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THE SHOPPING CENTER AS HYDE PARK CORNER: FREE SPEECH OR INVASION OF PROPERTY RIGHTS?

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The United States has undergone a tremendous transformation since the end of the Second World War in how towns and cities are organized and how and where people spend their free time. While shopping malls and shopping centers can be traced back to the late 1920's, the massive change occurred when the American architect Victor Gruen pioneered the enclosed shopping mall, commencing in the late 1940's.[1]

It's hard to overstate the dramatic effect the construction of shopping malls had on how people spend time together and, in a sense, formed a community. The phenomenon wasn't regional; in 1949 the Town and Country Shopping Center inaugurated nighttime shopping in Columbus, Ohio; in 1950 Northgate opened near Seattle, Washington, providing 800,000 square feet for stores arranged in a linear pattern along a 44-foot wide pedestrian walkway and Gruen's own Northland, near Detroit, Michigan, took the concept a step further, with 110 stores in 1,192,000 square feet on two levels, built in 1954. Not surprisingly, professional organizations followed; in 1957 the International Council of Shopping Centers was founded with a membership of 36.[2]

This phenomenon was amplified by the construction of entertainment centers, beginning with the famous 1982 Sherman Oaks Galleria; memorialized in the 1982 film "Fast Times at Ridgemont High." This phenomenon too wasn't limited to California; in 1995 the first mega-plex theatre, defined as 14 screens or more, opened in May of that year in Dallas, Texas, with 24 screens.[3] Clearly, old English and early American town squares, western European piazzas and other loci of societal interaction were being transplanted to these centers. Like so many modern social phenomena,

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other human needs went with them, one of which was the need to express political, social and religious thought in an atmosphere without restriction. And so the conflict commenced: *Can shopping centers prohibit speech on the premises since it is being conducted on private property, or, by virtue of inviting the public in, does the center owner have an obligation to allow speech?* If so, under what conditions and with what limitations?

Of the 24 states whose courts have ruled on the issue, only four states, California, Colorado, Massachusetts and New Jersey, have definitively held that private shopping center owners must permit access by individuals and groups exercising their free speech rights.[4] So how has the law developed and how has the current California Supreme Court case of *Fashion Valley Mall, LLC v. National Labor Relations Board*[5] changed the landscape?

The genesis of the law, at least at the United States Supreme Court level, began in 1946 with *Marsh v. Alabama*.[6] The *Marsh* case established an interesting principle, describing a shopping mall as the "functional equivalent of a municipality." In a recent law review article, the *Marsh* case was analyzed in that context:

> When a private entity undertakes a function that is municipal in nature, the courts will consider the entity to be a "state actor." As such, the private entity must not impose restrictions that interfere with the public's constitutional rights. This "functional equivalent" doctrine grows out the 1946 Supreme Court case *Marsh v Alabama*. In Marsh, the appellant entered privately owned company town of Chickasaw, Alabama and distributed religious literature on a street corner. The company did not permit solicitation of any kind, and the appellant was arrested and charged with trespassing. The Court held that the privately controlled town was a State actor because it was the functional equivalent of a municipality ... with no barriers denying the public's full and complete access to the town. 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. The Court reasoned that the more that private owners opened up their property for the public, the more their rights become circumscribed by those who use the property.[7]

So how does *Marsh* square with what has happened since? In a lot of ways, the *Marsh* case was a bit of an aberration; its facts make that clear:

> The town, a suburb of Mobile, Alabama, known as Chickasaw, is owned by the Gulf Shipbuilding Corporation. … A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area. The town and the surrounding neighborhood, which can not be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center. To do so, they now, as they have for many years, make use of a company-owned paved street and sidewalk located alongside the storefronts in order to enter and leave the stores and the post office. Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of thirty feet. There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there. *In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.*[8]

So Chickasaw was a quasi-public town; the Gulf Shipbuilding Corporation may have owned it, but essentially it was a public town. Public streets fed into it; the merchants on the main street all rented from it; the company paved (and apparently maintained) the main street and the company provided law enforcement as well.

This case's facts made it easy to infer a right of free speech; it was a town in the classic sense and the Jehovah's Witnesses who were seeking to distribute literature on the main street of the town were in fact expressing their rights in what in essence was a public place.

Really, Chickasaw was as much a town as any small town in America; the Court did not have to stretch to hold free speech rights applicable to its public spaces. But how did this doctrine expand, especially with such an order of magnitude?

The answer is: Incrementally. Professor Steven J. Eagle of George Mason University did an excellent short summation of what happened next:

> In Amalgamated Food Employees Union v. Logan Valley Plaza (1968) 391 U.S. 308, 88 S. Ct. 1601, 20 L.Ed.2d 603, the Court extended this protection to peaceful picketing of a business employing non-union labor within a shopping center. However, in Lloyd Corporation v. Tanner (1972) 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed. 2d 131, it held that a shopping center could prohibit First Amendment activity unrelated to the center's business.
>
> The U.S. Supreme Court subsequently ruled, in Hudgens v. NLRB (1976) 424 U.S. 507, 518, 96 S.Ct. 1029, 47 L.Ed. 2d 196, that *Lloyd* was "a total rejection" of *Logan Valley*.[9]

At this point, the benchmark was ready to be set. That happened with the 1980 case of *PruneYard Shopping Center v. Robins*.[10] Not surprisingly, *PruneYard* has generated intense controversy, not only because of its holding but because of its clear delegation to state law of the determination whether speech rights were protected. For that reason alone, a brief review of the case is in order.

> The *PruneYard* case arose after a shopping center ejected high school students who were attempting to gather signatures for a petition urging the United States to oppose a U.N. resolution against Zionism. 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. 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.[11]

The procedural posture of *PruneYard* is, in some ways, as interesting as the facts themselves; the students left the premises and filed suit in California state court to enjoin the shopping center and its owner from denying the students access to the center for the purpose of circulating their petitions. While the trial court held that the students were *not* entitled under either the Federal or California Constitution to exercise their asserted rights on the shopping center property, and the appellate court affirmed, the California Supreme Court reversed, holding that the California Constitution protects speech and petition-

ing, reasonably exercised, in shopping centers even when the center is privately owned, and that this result did not infringe on the shopping center's property rights protected by the Federal Constitution.[12]

The Supreme Court clarified and reiterated its repudiation of *Logan Valley* and its affirmance of *Hudgens*:

> Appellants first contend that [*Lloyd Corporation v. Tanner*] prevents the State from requiring a private shopping center owner to provide access to persons exercising their state constitutional rights of free speech and petition when adequate alternative avenues of communication are available. *Lloyd* dealt with the question whether under the Federal Constitution a privately owned shopping center may prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operations. Respondents in *Lloyd* argued that because the shopping center was open to the public, the First Amendment prevents the private owner from enforcing the handbilling restriction on shopping center premises. In rejecting this claim we substantially repudiated the rationale of [*Logan Valley*] which was later overruled in [*Hudgens*]. We stated that property does not "lose its private character merely because the public is generally invited to use it for its designated purposes" and that "[the] essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center."[13]

Confusingly, though, the Supreme Court abandoned this rationale in favor of simply bowing to what the state wanted:

> Our reasoning in *Lloyd*, however, does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution. In *Lloyd, supra*, there was no state constitutional or statutory provision that had been construed to create rights to the use of private property by strangers, comparable to those found to exist by the California Supreme Court here. It is, of course, well established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other Federal Constitutional provision.
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> * * *
>
> Here the requirement that appellants permit appellees to exercise state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of appellants' property rights under the Taking Clause. There is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center. The Pruneyard is a large commercial complex that covers several city blocks, contains numerous separate business establishments, and is open to the public at large. *The decision of the California Supreme Court makes it clear that the Pruneyard may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions.*[14]

Such is the landscape that the California Supreme Court faced when it granted certiorari to hear *Fashion Valley Mall, LLC v. National Labor Relations Board*.[15] To fully understand how groundbreaking the *Fashion Valley Mall* case was, though, the reader has to understand the collision between California's viewpoint in *PruneYard* and the circumstances and law extant in other states at the time *Fashion Valley Mall* was decided. Probably the best place to start in reviewing *Fashion Valley Mall* is to fully understand its basic facts as well as to understand procedurally how it arrived at the California Supreme Court's door. The path was a tortuous one. On October 15, 1998, Graphic Communications International Union filed a charge before the National Labor Relations Board alleging that the owners of the Fashion Valley Mall in San Diego had refused to permit employees of the Union-Tribune Publishing Company to leaflet in front of Robinsons-May department store in the Fashion Valley Mall. The NLRB issued a complaint and noticed a hearing, after which an administrative law judge ruled that the mall had violated § 881 of the National Labor Relations Act by barring the employees from distributing leaflets.[16]

The underlying dispute involved a larger, regional problem. The San Diego Union-Tribune wasn't paying its pressmen the amount that they believed they should make and, since Robinsons-May was a major advertiser in the San Diego Union-Tribune, the pressmen believed that the best way to get attention for their plight and to exert pressure on the newspaper was to "educate" people who shopped at the Robinsons-May Department Store. In a sense, shoppers and the store itself, as well as the mall, became a pawn in the dispute; the stores couldn't authorize

more money for the pressmen and the shoppers really couldn't, either. The leaflet's content limned out the problem:

> The leaflets stated that Robinsons-May advertises in the Union-Tribune, described several ways that the newspaper allegedly treated its employees unfairly, and urged customers who believed "that employers should treat employees fairly" to call the newspaper's "CEO," listing his name and telephone number.[17]

The mall had enacted time, place and manner restrictions consonant with *PruneYard*, but one of the additional rules that it had adopted was that persons wanting to engage in expressive activity had to agree to abide by Rule 5.6.2, which prohibited "impeding, competing or interfering with the business of one or more of the stores or merchants in the shopping center by ... [u]rging, or encouraging in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the shopping center.[18]

The administrative law judge found that the union had attempted to engage in a lawful consumer boycott, and that it would have been "utterly futile for the union to have followed the mall's enormously burdensome application-permit process because the rules contained express provisions barring the very kind of lawful conduct the union sought to undertake at the mall."[19] The case then was transferred to the NLRB in Washington, D.C., which affirmed the administrative law judge's decision. The NLRB's opinion, interestingly, distinguished the restriction at issue from a time, place and manner restriction:

> California law permits the exercise of speech and petitioning in private shopping centers, subject to reasonable time, place, and manner rules adopted by the property owner. Rule 5.6.2, however, is essentially a content-based restriction and not a time, place, and manner restriction permitted under California law. That is, the rule prohibits speech "urging or encouraging in any manner" customers to boycott one of the shopping center stores. … [I]t appears that the purpose and effect of this rule was to shield [the Mall]'s tenants, such as the Robinsons-May department store, from otherwise lawful consumer boycott handbilling.[20]

The mall, undeterred, petitioned for review by the United States Court of Appeals for the District of Columbia Circuit. That court kicked the football back to the California Supreme Court:

> The court of appeals observed that "no California court has squarely decided whether a shopping center may lawfully ban from its premises speech urging the public to boycott a tenant," and concluded that "whether [the Mall] violated § 8(a)(1) of the [National Labor Relations Act] depends on whether it could lawfully maintain and enforce an anti-boycott rule—a question no California court has resolved."[21]

In a sense, the D.C. Circuit was only following *PruneYard*; the Federal system was deferring to California state law to decide whether, under its own laws, its free speech protections were broader than those afforded under Federal law.

To get a better idea, though, of how the *Fashion Valley Mall* court decided its case, the reader needs to understand the viewpoint of a lot of the different parties that had a stake in the outcome besides the litigants themselves. For example, Fashion Valley Mall itself was but one mall owner. Both the International Council of Shopping Centers and the California Business Properties Association, filing amicus briefs, were critically interested in the outcome of this case; a brief recitation of their background makes that clear:

> Amici curiae are trade associations that represent virtually the entire shopping center industry in California. ICSC is the global trade association of the shopping center industry with over 67,000 members worldwide, 60,659 in the United States and over 10,000 in the State of California. Its members include developers, owners, retailers, lenders and others that have a professional interest in the shopping center industry. ICSC's members own and manage essentially all of the more than 6,200 shopping centers in the State of California. In 2006, these shopping centers accounted for $294.4 billion in shopping center inclined sales. That same year, these shopping centers employed more than 1.6 million individuals, constituting 11% of the total nonagricultural employment in the state, and contributed $18.4 billion in state sales taxes revenues.
>
> CBPA has almost 10,000 members and has served and represented retail, commercial and industrial property owners in the state for more than 30 years. CBPA members include numerous shopping center owners and property managers, as well as large retailers, such as Wal-Mart, Target, Lowes, and The Home Depot.

> ICSC's and CBPA's interest in this case relates to Fashion Valley's ability to enforce Rule 5.6.2 and similar limited content-based time, place and manner restrictions to regulate access to a shopping center's private property and restrict inherently disruptive activity that interferes with its, or its tenants', commercial operations, an interest universal to their members.[22]

The other side of the dispute was equally on pins and needles about the outcome of the case. It was represented by the California Labor Federation, AFL-CIO, and its interests and its membership were summarized as follows:

> The Federation is the California state body chartered by the American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO"). The Federation is a federation of affiliated labor organizations which represent in excess of two million workers in the State of California.
>
> The Federation's affiliates and their members are interested in and will be directly affected by the decision in this case. The primary issue in this case is the scope of what can be said by a labor union peacefully and lawfully in a large shopping center or mall pursuant to access rights under this Court's precedent in *Robins v. Pruneyard Shopping Center*. Access is of little value if the scope of expressive activity is repressed by a shopping mall's control of "content."[23]

The AFL-CIO, not surprisingly, tried to place the free speech activity on an intellectual plane:

> An appeal to the intellect of customers should not be "interference" with the shopping center's normal business operations and sufficient to permit content discrimination against the Union's speech. The only legal interference is worked by the Mall's rule upon the constitutional right of Mall customers to hear the Union's message[.]
>
> The meaning of interference has been "physical" interference such as by violence, physical intimidation, blocking ingress/egress or other coercive activity[.]
>
> The property interest, adequately protected by time, place and manner restrictions, simply does not require that members of the public "check" at the door upon entering a shopping center their constitutional right to "hear." Indeed, there is a near-mythical assumption in the Mall's rule, viz., that members of the public upon entering a mall possess an empty mind or at least one bent exclusively upon consumerism and that property rights are so great as to require the perpetuation of such an undistracted mind.[24]

Not surprisingly, the labor interests as represented by the AFL-CIO and the respondents in the underlying lawsuit, the Graphic Communications Brotherhood of Teamsters Local 432M, saw the issue as one of trying to regulate content and thus falling outside of the *Hudgens* and *PruneYard* restrictions. In essence, the unions advocated allowing union members to register grievances with shoppers, without regard to whether the content of that speech materially damaged the business interests of the private property that the speakers were standing upon and/or distributing leaflets upon at the time they made the statements.

With a rough outline of both points of view as a backdrop, the opinion itself now bears analysis. The Supreme Court of California again reiterated, in its opinion, how much broader the free speech rights of the California Constitution are than that of the Federal one, and then co-opted the *PruneYard* decision, in essence reaffirming it and giving it new life:

> The shopping center in *Pruneyard* appealed our decision to the United States Supreme Court, arguing that it violated the shopping center's constitutional right to control the use of its private property. ... The high court disagreed, noting that its decision in *Lloyd* did not "limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." ... The court rejected the argument that compelling the shopping mall to permit expressive activity amounted to a taking of its private property, observing that it would not "unreasonably impair the value or use of their property as a shopping center. The PruneYard is a large commercial complex that covers several city blocks, contains numerous separate business establishments, and is open to the public at large. The decision of the California Supreme Court makes it clear that the PruneYard may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions."[25]

By focusing on the time, place, and manner restrictions, the California Supreme Court ducked the real issue: Was economic coercion present and would it be detrimental to the private property owner? Pro-

fessor Steven Eagle, in his article, quoted a portion of the opinion that enumerated at best a crude test:

> The ensuing 4-3 majority opinion rehearsed California case law building upon *Marsh*, such as *Schwartz-Torrance Investment Corporation v. Bakery and Confectionary Workers Union* (California 1964) 61 Cal. 2nd 766, 394 Pacific 2nd 921, 40 Cal.Rptr. 233:
>
> > We recognized that peaceful picketing by a labor union "involves an exercise of the constitutionally protected right of freedom of speech." We rejected the shopping center's argument that its right to "the exclusive possession and enjoyment of private property" outweighed the union's right to picket: "Because of the public character of the shopping center, however, the impairment of plaintiff's interests must be largely theoretical. Plaintiff has fully opened his property to the public."[26]

This quote just reinforces the tautology of the Supreme Court's reasoning: it's a shopping center that's open to the public, so it isn't private property anymore because it's open to the public. This line of reasoning wasn't lost on the unions; in fact, the union's intervener's answer brief made the very point:

> In reaching this conclusion, the *PruneYard* Court emphasized "the growing importance of the shopping center" and "the potential impact [on speech and petition rights] of the public forums" provided by shopping centers. … The critical point, this Court added, was "[t]he importance assumed by the shopping center as a place for large groups of citizens to congregate" so that "such centers are becoming 'miniature downtowns.'" … "[I]n many instances the contemporary shopping center serves as the analogue of the traditional town square." ..."[T]he shopping [mall] … has become the modern suburban counterpart of the town center." Indeed, a shopping center the size of Fashion Valley Mall, with its hundreds of retail establishments and dozens of restaurants and entertainment facilities is no mere "miniature downtown"; it dwarfs the downtowns of most American towns and cities.[27]

In essence, reduced to its simplest form, the intervener's argument is "size matters." If the land owner is operating a large shopping center, then, in essence, under *Fashion Valley Mall*, the public has much, much greater rights than if the center is smaller.

This line of thinking inspired a vigorous dissent, leaving the case a close one with a mere 4 to 3 majority. Justice Ming Chin, writing the dissent, was scathing:

> By a bare four-to-three majority, [the California Supreme Court's decision in *Pruneyard*] overruled a decision then only five years old and held that public free speech rights exist on private property under the California Constitution. [*Pruneyard*] was wrong when decided. In the nearly three decades that have since elapsed, jurisdictions throughout the nation have overwhelmingly rejected it. We should no longer ignore this tide of history. The time has come for us to forthrightly overrule *Pruneyard* and rejoin the rest of the nation in this important area of the law. Private property should be treated as private property, not as a public free speech zone.
>
> Even if we do not overrule *Pruneyard*, we should at least not carry it to the extreme that the majority does. *Pruneyard* is easily distinguished. The free speech activity that *Pruneyard* sanctioned was compatible with normal use of the property. The opposite is true here. Fashion Valley Mall is a privately owned shopping center. A shopping center exists for the individual businesses on the premises to do business. Urging a boycott of those businesses contradicts the very purpose of the shopping center's existence. It is wrong to compel a private property owner to allow an activity that contravenes the property's purpose.[28]

Justice Chin went on to lambast the *Pruneyard* decision further:

> *Pruneyard* ... was controversial when decided. In the three decades since then, it has received scant support and overwhelming rejection around the country. As the 2001 plurality opinion in *Golden Gateway* noted, "most of our sister courts interpreting state constitutional provisions similar in wording to California's free speech provision have declined to follow [*Pruneyard*]. … Indeed, some of these courts have been less than kind in their criticism of [*Pruneyard*]. … The opinion fully supported these statements with citations to decisions from the many jurisdictions that have considered but rejected *Pruneyard*, and the few that have followed its lead to a limited extent.[29]

Justice Chin gave a brief but comprehensive review of all of the jurisdictions that declined to follow *Pruneyard*.

> As of the time we decided *Golden Gateway*, the following states, many with constitutional free speech language essentially identical to California's, had rejected any form of a *Pruneyard* approach regarding shopping centers and free speech rights: Arizona, Connecticut, Georgia, Michigan, Minnesota, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina and Wisconsin.
>
> In the six years since we decided *Golden Gateway*, we have become yet more isolated. No new state has followed our lead. Two more states have refused to follow the *Pruneyard* approach: Hawai'i and Iowa. Moreover, as I explain, the few states that previously adopted an approach like *Pruneyard* are generally retreating.
>
> I need not review all of the cases because three years ago the Connecticut Supreme Court did so. In [United Food and Commercial Workers Union, Local 919, AFL-CIO v. Crystal Mall Associate, L.P., 270 Conn. 261, 852 A.2d 659 (2004)], the court unanimously refused to reconsider its earlier decision of [Cologne v. Westfarms Associates, 192 Conn. 48, 469 A.2d 1201 (1984)], which had rejected *Pruneyard* even though Connecticut's constitutional free speech provisions are essentially identical to California's. … It explained that "since the decision in *Cologne*, courts in other jurisdictions that have considered this issue overwhelmingly have chosen not to interpret their state constitutions as requiring private property owners, such as those who own large shopping malls, to permit certain types of speech, even political speech, on their premises" … It summarized the law that most of the country has adopted: "Under *Cologne*, as in the overwhelming majority of our sister jurisdictions, the size of the mall, the number of patrons it serves, and the fact that the general public is invited to enter the mall free of charge do not, even when considered together, advance the plaintiff's cause in converting private action into government action."[30]

California courts are now running for cover; the size and character of the center is now being used in an attempt to try to distinguish *Fashion Valley Mall* and somehow give shopping centers some relief. A classic case in point is the 1999 case of *Trader Joe's Co. v. Progressive Campaigns*,[31] which is now providing "cover" for courts attempting to distinguish both *Pruneyard* and *Fashion Valley Mall*. *Trader Joe's* also bears analysis. The appellants in *Trader Joe's* attempted to obtain signatures for initiative petitions from persons patronizing the Trader Joe's store in Santa Rosa, California. Trader Joe's objected and halted the petitioning activity being conducted in front of the store entrance. Trader Joe's then filed a complaint for injunctive relief and damages for trespass against the entity that was trying to collect the signatures, Progressive Campaigns, Inc. and an individual, Matthew Temple. Trader Joe's obtained a preliminary injunction, and Progressive Campaigns appealed. The appellate court found that Trader Joe's was likely to succeed on the merits of its claim that the challenged activity wasn't constitutionally protected, and affirmed the preliminary injunction order. To avoid *Pruneyard's* holding, the *Trader Joe's* court strained to make the distinction based on size as well as use:

> Trader Joe's does have constitutionally protected property interests. However, like the owners of the Pruneyard Shopping Center, Trader Joe's has voluntarily opened its property to the public. But Trader Joe's invitation to the public to visit its Santa Rosa store is more limited than the invitation made by a shopping center like Pruneyard. Trader Joe's invites people to come and shop for food and food-related items. It does not invite them to meet friends, to eat, to rest or to be entertained. Indeed, citizens are not invited to "congregate" at the Santa Rosa Trader Joe's. Thus, in our view, Trader Joe's interest in maintaining exclusive control over its private property is stronger than the interest of a shopping mall owner.
>
> Similarly, the public's interest in using the Santa Rosa Trader Joe's as a forum for free speech and petitioning activity is not as strong as its interest in engaging in such activities at a large shopping center like Pruneyard. In contrast to Pruneyard, the Santa Rosa Trader Joe's is a single structure, single-use store. It contains no plazas, walkways or central courtyard where patrons may congregate and spend time together. The store sells food but has no restaurant or any place for patrons to sit and eat. Nor does the Santa Rosa Trader Joe's have a cinema or any other form of entertainment. There is evidence suggesting Trader Joe's may attract large numbers of people. But those people come for a single purpose—to buy goods. Further, because the store is a stand-alone structure, there can be no contention that its relationship to other establishments transforms it into a public forum. In short, the Santa Rosa Trader Joe's is not a public meeting place and society has no special interest in using it as such.[32]

Professor Steven Eagle of George Mason University looks at it more from an economic point of view:

> Shopping centers are economic creations; they exist to allow large retailers to have a "halo" effect on other adjacent retailers; they exist solely for economic reasons. If Nordstrom opened as a free-standing downtown building, the surrounding stores would become more valuable and get traffic. This is why Disney World was designed the way that it was; why larger retailers pay lesser rents. If the center is less desirable, the people will seek alternatives. Could a large tenant dictate these terms? In future choices by shopping center developers and owners, these decisions will have an impact on what activities they allow; outdoor concerts and other activities.[33]

Not surprisingly, one of the attorneys representing Fashion Valley Mall in the appeal, Stacy McKee-Knight, doesn't understand why California is different and why there is such an expansive view of free speech rights:

> Is the shopping center a town square? Does this now apply to every shopping center development? As I see it, under current law, any center of significant size will fall into a public forum. Pruneyard has 21 acres. It's hard to find a center that doesn't have these types of amenities; the present business is communal, now with movie theatres and restaurants.[34]

Her co-counsel, Joanne Bernhard, is perhaps more pragmatic and narrow in her interpretation:

> I can't give you information about sales and the effect of picketing on sales; there are no surveys. The perception is that it does affect sales and interferes with shoppers. If there's a big protest and lots of protestors, the size of the crowd will all negatively affect sales. Another potential problem that no one thinks about is that in some centers deliveries cannot get through; delivery drivers will not cross picket lines even when there's no picketing. The centers wind up with increased security costs for unruly and confrontational protestors. Increases in insurance are an additional cost the client has to bear.
>
> I don't think that large, free-standing or tacked-on-to-the-end-of-the-center type of stores should be impacted; there's no common, central meeting area.
>
> We can't rely on the architect; they deal with aesthetics only. There haven't been any legislative efforts to clarify the problem, at least from a Federal standpoint. At the State level, a few efforts have been made but have not succeeded five or ten years ago.[35]

Protestors of all kinds will now invoke the *Fashion Valley Mall* case to support their efforts; many of them now are including, in their materials posted on the internet, specific instructions tailored to the case.[36] Notwithstanding the force and degree of frustration that Justice Chin's dissent reflects, for private property rights to prevail in California will most assuredly require legislative efforts. Courts are busy scurrying to distinguish *Pruneyard* and now *Fashion Valley Mall*; with the proliferation of large malls and the alteration of the public's congregating, socializing and buying habits, more and more of these malls will be subject to picketing, leafleting and other free speech displays and, inevitably, legal challenges will be brought if they are stopped. Without a doubt, the original strength of the legal concept of private property rights in California has been significantly weakened by this case.

NOTES

1. "Evolution of the Shopping Center," Steven Schoenherr, Professor of History, University of San Diego, San Diego, California, cited at http://history.sandiego.edu/gen/soc/shoppingcenter.html [February 17th, 2006]. See also "What Would Victor Gruen Say?", May 1, 2003, John Kriskiewicz; Professor at Parson School of Design in Manhattan College; as quoted in Retail Traffic at http://retailtrafficmag.com/development/trends/retail_victor_gruen_say/.
2. "Evolution of the Shopping Center," Steven Schoenherr, Professor of History, University of San Diego, San Diego, California, cited at http://history.sandiego.edu/gen/soc/shoppingcenter.html [February 17th, 2006].
3. "Evolution of the Shopping Center," Steven Schoenherr, Professor of History, University of San Diego, San Diego, California, cited at http://www.history.sandiego.edu/gen/soc/shoppingcenter.html [February 17th, 2006].
4. "The Exercise of Free Expression in Shopping Centers," M. Rosie Rees and Peter P. Massumi; Pircher, Nichols and Meeks at http://www.pircher.com/resources/article.php?i=307 as published in California Centers Magazine, May 1, 2005.
5. Fashion Valley Mall, LLC v. N.L.R.B., 42 Cal. 4th 850, 69 Cal. Rptr. 3d 288, 172 P.3d 742 (2007), reh'g denied, (Feb. 20, 2008).

6. Marsh v. State of Ala., 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946).
7. Mulligan, "Finding a Form in the Simulated City: Mega Malls, Gated Towns, and the Promise of Pruneyard," 13 Cornell Journal of Law and Public Policy 533, 542-43 (Spring 2004) (footnotes omitted).
8. *Marsh*, supra n.6 at 326 U.S. 501, 502-03 (emphasis added).
9. Lexis 14427 (Cal. Dec. 24, 2007).
10. PruneYard Shopping Center v. Robins, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980).
11. Mulligan, "Finding a Form in the Simulated City: Mega Malls, Gated Towns, and the Promise of Pruneyard," 13 Cornell Journal of Law and Public Policy 533, 549-50 (Spring 2004) (footnotes omitted).
12. *PruneYard*, supra n.10, 447 U.S. at 74 (syllabus).
13. *PruneYard*, supra n.10, 447 U.S. at 80-81 (citations omitted).
14. *PruneYard*, supra n.10, 447 U.S. at 81-83 (citations omitted, emphasis added).
15. Fashion Valley Mall, LLC v. N.L.R.B., 42 Cal. 4th 850, 69 Cal. Rptr. 3d 288, 172 P.3d 742 (2007), reh'g denied, (Feb. 20, 2008).
16. Fashion Valley Mall, supra n.15, 42 Cal. 4th at 855.
17. *Fashion Valley Mall*, supra n.15, 42 Cal. 4th at 855.
18. *Fashion Valley Mall*, supra n.15, 42 Cal. 4th at 856.
19. *Fashion Valley Mall*, supra n.15, 42 Cal. 4th at 856.
20. *Fashion Valley Mall*, supra n.15, 42 Cal. 4th at 856.
21. *Fashion Valley Mall*, supra n.15, 42 Cal. 4th at 857.
22. Brief of *amici curiae*, International Council of Shopping Centers and California Business Properties Association, in support of petitioner Fashion Valley Mall, LLC; Fashion Valley Mall, LLC v. National Labor Relations Board; Case No. S144753; filed March 29, 2007.
23. Brief of California Labor Federation, AFL-CIO as *amicus curiae* in support of intervener; Fashion Valley Mall v. National Labor Relations Board; California Supreme Court Case No. S144753; filed March 19, 2007, pp. 1- 2 (citation omitted).
24. Brief of California Labor Federation, AFL-CIO, supra n.23, pp. 3, 12, 17.
25. *Fashion Valley Mall*, supra n.15, 42 Cal. 4th at 863 (citations omitted). In its opinion in PruneYard Shopping Center v. Robins, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980), the U.S. Supreme Court referred to the mall as "PruneYard." In the *Fashion Valley Mall* decision, however, the California Supreme Court referred to its decision in the same litigation as the *Pruneyard* case.
26. Eagle, Lexis-Nexis Expert Commentaries; Lexis 14427—p. 2.
27. Intervener's Answer Brief; Fashion Valley Mall v. National Labor Relations Board, California Supreme Court Case No. S144753, filed December 29, 2006, p. 9.
28. *Fashion Valley Mall*, supra n.15, 42 Cal. 4th at 870.
29. *Fashion Valley Mall*, supra n.15, 42 Cal 4th at 874. In a footnote, Justice Chin noted that the New York Court of Appeals, in SHAD Alliance v. Smith Haven Mall, 66 N.Y.2d 496, 498 N.Y.S.2d 99, 488 N.E.2d 1211, 1215 n.5 (1985), characterized *Pruneyard* as "hardly persuasive authority" and the result of "a change in personalities" among the members of the court.
30. *Fashion Valley Mall*, supra n.15, 42 Cal.4th at 875-76 (citations omitted).
31. Trader Joe's Co. v. Progressive Campaigns, 73 Cal. App. 4th 425, 86 Cal. Rptr. 2d 442 (1st Dist. 1999).
32. *Trader Joe's*, supra n.31, 73 Cal.App. 4th at 433.
33. Telephone conversation with Professor Steven Eagle of George Mason University on July 9, 2009.
34. Conversation with Stacy McKee-Knight on June 22, 2009.
35. Conversation with Joanne Bernhard on June 30, 2009.
36. See, e.g., p. 6 of "How to Organize a Peaceful Pet Store Protest," posted by the Best Friends Animal Society at http://puppiesarentproducts.com/download/how_to_organize_a_peaceful_puppy_store_protest.pdf.

Recent Cases

Ninth Circuit rules cities may consider aesthetics in deciding whether to permit telecommunication facilities within their jurisdictions.

When a decision begins "The City is a planned community," there is a good chance the community has prevailed in the litigation. The City of Palos Verdes Estates, California, did just that when Sprint challenged the city's denial of two permit applications to construct wireless telecommunications facilities in the city's public rights-of-way. Eight of its applications were approved, but the city's public works director denied two because they were "not in keeping with the city's aesthetics." One proposed site was a narrow residential street, and the other was one of four major entrances to the city.

The planning commission unanimously affirmed the denial. Sprint then appealed to the city council. A written staff report considered by the city council "detailed the potential aesthetic impact," and the "drive test" confirmed that cellular service from

Sprint was available in relevant locations in the city. The city council affirmed the denial, finding that the telecommunications facilities would "disrupt the residential ambiance of the neighborhood" and "detract from the natural beauty" valued at the main entrance to the community.

The district court concluded that California law prohibited the city from using aesthetics as a justification for its denial and granted summary judgment to Sprint, but the Ninth Circuit reversed. The Telecommunications Act requires that any denial be in writing and supported by substantial evidence (47 U.S.C.A. § 332(c)(7)(B)(iii)). In the Ninth Circuit, "substantial evidence" means that the city's decision must be authorized by local law and supported by a reasonable amount of evidence. The appellate court found both factors were satisfied. An ordinance adopted by the city authorized the denial of telecommunication facilities for "adverse aesthetic impacts arising from the proposed time, place, and manner of use of the public property."

The district court erred when it concluded that the state's Public Utilities Code (PUC) did not allow the city to consider aesthetics. The California Constitution (art. XI, § 7) gives the city authority to regulate local aesthetics and the PUC did not undermine such authority. *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates, 2009 WL 3273935 (9th Cir. 2009).*

California Court of Appeal upholds air pollution control rules and fees adopted by the San Joaquin Valley Air Pollution Control District.

San Joaquin Valley was classified as a serious nonattainment region in 1993 and as extreme nonattainment for the federal one-hour ozone standards in 2004. The San Joaquin Valley Air Pollution Control District was required to develop an attainment plan. Concluding that the rapid development and increase in traffic contributed to air pollution in the Valley, the District decided to adopt rules to mitigate the impacts from new development, referred to as indirect source review (ISR) rules.

Under the rules, developers were required to mitigate the emissions from their projects over a 10-year period. They could accomplish this by incorporating measures to reduce vehicle miles traveled, building at increased residential densities, locating near public transit, incorporating mixed uses, transportation demand management programs, and building pedestrian/bicycle facilities. If the on-site mitigation measures did not reach the reduction goals, then the developer was required to pay a fee to the District for off-site emission reduction projects. The District identified more than $400 million in such projects. The ISR program was flexible, allowing the developer to make on-site changes, pay the fee, or a combination of both.

The California Building Industry Association and others challenged the validity of the ISR rules and fees. They claimed the District did not have the authority to enact the rules, and argued the fees were development fees which violated the Mitigation Fee Act (Gov. Code §§66000 et seq.). The trial court found the District had the authority and that the fees were valid regulatory fees. The appellate court affirmed.

The appellate court noted there are three categories of fees in California that are not special taxes requiring a two-thirds majority vote: special assessments, development fees, and regulatory fees. The ISR fees were not subject to the Mitigation Fee Act because they were regulatory fees imposed under the police power, not development fees dependent on government-conferred benefits or privileges. The ISR fees were designed to mitigate the growth in air pollution from new development.

The court examined the fee calculation method and found that it was valid because there was a reasonable relationship between the fee and the burden posed by the development. "The more a development increases air pollution, the more the developer pays." Finally, the court determined that the District had specific statutory authority to enact the ISR fees. *California Bldg. Industry Ass'n v. San Joaquin Valley Air Pollution Control Dist., 178 Cal. App. 4th 120, 100 Cal. Rptr. 3d 204 (5th Dist. 2009).*

Seventh Circuit affirms district court's denial of injunctive relief to a church claiming an RLUIPA "equal terms" violation.

The Seventh Circuit has not specifically addressed the "equal terms" provision of RLUIPA, but in this case it considered how the Eleventh Circuit and the Third Circuit interpreted that provision, concluding that the Third Circuit's interpretation was the better approach. RLUIPA's equal terms provision states that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a non-religious assembly or institution." 42 U.S.C.A. § 2000cc(b)(1).

The River of Life Kingdom Ministries, with approximately 67 members, wanted to relocate from a warehouse it was renting on a part-time basis to

its own property—a fixer-upper in a blighted community in the Village of Hazel Crest, about 25 miles south of Chicago. The property was located in the oldest part of the Village, which had been deteriorating for some time, and had vacant storefronts, rundown houses, and underperforming public schools. In an attempt to revitalize the area near the Metra train station, the Village adopted a zoning ordinance and a Tax Increment Financing (TIF) plan. The TIF district provided public funds to build new infrastructure and land acquisition. The zoning allowed, as permitted uses, general commercial and retail uses, gas stations, hotels, taverns, offices, and meeting halls, but excluded, inter alia, churches, community centers, non-religious schools, meeting halls, art galleries, and recreational buildings.

The church waived a contingency provision in the sales contract for the property and proceeded to purchase the property before it sought permission to use it for religious services. After the Village denied its application for special permission to so use the property, the church sued, claiming the zoning ordinance violated the First Amendment, the Equal Protection Clause, and the "substantial burden" and "equal terms" provisions of RLUIPA. The district court denied the church's motion for a preliminary injunction. On appeal of the denial, the Seventh Circuit focused only on the "equal terms" issue and decided the church was unlikely to succeed on the merits, finding the Third Circuit's reasoning in *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253 (3d Cir. 2007) more persuasive than the Eleventh Circuit's opinion in *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004).

The church argued that because the zoning ordinance allowed assemblies such as gymnasiums, health clubs, salons, day care centers, and hotels, the ordinance treated religious assemblies on less than equal terms with non-religious ones, in violation of RLUIPA. The court noted, "The important question here is the proper interpretation of 'less than equal.' [RLUIPA] does not state explicitly whether this language means religious and non-religious institutions must always be treated *identically* in land-use regulations, or whether the regulations can differentiate between them for legitimate, non-religious reasons."

The court said that the Eleventh Circuit's approach would find a zoning ordinance non-neutral and not of general applicability, and thus apply strict scrutiny to the ordinance, any time a church was precluded from locating in an area that permitted nonreligious assemblies. This approach, concluded the court, presumes an illicit motive and potentially subjects zoning laws to strict scrutiny even if they are considered neutral under Free Exercise jurisprudence. However, the Third Circuit approach "compares the effect of the included and excluded assemblies on the local government's stated goals before finding a RLUIPA violation." In the present case, the Village wanted to create a tax-generating commercial district centered near the mass transit area. The permitted assemblies in the zoning ordinance were all commercial in nature, while churches and schools were not. "A locality seeking to create a commercial area should be able to exclude non-commercial uses that do not contribute to its goal without violating RLUIPA." *River of Life Kingdom Ministries v. Village of Hazel Crest, 2009 WL 3429103 (7th Cir. 2009)*.

Advocates for affordable housing in California have been hit by a triple whammy this year.

On January 30, 2009, the California Court of Appeal, Fifth District, ruled that the City of Patterson's affordable housing fee, based on the city's total need for such housing, was not "reasonably justified." Cities must show a nexus between market rate and affordable housing to require in-lieu affordable housing fees on new development. *Building Industry Ass'n of Cent. California v. City of Patterson, 171 Cal. App. 4th 886, 90 Cal. Rptr. 3d 63 (5th Dist. 2009), as modified, (Mar. 2, 2009) and as modified on denial of reh'g, (Mar. 20, 2009) and review denied, (June 17, 2009) and petition for cert. filed, 78 U.S.L.W. 3113 (U.S. Sept. 3, 2009)*.

On July 22, the Court of Appeal, Second District, struck down Los Angeles's inclusionary housing law on preemption grounds. The court ruled the state's Costa-Hawkins Rental Housing Act (Cal. Civ. Code §§1954.50 et seq.) preempts the city's inclusionary housing ordinance, perhaps throwing many other similar ordinances into jeopardy. *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles, 175 Cal. App. 4th 1396, 96 Cal. Rptr. 3d 875 (2d Dist. 2009), related reference, 2009 WL 2170478 (Cal. App. 2d Dist. 2009), unpublished/noncitable and reh'g denied, (Aug. 12, 2009) and review denied, (Oct. 22, 2009)*.

On September 28, the Ninth Circuit invalidated the City of Goleta's mobile home rent control ordinance, which effected a transfer of nearly 90% of the property value of the regulated area from mobile home park owners to mobile home tenants, as a regulatory taking. *Guggenheim v. City of Goleta, 582 F.3d 996 (9th Cir. 2009)*.