contextually speaking, reasonably clear.”⁵³ Peters’ argued that the applicable language of sections 4 and 14 was clear and unambiguous, and nowhere mentioned state action as a prerequisite to the protection of the constitutional right to free speech. In contrast, section 5 expressly invoked state action, stating that “[n]o law shall ever be passed to curtail or restrain the liberty of speech or the press.”⁵⁴ Peters’ argued that, read together, the conjunction of sections 4 and 5 underscored that “freedom of speech is ‘special’ and is entitled to a preferred position over other, competing constitutional rights.”⁵⁵ She particularly took issue with the majority’s reliance on their speculation of the framers’ intent, because while an important resource to resolve ambiguity, it was inappropriate to look to the draftsmen’s’ intent to actually create ambiguity.⁵⁶

Further, any inference the court made about the intent of the framers was “beset by logical difficulties.” The framers’ intentions, Justice Peters stated, “are at best indeterminate,” and it was “inherently anachronistic” to rely on their ideas shaped in a society of “small towns, country stores and village squares.” Peters was not convinced that the drafters had any particular view in 1818 “about the proper role of free speech in a mobile urbanized society when what is at issue is the exercise of free speech in a vast privately owned shopping center located at the intersection of superhighways.”⁵⁷

⁵² *Westfarms*, 192 Conn. at 75 (Peters, J. dissenting). Peters also found it noteworthy that aside from one case, every recent state supreme court decision had followed the lead of *Robins*, 592 P.2d 341, and afforded at least some degree of protection for political speech on private property. *Id.*

⁵³ *Westfarms*, 192 Conn. at 76 (Peters, J. dissenting).

⁵⁴ *Westfarms*, 192 Conn. at 76 (Peters, J. dissenting) (emphasis added).

⁵⁵ *Westfarms*, 192 Conn. at 76-77 (Peters, J. dissenting).

⁵⁶ While federal litigation often requires state action, Peters did not find textual support for imposing a similar requirement onto the protections of the Connecticut Constitution. See Michael F. J. Piecuch, “High Court Study: State Constitutional Law in the Land of Steady Habits: Chief Justice Ellen A. Peters and the Connecticut Supreme Court,” *Alb. L. Rev.* 60 (1997): 1769.

⁵⁷ *Westfarms*, 192 Conn. at 78-80 (Peters, J. dissenting).

Certainly, Peters concluded, NOW's speech rights and Westfarms' property interests should be balanced as a proper function of the courts, because courts were frequently called to draw lines on such a case-by-case basis. As NOW did not seek unrestricted access to Westfarms, Peters reasoned that the Plaintiffs' claim was "limited," and that they could invoke sections 4 and 14 to prohibit Westfarms from enforcing their exclusionary policy, in effect an all out ban on the exercise of political speech in any form. The central problem in this case was Westfarms' assertion of an "absolute," "unconditional right to preclude [the Plaintiffs'] exercise of their constitutional rights."⁵⁸ In discussing NOW's right to exercise free speech, Peters also noted the incident that transpired in May 1983 with the anti-Klan protestors. She explained that those events were in no way connected with the past or proposed conduct of NOW; in fact, the trial court found that the Plaintiffs had always been peaceful and had not adversely affected Westfarms' commercial activities.⁵⁹ She further pointed out that the ineptitude or ineffectiveness of the police to maintain peace with respect to other actors like the anti-Klan demonstrators should carry no weight in the protection of the Plaintiffs' peaceful exercise of their own constitutional rights.⁶⁰

Alternatively, Peters' expounded that even if state action were required, NOW could still prevail because of the public character of the shopping mall. Westfarms permitted numerous other activities that were not entirely commercial, such as health clinics, exhibitions, informational programs, fashion shows, concerts, and labor activity. Moreover, the trial court explicitly found that Westfarms' facilities provided a potential access to the public that was unmatched at other facilities they claimed were viable alternate sites for NOW's solicitation. As Westfarms relied on governmental institutions such as the police to enforce their exclusionary policy, and opened up their property for use by the public in general, the dissenting minority contended that the operation of Westfarms' vast shopping center demonstrated significant state action. The minority would have affirmed the trial court's injunctive relief that stopped Westfarms' no-trespass policy, removed that relief's restrictions

⁵⁸ *Westfarms*, 192 Conn. at 81-82 (Peters, J. dissenting).

⁵⁹ *Westfarms*, 192 Conn. at 67-68 (Peters, J. dissenting).

⁶⁰ *Westfarms*, 192 Conn. at 68 n.1 (Peters, J. dissenting). Although the majority did not expressly rely on these facts in declining to afford protection of NOW's rights, its discussion of these unrelated facts supports Justice Peters' implied view that this unrelated incident colored the majority's analysis. *See, e.g.*, Margulies, "Westfarms' Unquiet Shade," 13.

on the content and timing of NOW's petitions, and invalidated Westfarms' policy altogether.⁶¹ In Peters' view, because NOW sought to protect its right of political speech, and that right was "central to the very existence of a democratic society," it outweighed Westfarms private property rights.⁶²

In addition to its substance, one of the most captivating points about Justice Peters' dissent is the possibility of what might have been. As a former law clerk to Justice Peters, I had the opportunity to assist in drafting her incisive decisions and learned that one of her persistent concerns with deciding key issues was that, many times, the Court's power to develop the law in a certain area was limited by the underlying facts found by the Superior Court. That an appellate court is typically bound by the factual record established in the trial court is well-established, and if there is a less than full development of facts, appellate courts will just as typically decline a party's invitation to rule on an issue. Although appellate courts occasionally remand cases for further factual findings, more frequently they determine that the parties could not argue about the interpretation of various factual scenarios which the superior court declined to explain.

In speaking with Justice Peters about *Westfarms*, some thirty years after the decision was originally decided, she offered some interesting thoughts on the panel's conclusions. Justice Peters was perplexed that it had not occurred to any of the justices to remand the case for certain factual findings.⁶³ The Supreme Court decision did note some findings, such as that by Judge Spada that NOW's activities had not had a substantial impact on the mall's operations.⁶⁴ But given the majority opinion's focus on the *potential* harm to business that groups like NOW

⁶¹ *Westfarms*, 192 Conn. at 66-85 (Peters, J. dissenting).

⁶² *Westfarms*, 192 Conn. at 67 (Peters, J. dissenting); *see also* Piecuch, "High Court Study," 1769.

⁶³ Justice Peters has also expressed wonder that neither party had moved the trial court to articulate the underpinnings of its findings.

⁶⁴ *Westfarms*, 192 Conn. at 64-65. Judge Spada had not been persuaded by a survey introduced by Westfarms that concluded shoppers would be bothered if they were approached by NOW. Judge Spada called the survey "manifestly unfair," because the questionnaire asked patrons if they would be bothered by being approached by five groups, sandwiching NOW between the Nazi party and the Ku Klux Klan. *See* Shen, "Judge Opens Mall to NOW Petitioners."

and the anti-Klan protestors might cause, in hindsight Justice Peters believes that additional factual development in the trial court was warranted.⁶⁵ For example, it appears that the incident involving the anti-Klan protest influenced the Court's analysis, considering that it was discussed in Justice Shea's opinion. That opinion sought to avoid the significance of facts, however, by determining that whatever might be the varied factual matters related to the effects of exercising speech rights on private property, these were for the legislature and not the courts to balance.⁶⁶ Accordingly, in retrospect, Justice Peters has noted the potential significance of a more fully developed factual record in shaping the case's outcome.

Justice Peters also offered a second insight into the Supreme Court's decision. She noted the unusual make up of the panel that decided the case and, but for disqualifications of some justices who otherwise would have heard the case, the outcome would likely have been different. The majority that declined to embrace the expansive view of sections 4 and 14 of the Connecticut Constitution was comprised of Justice Shea, Justice Healy, and Superior Court Judge Covello. Justice Peters has reported that then-Chief Justice Speziale was part of the original panel scheduled to hear argument, but was disqualified. Justice Parskey had also been disqualified. Consequently, the majority decision in *Westfarms* was handed down by a three person majority panel made up of only two acting members of the Supreme Court, Justice Shea and Justice Healy.

The late Justice Shea has been described as both a "cerebral" jurist and, when he sat in the Superior Court, an exceptional trial judge.⁶⁷ Although Justice Shea voted to expand constitutional rights along with Justice Peters in subsequent cases, he disagreed with her in *Westfarms*,

⁶⁵ A decade later, in an equally significant decision, *Sheff v. O'Neill*, 238 Conn. 1 (1996), the Supreme Court took this very type of action, to order development of the record: "Noting that the plaintiffs' complaint had been pending since 1989, we held a special hearing, shortly after the appeal had been filed, to order supplementation of the trial record. We directed the parties to prepare a joint stipulation of all relevant undisputed facts and to assist the trial court in making findings of fact on matters upon which the parties could not agree. Our resolution of this appeal has proceeded on the basis of this supplemented record, which the parties and the court promptly prepared in accordance with our order." 238 Conn. at 7-8.

⁶⁶ See, e.g., Margulies, "Westfarms' Unquiet Shade," 13.

⁶⁷ Wesley W. Horton, *The History of the Connecticut Supreme Court* (Thompson-West (2008)), 207.

interpreting the Constitution strictly and focusing heavily on the framers' intent.⁶⁸ At the time, it was no shock to NOW's counsel that Justice Shea embraced the limits on free speech imposed by the federal constitution, stating that "the faith which democratic societies repose in the written document as a shield against the arbitrary exercise of governmental power would be illusory if those vested with the responsibility for construing and applying disputed provisions were free to stray from the purposes of the originators."⁶⁹ It was also not unexpected that Justice Healey would side with Westfarms in strictly construing the state constitutional limits on free speech on private property, rather than carving out affirmative duties for property holders—he has been described as the Supreme Court's "conservative wing" during the early 1980s.⁷⁰ Of the three sitting Supreme Court justices, then, two voted in favor of the Mall, and one in favor of NOW.

The case would hinge, then, on the Superior Court judges who sat on the case because of Justice disqualifications. Judge Maurice Sponzo joined Justice Peters, and so it turned out that the decisive swing vote was cast by Judge Covello. Not much was known by the parties at that time regarding which way Judge Covello might vote on the issue, although he would later go on to become a Justice of the Connecticut

⁶⁸ Horton, *History of the Connecticut Supreme Court*, 208-10 (discussing expansion of rights during tenure of Justices Peters and Shea and citing *Westfarms* and *Pellegrino v. O'Neill*, 193 Conn. 670 (1984), as cases in which the Justices disagreed. In *Pellegrino*, Justice Shea and the majority refused to consider whether excessive court delays in civil cases were unconstitutional).

⁶⁹ See David Leshner, "Mall Ruling Called Free Speech Threat," *Hartford Courant*, Jan. 18, 1984 at A1A.

⁷⁰ Horton, *History of the Connecticut Supreme Court*, 204. Justice Healey's strict adherence to the framers' intent seems to have faded somewhat over the years. Writing for the Connecticut Supreme Court in *State v. Dukes*, 203 Conn. 98 (1988), Justice Healy reasoned that "the Connecticut constitution is an instrument of progress, it is intended to stand for a great length of time and should not be interpreted too narrowly or too literally so that it fails to have contemporary effectiveness for all of our citizens." Furthermore, in *Dukes*, Justice Healy "cited with approval the Washington Supreme Court's observation that the Washington constitution was not intended to be a static document incapable of coping with changing times. It was meant to be, and is, a living document with current effectiveness." Thomas Morawetz, "Commentary: Deviation and Autonomy: The Jurisprudence of Interpretation in State Constitutional Law," 26 *Conn. L. Rev.* 635, 643-44 (1994). Based on this language in *Dukes*, it seems that had the late Justice Healy decided *Westfarms* later in his career, the outcome may also have been different.

Supreme Court and a United States District Court Judge.⁷¹ While it seems unusual that a Superior Court judge would cast the determinative vote in a seminal decision with long lasting effect on free speech in Connecticut, the consequences of this substitution became even more apparent when speaking with Justice Peters about her recollection of the panel. Recalling the decision, Justice Peters confirmed for me what counsel for NOW likely suspected: then Chief Justice Speziale informed her that had he been on the panel that day, he likely would have voted to uphold the constitutionality of NOW's distribution of pamphlets at Westfarms.

In the years immediately following *Westfarms*, several other states also considered whether free speech was such a fundamental right that it required protection above all else, even in private shopping malls. A majority of these states similarly declined to interpret their constitutions as providing guaranties for expansive free speech rights on private property.⁷² In light of this post-*Westfarms* trend, it appears as if the Connecticut decision in effect operated as a pivot point in the turn away from recognition of expansive free speech rights. Although courts in other states cited *Westfarms* as support for their analyses, at the time none of them explicitly regarded Connecticut's case as the one that

⁷¹ Recently, Judge Covello, a Connecticut native who was appointed to the federal bench by George H.W. Bush in 1992, issued a decision that operated to limit certain liberties in favor of recognizing the value of public safety—not unlike the outcome in *Westfarms*. Specifically, as a United States District Judge, he upheld Connecticut's new gun control laws, despite its burden on Second Amendment rights, because the law is “substantially related to the important governmental interest of public safety and crime control.” Edmond Mahoney, “Federal Court Upholds States Tough Assault Weapons Ban,” *Hartford Courant*, Jan. 30 2014, available at http://articles.courant.com/2014-01-30/news/hc-gun-control-0131-20140130_1_gun-ownership-gun-control-gun-rights.

⁷² See e.g., *Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assoc.s, L.P.*, 392 S.E.2d 8, 9-10 (Ga. 1990) (stating that convenient access to a large number of people “does not create a constitutional right of access to private property”); *SHAD Alliance v. Smith Haven Mall*, 488 N.E.2d 1211, 1217-18 (N.Y. 1985) (stating that “the nature of property [does not] transform a private actor into a public one”).

marked a shift in the tide concerning state constitutional protections.⁷³ Very soon, though, and with little fanfare, it appeared as if the question regarding political speech access to private shopping malls had quickly been decided and settled. Similarly, outside Connecticut there was little scholarly commentary about the decision, despite its departure from existing precedent and its notice by courts in other jurisdictions.

It is important to recall the context of the Court's decision in *Westfarms* in order to appreciate why it was such a formative decision, despite the lack of explicit recognition at the time. Before *Westfarms*, the trial and appellate court precedent indicated that state constitutions were fertile grounds for defending citizens' rights, as the California Supreme Court demonstrated in its *Robins v. Pruneyard Shopping Center* decision (1979). There, the California Supreme Court found protection of students' right to distribute pamphlets protesting a United Nations resolution in the courtyard of their high school not in the federal constitution, but in the language of the California Constitution, which states in relevant part as follows: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right."⁷⁴ The court interpreted this and other constitutional language to permit the students a right of access to their school's private property, for the purpose of exercising political speech. Subsequently, in *Pruneyard Shopping Center v. Robins* (1980), the U. S. Supreme Court affirmed California's reliance on its state constitution, on the grounds that the federal constitution is a floor, not a ceiling, and that states could exercise their sovereign right to adopt "individual liberties more expansive than those conferred by the Federal Constitution."⁷⁵ Having previously declined to provide national speech protection in private shopping malls,⁷⁶ the U.S. Supreme Court now invited states to do so pursuant to their state constitutions.

As a result, the setting was ripe for courts outside of California to find protections for free speech rights. At the time *Westfarms* was decided, in fact, the trend of case law had been moving in favor of

⁷³ See e.g., *Citizens for Ethical Gov't, Inc.*, 392 S.E.2d at 9-10 (citing *Westfarms* only once and in a string cite of other states that had decided against expanding state constitutional rights).

⁷⁴ California Const. article 1 § 2(a).

⁷⁵ *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980).

⁷⁶ See *Hudgens v NLRB*, 424 U.S. 507 (1976) (holding that large private shopping centers are not subject to the prohibitions of the First Amendment).

expansive speech protections—indeed, only one case prior to *Westfarms* had declined to follow the lead of the California Supreme Court in *Robins*, to afford at least some degree of protection for political speech even when the speaker was on private property. In that case, *State v. Felmet* (1981), the Supreme Court of North Carolina recognized that it *could* interpret its state constitution to protect the defendants’ conduct, soliciting signatures in a mall parking lot, but it was not “so disposed.”⁷⁷ That court summarily stated its conclusion, failing to elaborate on the decision. Thus, although *Felmet* did not follow *Robins*’ expansion of state constitutional rights, its lack of analysis provided no precedential foundation upon which other state courts might rely to decline to find a right to free speech on private shopping mall property.

Consequently, *Westfarms* became the first state court case following *Pruneyard* to provide in-depth reasoning for not affording protection to free speech in private shopping malls. It effectively acted as a support, at the least, for other state courts as they altered the existing legal landscape, if not also an actual catalyst for those courts to refuse to afford such protections based on their own constitutions. In total, *Westfarms* has been cited about forty times combined by state and federal courts located outside of Connecticut. This number seems relatively trivial considering the importance and timing of the decision’s holding on the issue of free speech in private shopping malls, an issue that was very much up for debate across the country. While this number of citations may seem low, the citation rate does not mark *Westfarms* as an aberration. Indeed, today, the substantial majority of states agree with the holding in *Westfarms*, finding that their own constitutions do not provide broader protection for freedom of speech than the federal constitution, and that state action is a prerequisite to invoking the protections of state constitutional free speech provisions.⁷⁸

A review of decisions from other states reveals that, even if *Westfarms* was not explicitly treated as a seminal decision, other jurisdictions adopted the *reasoning* evident in *Westfarms*. In particular, two cases decided in the year immediately following *Westfarms* show this trend, as both authoring judges relied heavily on the Connecticut Supreme Court’s decision in penning their own opinions. First, in 1985, only the year after *Westfarms* was decided, the Michigan Supreme Court reasoned in *Woodland v. Michigan Citizens Lobby* that Michigan’s

⁷⁷ 302 N.C. 173 (1981).

⁷⁸ Robert Aalberts, *Real Estate Law* (Seidel, George) 528 (9th ed. 2014).

constitution is “a shield against the actions of the state,” not “a sword by individuals against individuals,” and rejected the plaintiff’s argument that large shopping centers should be exempt from a state action requirement.⁷⁹ In reaching this conclusion, the court cited its past decisions, the limited reach of constitutionally guaranteed individual rights, Michigan’s constitutional convention, and the underlying rationale of the state action limitation. Additionally, the *Woodland* court specifically cited *Westfarms* in declining to distinguish shopping malls “from other places where large numbers of people congregate, thereby affording superior opportunities for political activities, such as sport stadiums, convention halls, theaters, private parks, large office or apartment buildings, factories, supermarkets, department stores, or similar places.”⁸⁰

The influence of *Westfarms* is obvious in the *Woodland* court’s analysis. Although the court noted that there were a number of cases in other jurisdictions to grant a limited right of access to certain types of private property for specific free speech activity, it concluded that these courts’ reasoning had not been consistent, and noted that those decisions had been split, not unanimous.⁸¹ Alternatively, the *Woodland* court pointed directly to *Westfarms*, adopting its analysis and explaining that the panel found “the reasoning of the Connecticut Supreme Court in *Cologne v. Westfarms Assoc.* . . . to be sound. . . . The court, after reviewing the history surrounding the enactment of the Connecticut Constitution, stated that the concern which led to the adoption of the state constitutional provisions at issue was the protection of individual liberties from governmental interference, not the prevention of private

⁷⁹ 378 N.W.2d 337, 348 (Mich. 1985).

⁸⁰ 378 N.W.2d. at 347-48.

⁸¹ 378 N.W. 3d at 354. See also *Batchelder v Allied Stores Int’l, Inc.*, 445 N.E.2d 590 (Mass. 1983) (court’s decision was not based upon state free speech provision, but was expressly limited to “free election” provision of Massachusetts Constitution).

Two other state supreme courts have also considered related issues with regard to a private university and college. In *State v Schmid*, 423 A.2d 615 (N.J. 1980), the New Jersey Supreme Court held that its state constitution protected the rights of free speech and assembly on the campus of a private university. The Supreme Court of Pennsylvania reached the same result in *Commonwealth v Tate*, 432 A.2d 1382 (Pa. 1981). Both of these decisions emphasized the dedicated use of university or college property as a forum for the exchange of opinions and ideas.

interference with those liberties.”⁸² The *Woodland* court further stressed that the legislature was more competent than the judicial system to regulate property rights and economic interests for the general welfare, because of its institutional nature, superior fact-finding ability, and general legislative authority. Relying on *Westfarms*, the court concluded that the tension between a legal right of access to large private shopping malls and the interests of the mall owners was a problem that the legislature was more adequately equipped to deal with, because it concerned conflicting interests of private individuals.⁸³

The Michigan court also addressed the defendant mall’s argument, that forcing it to permit access for the exercise of political speech would harm its financial interests. The defendant shopping mall contended that the economic harm would increase as the political speech activity increased, and that such activity also posed a risk to public safety. Specifically, the mall cited *Westfarms* and the incident with the anti-Klan protestors as illustrative, despite the fact that this incident had nothing to do with NOW’s peaceful use of the mall for pamphlet distribution.

In *Cologne* [*v. Westfarms Associates*], a violent demonstration erupted at the mall involved, when the Ku Klux Klan sought to take advantage of a prior decision of the superior court granting access to the National Organization for Women for expressive purposes. Anti-Klan groups protested and engaged in a heated demonstration which resulted in a major disturbance. While this evidence is less than conclusive, it tends to show that a legally mandated right of access could present some complex problems and result in some harm to private shopping centers.⁸⁴

Accordingly, although *Westfarms* did not present a factual basis demonstrating that the mall’s economic interests were harmed by NOW’s political activity, the anti-Klan demonstration acted as an additional platform for other courts to conclude that their state constitutions did not protect a right of access for political speech in private shopping malls.

That same year, in *SHAD Alliance v. Smith Haven Mall* (1985), the New York Court of Appeals concluded that the language of Article I,

⁸² *Woodland*, 378 N.W.2d at 357.

⁸³ 378 N.W.2d at 357-58.

⁸⁴ 378 N.W.2d at 358, n.47

Section 8 of the New York Constitution did not protect the right of individuals to distribute leaflets at the defendant mall.⁸⁵ The court held that the New York Constitution only limited the ability of state actors to prohibit access for the purpose of political speech activity, and that the defendant mall was not the functional equivalent of a government.⁸⁶ In evaluating cases from other jurisdictions to have considered the same issue, the *SHAD* court noted that the language in Article I, Section 8, ratified by New York's Constitutional Convention of 1821,⁸⁷ was almost identical to the language inserted into the Connecticut Constitution three years before in 1818. The court then looked to *Westfarms* in support of its own constitutional interpretation, noting that “[t]he Connecticut Supreme Court found that a ‘review of [its] origin discloses no evidence of any intention to vest in those seeking to exercise such rights as free speech and petition the privilege of doing so upon property of others’”⁸⁸

The court also cited *Westfarms* for the proposition that the nature of a property does not transform private actors into public ones, and thus a shopping mall's similarity to a town square does not mean that its owners should be forced to allow entrance for certain free speech activities anymore so than any other property owner is required to. “To be sure, the shopping mall has taken on many of the attributes and functions of a public forum, as the record demonstrates, but the characterization or the use of property is immaterial to the issue of whether state action has been shown. . . . (see *Lloyd Corp. v Tanner*, 407 U.S. 551, 564-565 . . . ; *Cologne v Westfarms Assoc.*, 192 Conn 48 . . .). Rather, the analysis must proceed from the other direction to show significant government participation in private conduct that limits free speech rights.”⁸⁹

It is clear from the analyses of both *Woodland* and *SHAD* in the year following the Connecticut Supreme Court's decision that *Westfarms* marked a turning point in states' willingness to broadly interpret their constitutions to afford protections for political speech in private shopping malls. More evidence of this watershed moment arrived later, as since 1985 the Supreme Courts of Alaska, Georgia, Illinois, Indiana, Michigan, Minnesota, Ohio, Pennsylvania, Texas, Wisconsin, and Hawaii have all cited *Westfarms* with approval, and have declined to find a protection for

⁸⁵ 488 N.E.2d 1211 (N.Y. 1985).

⁸⁶ 488 N.E.2d at 1214-1217.

⁸⁷ 488 N.E. 2d at 1217; see also N.Y. Const. art. I, § 8.

⁸⁸ 488 N.E. 2d at 1214 (citing *Westfarms*).

⁸⁹ 488 N.E. 2d at 1217-1218.

free speech on private property in their own state constitutions.⁹⁰ For example, in *Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Ins. Co.* (1986), the Pennsylvania Supreme Court noted that while previous cases such as *Robins* had afforded broader constitutional protections for political speech activities, it believed the position in states such as Connecticut and Michigan were more correct.⁹¹ The court relied specifically on *Westfarms* and

⁹⁰ See, e.g., *State v. Viglielmo*, 95 P.3d 952 (Haw. 2004) (upholding conviction for trespass on basis that Hawaii's state constitution afforded no greater protection than First Amendment, and citing *Westfarms* to illustrate state courts that limit free speech in shopping centers); *Cahill v. Cobb Place Assocs., L.P.*, 519 S.E.2d 449 (Ga. 1999) (construing state constitution same as federal constitution and noting that other states like Connecticut also found that state constitutional free speech guaranties were no greater than guaranty in free speech clause of first amendment); *Republican Party v. Dietz*, 940 S.W.2d 86 (Tex. 1997) (citing *Westfarms* for proposition that state courts have determined that free speech rights can only be asserted against private property owners when property has assumed all characteristics of a municipality); *Eastwood Mall v. Slanco*, 626 N.E.2d 59 (Ohio 1994) (holding that injunction against protestor did not constitute prior restraint on speech and citing *Westfarms* for conclusion that privately owned shopping center may exclude unwanted speech from its property); *Wilhoite v. Melvin Simon & Assocs.*, 640 N.E.2d 382 (Ind. Ct. App. 1994) (holding that neither federal nor Indiana law created liberty interest in right of access to private property and citing *Westfarms* as example of state that does not provide broader protection than the U.S. Constitution); *People v. DiGuida*, 604 N.E.2d 336 (Ill. 1992) (upholding defendant's conviction for trespass for soliciting petition signatures in grocery store and citing *Westfarms* as example of state interpreting constitution no more broadly than Federal Constitution); *Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assoc., L.P.*, 260 Ga. 245 (1990) (upholding mall policy prohibiting political activity and solicitation on premises and citing *Westfarms* among majority of states that don't require privately owned shopping centers to permit political activities); *Johnson v. Tait*, 774 P.2d 185, 190 (Alaska 1989) (citing *Westfarms* for the proposition that reasonable regulation of private property in the public interest is a matter for the legislature); *Fiesta Mall Venture v. Mecham Recall Comm.*, 767 P.2d 719, 722 (Ariz. Ct. App. 1988) (holding that mall owners not required to permit political activities on mall premises because shopping centers not functional equivalent of public forums and citing *Westfarms* for proposition that shopping center does not constitute property vested with public character); *Jacobs v. Major*, 407 N.W.2d 832 (Wis. 1987) (Wisconsin's constitution did not protect dance troop's right to access private mall for performance without permission; citing *Westfarms* for interpretation of Connecticut's bill of rights and adopting similar approach to Wisconsin's constitution).

⁹¹ 515 A.2d 1331 (Pa. 1986).

Woodland, explaining that the Connecticut Supreme Court “did not confer a right to solicit signatures in a privately owned shopping mall. The court rejected the *Pruneyard* analysis and held that the history of the Connecticut Constitution shows that their Declaration of Rights is a restraint on the government and does not confer positive rights. The court also refused to exercise the state’s police power, in deference to the legislature. . . . The Commonwealth of Pennsylvania through its police powers may also constitutionally regulate private property’s use in the public interest, . . . However, such an exercise of the Commonwealth’s police power is exclusively within the legislative domain. . . . Like the Connecticut and Michigan Supreme Courts, we are not free under our constitution to follow the California Supreme Court in this area.”

More recently, in *State v. Wicklund* (1999), the Supreme Court of Minnesota noted these previous rulings from other jurisdictions.⁹² The court explicitly pointed out that “[m]any of these state rulings follow the logic of the Connecticut Supreme Court when it declined to extend the state’s constitutional protections to a political advocacy group attempting to distribute literature and solicit signatures in a regional shopping mall. . . .” and found no legal basis for distinguishing shopping centers from other places where large numbers of people congregate.

In contrast, there are certainly states that *do* require private shopping mall owners to permit access for some form of political speech activity. These states are in the minority, however, and include only California, Colorado, New Jersey, Massachusetts, and Washington.⁹³ And although

⁹² 589 N.W.2d 793, 800 (Minn. 1999).

⁹³ See, e.g., *In New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757 (1994), cert. denied sub nom. *Short Hills Assoc. v. New Jersey Coalition Against War in the Middle East*, 516 U.S. 812, (1995) (holding that regional and community shopping centers must permit leafleting on “societal issues” because, “although 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.”); *Bock v. Westminster Mall Co.*, 819 P.2d 55, 56 (Colo. 1991), (holding that Colorado state constitution protected political leafleting in large shopping mall because mall was “so entangled with the government that there was sufficient state action to trigger the protection of Colorado’s constitutional free speech provision.”); *Batchelder v. Allied Stores Int’l, Inc.*, 445 N.E.2d 590 (Mass. 1983) (holding that Massachusetts state constitution confers a right to solicit signatures in shopping mall on basis of

these states provide at least some limited right of access for the purpose of exercising political speech in private shopping malls, most of the court rulings are narrow or were decided prior to *Westfarms* and have faced challenges since their initial adoption.

Still other states have recently overruled prior protections for political activity in the private shopping mall context. In *Stranahan v. Fred Meyer, Inc.* (2000), the Oregon Supreme Court held that a shopping center's rules requiring twenty-four hour written notice prior to solicitation, limiting the number of signature gatherers, and denying permission during certain holidays were not unreasonable time, place or manner restrictions.⁹⁴ *Stranahan* overruled the court's previous holding in *Lloyd Corp. v. Whiffen* (1993), which had provided that seeking signatures on initiative petitions was essential to the purposes of the Oregon Constitution's guarantees regarding the initiative and referendum powers, and that prohibiting such rights impinged on the constitutional rights of the solicitors.⁹⁵ In *Stranahan*, the Oregon Supreme Court maintained that although the Oregon constitution conferred the right to *propose* laws via initiative, it did not extend so far as to create a right to solicit signatures for initiative petitions on private property, including petitioner's privately owned shopping center.⁹⁶

Moreover, prior to *Westfarms*, in *Alderwood Assoc. v. Wash. Envtl. Council* (1981), the Washington Supreme Court reversed a temporary restraining order that prohibited environmental petitioners from soliciting signatures in the defendant mall.⁹⁷ The court conducted a balancing of interests and concluded that the case was "not one where the speech activity so affects the value or use of the shopping center as to constitute a 'taking' of the mall owners' property."⁹⁸ The majority opinion reflected the panel's reliance on the similarities between the political activity in the case and that in *Pruneyard*. The court concluded that, as in *Pruneyard*, "the petitioners' activities were neither disruptive nor

right to seek petition and office, not on free speech provision); *Robins*, 592 P.2d 341.

⁹⁴ 11 P.3d 228 (2000).

⁹⁵ 849 P.2d 446 (1993).

⁹⁶ *Stranahan*, 11 P. 3d at 243-44. The Massachusetts Supreme Court's decision in *Batchelder v. Allied Stores Int'l, Inc.*, 445 N.E.2d 590 (1983), was similarly premised on the right to seek petition and office, not on the Massachusetts Constitution free speech provision.

⁹⁷ 635 P.2d 108 (Wash. 1981).

⁹⁸ 635 P.2d at 116-17.

offensive. In fact, they had been allowed in other shopping centers of similar size within our state.”⁹⁹

Despite this seemingly broad interpretation, the Washington Supreme Court has since held that the free speech provision of its state constitution does not protect against infringement by private individuals. In *Southcenter Joint Venture v. Nat’l Democratic Policy Comm.* (1989), the court held that a political organization’s free speech rights under the state constitution did not protect against actions by private parties because of the state action requirement.¹⁰⁰ In its analysis, the court reasoned that its decision on the state action issue was consistent with *Alderwood*, because in that case, a five member majority of the court rejected the argument that free speech did not require state action; rather “the holding in *Alderwood* was simply that people have a right under the initiative provision of the Constitution of the State of Washington to solicit signatures for an initiative in a manner that does not violate or unreasonably restrict the rights of private property owners. We expressly do not here disturb that holding.”¹⁰¹ Thus, the court considerably restricted what appeared to be its previously expansive stance on freedom of speech pursuant to its state constitution. Not unexpectedly, in so doing, the court relied on the Connecticut Supreme Court’s analysis in *Westfarms*, concluding that it was not the court’s role to balance competing interests between private entities.¹⁰²

In light of this precedent in other jurisdictions and in spite of the relative lack of immediate interest in the importance of *Westfarms*, the Connecticut decision’s impact was greater in scope and reach than the absence of initial heralding proclamations might otherwise suggest. Given other states’ reliance on *Westfarms* in their evaluations of their own constitutions, it would not be unreasonable to conclude that had

⁹⁹ 635 P.2d at 117.

¹⁰⁰ 780 P.2d 1282, 1289 (Wash. 1989). In so doing, the court noted that the “position we adopt herein commands the support of the overwhelming majority of courts that have addressed the issue. The highest courts of Connecticut, Michigan, New York, North Carolina, Pennsylvania and Wisconsin have all recently concluded in cases involving similar facts that the free speech provisions of their respective state constitutions do not protect against infringement by private individuals.” 780 P.2d at 1289. Notably, the majority of the states listed by the Washington Supreme Court to support their conclusion heavily cited and looked to *Westfarms*’ analysis in reaching their positions.

¹⁰¹ 780 P.2d at 1289-1290.

¹⁰² 780 P.2d at 1287, quoting *Westfarms* at 65.

Westfarms been decided differently, at least some portion of the majority opinion in these later cases in other states may likewise have had very different outcomes.¹⁰³

As surprising as it is that *Westfarms* was not openly recognized as a seminal decision in other jurisdictions that so clearly relied on the case for support, it is equally intriguing that it did not generate additional litigation until years later, where it was an important part of the decision in *United Food and Commercial Workers Union, Local 919 AFL-CIO v. Crystal Mall Assoc.* (2004).¹⁰⁴ Because *Westfarms* foreclosed rather than welcomed the expansion of rights, plaintiffs likely did not see it as supporting precedent, although it left open important questions concerning state action.

Crystal Mall dealt with a fact pattern very similar to the shopping mall cases of the 1980s, with the important exception that the plaintiffs alleged that the extensive state involvement with the construction and maintenance of the defendant mall constituted state action sufficient enough to trigger free speech protection.¹⁰⁵ Nevertheless, the Connecticut Supreme Court again declined to extend the constitution far enough to protect speech on this private property. Notably, though, the court left open the door for this issue to be revisited, stating, “[w]e do not, however, foreclose the possibility that a proper interpretation of the Connecticut constitution *could* lead to the conclusion that our state action requirement is more expansive than its federal counterpart. . . . Thus, should an appropriate case present itself, we may reconsider the issue.”¹⁰⁶ No such case has presented itself, however, and so the reach of constitutionally protected free speech on private property remains, for all intents and purposes, where *Westfarms* left it.

As *Crystal Mall* shows, the decision in *Westfarms* raises several interesting questions. Of course, there remains the ongoing consideration of the type of case that may be “appropriate” to redefine the contours of the state action doctrine, and whether this someday will be an avenue for

¹⁰³ Margulies, *Cologne v. Westfarms Assoc.: A Blueprint for an Overruling*, 706-708 (discussing the circular reasoning of post-*Westfarms* authorities)

¹⁰⁴ 270 Conn. 261 (2004).

¹⁰⁵ 270 Conn., at 266-272.

¹⁰⁶ 270 Conn. at 290 (emphasis in original).

an outcome different from that in *Westfarms*. Considering the extent to which other states have relied on *Westfarms* for support in requiring state action before affording protection for political speech, it also would be interesting to see how these other jurisdictions may treat any future decisions in Connecticut expanding the definition of “state action.”

Given that *Crystal Mall* was decided over ten years ago, at first glance it may seem perplexing that the Supreme Court has not revisited the state action issue after clearly leaving the issue open to be challenged. One reason could be that the modern shopping mall is arguably no longer the quintessential public forum. Just as shopping malls replaced the town greens of the previous generation, social media has at least somewhat replaced shopping malls as the gathering place for expression of political and other ideas in today’s society.¹⁰⁷ Although *Westfarms* has not yet been overturned, whether the Court’s reasoning will apply equally to regulating freedom of speech in privately owned domains or websites that permit some level of communication and interface between users remains to be fully determined. Going forward, such disputes will likely prove to be a more fertile ground for testing the now thirty year old decision than the challenges of plaintiffs seeking to distribute pamphlets in private shopping malls.

¹⁰⁷ See, e.g., Xiang Li, “Hacktivism and the First Amendment: Drawing the Line Between Cyber Protests and Crime,” *Harv. J. L. & Tech* 301, 330 (courts will likely entertain more arguments that websites constitute limited public forum).