

FINDING A FORUM IN THE SIMULATED CITY: MEGA MALLS, GATED TOWNS, AND THE PROMISE OF *PRUNEYARD*

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INTRODUCTION

The right to free speech in public spaces is becoming irrelevant in the United States. Americans are abandoning the traditional cities and suburbs in favor of the exopolis, edge city, or simulated city—areas which are characterized by private (often gated) common interest communities, enclosed shopping malls, private parks, and office complexes, and which have no sense of center. These shopping, recreation, and residential areas seek to simulate urban environments, only in a safer, more

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homogenized and more consumable form. The modern shopping center is a reproduction of downtown shopping areas. Gated communities and other common interest communities seek to recreate an idealized version of residential areas. Mini-amusement parks simulate the community aspects of city parks, with the added thrills of scaled-down park rides and the feeling of security provided by the exclusion of panhandlers and the poor. To a large extent, these simulations have actually displaced the areas they are intended to simulate. As the shopping malls and office parks grow, downtown areas wither and die. As common interest communities proliferate, urban communities are abandoned. As private parks spread, city parks are left to an ever-expanding horde of homeless.

Local municipal governments control the downtown areas, city residential neighborhoods, and public parks that are being simulated. However, private interests, usually corporations, control the simulated spaces—the shopping malls, the gated communities, and the private parks. Because these simulated spaces are privately-owned and controlled, owners regulate behavior within by exerting the most fundamental property right—the right to exclude. Thus, individuals may not engage in speech activities unless the owner permits it.

Social and architectural critics have long recognized the problem and have argued vigorously for a preservation of civic life. But there has been no sign of reversal and no indication that Americans intend to change their living patterns. In response, free speech advocates have gone to the courts to extend speech rights into certain private spaces. In a series of decisions in the 1960s, culminating with *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*,¹ the Supreme Court recognized a speech right in shopping centers, which were the “functional equivalent of a ‘business block.’”² Yet the Court soon began to limit the decision and eventually overruled *Logan Valley*.³

However, the Court refused to rule out the possibility that statutes or state constitutions might be interpreted to extend speech rights into shopping centers. In its *Robins v. Pruneyard Shopping Center* decision,⁴ the California Supreme Court became the first state court to rule that its state constitution permits citizens to engage in expressive activities in shopping centers. At least twenty-one states have examined the *Robins* decision, and several have extended their own constitutions to allow speech rights in shopping centers.⁵ Courts in California and New Jersey have

¹ 391 U.S. 308 (1968).

² *Id.* at 325.

³ See *Hudgens v. NLRB*, 424 U.S. 507, 518–19 (1976).

⁴ 592 P.2d 341 (Cal. 1979), *aff'd* 447 U.S. 74 (1980).

⁵ Jennifer Niles Coffin, Note, *The United Mall of America: Free Speech, State Constitutions, and the Growing Fortress of Private Property*, 33 U. MICH. J.L. REFORM. 615, 625–33 (2000).

also extended limited free speech rights into gated communities.⁶ The rationale underlying these decisions presents the possibility that courts might extend speech rights in to other forms of privately-owned public spaces.

This note examines speech rights in simulated spaces and explores possibilities for extending these rights. Part I defines simulated cities and the free speech problems one encounters therein. Part II examines the United States Supreme Court's approach to expressive conduct in privately-owned public areas, including company towns, private parks, and shopping malls, before it finally delegated to the states the responsibility of protecting free speech in simulated spaces in *PruneYard Shopping Center v. Robins*.⁷ Part III examines how the Court might handle privately-owned "New Towns," gated communities, mega malls, and amusement parks. Part IV details how individual states have extended speech rights in shopping centers, gated communities, and condominium complexes following California's *Pruneyard* experiment. Part V examines problems common to all the state approaches and suggests that courts should not treat private property differently from government property when determining whether a public forum exists.

I. OVERVIEW: DEMOCRACY AND SIMULATED CITIES

A. THE PURPOSE OF PUBLIC SPACE

Public space occupies a tremendously important place in any democracy as a forum for protest, discourse, and other political dialogue. Streets "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."⁸ Furthermore, "[p]ublic places are of necessity the locus for discussion of public issues, as well as protest against arbitrary government action. . . . [I]n a free nation citizens must have the right to gather and speak with other persons in public places."⁹ Public spaces allow people of different social classes and races to see one another and to interact. Grassroots protest movements, which depend heavily on public space, have contributed far more to the expansion of rights in this country than has mainstream politics.¹⁰

⁶ See *Laguna Publ'g Co. v. Golden Rain Found.*, 182 Cal. Rptr. 813 (Cal. Ct. App. 1982); *Guttenberg Taxpayers and Rentpayers Ass'n v. Galaxy Towers Condo. Ass'n*, 688 A.2d 156 (N.J. Super. Ct. Ch. Div. 1996), *aff'd* 688 A.2d 108 (N.J. Sup. Ct. App. Div. 1996).

⁷ 447 U.S. 74 (1980).

⁸ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

⁹ *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) (Kennedy, J., concurring).

¹⁰ See JAMES MACGREGOR BURNS & STEWART BURNS, *A PEOPLE'S CHARTER* 453-54 (1991) ("Advances in rights have been achieved far more by grass-roots protesters, movement

Public space is now in crisis. The traditional fora are being abandoned, leaving:

Cultural centers that are unable to support a good bookstore. Civic centers that are avoided by everyone but bums, who have fewer choices of loitering place [sic] than others. Commercial centers that are lackluster imitations of standardized suburban chain-store shopping. Promenades that go from no place to nowhere and have no promenaders.¹¹

In what Robert Reich calls the “secession of the successful,” those Americans with the means to do so are largely abandoning public life for the safety of entirely private institutions.¹² The most important form of public space has long been the marketplace.¹³ Through the first half of the twentieth century, downtown areas in the centers of cities provided this forum.¹⁴ Between World War II and the 1970s, the marketplace gradually shifted to suburban shopping malls.¹⁵ And by the 1970s, the malls

activists, and bold leaders—such as Martin Luther King, Jr., and his cadres, the CIO militants of the 1930s, and two centuries of women pathfinders—than by even the most well-meaning political brokers of those days.”). *See also* *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943) (“Door to door distribution of circulars is essential to the poorly financed causes of little people.”).

¹¹ JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 4 (Vintage Books 1992) (1961).

¹² Robert B. Reich, *Secession of the Successful*, N.Y. TIMES, Jan. 20, 1991, (Magazine), at 16.

The secession is taking several forms. In many cities and towns, the wealthy have in effect withdrawn their dollars from the support of public spaces and institutions shared by all and dedicated the savings to their own private services. As public parks and playgrounds deteriorate, there is a proliferation of private health clubs, golf clubs, tennis clubs, skating clubs and every other type of recreational association in which costs are shared among members. Condominiums and the omnipresent residential communities dun their members to undertake work that financially strapped local governments can no longer afford to do well—maintaining roads, mending sidewalks, pruning trees, repairing street lights, cleaning swimming pools, paying for lifeguards and, notably, hiring security guards to protect life and property.

Id.

¹³ “[T]he marketplace had always been a public space, part of the fabric of the town, usually at the heart of it, existing in continuity with the rest of town life. By the 1970s, when malls started to multiply across the land, the public realm had been pretty much eliminated from the American scene. Yet that hunger for public life remained. . . . What had existed before in an organic state as Main Street, downtown shopping districts, town squares, hotel lobbies, public gardens, saloons, museums, churches, was now standardized, simplified, sanitized, packaged, and relocated on the suburban fringe in the form of a mall.” JAMES HOWARD KUNSTLER, *GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA’S MAN-MADE LANDSCAPE* 119 (1993).

¹⁴ For a history of public space in the United States, see generally *id.*

¹⁵ *See id.* at 103–21; *see also* KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 246–71 (1985) (detailing the displacement of downtown business districts in favor of shopping centers and suburban office space).

almost completely displaced downtown areas as the primary place for Americans to shop.¹⁶ Today, many downtown areas are largely abandoned, leaving wastelands where true public speech is impossible.¹⁷

B. PUBLIC SPACE AND THE SIMULATED CITY

Critics have used many names to describe the simulated city,¹⁸ including exopolis,¹⁹ edge city,²⁰ postsuburb,²¹ cybur-

¹⁶ KUNSTLER, *supra* note 13, at 119.

¹⁷ See *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 91 (1980) (Marshall, J., concurring) (“Rights of free expression become illusory when a State has operated in such a way as to shut off effective channels of communication.”).

Only the myopic magnifying lens of the television camera maintains the demonstration, march, and picketing as a modality of political expression; they have otherwise faded into meaninglessness . . . with the shift of urban form and activity. These acts and activities have been displaced over the past decade from the square and main street to the windswept emptiness of City Hall Mall or Federal Building Plaza. To encounter a ragtag mob of protesters in such places today renders them even more pathetic, their marginality enforced by a physical displacement into so unimportant, uninhabited, and unloved a civic location.

Trevor Boddy, *Underground and Overhead: Building the Analogous City*, in VARIATIONS ON A THEME PARK: THE NEW AMERICAN CITY AND THE END OF PUBLIC SPACE 123, 125 (Michael Sorkin ed., 1992).

¹⁸ Peter Halley coined the term “simulated city” to refer to suburban environments that “simulate the phenomenon of the center.” Peter Halley, *Notes on Nostalgia*, in PETER HALLEY COLLECTED ESSAYS 1981-1987, 135 (Cheryl Epstein ed., 2000) (1988). This note uses the term “simulated city” because it is the most similar to the legal idea that the public has the same free speech entitlements in a privately-owned town that is functionally equivalent to a municipality. See *Marsh v. Alabama*, 326 U.S. 501, 502-08 (1946).

¹⁹ Edward W. Soja, *Inside Exopolis: Scenes from Orange County*, in VARIATIONS ON A THEME PARK: THE NEW AMERICAN CITY AND THE END OF PUBLIC SPACE 94, 95 (Michael Sorkin ed., 1992).

²⁰ JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* 4-8 (1991). Garreau employs a five-part definition for an edge city, which is any area that has: (1) at least 5 million square feet of office space; (2) at least 600,000 square feet of leasable retail space or the equivalent of a fair-sized mall; (3) more jobs than bedrooms, so that the population is larger during the day than at night; (4) a public perception as being one place, so that it is a “regional end destination for mixed use;” (5) had rapid growth, an area was not a “city” thirty years ago, but rather a traditional suburb (mostly all residential) or farmland. *Id.* at 6-7. Garreau identified over 200 edge cities in the United States. For a list of the cities, see *id.* at 426-38.

²¹ Rob Kling et al., *The Emergence of Postsuburbia: An Introduction*, in POSTSUBURBAN CALIFORNIA: THE TRANSFORMATION OF ORANGE COUNTY SINCE WORLD WAR II 1, 6 (Rob Kling et al. eds., 1991).

[T]hese centers are functionally specialized and separated by travel times of from fifteen-to-thirty minutes. People are likely to travel by automobile *across* city boundaries for work, socializing, and shopping as much as *within* them. . . . Further, such regions typically contain several centers with specific foci (such as shopping *and* entertainment) that provide multiple attractions for many residents. Instead of stores and residences being integrated into neighborhoods, or shopping being mixed in with industrial workspaces, one will find in postsuburbia distinct and separable centers-residential neighborhoods, shopping malls, and industrial parks.

Id. at ix.

bia,²² and exurb.²³ Social critic Edward W. Soja perhaps best described the form of the simulated city:

The metropolitan forms that have become so familiar to us—with dominating downtowns, concentric rings of land uses spreading out from the tightly packed inner city to sprawling dormitory suburbs, density gradients declining neatly from core to periphery—are now undergoing radical deconstruction and reconstitution, exploding and coalescing today in multitudes of experimental communities of tomorrow, in improbable cities where centrality is virtually ubiquitous and the solid familiarity of the urban melts into air.²⁴

The centerless simulated city emulates familiar urban forms in what many consider an improvement over city life: the simulations are rendered safer, more homogenized, and more consumable.²⁵ The simulated city has enclosed malls instead of Main Street, gated communities instead of neighborhoods, and campus-style industrial parks instead of downtown office buildings.²⁶ Simulated cities are currently the fastest growing communities in the United States,²⁷ and a substantial portion of the American population already lives in such areas.²⁸ Effectively, simulated cities have no real public spaces. These simulated spaces that have replaced the public spaces in urban environments are actually private spaces which are *almost* indiscriminately open to the public.

²² Michael Sorkin, *Introduction: Variations on a Theme Park*, in *VARIATIONS ON A THEME PARK: THE NEW AMERICAN CITY AND THE END OF PUBLIC SPACE* xi, xii (Michael Sorkin ed., 1992). Sorkin describes cyburbia as:

[A]n architecture of deception which, in its happy-face familiarity, constantly distances itself from the most fundamental realities. The architecture of this city is almost purely semiotic, playing the game of grafted signification, theme-park building. Whether it represents generic historicity or generic modernity, such design is based in the same calculus as advertising, the idea of pure imageability, oblivious to the real needs and traditions of those who inhabit it.

Id. at xiv-xv.

²³ Judy S. Davis et al., *The New 'Burbs': The Exurbs and Their Implications for Planning Policy*, 60 J. AM. PLANNING ASS'N. 45 (1994).

²⁴ Soja, *supra* note 19, at 95.

²⁵ *See id.* at 94-95 (describing Orange County as "a park-themed paradise, the American Dream repetitively renewed and infinitely available . . . to be encountered and consumed with an almost endemic simultaneity").

²⁶ *See generally id.*

²⁷ Davis, *supra* note 23, at 45-46.

²⁸ Although exact numbers are difficult to ascertain, due to the various differences in definitions, it is estimated that 58.7 million Americans lived in exurban communities in 1990. *Id.* at 46.

1. *Simulated Main Street*

Shopping centers have largely replaced the traditional “business block” in American downtowns as a marketplace and community center.²⁹ The 45,721 shopping centers in the United States account for over half of all retail sales.³⁰ Malls have also shouldered widespread community functions. Events at the Carousel Mall in Syracuse, New York include fundraising for a local high school, a local youth program soliciting volunteers, a beauty pageant, and a girl-scout cookie-eating contest.³¹ The Mall of America in Bloomington, Minnesota has installed facilities for thousands of walkers to keep track of mileage as they exercise within the mall.³² Other amenities offered by the Mall of America include a full-service post office, a college campus, a wedding chapel,³³ and an alternative high school.³⁴ Newer malls are taking their community function to even greater heights. In an incredible emulation of traditional town business districts, where people commonly lived above businesses, some newer mega-malls are even including housing.³⁵ As

²⁹ The shopping center industry itself has characterized shopping centers as “the new downtown.” Note, *Private Abridgment of Speech and the State Constitutions*, 90 YALE L.J. 165, 168 n.19 (1980) (quoting SHOPPING CENTER WORLD, Feb. 1972, at 52). Courts have also placed great emphasis on the fact that shopping malls are displacing the traditional downtown. See *N.J. Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757, 774 (N.J. 1994) (recognizing the “total transformation of private property to the mirror image of a downtown business district and beyond that, a replica of the community itself The regional and community shopping centers have achieved their goal: they have become today’s downtown and to some extent their own community; their invitation has brought everyone there for all purposes.”); *Amalgamated Food Employees Union Local 590 v. Logan Valley*, 391 U.S. 308, 319 (1968) (recognizing that “the shopping center serves as the community business block”); *Hudgens v. NLRB*, 424 U.S. 507, 539 (1976) (Marshall, J., dissenting) (“[T]he owner of the modern shopping center complex, by dedicating his property to public use as a business district, to some extent displaces the ‘State’ from control of historical First Amendment forums, and may acquire a virtual monopoly of places suitable for effective communication.”); see also KUNSTLER, *supra* note 13, at 119–20.

³⁰ International Council of Shopping Centers, *Did You Know?* (2002), at <http://www.icsc.org/srch/about/DidYouKnow.pdf> (last visited Nov. 16, 2003).

³¹ Carousel Center, *News and Events* (Jan. 19, 2002), at <http://www.carouselcenter.com/news/listEvents.asp> (last visited Jan. 19, 2002).

³² Eric Slater, *10-Year-Old Mall of America Discounts Doubters*, L.A. TIMES, Sept. 15, 2002, at A1.

³³ *Id.*

³⁴ BLOOMINGTON THOMAS JEFFERSON SENIOR HIGH SCHOOL, 2002-2003 REGISTRATION GUIDE 48 (2002), available at <http://www.bloomington.k12.mn.us/indschool/TJ/courses/JH-SGuide48.html> (last visited Oct. 27, 2003) (copy on file with author).

³⁵ Matt Valley, *The Remalling of America*, NAT’L REAL EST. INVESTOR, May 1, 2002, at 4 (describing a mall renovation which will include the addition of 105 housing units); see also *The Early Show* (CBS television broadcast, May 22, 2002) (copy of transcript on file with author) (reporting on outdoor malls in North Carolina that look exactly like small town business districts, including apartments above businesses).

the New Jersey Supreme Court has observed, “malls are where the people can be found today.”³⁶

Popular culture has also begun to represent the community function of malls. In the film *Mall Rats*,³⁷ the mall had particular significance as a community place where young people pass the time when they have nothing else to do. Woody Allen used the shopping mall as a backdrop for *Scenes From a Mall*,³⁸ forgoing the usual ultra-urban New York City background. Even the flesh-eating zombies in *Dawn of the Dead* seem to have a vague recall of the community function the mall served as they return there because of the “memory . . . [of] what they used to do. This was an important place in their lives.”³⁹

The creation of new community spaces is normally a happy event. Yet the rise of malls as a public space has left the public at the mercy of the mall owner’s determination of what constitutes acceptable speech inside the mall. Recently, the issues relating to free speech in shopping malls received a significant amount of media attention when massive public protests accompanied the military buildup for war in Iraq. In upstate New York, for example, a protest and widespread media coverage followed after authorities arrested a man for wearing a t-shirt which read “Give Peace a Chance” inside a shopping mall.⁴⁰ Reactions to the arrest were highly emotional. One commentator on MSNBC even suggested that a swastika should be painted on the exterior of the mall.⁴¹ Following the arrest, a crowd of 100 people gathered in the mall to protest the mall policy.⁴² Although often less public, the peace movement has had other incidents that demonstrate the frustration encountered when attempting to publicly voice its message in community space that is controlled by

³⁶ N. J. Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 767 (1994).

³⁷ MALLRATS (Universal Studios 1995).

³⁸ SCENES FROM A MALL (Buena Vista 1991).

³⁹ DAWN OF THE DEAD (Anchor Bay Entertainment 1979).

⁴⁰ For the original story, see Carol DeMare, *He Kept His Shirt On—and Got Arrested*, TIMES UNION (Albany, NY), March 5, 2003, at B1. The story quickly gained national and international attention. See, e.g. Conor O’Clery, *First Amendment to the Rescue as Shopping Malls and Cheney Get Shirty*, IRISH TIMES, March 8, 2003, at 13; *Short Wave*, Sunday Times (South Africa), March 9, 2003, at Leisure and Lifestyle 4, available at <http://www.sundaytimes.co.za/2003/03/09/lifestyle/life18.asp> (last visited Nov. 17, 2003).

⁴¹ Bill Press suggested this. Pat Buchanan replied that the mall is private property and should have the right to expel whomever they wish. Press asked Buchanan if the mall should be able to expel shoppers who read a Bible in the mall. Buchanan replied, “Private—private property!” *Countdown: Iraq* (MSNBC television broadcast March 5, 2003) (copy of transcript on file with author). An editorial in a Tampa, Florida newspaper compared the mall owners to “jackbooted storm troopers.” Daniel Ruth, *You Can Take The Peace Stuff Only So Far*, TAMPA TRIB., March 10, 2003, at Nation/World 2.

⁴² *Countdown: Iraq*, *supra* note 41.

private shopping malls.⁴³ One commentator has suggested that the attention heaped upon this incident is a result of the fact that Americans do not realize that they waive significant constitutional rights upon entering a shopping mall.⁴⁴

Even when clothing does not display a controversial political message, shopping malls routinely expel shoppers for their attire. An article in the online magazine *Salon* details the growing trend of malls forbidding shoppers from wearing “gang related” clothing while on the premises.⁴⁵ One St. Louis area mall even expelled rap star Nelly from mall property for wearing a “do-rag,” which was an item of clothing the mall’s dress code expressly forbade.⁴⁶ Because it is exceedingly difficult to tell exactly what gang clothing is, the real purpose of the policy appears to be to give mall security *carte blanche* to expel black youths from mall premises, rather than to prevent gang activity.⁴⁷ Some critics agree, charging that the anti-gang clothing policies are actually a form of “ethnic cleansing” aimed at young black males.⁴⁸

2. *Simulated Neighborhoods*

Gated communities and other common interest communities are largely replacing the traditional city neighborhood. Gated communities vary in size and form, with some developments containing only a few dozen units, while others have several thousand.⁴⁹ In some areas, gated communities are becoming more common than un-gated developments. For example, in a recent poll in south Orange County, California, 48 percent of respondents indicated that they lived in a gated community, and 62 percent expressed a desire to live in a gated community.⁵⁰ Nationally, 27.4 percent of the population would like to live in a gated com-

⁴³ Maria Allwine, *Peace Protestors Arrested and Detained in Baltimore Suburb*, BUZZFLASH.COM, March 4, 2003, at http://www.buzzflash.com/contributors/03/03/04_protest.html (last visited Nov. 17, 2003).

⁴⁴ See O’Clery, *supra* note 40. Several others have expressed confusion over why First Amendment rights are not protected in shopping malls. See, e.g., *Countdown: Iraq*, *supra* note 41; Lance Morrow, *The Right to Wear T-Shirts: Let’s Not Trample the Constitution in Our March Against Terrorism*, TIME, Mar. 17, 2003, at 90.

⁴⁵ Any Benfer, *Policing Gangsta Fashion*, SALON.COM, May 29, 2002, at <http://www.salon.com/mwt/feature/2002/05/29/nelly/print.html> (last visited Oct. 25, 2003) (copy on file with author).

⁴⁶ *Id.* A do-rag fits in the mall’s prohibited category of “commonly known gang-related paraphernalia,” which includes but is not limited to “wearing or showing a bandana or do rag of any color, a hat tilted or turned to the side, a single sleeve or pant leg pulled/rolled up and flashing gang signs.” *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Jim Radcliffe, *Owner of Coto Store Faces Resistance on Expansion*, ORANGE COUNTY REG., Jan. 18, 2002, at 1.

⁵⁰ Stephen Lynch, *Is Gated Dated?*, ORANGE COUNTY REG., Nov. 4, 2001, at Accent 1.

munity.⁵¹ More than 8.5 million Americans reside in one of the estimated 20,000 gated communities nationwide.⁵² Including gated communities, in 1992, 32 million Americans lived in a private community in which a homeowner's association owns the roads, sidewalks and parks.⁵³ The people who move into these gated communities are often seeking a greater sense of community and profess a desire to return to small town values.⁵⁴

II. EXPRESSIVE CONDUCT ON PRIVATE PROPERTY AND THE UNITED STATES CONSTITUTION

The right to exclude is one of the most fundamental of all property rights.⁵⁵ Yet the state also may regulate property, so long as that regulation does not result in a "taking" of the property, whereby the state, through excessive regulation, effectively occupies the property.⁵⁶ The state routinely exercises its power to regulate private property through such devices as zoning laws and environmental regulation.⁵⁷ The Supreme Court has held that the Constitution provides that, where private property is the functional equivalent of a municipality, the public shall have a free speech right on that property.⁵⁸

A. THE FUNCTIONAL EQUIVALENT OF A MUNICIPALITY

When a private entity undertakes a function that is municipal in nature, the courts will consider the entity to be a "state actor."⁵⁹ As such, the private entity must not impose restrictions that interfere with the public's constitutional rights. This "functional equivalent" doctrine grows out of the 1946 Supreme Court case *Marsh v. Alabama*.⁶⁰ In *Marsh*, the appellant entered the privately owned company town of Chickasaw, Alabama and distributed religious literature on a street corner.⁶¹ The company did not permit solicitation of any kind, and the appellant was

⁵¹ *Id.*

⁵² Ray Tessler & David Reyes, *2 O.C. Gated Communities are Latest to Seek Cityhood*, L.A. TIMES (Orange County Edition), Jan. 25, 1999, at A1.

⁵³ Frank Askin, *The Privatization of Public Space and Its Impact on Free Speech*, N.J. LAWYER, June 1997, at 12,t.

⁵⁴ EDWARD J. BLAKELY & MARY GAIL SNYDER, *FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES* 29-45 (1997).

⁵⁵ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

⁵⁶ See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

⁵⁷ See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (establishing the constitutional validity of zoning regulations).

⁵⁸ See *Marsh v. Alabama*, 326 U.S. 501, 507-09 (1946).

⁵⁹ See *id.* at 506-08.

⁶⁰ *Id.*

⁶¹ *Id.* at 502-03.

arrested and charged with trespassing.⁶² The Court held that the privately-controlled town was a state actor because it was the functional equivalent of a municipality.⁶³ Chickasaw appeared to be a town just like any other,⁶⁴ with no barriers denying the public's full and complete access to the town.⁶⁵ As a state actor, the company town was bound to respect the public's First Amendment rights, just as any government actor would, and therefore had to respect the public's right to freedom of expression in the town.⁶⁶ The Court reasoned that the more that private owners open up their property for the public, the more their rights become circumscribed by those who use the property.⁶⁷ Furthermore, the Court held that the First Amendment right applied not only to those who enter the town to engage in expressive activity, but also to those individuals living in company towns who have the right to be informed through uncensored information.⁶⁸

In 1966, *Evans v. Newton*⁶⁹ extended the *Marsh* holding to include privately-run parks. Senator Augustus O. Bacon left property in Macon, Georgia to be operated in trust as a park (by a private trustee) with the proviso that only whites could use the park.⁷⁰ The Court held that the privately-owned park should be treated as if it were owned by a state actor because the functions of the park were "municipal in nature" and a park "traditionally serves the community."⁷¹ Thus, enforcement of the whites-only rule at the park would violate the equal protection clause of the Fourteenth Amendment.⁷² Justice Rehnquist later clarified this holding in *Flagg Bros. v. Brooks*,⁷³ where he indicated that parks intended for purely recreational purposes—presumably places such as Six Flags or Disney World—would not qualify as state actors.⁷⁴

Two years after *Evans*, the Supreme Court decided *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*,⁷⁵ the high-water mark for the Court's state actor cases. In *Logan Valley*, the Court extended the *Marsh* holding to include shopping malls, reasoning that large shopping malls are the functional equivalent of downtown business

⁶² *Id.* at 503-04.

⁶³ *Id.* at 507-09.

⁶⁴ *Id.* at 502-03, 506-09.

⁶⁵ *Id.*

⁶⁶ *Id.* at 507-09.

⁶⁷ *Id.* at 506.

⁶⁸ *Id.* at 508-09.

⁶⁹ 382 U.S. 296 (1966).

⁷⁰ *Id.* at 297.

⁷¹ *Id.* at 301-02.

⁷² *Id.* at 302.

⁷³ 436 U.S. 149 (1978).

⁷⁴ *Id.* at 159 n.8.

⁷⁵ 391 U.S. 308 (1968).

districts.⁷⁶ The Court rejected the defendant's contention that title to the property gave the mall the right to exclude those who engaged in activities of which the mall did not approve.⁷⁷ The Court reasoned that, unlike an individual's home, operating a space where the public was permitted to freely gather entailed no privacy interest, and thus there was no blanket right to exclude.⁷⁸

The holdings in *Logan Valley* and *Evans* permitted courts to conceptually divide cities. If a private interest simulated a public space, thereby creating a "functional equivalent" of a traditionally public area (a business district in *Logan Valley* and a park in *Evans*), the owner of that property would lose much of his power to exclude individuals.⁷⁹ This permitted courts to apply the rule in a far greater variety of situations than would have been permitted under a narrow reading of *Marsh*, where individuals living in a private company town enjoy First Amendment rights only if a single private interest owns and simulates the entire town. Justice Black, who authored the *Marsh* opinion, dissented in *Logan Valley*, arguing:

I think it is fair to say that the basis on which the *Marsh* decision rested was that the property involved encompassed an area that for all practical purposes had been turned into a town; the area had all the attributes of a town and was exactly like any other town in Alabama. I can find very little resemblance between the shopping center involved in this case and Chickasaw, Alabama. There are no homes, there is no sewage disposal plant, there is not even a post office on this private property which the Court now considers the equivalent of a "town."⁸⁰

In short, Justice Black wanted to limit the *Marsh* rule to situations that were factually identical to *Marsh*.

The Court soon began to reduce the broad scope of the state actor rule. In *Lloyd Corp. v. Tanner*,⁸¹ the Court examined the rights of people who, in a large shopping mall in Oregon, distributed handbills protesting

⁷⁶ *Id.* at 319.

⁷⁷ *Id.* at 324.

⁷⁸ *Id.*

⁷⁹ *See id.* at 319–20 (holding that when a "shopping center serves as the community business block" and is accessible and open to the public, the owners cannot exclude the public's exercise of 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"); *Evans v. Newton*, 382 U.S. 296, 302 (1966) ("the public character of this park requires that it be treated as a public institution").

⁸⁰ *Logan Valley*, 391 U.S. at 331 (Black, J., dissenting).

⁸¹ 407 U.S. 551 (1972).

the Vietnam War. The Court held that the anti-war protesters had no general right to conduct expressive activity in the shopping mall.⁸² It distinguished *Lloyd* from *Logan* on the basis that the speech in *Logan* involved labor issues relating directly to a business within the shopping mall.⁸³ The Court preserved the right to engage in expressive activity in shopping centers where it related directly to shopping center operations.⁸⁴ Thus, the public would be free to speak on issues relating to employment, sales, or environmental practices of a particular business within the shopping center, but the shopping center could no longer be considered a generally open public forum.

The Supreme Court destroyed what was left of *Logan* four years later with its holding in *Hudgens v. NLRB*.⁸⁵ The Court essentially narrowed the *Marsh* holding to situations in which the entity in question undertakes *all* of the responsibilities of a municipality.⁸⁶ To be deemed a state actor, the area must include “residential buildings, streets, a system of sewers, a sewage disposal plant and a ‘business block’ on which business places are situated.”⁸⁷ Thus, the Court overruled *Logan* and restricted the *Marsh* holding to cases in which the factual circumstances are virtually identical to those in *Marsh*.

B. *MARSH* AND THE SIMULATED CITY

However, given the continuous suburbanization in the United States, which has occurred since the Court decided *Hudgens*, evolving social change may merit reconsideration of the shopping center as a state actor.⁸⁸ In 2001, shopping centers accounted for over half of the nation’s retail business.⁸⁹ However, shopping malls were a relatively new and novel phenomenon when the Supreme Court refused to recognize free speech rights in shopping centers. When the Court decided *Lloyd* in 1972, it described the shopping center as follows:

⁸² *Id.* at 563–64.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ 424 U.S. 507 (1976).

⁸⁶ *Id.* at 513–14, 539.

⁸⁷ *Id.* at 516 (quoting *Marsh v. Alabama*, 326 U.S. 501, 502 (1946)). In his dissent, Justice Marshall argued that:

The underlying concern in *Marsh* was that traditional public channels of communication remain free, regardless of the incidence of ownership. Given that concern, the crucial fact in *Marsh* was that the company owned the traditional forums essential for effective communication; it was immaterial that the company also owned a sewer system and that its property in other respects resembled a town.

Hudgens, 424 U.S. at 539 (Marshall, J., dissenting).

⁸⁸ See KUNSTLER, *supra* note 13, at 117–21; JACKSON, *supra* note 15, at 257–61.

⁸⁹ International Council of Shopping Centers, *supra* note 30.

The Center embodies a relatively new concept in shopping center design. The stores are all located within a single large, multi-level building complex sometimes referred to as the "Mall." Within this complex, in addition to the stores, there are parking facilities, malls, private sidewalks, stairways, escalators, gardens, an auditorium, and a skating rink. Some of the stores open directly on the outside public sidewalks, but most open on the interior privately owned malls. Some stores open on both. There are no public streets or public sidewalks within the building complex, which is enclosed and entirely covered except for the landscaped portions of some of the interior malls.⁹⁰

At the time of the *Lloyd* and *Hudgens* decisions, the process of decay in the nation's downtown areas had only just begun. Now the process has long been completed, but the state actor rule has remained the same. And many communities throughout the country lack an effective area where one can publicly engage in expressive conduct.⁹¹

Hudgens restricts the *Marsh* holding to situations where a private entity has essentially constructed an entire town.⁹² But the Court's definition rests upon an anachronistic conception of towns, which is best suited to pre-World War II America. Few towns in the exopolis have "residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated"⁹³ together as a distinct unit. In the simulated cities, one can fully observe how constraining this holding has been; in the world of shopping malls, common interest communities, and corporate industrial parks, citizens are left with nowhere to engage others freely in social and political discourse. Even where one does not wish to exercise this right, one is still deprived of the opportunity to be engaged by others.⁹⁴

The new mega-malls may present a compelling argument to extend the reach of *Marsh*. Consider the Mall of America in Bloomington, Minnesota, which has a post office, a university, a wedding chapel, and a private security force to keep order.⁹⁵ If one holds to the narrow definition of town in *Hudgens*, the Mall of America almost certainly will not

⁹⁰ *Lloyd Corp. v. Tanner*, 407 U.S. 551, 553 (1972).

⁹¹ See generally KUNSTLER, *supra* note 13, JACKSON, *supra* note 15.

⁹² See *Hudgens*, 424 U.S. at 516, 539.

⁹³ *Marsh v. Alabama*, 326 U.S. 501, 502 (1946).

⁹⁴ *Id.* at 508. The responsibilities of citizenship require that citizens must "be informed. In order to enable them to be properly informed their information must be uncensored." *Id.*

⁹⁵ Slater, *supra* note 32.

be considered a state actor.⁹⁶ After all, it has no streets, nor any residential buildings.

Some newer malls are adding residential units to their design.⁹⁷ It remains to be seen how this new phenomenon will affect the Court's analysis. It does seem to add the key ingredient missing from the *Hudgens* requirements for state actors. However, technically there are still no streets inside most mega-malls. Also, their amusement park-like nature might work against characterizing them as state actors, considering Justice Rehnquist's footnote comment in *Flagg Bros.*, where he advises that parks intended for purely recreational purposes are not municipal in nature.⁹⁸

If there remains any current phenomenon that clearly will still be controlled by *Marsh*, the "New Towns" in Florida and elsewhere likely qualify.⁹⁹ Celebration, Florida is the most commonly known "New Town." The Disney Corporation designed and constructed Celebration based on the tenants of New Urbanism, a planning philosophy that encourages pedestrian-friendly streets, strong downtown business districts, and old-style front porches.¹⁰⁰ Disney and the Celebration homeowners association own the common areas of the town.¹⁰¹ Celebration is not an incorporated city, even though its population will eventually hit 20,000, and its physical appearance resembles a city in every significant way.¹⁰² One way in which it differs substantially from a city is its lack of a municipal government.¹⁰³ Instead, a homeowners association, in which each resident can participate, controls the administration of the town along with Disney.¹⁰⁴ The Disney Corporation is given final veto power over all decisions.¹⁰⁵ If the courts were to refuse to characterize Celebration as a state actor, the citizens of that town would have little recourse

⁹⁶ The Minnesota Supreme Court has refused to take an expansive view of First Amendment rights in the Mall of America. See *Minnesota v. Wicklund*, 589 N.W.2d 793 (Minn. 1999) (holding that Mall of America is not a state actor).

⁹⁷ See *supra* note 35.

⁹⁸ 436 U.S. 149, 159 n.8 (1978). But one could make the argument that existing public space is also becoming more like amusement parks—consider Times Square in New York and the main public areas in Las Vegas.

⁹⁹ For the purposes of illustration I will focus on Celebration, Florida, which is the most famous new town. However, there are at least a half-dozen other new towns in the United States, including Kentlands, Maryland, Seaside, Florida (which served as the set for the film *THE TRUMAN SHOW* (Paramount 1998)), and Columbia, Missouri. All are privately owned.

¹⁰⁰ Michael Pollan, *Town-Building Is No Mickey Mouse Operation*, N.Y. TIMES, Dec. 14, 1997, § 6 (Magazine), at 56.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

against corporate form of government the Disney Corporation has established.¹⁰⁶

Of course, Celebration is not exactly a company town. Two possible distinctions between Celebration and Chickasaw (the “town” at issue in *Marsh*) are evident. First, the common areas of Celebration are owned by a corporation (the homeowners association) which is in turn owned in common by the residents of Celebration. Thus, unlike Chickasaw, the town is owned by its residents, not by a third party. Second, the residents of Celebration actually own their own homes, whereas in Chickasaw the corporation owned the homes as well as the common areas. However, both of these arguments should ultimately fail. While the common areas are owned in common, Disney holds an unqualified veto power, effectively giving them complete discretion over how the town is controlled. Also, the weight of the individual homeownership factor is diminished somewhat by the high degree of control asserted by Disney and the homeowners association, including authority to determine permissible types of shrubbery, house exterior colors, and the limitation on political signs.¹⁰⁷

Gated communities likely fall outside the scope of *Marsh*, as interpreted under *Hudgens*. Gated communities commonly include clubhouses, golf courses, parks, private schools and other similar amenities.¹⁰⁸ However, there does not seem to be any communities that include full business districts inside the gates. Even Coto de Caza, an Orange County gated community of 13,000 residents, only has one small general store inside the gates.¹⁰⁹ So, as similar as gated communities are to towns, the *Hudgens* requirement that an entity possess *all* the attrib-

¹⁰⁶ See *id.*

It may be Disney’s boldest innovation at Celebration to have established a rather novel form of democracy, one that is based on consumerist, rather than republican, principles. For many of the people I met at Celebration, the measure of democracy is not self-rule but responsiveness—they’re prepared to surrender power over their lives to a corporation as long as that corporation remains sensitive to their needs. This is the streamlined, focus-grouped responsiveness of the marketplace, rather than the much rougher responsiveness of elected government—which for many Americans was discredited a long time ago. Of course, the consumerist democracy holds only as long as the interests of the corporation and the consumer are one. So far, this has largely been the case, if only because all the community’s “stakeholders” have dedicated themselves to the proposition of maintaining high property values—which is one way, I suppose, to define the public interest.

Id.

¹⁰⁷ *Id.* Celebration limits political signs on front yards to one 18’x24’ sign posted no more than 45 days before an election. *Id.*

¹⁰⁸ BLAKELY & SNYDER, *supra* note 54, at 1–29.

¹⁰⁹ See Radcliffe, *supra* note 49.

utes of a municipality will likely preclude gated communities from being characterized as state actors.¹¹⁰

Another interesting trend is the popularity of mini-amusement parks as a gathering place for teenagers. Especially in the post-suburban world of Orange County where "cities often have no center and parks often have no jungle gyms, places like Boomers [a mini-amusement park] have become the de facto hangout for a Saturday afternoon or weekday evening."¹¹¹ One park owner went so far as to say, "We're a community center, a local gathering place."¹¹² It seems that while parks may start as purely recreational places, they may evolve into something more. However, it seems highly unlikely that the Court would protect the exercise of First Amendment rights on these properties.

III. PROGRESSIVE STATE MODELS

Although the Court has not reconsidered its holding in *Hudgens*, it further developed its shopping mall jurisprudence in *PruneYard Shopping Center v. Robins*.¹¹³ The California Supreme Court had held that the free speech provision in the California constitution provides greater rights than under the federal constitution and granted Californians an expressive right in shopping centers.¹¹⁴ In *PruneYard*, the United States Supreme Court upheld the California Supreme Court's decision and concluded that compelling a shopping center owner to permit expressive conduct: (1) did not result in an unconstitutional taking;¹¹⁵ and (2) did not violate the shopping center owner's First Amendment rights.¹¹⁶ Thus, states were left free to expand their own constitutional protection of freedom of speech to include shopping centers.¹¹⁷

A. CALIFORNIA

California was the first state to recognize a right to expressive conduct in shopping centers after the Supreme Court decided *Hudgens*.¹¹⁸ The *PruneYard* case arose after a shopping center ejected high school

¹¹⁰ See *Hudgens v. NLRB*, 424 U.S. 507, 516, 539 (1976).

¹¹¹ Stephen Lynch, *O.C. Trends: The New Downtowns for Kids*, ORANGE COUNTY REG., July 14, 2002, at 1.

¹¹² *Id.*

¹¹³ 447 U.S. 74 (1980).

¹¹⁴ *Robins v. PruneYard Shopping Center*, 592 P.2d 341 (Cal. 1979).

¹¹⁵ *PruneYard*, 447 U.S. at 82-85. For criticism of the takings aspect of *PruneYard*, see Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of PruneYard v. Robbins*, 64 U. CHI. L. REV. 21 (1997). For a critique of Epstein's argument, see Frank Michelman, *The Common Law Baseline and Restitution for the Lost Commons: A Reply to Professor Epstein*, 64 U. CHI. L. REV. 57 (1997).

¹¹⁶ *PruneYard*, 447 U.S. at 85-88.

¹¹⁷ See Coffin, *supra* note 5, at 624.

¹¹⁸ See *Robins*, 592 P.2d at 344, 350-51.

students who were attempting to gather signatures for a petition urging the United States to oppose a U.N. resolution against Zionism.¹¹⁹ Although the students did not create a disturbance and were generally well received by shoppers, mall security guards informed them that mall regulations forbade them from engaging in political activity on mall premises.¹²⁰ The students were left with few alternative venues in which to seek signatures for their petition, given that shopping centers had effectively replaced city centers as the main place for public gatherings in the San Jose area, where the PruneYard Shopping Center was located.¹²¹ The Court held (1) that *Lloyd Corp. v. Tanner*¹²² did not give shopping mall owners the absolute property right to eject the public from the shopping center, and (2) that the California constitution afforded people in California greater free speech rights than under the Federal Constitution.¹²³ The Court reasoned that First Amendment rights must evolve to cope with changing patterns of development.¹²⁴ To a large extent, the Court stated, First Amendment rights exist where the public openly and freely gathers.¹²⁵ Furthermore, the Court indicated that the California constitution envisions strong citizen activity through the use of referendum, recall, and initiative.¹²⁶ According to the Court, this high level of grassroots citizen activity envisioned by the California constitution further justified the state's use of its police power to regulate private property to protect political speech.¹²⁷

Free speech advocates have argued that the rule should be expanded to include stand-alone suburban retailers, but the courts have held that

¹¹⁹ *Id.* at 342.

¹²⁰ *Id.*

¹²¹ *See id.* at 345. The court cites incredible statistics:

Evidence submitted by appellants in this case helps dramatize the potential impact of the public forums sought here: (1) As of 1970, 92.2 percent of the county's population lived outside the central San Jose planning area in suburban or rural communities. (2) From 1960 to 1970 central San Jose experienced a 4.7 percent decrease in population as compared with an overall 67 percent increase for the 19 north county planning areas. (3) Retail sales in the central business district declined to such an extent that statistics have not been kept since 1973. In 1972 that district accounted for only 4.67 percent of the county's total retail sales. (4) In a given 30-day period between October 1974 and July 1975 adults making one or more shopping trips to the 15 largest shopping centers in the metropolitan San Jose statistical area totaled 685,000 out of 788,000 adults living within that area. (5) The largest segment of the county's population is likely to spend the most significant amount of its time in suburban areas where its needs and wants are satisfied; and shopping centers provide the location, goods, and services to satisfy those needs and wants.

Id.

¹²² 407 U.S. 551 (1974).

¹²³ *Robins*, 592 P.2d at 344-45.

¹²⁴ *Id.* at 346-47.

¹²⁵ *See id.*

¹²⁶ *Id.* at 345-46.

¹²⁷ *See id.*

PruneYard does not extend the public's free speech rights to such areas.¹²⁸ However, the courts have refused to free all stand-alone retailers from having any obligation to allow for expressive conduct.¹²⁹ The court in *Trader Joe's Co. v. Progressive Campaigns*, for instance, held that there is no bright-line test and, instead, courts must balance private property rights with public rights.¹³⁰ Factors to consider include the extent to which the public is invited to congregate at the property and the extent to which the property adopts a "public character."¹³¹ Thus, Trader Joe's, a grocery store, can restrict free speech because it invites the public to its establishment purely for the purpose of shopping, unlike the collection of stores in a shopping center, which generally invite the public to gather.¹³² Courts have also refused to extend *PruneYard* restriction to big-box retailers, even where there is a complex of connected stores.¹³³

Although the California courts have been highly liberal in finding a right to political speech in shopping centers, they have also been generally compliant in allowing shopping centers to limit speech through the use of "time, place, and manner" restrictions. Courts commonly allow such restrictions under First Amendment jurisprudence.¹³⁴ Speech restrictions in a traditional downtown public forum are only permissible "provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."¹³⁵ In the context of shopping centers, the courts have recognized the owner's property rights and engage in a balancing test, which ultimately ends in restrictions on expressive rights in shopping malls that are far greater than those allowed in downtown business districts. In *Union of Needletrades v. Superior Court*,¹³⁶ for instance, a California appeals court upheld several mall owners' highly restrictive free speech rules, including: designating small areas of the shopping center as expressive zones and forbidding expressive activities outside those zones;¹³⁷ "blackout periods," extending from

¹²⁸ *Trader Joe's Co. v. Progressive Campaigns Inc.*, 86 Cal. Rptr. 2d 442 (Cal. Ct. App. 1999).

¹²⁹ *Id.* at 448-49.

¹³⁰ *Id.* at 448-52.

¹³¹ *Id.* at 449.

¹³² *Id.* at 448-51.

¹³³ *See Slevin v. Home Depot*, 120 F. Supp. 2d 822 (N.D. Cal. 2000) (holding that a Home Depot store, even when connected to a Staples, did not constitute a public forum under *PruneYard*).

¹³⁴ *See generally Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1988).

¹³⁵ *Id.* at 293. *See also* LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 981-82 (2d ed. 1988).

¹³⁶ 65 Cal. Rptr. 2d 838 (Cal. Ct. App. 1997).

¹³⁷ *Id.* at 842-43.

Thanksgiving Day to New Years Day, where all expressive activity is prohibited;¹³⁸ prior approval of signs and pamphlets;¹³⁹ and a requirement of insurance and cleaning/damage deposits.¹⁴⁰

1. *PruneYard and the Simulated Neighborhood*

The *PruneYard* holding has also been tested in the context of gated communities.¹⁴¹ For example, the plaintiff in *Laguna Publishing Co. v. Golden Rain Foundation* wished to distribute free newspapers to residents that lived inside Leisure World, a private gated community.¹⁴² Leisure World allowed the distribution of another free paper within its gates, but forbade access to Laguna Publishing.¹⁴³ The California Supreme Court held that Laguna Publishing had a right to distribute its paper inside the Leisure World community.¹⁴⁴ The court relied heavily on *PruneYard's* reasoning that First Amendment rights should be allowed to evolve as societal conditions change, and that the state has the power to regulate private property to meet this need: "the ingenuity of the law will not be deterred in redressing grievances which arise, as here, from a needless and exaggerated insistence upon private property rights incident to [gated] communities."¹⁴⁵ But the holding in this case cannot be construed as generally allowing a free speech right in gated communities. Rather, *Laguna* holds that where a gated community opens itself to one particular speaker, it may not exclude other speakers who wish to express themselves in an identical manner. In other words, gated communities may not discriminate amongst viewpoints or speakers.¹⁴⁶

Although the outcome is favorable, the court's reasoning is problematic in several ways. The most obvious problem in relying so heavily on *PruneYard* is that the public was openly invited to enter the PruneYard shopping center.¹⁴⁷ Thus, the *PruneYard* decision relied

¹³⁸ *Id.* at 843-44.

¹³⁹ *Id.* at 844. The court noted that the Beverly Center required that signs:

"shall be two dimensional, neat in appearance, and compatible with the general aesthetics of the mall, shall not interfere with or directly compete with business displays or logos, and shall not contain obscene, pornographic, patently vulgar, gruesome or grisly material or displays, or highly inflammatory slogans likely to provoke a disturbance."

Id.

¹⁴⁰ *Id.* at 845-46. The court also considered a prohibition on interference with mall tenants, but did not reach a conclusion as to the validity of the prohibition. *Id.* at 854-55.

¹⁴¹ *Laguna Publ'g Co. v. Golden Rain Found. Of Laguna Hills*, 182 Cal. Rptr. 813 (Cal. Ct. App. 1982).

¹⁴² *Id.* at 815-16.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 837.

¹⁴⁵ *Id.* at 826.

¹⁴⁶ *See id.* at 826-29.

¹⁴⁷ *Robins v. PruneYard Shopping Center*, 592 P.2d 341, 344 (Cal. 1979).

mainly upon the rationale that the public does not relinquish its First Amendment rights when openly invited to congregate in a public space.¹⁴⁸ Leisure World, on the other hand, is a gated community with restricted access.¹⁴⁹ The court, however, dismissed this concern, stating that while Leisure World did not invite the public, it did have many of the attributes of a municipality.¹⁵⁰ Yet, the *PruneYard* holding did not depend upon a “functional equivalent of a municipality” test.¹⁵¹ Although the *Marsh* holding is still valid, the Supreme Court has made clear that a private entity must possess *all* of the attributes of a municipality before it is a state actor, *including* a business district.¹⁵² The *Laguna* court recognized its shortcomings and compensated by reasoning that this was in fact a mixed case and looked to three factors in determining that Leisure World was prohibited from excluding Laguna Publishing from the gated community: (1) *PruneYard* envisions an expansive right to regulate property in the interest of free speech; (2) Leisure World displayed many traits of a municipality; and (3) Leisure World discriminated against Laguna Publishing because it allowed other papers to be distributed.¹⁵³

Laguna is not settled law in California. The California Supreme Court subsequently held in *Golden Gateway Center v. Golden Gateway Tenants Ass'n* that the private property *must* be freely and openly accessible to the public before the owner is required to recognize First Amendment rights.¹⁵⁴ In *Golden Gateway*, the court reasoned that, because the Golden Gate Apartment Complex had not issued a general invitation to the public, there was no state action.¹⁵⁵ Although the court expressly declined to address whether gated communities are state actors,¹⁵⁶ it seems highly unlikely that that free speech rights will be extended into such communities in California, as they clearly do not invite the public onto their property.

B. NEW JERSEY

New Jersey has perhaps the strongest First Amendment protections in the nation. In *State v. Schmid*, the New Jersey Supreme Court granted the public the right to distribute political literature on Princeton Univer-

¹⁴⁸ *See id.*

¹⁴⁹ *Laguna Publ'g*, 182 Cal. Rptr. at 815.

¹⁵⁰ *Id.* at 824, 826-827.

¹⁵¹ In fact, the *PruneYard* opinion does not include any discussion regarding the “functional equivalent of a municipality” test. *See generally* *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

¹⁵² *Hudgens v. NLRB*, 424 U.S. 507, 518-21 (1976).

¹⁵³ *Laguna Publ'g*, 182 Cal.Rptr. at 824-29.

¹⁵⁴ 29 P.3d 797, 810 (Cal. 2001).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 811.

sity's campus.¹⁵⁷ The court recognized the state's "strong traditions which prize the exercise of individual rights and stress the societal obligations that are concomitant to a public enjoyment of private property."¹⁵⁸ The Court, drawing heavily from the *Marsh* line of cases and *PruneYard*,¹⁵⁹ formulated a balancing test whereby the courts would take into account:

(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.¹⁶⁰

In 1994, the New Jersey Supreme Court accepted a shopping mall case, *N.J. Coalition v. J.M.B. Realty Corp.*¹⁶¹ The court held that the *Schmid* balancing test clearly worked in favor of granting the public a limited expressive speech right in shopping centers.¹⁶² The court reasoned that, although the ultimate use of a shopping center is commercial, such property also allows broader public uses, "almost without limit."¹⁶³ According to the court, the invitation for the public to use the property was unqualified, and the speech (leafleting) was entirely consistent with the use of the property—leafleting was no more damaging to a shopping center than to a downtown business district.¹⁶⁴ In fact, the court noted, other shopping centers actually permitted the plaintiff to leaflet on their property.¹⁶⁵ The court stated that, furthermore, shopping centers routinely allow expressive conduct on their property, and thus are in a difficult position when arguing that this particular use is inconsistent with the function of the property.¹⁶⁶ Finally, the court recognized that rules governing free speech must evolve to meet social change:

If free speech is to mean anything in the future, it must be exercised at these centers. Our constitutional right encompasses more than leafleting and associated speech

¹⁵⁷ 423 A.2d 615 (N.J. 1980), *appeal dismissed sub. nom* Princeton Univ. v. Schmid, 455 U.S. 100 (1982).

¹⁵⁸ *Id.* at 630.

¹⁵⁹ *See id.* at 629–30.

¹⁶⁰ *Id.* at 630.

¹⁶¹ 650 A.2d 757 (N.J. 1994).

¹⁶² *Id.* at 760–61.

¹⁶³ *Id.* at 761.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 764–65 (emphasizing that while defendant claimed to disallow expressive conduct on controversial issues, many of the mall tenants displayed posters supporting the Gulf War, which was the very activity that the Plaintiff was trying to protest through leafleting).

on sidewalks located in empty downtown business districts. It means communicating with the people in the new commercial and social centers; if the people have left for the shopping centers, our constitutional right includes the right to go there too, to follow them, and to talk to them.¹⁶⁷

The holding in *N.J. Coalition* permits shopping mall owners to impose reasonable time, place, and manner restrictions on free speech activities.¹⁶⁸ Although the restrictions have not been as heavily tested in New Jersey as they have in California, the holding in *Green Party v. Hartz Mountain Industries*¹⁶⁹ attempted to establish reasonable guidelines for such restrictions. The *Green Party* court struck down restrictions that: (1) would limit an applicant's expressive activities to only one day per year; (2) required proof of a one million dollar insurance policy;¹⁷⁰ and (3) required the applicant to sign a "hold harmless" agreement that would indemnify the mall owner for any losses related to the activity and pay attorney fees in case of any litigation.¹⁷¹ In doing so, the court refused to use the "narrowly tailored to serve a compelling interest" standard that is used to evaluate restrictions on speech imposed by government.¹⁷² It also rejected the lower court's vaguely defined "business judgment rule" because the rule had "limited relevance in this context" and gave the shopping malls too much power to prevent speech in the malls.¹⁷³ Surprisingly, after having rejected two standards that have been carefully formulated and articulated, the Court made no attempt to articulate a new standard which would apply in shopping centers. The Court instead reasserted its original holding in *N.J. Coalition* 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."¹⁷⁴ The court recognized the "broad authority" of shopping center owners to formulate regulations that minimize the impact of expressive activities on the commercial operations of the mall.¹⁷⁵ However, the court noted that any regulations chosen "must be designed to achieve the mall's legitimate purposes while preserving

¹⁶⁷ *Id.* at 779.

¹⁶⁸ *Id.* at 783.

¹⁶⁹ 752 A.2d 315 (N.J. 2000).

¹⁷⁰ *Id.* at 318–19 (noting that one of the plaintiffs received a quote of \$655 from an insurance agency for a one-million dollar policy to cover one day of leafleting in the mall).

¹⁷¹ *Id.* at 319.

¹⁷² *Id.* at 325–36.

¹⁷³ *Id.* at 326–27 (noting uncertainty that "what is good for mall owners is . . . good for the citizens of New Jersey who seek to exercise their free speech rights").

¹⁷⁴ *Id.* at 327 (quoting *Marsh v. Alabama*, 326 U.S. 501, 506 (1946)).

¹⁷⁵ *Id.* at 327–28.

the leafleteer's expressive rights."¹⁷⁶ More recent New Jersey cases evaluating mall restrictions on speech do not exist. Thus, it remains to be seen how the New Jersey Supreme Court's common sense approach will play out.

1. *Schmid and the Simulated Neighborhood*

Just as in California, free speech advocates worked to extend the favorable free speech rules into new forms of residential living. The Galaxy Towers in the town of Guttenberg provided the ideal target—1,076 condominium units above a shopping mall,¹⁷⁷ a sort of post-suburban company town. The Galaxy Towers homeowners association chose particular local politicians to endorse and then allowed only those politicians to distribute campaign literature.¹⁷⁸ The Galaxy Towers residents represented nearly one-quarter of the local voters.¹⁷⁹ Not surprisingly, the excluded politicians felt substantially disadvantaged.¹⁸⁰ The court determined that the condominium complex met the *Schmid* requirements, and compelled the homeowners association to allow candidates not endorsed by the homeowners association the right to distribute flyers to the 1,076 units in the Galaxy Complex.¹⁸¹ Galaxy Towers had made distribution of fliers a normal use of its property, and thus the court reasoned that a public invasion caused by further distribution of political fliers would be minimal.¹⁸²

However positive the result here, *Guttenberg* does not create a general rule allowing the public access to community associations for the purpose of political speech. The court made clear that the situation in *Guttenberg* was extremely fact-sensitive.¹⁸³ At best, this case recognizes a right of reply.¹⁸⁴ That is, where a private property is opened to a kind of speech, it will be required to generally allow that kind of speech without discriminating among different speakers.

It seems that a more determined court could have adopted the *Marsh* holding completely in this case, finding that the property was the

¹⁷⁶ *Id.* at 328.

¹⁷⁷ *Guttenberg Taxpayers & Rentpayers Ass'n v. Galaxy Towers Condo. Ass'n*, 688 A.2d 156, 157 (N.J. Super. Ct. Ch. Div. 1996).

¹⁷⁸ *Id.* at 156–57.

¹⁷⁹ *Id.* at 157–58.

¹⁸⁰ *See id.* (noting that politicians have consistently lost in other districts, yet won their respective contests by “carrying overwhelming majorities” in the district containing the Galaxy Towers condominium).

¹⁸¹ *Id.* at 158.

¹⁸² *Id.*

¹⁸³ *Id.* at 158–59.

¹⁸⁴ *See Askin, supra* note 53, at 14 (noting that if the condominium association “decides to cease handing out election materials to its members, the plaintiffs lose their right to respond”).

functional equivalent of a municipality, as the Galaxy Towers did contain the essential elements - a residential area and a business district. *Guttenberg* did not resolve the question of how a court would rule if faced with the problem of speech in an actual gated community, with no similar business district attached. However, it seems that, if the property opened itself to speech, it could be forced to refrain from discriminating among different speakers. For example, if a gated community allows a town's Democratic candidate for mayor to attend community functions for political purposes, such as a community barbecue, it may not be able to bar the Republican candidate from attending similar functions.¹⁸⁵

C. OTHER STATES

At least twenty-one states have decided at least one shopping mall case since the Supreme Court decided *PruneYard* in 1980.¹⁸⁶ States declining to extend citizens an expressive right in shopping centers include Minnesota,¹⁸⁷ Connecticut,¹⁸⁸ Pennsylvania,¹⁸⁹ Arizona,¹⁹⁰ Wisconsin,¹⁹¹ Georgia,¹⁹² Hawaii,¹⁹³ Iowa,¹⁹⁴ Michigan,¹⁹⁵ New

¹⁸⁵ Interestingly, this test seems largely indistinguishable from the long-standing doctrine of viewpoint neutrality employed by the courts in analyzing non-public fora created by the state. *See, e.g., Int'l Soc'y. for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992).

¹⁸⁶ Coffin, *supra* note 5, at 625.

¹⁸⁷ *State v. Wicklund*, 589 N.W.2d 793, 794-95 (Minn. 1999). The *Wicklund* case is significant because it involved speech activity at the Mall of America in Bloomington, the nation's largest mall. The Court failed to recognize any legally significant distinction between the Mall of America and the modest shopping center at issue in *Hudgens*. *See id.* at 798.

¹⁸⁸ *Cologne v. Westfarms Assoc.*, 469 A.2d 1201, 1202 (Conn. 1984). Connecticut has at least one interesting *PruneYard* story. Before the *Cologne* decision, a trial level court granted the local Ku Klux Klan a right to leaflet in a mall in West Hartford. A counter-demonstration ensued and eventually SWAT teams were required in order to control the incident. Scott G. Bullock, *The Mall's in Their Court*, REASON, Aug. 1995, at 46, 47.

¹⁸⁹ *W. Pa. Socialist Workers 1982 Campaign v. Ct. Gen. Life Ins. Co.*, 515 A.2d 1331, 1333 (Pa. 1986).

¹⁹⁰ *Fiesta Mall Venture v. Mecham Recall Comm.*, 767 P.2d 719, 720 (Ariz. Ct. App. 1988).

¹⁹¹ *Jacobs v. Major*, 407 N.W.2d 832 (Wis. 1987). The Court based part of its holding on the functions of a municipality test of *Marsh*, observing that "[f]rom the way the mall is arranged and operated, the mall is much more like the old-fashioned department store than a municipality. It concerns itself only with one facet of its patrons' lives—how they spend their money." *Id.* at 845.

¹⁹² *Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assoc.*, 392 S.E.2d 8, 9 (Ga. 1990).

¹⁹³ *See Estes v. Kapiolani Women's & Child. Med. Ctr.*, 787 P.2d 216, 221 (Haw. 1990) (holding that "[c]ontrary to the framers of the California constitution, the framers of our Hawaii constitution adopted language nearly identical to that of the First Amendment for the protection [of] free speech"). But note that the property in question here was actually a hospital and not a shopping center.

¹⁹⁴ *See State v. Lacey*, 465 N.W.2d 537, 539-40 (Iowa 1991) (holding that union members did not have a free speech right to distribute handbills in a restaurant parking lot).

¹⁹⁵ *Woodland v. Mich. Citizens Lobby*, 378 N.W.2d 337, 363-65 (Mich. 1985) (holding that the Michigan constitution "did not prohibit owners of large private malls from denying or restricting access to private individuals seeking to exercise" their constitutional rights).

York,¹⁹⁶ North Carolina,¹⁹⁷ Ohio,¹⁹⁸ and Texas.¹⁹⁹ For various reasons, these states have chosen not to expand their state constitutional right to free speech to cover speech in shopping malls.²⁰⁰

But California and New Jersey are not the only states to recognize a right to expressive activity in shopping centers. The Colorado Supreme Court has found a right of access guaranteed by the Colorado State Constitution.²⁰¹ The Colorado Court had an interesting two-fold reason for concluding that the Westminster Mall is a state actor.²⁰² First, the court held that where there are significant tax abatements given to mall owners, where there is a police station inside the mall, and where the mall allows military recruiting on the premises, such government involvement indicates state action.²⁰³ Although perhaps a good policy, it is at odds with Supreme Court decisions holding that government funding and control must be nearly exclusive for the private interest to be a state actor.²⁰⁴ Second, the court rehearsed the typical post-*PruneYard* “functional equivalent of a downtown business district” analysis.²⁰⁵ It still remains to be seen how the Colorado Court will resolve the issue of “time, place, and manner” restrictions that has arisen in California and New Jersey. The court did indicate that shopping centers in Colorado could impose restrictions “similar to those imposed on the other activities which it ha[d] permitted in the past.”²⁰⁶ This could open the door for shopping centers to impose highly restrictive application requirements for speakers, such as security deposits, proof of insurance, and “blackout days” during which no speech is permitted.²⁰⁷

¹⁹⁶ *SHAD Alliance v. Smith Haven Mall*, 488 N.E.2d 1211 (N.Y. 1985) (holding that a mall owner could preclude leafleting under a blanket no-handbill distribution policy).

¹⁹⁷ *State v. Felmet*, 273 S.E.2d 708 (N.C. 1981). But note that the defendant was charged with trespassing while collecting signatures for a petition in the mall’s parking lot, not inside the mall’s common areas. *Id.* at 712.

¹⁹⁸ *Eastwood Mall v. Slanco*, 626 N.E.2d 59, 60–63 (Ohio 1994) (upholding an injunction prohibiting “picketing, patrolling, handbilling, soliciting, or engaging in any other similar activities” on the property of a shopping center).

¹⁹⁹ *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 88–93 (Tex. 1997) (finding that a political party is not a state actor and could thus deny booth and program advertising space at a state convention to specific groups).

²⁰⁰ See Coffin, *supra* note 5, at 625–33.

²⁰¹ *Bock v. Westminster Mall Co.*, 819 P.2d 55 (Colo. 1991) (holding that the free speech clause in the Colorado Constitution prevents a mall owner from prohibiting nonviolent political speech, as the mall has sufficient government involvement in its operation and the mall functions as a “latter-day public forum”).

²⁰² *Id.* at 60–63.

²⁰³ *Id.* at 61–62.

²⁰⁴ See *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (holding that there is no state action by a private school even where nearly all of the school’s funding comes from state sources).

²⁰⁵ *Bock*, 819 P.2d at 62–63.

²⁰⁶ *Id.* at 63.

²⁰⁷ See *Union of Needletrades v. Superior Court*, 65 Cal. Rptr. 2d 838, 847–54. *But see Green Party v. Hartz Mountain Indus.*, 752 A.2d 315, 330–32 (holding that the requirement of

Finally, Massachusetts has taken a limited approach to free speech in shopping centers. Its state supreme court has provided for mall access to persons seeking to gain the required number of signatures for putting candidates on the ballot.²⁰⁸

IV. THE PROBLEMS OF *PRUNEYARD*

A. TIME, PLACE, AND MANNER RESTRICTIONS MIGHT CREATE SUBSTANTIAL BARRIERS TO SPEECH

Even if the *PruneYard* holding were extended to every state, it still would not be satisfactory. Even after a state court has approved a *PruneYard*-style extension of First Amendment rights into shopping malls, there are still numerous ways hostile judges could emasculate the right to speech in privately-owned public space. In California, shopping malls have made serious inroads through the use of more and more aggressive time, place, and manner restrictions.²⁰⁹ The *Green Party* case in New Jersey also reveals the possibility of granting “reasonable business judgment” discretion to shopping malls when establishing restrictions on speech.²¹⁰ Although the New Jersey Supreme Court rejected the “reasonable business judgment” standard,²¹¹ it remains a ready model for judges in other states looking for an easy way to preserve shopping mall owners’ excessive property rights.

The California Supreme Court’s holding in *Robins v. Pruneyard* did provide that shopping malls could exert control over expression in the mall through the use of time, place, and manner restrictions.²¹² However, it was not clear from the opinion whether the restrictions imposed by the shopping centers would be subject to the same level of scrutiny as time, place, and manner restrictions imposed by government.²¹³ Subsequent decisions in California and other states have refused to apply the same level of scrutiny to government-owned public spaces and privately-owned public spaces.²¹⁴

proof of a \$1,000,000 insurance policy was excessive restriction of speech activities in a shopping mall).

²⁰⁸ *Batchelder v. Allied Stores Int’l, Inc.*, 445 N.E.2d 590 (Mass. 1983).

²⁰⁹ *See Union of Needletrades*, 65 Cal. Rptr. 2d at 838.

²¹⁰ *See Green Party*, 752 A.2d at 326.

²¹¹ *Id.* at 326-27.

²¹² 592 P.2d 341, 847 (Cal. 1979).

²¹³ *See id.* Time, place, and manner restrictions on a government-owned public forum must be “narrowly tailored to serve a significant governmental interest.” *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

²¹⁴ *See Union of Needletrades*, 65 Cal. Rptr. 2d at 852-53; *Green Party*, 752 A.2d at 325-26.

B. POLICIES DEFINING PERMISSIBLE REGULATION COULD UNDERMINE
PRUNEYARD

The holding in *Union of Needletrades* attempts to provide a rationale for giving shopping malls greater discretion to restrict speech rights.²¹⁵ The court reasoned that: (1) unlike municipalities, shopping centers do not have the benefit of statutory immunity from lawsuits and, thus, they face greater exposure;²¹⁶ (2) “while the government has the obligation to defend an unpopular speaker from a hostile mob, it is not so clear to us that an equivalent obligation devolves upon a shopping center;”²¹⁷ and (3) “[h]ere . . . *private property* has been converted into the functional equivalent of a public forum by a holding of the state Supreme Court.”²¹⁸ The court concluded that *Robins v. Pruneyard* does not require that a

shopping center’s obligations vis-à-vis expressive activities completely mirror those of the government. Such a conclusion would fly in the face of the reality that a shopping center wears two hats: *one is as a center of commerce and the other is as a public forum located on private property.*²¹⁹

This rationale is problematic on several points. First, shopping centers probably already insure against the sorts of damaging activities that might occur as a consequence of speech activities. Indeed, one of the most prominent rationales for allowing speech activities in shopping centers is that such use is compatible.²²⁰ The concern that shopping centers have no obligation to protect unpopular speakers from an angry mob also seems unfounded. There is no evidence that police jurisdiction stops at the shopping center entrance and no reason why police could not aid in the protection of unpopular speakers inside the shopping center just as they do in downtown business districts. Shopping centers may actually be better equipped than other parts of a city to handle the protection of unpopular speakers as there is usually a private security force employed by the shopping center that could supplement police protection.

The fact that the common areas of shopping centers are not the “quintessential public forums of streets, sidewalks, and parks”²²¹ hardly seems relevant. The California Supreme Court held that shopping centers are public fora precisely because they so closely simulate the tradi-

²¹⁵ See *Union of Needletrades*, 65 Cal. Rptr. 2d at 852–53.

²¹⁶ *Id.* at 852.

²¹⁷ *Id.* (citation omitted).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ See *N.J. Coalition v. J.M.B. Realty Corp.*, 650 A.2d 757, 761–62 (N.J. 1994).

²²¹ *Union of Needletrades*, 65 Cal.Rptr.2d at 852.

tional public fora.²²² The court's concern that private shopping centers not be forced to "wear two hats" as a center for both commerce and speech²²³ also seems unwarranted. The traditional business district that the shopping malls simulate "wears two hats," yet the presence of speech activities does not hinder the primary purpose of the business district — commerce.

PruneYard and its progeny also suggest a very messy balancing test. As with any balancing test, the rule is difficult to apply and difficult for businesses and activists to comply with. Indeed, the *PruneYard* standard—that as property becomes more open to the public, the more the property owner's rights are circumscribed in favor the public's first amendment rights²²⁴—may be one of the most difficult to apply, and, as can be seen from the *PruneYard* litigation discussed above, the results of applying this standard are neither entirely predictable nor entirely consistent.

The problems outlined above all result from the fact that owners of simulated spaces have a large degree of control over expressive conduct, even in New Jersey and California. Thus, the exopolis or simulated city, where there is virtually no publicly-owned public space, will, in the end, be less free than the few remaining traditional cities. A superior rule would hold that wherever the public is freely and openly invited to gather for no particular purpose, the space will be considered public, and whoever owns the property will exert control as a state actor.

Critics charge that opening malls as public spaces would damage the business viability of shopping malls, which are an important part of many individuals' lives.²²⁵ However, it seems unlikely that a general rule as formulated above would drive simulated spaces into extinction. Such spaces thrive in New Jersey and California, the two states that have most seriously eroded property owners' right to exclude. If this rule actually did lead to the demise of simulated space and people returned downtown, it would indicate that the simulated spaces thrived solely due to their autocratic nature, that the only competitive advantage simulated spaces ever had over traditional downtowns was their ability exclude people who wished to exercise those rights most fundamental to a democracy.

²²² See *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d at 346–47.

²²³ *Union of Needletrades*, 65 Cal.Rptr.2d at 852.

²²⁴ See generally *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980); see also *Marsh v. Alabama*, 326 U.S. 501, 506 (1946) (stating that the "more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it").

²²⁵ See *Bullock*, *supra* note 188, at 46.

CONCLUSION

Simulated spaces exert a powerful hold on our culture. All reasonable evidence points to the continued expansion of the exopolis and post-suburban lifestyles. As these privately-controlled areas continue to replace open and democratic municipally-controlled spaces, public dissent and protest may become impossible. The Constitutional right to freedom of expression should be flexible to adapt to social change. The First Amendment has changed in the past as new forms of governance and property have. There is no reason to halt the evolution here.

It is a positive sign that California and New Jersey, the states where simulated spaces appear to be most dominant, have sought to invigorate the state constitutional rights to free speech and extend that right into shopping malls and even, to some extent, into gated communities. Hopefully the Supreme Court will reverse its backward-looking decisions and follow California, New Jersey, and other states in recognizing the right of the public to engage in expressive conduct, wherever the public freely gathers.