Occupy Mall Street?

How Public Space was Excluded in Shopping Centers

Anthony Maniscalco

The quintessential suburb is home to the shopping mall, an indoor space of anchor departments stores, small specialty shops and food courts. This multi-tiered site of commerce is sometimes repurposed as a senior exercise track, a meeting place for holiday festivities, or YouTube-inspired flash mobs. However, as Tony Maniscalco explains, coordinated efforts and legal precedents have curbed the possibility of freedom of expression and assembly at shopping malls.

When the suburban shopping mall was first designed in the 1950s, it was modeled on the downtowns of Europe and the United States. It was also intended to replace those downtowns, which people were beginning to flee in the wake of World War II, while providing community space in sprawling suburbs built for automobile travel. Yet few people know how public space was excluded from most American shopping malls developed during the postwar era. If they did, they might be disappointed to learn that those exclusions were enforced by their legal system, specifically the US Supreme Court—the institution charged with protecting freedoms of expression and assembly, as well as minority rights (Ely 1980).

The mall as public space

The story of this exclusion began on a very different note, in 1946, when the Supreme Court decided a case involving a company-owned town and the free-speech rights of a Jehovah's Witness, *Marsh v. Alabama*.[1] The Gulf Shipbuilding Company constructed an entire municipality for its workers, complete with a downtown business district, a shopping center, and all the infrastructures found in American cities at the time. Treating this urban simulacrum as its exclusive possession, the Company prohibited all forms of unwanted expression inside. When Grace Marsh refused to stop handing out religious pamphlets in the shopping center adjacent to the downtown business district, she was arrested for criminal trespass by the local sheriff and successfully prosecuted by the state authorities.

In overturning her prosecution, a Supreme Court majority appointed in large part by Franklin Delano Roosevelt focused not only on Marsh's First Amendment freedoms, which it regarded as preferential to the property rights claimed by the Gulf Shipbuilding Company; the majority also devoted its otherwise brief opinion to the downtown business district and its shopping center—a *de facto* **urban** space, which engendered the same rights of expression as city streets and sidewalks protected under the Court's nascent "public forum" doctrine. In the opinion of Justice Hugo Black, a staunch advocate of free-speech rights at the time, when the company-town owners built their analogous city, they created a public space—one where Marsh's expression might find audiences of

[1] *Marsh v. Alabama*, 326 US 501 (1946).

fellow citizens in need of information with which to deliberate and effectively participate in their democracy.

For the first time, the idea of public space was embedded in a legal doctrine that pertained to privately owned property, particularly when that property fulfilled democratic functions. The next case involved a large shopping mall outside Altoona, Pennsylvania, called Logan Valley Plaza.[2] Members of a labor union picketed the employment practices of a supermarket located inside the shopping center. They were turned away by the property owners and required to stage their protest outside the center. When they refused to comply, they were charged and convicted with violating Pennsylvania's trespass laws, which were upheld by its courts.

In *Amalgamated Food Employees v. Logan Valley Plaza*, Justice Thurgood Marshall overruled the convictions. Focusing on the *Marsh* decision, and specifically the analogy between publicly owned and privately owned downtown business districts, Marshall argued that the suburban shopping mall served the same spatial functions as any urban corridor where publics gathered, notwithstanding the deed waived around by its landlords. In Marshall's view, malls were replacing city streets, sidewalks and parks as the new spaces of congress in the US, especially as they began to pepper an American geography of exploding suburbs and out-migration from older cities. If democracy was going to survive in the US, it would need to *take place* in shopping malls. And if the American public was moving to the suburbs, then the First Amendment and freedom of expression needed to accompany it.

A turn for the worse

The analogy between downtown and the suburban mall was short-lived, however. So, too, was the Court's protection of free speech in malls. Just four years later, in *Lloyd Corporation v. Tanner*, a newly realigned Supreme Court majority, one appointed by President Richard Nixon—scarcely a champion of American urbanism—walked back the decisions above (and much of the Warren Court's[3] First Amendment doctrine). Rejecting claims to public space by a group of anti-war activists, the Nixon majority expressed suspicion toward public-function analogies where private property was concerned. Justice Lewis Powell held that expressions of protest could now be excluded by shopping-mall owners if those expressions bore no immediate relationship to the activities privately owned malls were designed to house: buying and selling.[4] Malls were not analogous to cities, argued Powell; the enclosed properties supported commerce, rather than public deliberation. Shopping malls, said the new Burger Court, had nothing to do with public space and everything to do with private consumption.

The tide had shifted, then, ideologically, and it is fair to say that public space and the First Amendment were on life support in shopping malls by the early 1970s. By the end of the decade, they would cease to exist inside the increasingly behemoth complexes being erected around the country. In *Hudgens v. NLRB*, the High Court rebuffed striking shoe-store workers and explicitly overruled Justice Marshall's decision in *Logan Valley Plaza*. It declared that First Amendment rights of free speech and expression were no longer applicable to shopping malls, notwithstanding the fact that malls daily assembled millions of American citizens.[5]

With protections for free speech and assembly erased at the federal level, public space inside shopping malls would have to be defended by the states' benches. In its last significant decision on the matter in 1980, *Pruneyard v. Robins*, the US Supreme Court considered whether California's

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2 *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc*., 398 US 308 (1968).

3 "Warren Court" refers to the US Supreme Court between 1953 and 1969, under Chief Justice Earl Warren, who led a liberal majority that used judicial power to significantly expand civil rights, civil liberties, judicial power, and federal power; the Warren Court notably brought an end to racial segregation in the US.

4 *Lloyd Corporation v. Tanner*, 407 US 551 (1972).

5 *Hudgens v. NLRB*, 424 US 507 (1976).

judiciary could extend rights of expression to private property under the state's constitution.[6] When a group of Santa Clara high-school students set up a table inside a shopping center to petition against a United Nations resolution, they were removed by the mall owner. Relying on the state's free-speech provisions, the California Supreme Court ruled in favor of the students. Going further, the state court declared that Californian shopping malls served as vital spaces for the dissemination of political ideas. Echoing Thurgood Marshall's opinion, the court keyed in on the wholesale replacement of urban downtowns by suburban shopping centers. Finally, the court invoked California's participatory traditions, specifically its initiative and referendum processes, relating them to public space and pointing out that shopping malls had replaced cities as the sites of democratic interaction. The property owner appealed to the nation's High Court, which reprised its rejection of public space in shopping malls. However, a unanimous majority decided that California was free to expand its constitutional speech provisions to reach inside malls, without running afoul of property rights or the First Amendment.

After *Pruneyard* was handed down in 1980, it appeared that public space might be resuscitated inside suburban shopping centers. Regrettably, the post-*Pruneyard* era has produced little breathing space for democratic deliberation in malls. In fact, just five of the 50 states—California, Colorado, New Jersey, Massachusetts, and Washington—currently require legal protection for free speech and assembly in malls. Of those five, the last two protect speech and assembly only at election time, for balloting and candidate petitions. That means practicable space in malls is now defunct in all but three states. And even the most politically liberal states—New York, for instance—routinely follow the High Court's lead, permitting exclusions of controversial ideas as anathema to property rights. An example of these exclusions was handed down in 2003, when a lawyer was arrested by local police for refusing to remove his anti-war T-shirt in the Crossgates Mall, located in a suburb just outside Albany.[7]

Reverting the trend

In addition to excluding free expression in shopping centers, the Court has drastically scaled back protections for traditional public spaces, amending its "public forum" doctrine to limit speech and assembly in places once considered quintessential for civic engagement. As social change continues to take place in suburbs and central cities alike, it will be even more important to contest the decisions summarized above. Moreover, as the New Urbanism flourishes and many of America's 1,500 large-scale suburban shopping centers are moved outdoors and transformed into traditional streetscapes, the space to build civic capacity among millions of new suburbanites should be defended by legal conventions that privilege the free exchange of ideas, including minority points of view.[8] In a rapidly diversifying United States, anything less is a threat to democracy.

Bibliography

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[6] *Pruneyard Shopping Center, et al. v. Robins, et al.*, 447 US 74 (1980).

[7] *Stephen Downs v. Town of Guilderland*, State of New York Supreme Court, Appellate Division, Third Judicial Department, Docket No. 507428 (2010).

[8] For further treatment of social diversity and space in suburbs, see Anthony Maniscalco, "A Right to the Suburb? New Urbanism, Public Space, and the Law", *Metropolitics*, 8 December 2014. URL: http://www.metropolitiques.eu/A-Right-to-the-Suburb-New-Urbanism.html.

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