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Occupy Mall Street? How the Court Conditioned Public Space Where People Go

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Occupy Mall Street?

**How the Court Conditioned Public Space
Where People Go**

by

Anthony J. Maniscalco

A dissertation submitted to the Graduate Faculty in Political Science in partial fulfillment of the requirements for the degree of Doctor of Philosophy, The City University of New York

2014

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This manuscript has been read and accepted for the
Graduate Faculty in Political Science in satisfaction of the
dissertation requirement for the degree of Doctor of Philosophy

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Abstract

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Advisers: Professors Marshall Berman and Thomas Halper

This thesis explores the tension between practicable space and property rights. That tension has frequently animated legal contests over political expression in privately owned, publicly accessible marketplaces in the United States. Do American marketplaces function as *marketplaces* of ideas? Should they? In order to examine those questions, I survey the Supreme Court's considerations of expressive activity on public and commercial property, in particular, shopping centers. I begin by developing indications of public space, as well as noting the challenges for civic inclusion within the modern political sphere. Next, I survey historical practices of public space within (Western) marketplaces. Those practices reveal myriad negotiations over the multi-functionality of urban place, as well as dialectical interplay between publics and embodied spaces, which appear to impact civic capacity. In an era of suburbanization, space, spatial practices, and legal interpretations transform significantly, due in large part to the segregation of private places and purposes from genuine public uses.

I combine social and political theory with case studies of judicial decision-making, in order to historicize the contest over practices and exclusions of space. I trace the development of the High Court's public forum doctrine, focusing specifically on typologies used to regulate expression on public property. Then I detail the Court's rulings on free speech and assembly inside shopping centers. After examining the way in which Supreme Court precedents have been construed in two states, New York and New Jersey, I argue for revisited First Amendment protections of expressive space inside privately owned shopping centers. The goal of this study will be to look beyond a zero-sum game between space and property, towards a more inclusive view of commerce and public functionality.

Acknowledgements

This thesis is a bit of a comeback story, one long in the making. I may wind up omitting a number of people who helped me see it to completion, therefore. I am grateful to everyone who put up with me while I wrote it, and while I didn't write it. I would like to thank my father and my family, including the family I've adopted along the way. They all helped me find the wherewithal to carry this through during Round 2. I thank my yoga instructors, too, for modeling strength, flexibility, and mental clarity. My tennis buddies always showed interest in the outcome. I hope they will take my calls to play again, now that this work is in the books, so to speak. Similarly, anyone and everyone who was willing to indulge me in conversations about the topic ought to be acknowledged. The ideas herein are more urgent to me than simpler banter allowed, so I owe them all a debt of gratitude for their patience.

To the faculty at CUNY, who enthusiastically helped me launch this comeback, by reading abstracts and commenting at various phases: Setha Low, June Williamson, Monica Varsanyi, John Mollenkopf, Steve Brier, and Ira Bloom, to name some. To Joe Rollins, for permitting me to finish, something I scarcely thought I would do again. To Frances Piven, for hearing me out when I decided to give it a go again, after doing so many years ago, when I first sought to become a PhD student at the Graduate Center. My hearty and heartfelt thanks to Jack Jacobs, who offered such great encouragement and advice, well before he took on the responsibility of readership with such warmth and caring. To Tom Halper, copy editor-in-chief and conscience. This would not have been possible—or remotely coherent—without his interventions. Tom kept me accountable throughout, and he never admonished me for forgetting that he was responsible for other things besides my thesis. I cannot say enough about his patience and generosity.

Though I am remiss for not naming them here, I am grateful to all the students I have worked with over the years. My desire to understand civic engagement is an outgrowth of the work they put in; from all parts of the City. Beyond its reaches, I would also like to thank Stephen Downs, the lawyer who was courageous enough to stand by his convictions in 2003, when he was excluded from a mall in Albany and then arrested for refusing to take off a t-shirt bearing the controversial message, "Give Peace a Chance." Ten years later, he was very generous with his time and thoughts, both about his own experience Upstate and broader questions on privacy versus publicity in the places we share today.

A special thanks to Gloria. One day, she told me about a lecture at CUNY, where that professor I always talked about was speaking on a book about Occupy Wall Street. Talk about correlation! That conversation led me to ideas I never knew existed, and a curiosity I thought I left behind; finally, the willingness to write what follows. That conversation also led me back to the mentor and friend to whom this work is dedicated...

Dedication to Marshall

I wish to dedicate this thesis to Professor Marshall Berman. Marshall passed away just two days after leaving me a voice mail about one final step in the writing process. His message began, “Hi Tony, I enjoyed your introduction...” Perhaps I should only speak for myself, but anyone who knew and loved him like I did would have been walking on sunshine after hearing his review. When his wonderful wife, Shelley, informed me about his death 48 hours later, I felt the air abandon my effort. Thankfully, I could draw on the things that Marshall always wanted for me: to be strong, to keep growing. It is in his spirit that I could carry this through, with the help of those who loved him as much as I do.

Marshall had me at “shalom.” Under his tutelage I read about, thought about, and wrote about things I never dreamed about, including Freud’s *The Interpretation of Dreams*, which Marshall let me compare with Orwell’s “Politics and the English Language.” It wasn’t merely that he let me do it, barely knowing me beyond the shoddy writing I previously handed him during my first semester at CUNY. It was how open he was to the idea of someone trying something that might end up messy, at best. He behaved the same way when I proposed to place Rousseau and Dostoyevsky under Foucault’s microscope, something we both knew he didn’t feel too good about at the time. He was a good “allower” and a great friend.

Marshall wrote that public space can be “sloppy.” But more than anyone I have ever known, he was willing to let it be. He embodied everyday freedom and invention, intellectually and spiritually. He helped me become attracted to the idea of shared space by being the things I now want that space to be: open, community-oriented, revelatory, tolerant, and, most of all, authentic. I believe space ought to be compassionate, too, which is something I always felt from Marshall’s teaching and scholarship. When I approached him about trying to do this again, he let me open up to him about why I couldn’t succeed the first time, and why I needed to this time. His involvement was curative for me. And the strength he wanted for all his students is right where I need it anytime I think about him.

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Introduction: The Publicity of People's Marketplaces

“[T]here is a politics of space because space is political”
- Henri Lefebvre¹

While discourses on public space have almost always teemed with allusions to cities, the state has been harder to find in many accounts of how public and space are joined. In a similar way, traditional narratives about the public sphere have commonly failed to shed light on the state's ability to configure access to space. Scholarship on shared space and state regulation has surely grown since the start of the 21st century, following the World Trade Center attacks and post-9/11 security apparatuses in New York and other major cities. Occupy Wall Street and Tea Party protests appear to have raised the watermark in the second decade of the new century. Yet uncertainty about the durability of the former and speedy conversion of the latter into an electoral movement requires us to consider alternative examples of public space and its political uses, absent popular demonstrations like the ones that piqued our curiosities a few short years ago. Going forward, moreover, we would do well to embark on new discourses about the state's power to control rights of access to the contemporary public sphere.

We must likewise expand our inquiries into state interventions and the privatization of public space. Recent conflicts in the heart of Istanbul, Turkey, precipitated in part by the planned demolition of that city's oldest public park, Taksim Square—and slated for replacement by an indoor shopping mall—are likely to stir further inquiry into these transformative processes,

¹ Henri Lefebvre, “Reflections on the Politics of Space,” in Richard Peet (Ed.), *Radical Geography: Alternative Viewpoints on Contemporary Social Issues* (London: Methuen & Co., 1978), pg. 345.

internationally.² At the same time, urban activists in the United States remain dedicated to using and preserving traditional public spaces against so many private conventions that delimit the exercise of their personal freedoms. Local battles over community gardens come to mind, as do business improvement districts and public-private conservancies that restructure the rules of use in streets and parks, respectively.

Given these phenomena, discourses about space ought to look at property and how it may be reimagined publicly with the aid of the state. Commercialization of public space remains an important theme, one that will resurface throughout this study. But perhaps it is time to rethink privately owned marketplaces as centers of publicity and civic capacity, multifunctional spaces embodied politically and commercially by people who use them for diverse ends. The idea may seem farfetched these days. But in fact there is a long history of publicity and civic capacity in marketplaces. It is a history of emplacement for expressive practices, in which the spaces where people bought and sold things were the same ones they used to openly participate in conceiving their public sphere.³

As Barker has shown, for example, Athenian publics of the fifth century BC designed the first democratic space celebrated in the Western tradition. It was a marketplace: the *agora*. The *agora* was an amalgam of commercial and political association, where discourse on current affairs and ideas took place alongside people's trading activities. After it replaced the Acropolis as the center of public life—that is, after civic participation replaced passive witness of religious rites as the quintessence of citizenship—Athens “attained to full self-consciousness” and became

² Michael Kimmelman, “In Istanbul’s Heart, Leader’s Obsession, Perhaps Achilles Heel,” *The New York Times*, June 8, 2013, pgs. A1 and A6.

³ NB: The description here is cursory and anticipatory. A more detailed analysis will follow in the second chapter.

a model of “highly developed political life,” as critics of democracy were forced to concede.⁴

And one of the defining characteristics of the Athenian *agora* was its support for publicness among citizens who met, marketed, and debated there:

In the market-place...the city had its brain centres; and when men met in the assembly for deliberation, they met to settle matters which had been discussed before, and on which an opinion had already been formed...The city was not only a unit of government: it was also a club. It was not only politically self-governed: it had also (what made its self-government possible) a large freedom of social discussion...the open life of the market square... In the frequent contact of such a life, men of all classes met and talked with one another; and the democratic ideals of equality and of freedom of speech found their natural root. Knots of talkers and circles for discussion formed themselves from day to day; and in public talk and open discussion, the business of the community would be a natural staple. Men would come to know one another intimately, and in the common discussion of the market-square...would learn one another's worth. Such a society is the background and basis of the theory of the Greek philosophers.⁵

One of those philosophers, Aristotle, recognized a need for strong ecological overlaps between the polis and its public spaces. In this sense, it is important that his discussion of the *agora* appears in *Politics*, his treatise on government and political organization. Aristotle understood that common space was political at its core. This was something he shared with the Athenians of his generation, along with a distrust of city planners such as Hippodamus, who developed a prototype for authoritarian political space, meant to channel spectatorship among its users. Hippodamus had designed militaristic space, really.⁶

⁴ Ernest Barker, *Greek Political Theory* (London: University Paperbacks, Methuen & Co., 1960), pg. 16. NB: Among others, Plato recognized this fact of public life in Athens, as Barker points out in his seminal account.

⁵ *Ibid.*, pp. 21-22. NB: There are objections to this gendered formulation, as well as the exclusionary tendencies of the Greek polis, specifically, the distinction between the private household, on the one hand, and the public market, on the other. For criticism of the public-private split in political theories of fraternity, see, for example, Susan Moller Okin, *Justice, Gender and the Family* (New York: Houghton Mifflin, 1989); Carol Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988); Jean Bethke Elshtain, *Public Man, Private Woman: Women in Social and Political Thought* (Princeton: Princeton University Press, 1981); Okin, *Women in Western Political Thought* (Princeton: Princeton University Press, 1979); Dorothy Dinnerstein, *The Mermaid and the Minotaur: Sexual Arrangements and Human Malaise* (New York: Harper & Row, 1976).

⁶ Ernest Barker, *The Politics of Aristotle* (New York: Oxford University Press, 1958), Book II, Chapter VIII, sections 8-10, pp. 69-70; see also, Barker (1960), *op cit.*, pp. 93-94.

Yet Aristotle also challenged multifunctional arrangements in the marketplace above. That challenge seemed quite integral to his broader political philosophy, in fact. Suspicious of pure democracy, Aristotle proposed that politics and commerce be separated on the Athenian *agora*. He thought polity would be better served by splitting the “traders’” *agora* from the “freemen’s” *agora*, in other words, the marketplace of goods from the marketplace of ideas.⁷ Aristotle championed public discourse and private property rights at the same time. When it came to *place*, however, he believed that Athens’ policy of blending commerce and politics would undermine civic engagement in the city-state, by sowing disunity among its citizens and inhabitants. In the end, however, Aristotle’s cautions failed to convince Athenian democrats to alter mixed-use space atop the *agora*.⁸ Thus, the marketplace remained the heart of public space in ancient Athens, its civic nerve center.

Without ignoring exclusions on which Athenian society and economy relied, historical developments have changed the way politics and markets intersect today. Whether one supports Aristotle’s positions on practical uses of the *agora* or not, modern marketplaces are more regulated than their precursors in ancient Greece. For one, most physical spaces in which commercial intercourse occurs are now privately owned, unlike squares and town centers where people who once sold goods and services assembled in common with others who did not, but who nevertheless wanted to engage their fellow citizens in open debate about controversial topics. Contemporary property owners have an immediate stake in the way *their* marketplaces function. They also possess much greater veto power over civic activity within those spaces.

⁷ Aristotle, *Politics* (New York: Modern Library, 1958), Book VII, Chapter 12, Lines 30-35, pg. 302 (in Barker, 1958, sections 3-6, pg. 310).

⁸ R.E. Wycherley, *How the Greeks Built Cities: The relationship of architecture and town planning to everyday life in ancient Greece* (New York: W.W. Norton & Company, 1962). A more detailed account of Wycherley’s study appears in Chapter Two.

That much is plain. But then again, the veto power enjoyed by modern property owners rests on more than their titles to marketplaces. It is stored within a bundle of legal rights that are at once safeguarded by the state, based on philosophical and constitutional tenets that go back hundreds of years in Europe and the United States. At the same time, though, there is a rich tradition of outspoken dissent in America, as well as toleration for various forms of political association, though neither is specified in the text of our Constitution.⁹ The language of the First Amendment provides for “the freedom of speech,” of course, and it specifies “the right of the people peaceably to assemble.” And while it does not say where they may do so, American history permits us to infer that freedoms of expression were thought in one way or another to pertain to spaces embodied by publics: public spaces. In view of developments alluded to in the previous paragraph, however, and legal rights of owners to dispose of their property as they see fit, the question now becomes, which public spaces?

The principal aim of this study is to explore legal contests over publicity inside today’s privately owned marketplaces. Following an attempt to better understand public space and its expressive implications in theory, history, and jurisprudence, I survey legal disputes triggered by incidences of unauthorized speech and conduct in modern American shopping centers. I examine judicial opinions that have emanated from open discourses and organized protests in the common areas of malls, as well as their exclusion when speech practices have been observed as threatening to the commercial interests of owners. In light of constitutional rights enjoyed by property owners, on the one hand, and speakers and activists, on the other, these struggles have occasioned conflicting interpretations of First Amendment freedoms by the United States

⁹ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (New York: Harvard University Press, 1980), pg. 105.

Supreme Court. Over the course of the past half century, the Court has considered whether and to what extent expressive activities legally safeguarded in public places are likewise protected on privately owned property, which is chiefly defended in the language of the Fifth and Fourteenth Amendments.

Though this is not a study of property rights in America, they play a critical role in the nation's constitutional design, and they have often been invoked to temper unwieldy expressions of civic engagement. After all, it was Shays' Rebellion and other instances of public protest that prompted the Constitution's founders to invest greater power in an expanded government that could protect property owners and other minority stakeholders from the volatility of popular majorities who did not possess estates.¹⁰ There was bound to be competition between public and private rights in an enduring republic as a result. Federalists such as Madison hoped that an effective constitutional design would contain that competition through divided government and innovative procedures of decision-making, so that foreseeable conflicts would become objects of political representation, rather than of pure democracy.¹¹ Property and substantive concerns would be addressed through the policy process, while rights of free speech and assembly would be safeguarded in a Bill of Rights championed by Anti-Federalists and other opponents of the new central government.¹²

Of course, the architectures of representation envisioned by Madison and his fellow framers predate the growth of professional politicians, lobbyists, and our contemporary campaign finance system. They also preceded political action committees and myriad covenants

¹⁰ James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (New York: Oxford University Press, 1998), pp. 39-40.

¹¹ This, of course, was the essence of Madison's argument in *Federalist* 10, which is both credited and criticized for being a sophisticated political defense of property rights vis-à-vis interest group arrangements made possible by the proposed Constitution. See Clinton Rossiter (Ed.), *The Federalist Papers* (New York: Mentor, 1961), pp. 77-84.

¹² Ely, *op cit.*, pg. 47. NB: Ely points out on multiple occasions that the Anti-Federalists, who expressed objections against a centralized government, never objected to the property protections included in the 1787 Constitution by their Federalist opponents. See, for example, pg. 51.

between public officials and private citizens. These may have seemed unthinkable in the late 18th century, but they have nevertheless restructured contests for control of topography and people's access to shared spaces. In at least one review of the current situation, democratic theorists are reproached for overlooking client relationships between property owners and state actors, who have final say over what spaces we can use, as well as what practices we are permitted to engage in legally. According to that charge, too many theorists have touted free speech as some sort of abstract good or have leaned on their lamentations about its eclipse in America. Worse, perhaps, they have analytically detached notions of place from their discussions about civil rights in the public sphere. Meanwhile, modern real estate developers have purchased public space, turned that space into private territory, and then deployed it to enhance their commercial position and political influence on governments at every level.¹³ Given these competing approaches to embodied space, the physical landscape in which free expression finds legal and political protection continues to contract, while practical opportunities to build civic capacity, such as I have related to the Athenian *agora*—and others do in the marketplaces of early America, for example—continue to diminish.¹⁴

This study will be carried out in the context of these developments, and others to be discussed in what follows. Given disparities in the ground war alluded to above, the modern representative process seems an improbable one for reopening space on behalf of democratic association, or for closing gaps that exist between marketplaces and public practices previously, if imperfectly united. Neither public nor private rights have ever been absolute in our constitutional scheme, and it has often been an institutional responsibility of the judicial

¹³ Margaret Kohn, *Brave New Neighborhoods: The Privatization of Public Space* (New York: Routledge, 2004), pg. 80.

¹⁴ Timothy Zick, *Speech Out of Doors: Preserving First Amendment Liberties in Public Places* (New York: Cambridge University Press, 2009), pp. 25-36.

branch—the one designed to be immune from political pressures—to referee relationships between marketplaces of goods and the marketplace of ideas.¹⁵ These legal mediations have frequently been channeled through First Amendment jurisprudence, which will be traced in much of what follows. Yet, if we are to avoid the misfortune of disembodied expression, or depriving it of what Justice Brennan called “breathing space,” then the study of civic engagement needs to transcend what people can do with their speech: it should also be about *where* they can do it, and, as we often find, where they cannot.

In Chapter One, therefore, I look to erect a working idea of public space. As I note at the outset, it is not really possible to define public space singularly. Notions of public and space are frequently clustered and contradictory. Instead I offer five signposts, which I use to indicate the publicity of space throughout this study: openness and accessibility to users; support for community practice; visibility and revelation; diversity, tolerance, and accommodation; authenticity and unexpectedness. These indications are drawn from a variety of intellectual sources, and they admittedly warrant further interrogation. They are meant to elicit an ongoing discussion of public functionality within modern, unconventional gathering spaces, as well as evoke ideas about *individual and collective participation in open political discourses*. In this respect, I should admit at the outset that I am generally referring to participants in those discourses when I say “public” or “publics” in this study, or when I argue for rights to public space. This is not the only available usage of such multi-determined notions, of course, but the indications I develop in the first chapter correspond to my consideration of the normative public sphere, which follows from them. That analysis focuses on the problem of political participation

¹⁵ Any number of observers has questioned the neutrality or apolitical nature of judicial interpretation, including Ely (1980), *op cit.*, pp. 4-5. I will return to this argument in the conclusion.

and social inclusion, specifically, in the theory of Jürgen Habermas, in his groundbreaking work, *The Structural Transformation of the Public Sphere*.

My approach is topographical, first and foremost. Yet, it should become evident by the close of the first chapter that our ideas of public space and public sphere are also shaped by myriad ways in which people endeavor or even struggle to use space for civic engagement. The modern public sphere theorized and revisited by Habermas and his critics likewise encourages us to look at how people may successfully use marketplaces as practicable political spaces. But it also requires us to consider how they have been prevented from doing so, historically.

The purpose of Chapter Two, then, is to trace uses of commercial space and property for non-commercial activity. I examine four periods, in which marketplaces have at times functioned as centers of open discourse and participation. At other times, they have been architecturally or administratively regulated against public functionality. I begin with the mixed-use, democratic *agora*, and then transition to Roman forums, where spaces become more closed off and decentralized. That pattern repeats in medieval and early modern market squares in Europe, where mixed social classes begin to inhabit space in entirely new and unexpected ways, eventually triggering misgivings among governing regimes and their land use administrators in the 18th and 19th centuries. Across the ocean, colonial American markets become epicenters of revolutionary and post-revolutionary political expression and activism. By the close of the Civil War, however, concerted efforts to restructure and manage urban space are evidenced in many of the largest cities of the late 19th century. Following radical resurgences of that space in the first half of the 20th century, the most significant de-politicization of America's commercial landscape, along with the rest of its geography, is embedded in a host of federal suburbanization schemes launched after World War II.

Around the same time—and not coincidentally, as I suggest in Chapter Three—the impact of topographical rearrangements in the United States begins to play out as a prime constitutional question, which implicates the protection of free speech, on the one hand, and its legal exclusion, on the other. That question is addressed through an expansion of Supreme Court jurisprudence related to expressive practices. In it, the Court constructs a *public forum doctrine* from its First Amendment interpretations of public places. The doctrine defines what forms of public property are legally accessible for purposes of communication, as well as what forms of communication are allowed on public property. It protects public space for speech and conduct in its earliest iterations, but the Court begins to classify an ever-growing array of landscapes as limitedly public, and eventually non-public. In doing so, it gradually applies constructs of property ownership to places in which citizens gather in an era of suburbanization, and on which they must rely to participate in political discourse. Grouping publicly accessible spaces via an increasingly formal typology that distinguishes “public” from “non-public,” the Court relies on that typology to narrow rights of expression in all but the most traditional venues. In essence, then, the third chapter shows how free speech is de-spatialized by judicial determinations. That is, the Court’s rulings establish where public forums are held in trust for popular participation, versus where place is reinterpreted as property and legally disembodied from the public sphere and practices encompassed by it.

The arc of the public forum doctrine provides an object lesson on how the High Court excludes political expression, first by defining spaces where speech is exercised as restricted property, then by withdrawing First Amendment freedoms therein. This legal phenomenon is particularly problematic in suburbs, where privately owned shopping centers have become *de facto* gathering places for millions of Americans outside cities, where they previously

participated in social discourse and activism. In Chapter Four, I turn to the Court's rulings on malls. I begin by looking at a seminal speech and property opinion delivered by the Court in 1946. Next, I trace four decisions handed down between 1968 and 1980, in response to legal disputes over protest and prohibition inside the common areas of modern malls.

Not unlike its genesis of the public forum doctrine, the Court's initial considerations of free expression in shopping centers emplaced political discourse and connected it to democratic robustness. In *Marsh v. Alabama*, a majority led by Justice Hugo Black held that civic engagements required First Amendment places and trumped constitutional rights of property in a privately owned company town. Two decades later, in *Amalgamated Food Employees v. Logan Valley Plaza*, the Court opined that changing landscapes demanded a reformulation of embodied space, as well as legal relationships between private property owners and a rapidly suburbanizing public. Writing for his colleagues, Justice Thurgood Marshall challenged the constitutional right of the former to legally exclude the latter. Moreover, he concluded that the state's imprimatur for exclusions of speech and conduct needed to be viewed in the context of suburbanization and transforming geographies in America.

The Court reversed its protections of speech inside malls, however, in remarkably short order. In *Lloyd Corporation v. Tanner*, decided just four years after *Logan Valley Plaza*, a realigned majority concluded that malls offered few, if any public functions besides commerce; speech unrelated to the private purpose of shopping centers found no public place or protection inside malls. The Court went much further four years later, expressly overruling its decision in *Logan Valley Plaza* and contending in *Hudgens v. NLRB* that the First Amendment enjoyed *no* protection in shopping malls. The majority invoked a doctrine first espoused in the 19th century: the state action doctrine. It holds that the First and Fourteenth Amendments limit government

alone from interfering with free speech. According to the *Hudgens* Court, the Constitution was framed specifically to prevent a despotic state from abrogating personal freedoms. The doctrine therefore did not apply to property owners, who were generally free to make decisions about the disposal of their private assets. Thus, the legal script that treated malls as publicly functional spaces had been substantially rewritten when it came to free speech.

In its last major decision on the issue, *Pruneyard v. Robins*, the Court maintained that its mall doctrines, in particular, state action, still precluded First Amendment protection for public expression in shopping centers. But now the Court invited individual states to conduct their own independent analyses of the matter, and to extend rights of speech and assembly in malls if their constitutions warranted expressive protections. Notwithstanding the Court's relatively new position, that shopping centers met no threshold for First Amendment protection in light of their public functions, speech in suburban malls could be reviewed by state courts, under local conditions. In many cases that meant jurisprudence would derive from affirmative constitutional provisions in the states, along with the diverse political cultures represented by them. The *Pruneyard* opinion therefore signaled a positive turn for public space in malls.

As I argue in Chapter Five, however, the promise extended by *Pruneyard* has scarcely been realized since it was handed down. In fact, a preponderance of states has responded to that 1980 ruling by repeating High Court rationales for excluding speech and assembly in shopping centers, though a small number have done otherwise. Therefore, I try to reimagine the mall as a space for free expression, in which First Amendment speech might again be legitimated. Given legal fragmentation and topographical changes that have followed the Court's adjudication of mall contests more than thirty years ago, I argue in favor of revisiting the debate about free speech therein. I take the position that political expression in malls ought to fall within the field

of federal jurisprudence, given social and topographical conditions that have emerged nationally, both in and outside of suburban shopping centers.

In order to develop this argument, and contemporize the concerns raised at various stages in this study, I describe responses to *Pruneyard* in two states: New York and New Jersey. Treating their court rulings as case studies of post-*Pruneyard* decision-making, I suggest that the state action doctrine, the main source of speech exclusions on private property, is reconcilable with government support to older, enclosed shopping malls, and innovative mixed-use centers built after the Supreme Court issued its opinions decades ago. In the main, though, I support a notion of state action once construed by the Court, when it not only evoked ideas about changing landscapes to protect expression on private property, but also public functions served by that property. My rationale for free expression inside shopping centers is based on environmental swings currently taking place in suburbs throughout the country. Metropolitan areas in America are being reshaped by major demographic shifts and other ecological changes. In view of these social and spatial transformations, I borrow *the right to the city* concept from Lefebvre's work on urban space. I try to recast malls as *de facto* urban centers, where civic engagement ought to transpire publicly among new and diverse suburban inhabitants, who share more and more commonalities with their counterparts in cities. Owing to the state's capacity to condition public and private relationships inside these centers, I conclude that the Court can regenerate speech-protective iterations of place through First Amendment analysis.

My hope is to encourage ongoing discourse about free expression inside shopping malls, as well as the Court's power to shape practices of public space inside privately owned, analogous cities spread across an ever-changing metropolitan landscape. When Barker and early political

theorists extolled multi-functionality on the *agora*, they were not yet thinking about 20th century zoning or single-use topographies in suburbs. In the 21st century, questions about the role of courts and their ability to catalyze public space or private property loom large in suburbs. The commons there has again been the marketplace, in this case, the shopping center, one of the few places in which suburbanites collect. At the same time, the faces of those suburbanites have changed profoundly over the last decade, following demographic shifts that are forcing us to reconsider notions of civil rights in a transforming milieu outside older cities.

This study of publicity attempts to engage with those developments, inside built landscapes. It is undertaken in the spirit of a “living Constitution,” which can indeed accommodate political change through reform of legal interpretations, while protecting breathing space in newer places where people go. There is little dispute that speech and assembly are paramount freedoms in our democracy; that they should be defended under most conditions. Yet, during the last several decades, we have witnessed any number of prohibitions against expression in publicly accessible places where it might find listeners. As I indicated earlier, those exclusions have pitted expression against property, including shopping centers. Following a detailed review of that contest, I wish to argue that the High Court is the most reliable institution in which to reconcile conflicts between mall owners and outside speakers; that it is best suited to protecting the public functionality of today’s mall spaces, and the use of those spaces for free speech and assembly in suburbs.

The irony of my position on the Court—that is, my confidence in the very institution I am criticizing to secure rights of association—is not lost here. Nor is the fact that I am seeking out the only unelected branch of government to resolve what I see as a problem in privately owned malls. It may be objected that the political process is the place where this issue ought to be

addressed, that courts ought to leave these concerns in the hands of elected officials, who are accountable to the people, in deference to our republican scheme. This is a persuasive line of reason. Indeed, seeking the Court’s intervention to remediate a problem it helped create seems a long shot. However, if we agree that there is a problem, specifically, the exclusion of speech from spaces where it might find listeners, then slanted political processes I mentioned earlier ought at times be superseded by judicial review. When it comes to public participation, if elected officials engender distrust in democracy, by “choking off the channels of political change to ensure that they will stay in and the outs will stay out,” then it will make sense to turn to the Court and our Constitution’s chief “participation-oriented, representation-reinforcing” provision: the First Amendment.¹⁶ And though that Amendment has been unwelcome in shopping malls for some time now, the stakes in our changing metropolitan landscape are too high to abandon all hope that it could be re-invited there in the future. I myself have little doubt that future contests will issue from changing conditions traced in this study. Thus, the Court will eventually get a chance to right what it got wrong in places where people go.

¹⁶ Ely, *op cit.*, pgs. 87 and 103.

Chapter One

Positing Public Space: Reconciling Built Environments With The Public Sphere

While so much has been written about public space during the last two decades, especially, it remains an elusive idea. Efforts to articulate that space in a universal manner will likely provoke spirited responses from not too rare observers or users who convey it differently. Defining the public sphere proves equally challenging, particularly when we try to do so from a democratic perspective. Yet, it is plain that public spaces and spheres exist in some way. They are spread across our topography and human geography, no matter where or by whom they are expressed in time. When I think of them, the following comes to mind: *individual and collective participation in open political discourses*. Though there are other ways to understand public spaces and spheres, the arguments here will reflect this communicative iteration, which is traced to ancient Athens, found in the Middle Ages, and repeated in our modern vernacular. It is also manifested in Europe, as well as in the contemporary United States. And notwithstanding the multiple genealogies or protean qualities of publicity and space, expression remains central to politics and participation. Similarly public spaces and spheres—whether we identify them as products of environmental design, civic practice, or legal interpretation—are vital to the political experiences of people who aim to inhabit them.

Recognizing public space and how it functions in law, design, and practice animates this examination, and this chapter, specifically. Since exact meanings of that space prove challenging to distinguish, I would like to start with some scholarly efforts to indicate the idea across multiple disciplines. There are signs of cohesion among these efforts, thankfully.

Similarly, there is shared agreement about the political value of public space to an active public sphere outside the state. So, in order to prepare for the statements of law to be discussed later, I will concentrate on design and practice in this chapter and the next, borrowing interpretations of public space found principally in the work of urbanists and architects, planners and geographers, sociologists and environmental psychologists, among others.

I would also like to address a debate in political theory over the modern, liberal public sphere—in particular, whether a normative construct of that sphere can accommodate expanded civic inclusion and participation in democratic discourses. The disciplinary lines here are fuzzy, as the interpretations above invariably overlap with political theory, and vice versa. Still, it is possible to differentiate them in at least one way, in my view. While the approaches referred to in the previous paragraph tend to locate a wider array of socio-cultural practices within physical places, political theory traditionally abstracts the legal and historical conditions through which collective actions manifest vis-à-vis the state, explicitly. For example, the criteria found in planning and its sister literatures typically emphasize the physical arrangement of public space. Political theory, more often than not, privileges the *publicness* of the public sphere.¹ The distance is steadily closing, and a broader goal of this examination is to continue to enhance reciprocity between these different fields of research on laws, designs, and practices of publicity and public functionality.

¹ See Michael Rios, “Emplacing Democratic Design,” in Rick Bell, Lance Jay Brown, Lynn Elizabeth & Ron Shiffman, Eds., *Beyond Zuccotti Park: Freedom of Assembly and the Occupation of Public Space* (Oakland, CA: New Village Press, 2012), pg. 134. Let me reiterate that this distinction is essential, rather than emphatic. Moreover, scholarship in the last decade especially has begun to problematize the difference between public space and public sphere, seeking to identify the “scale” on which public spheres may be discerned among existing public spaces. See Setha Low and Neil Smith, *The Politics of Public Space*, (New York: Routledge, 2006), pp. 4-11.

Interdisciplinary indications: connotative public space

In the spirit of its multiplicity and seemingly defiant qualities where any single definition might be adopted, I suggest that public space may best be indicated by the following signposts, frequently found within academic and professional expressions: 1) openness and accessibility to users; 2) support for community practice; 3) visibility and revelation; 4) diversity, tolerance, and accommodation; 5) authenticity and unexpectedness. These five indications are hardly exhaustive. Many more might be added, for example, “the *flaneur*” artfully extolled in the streets of Benjamin’s Paris or other European coinages.² In other words, public space might just as easily be indicated by leisurely strolls, people-watching, or private repose in places where people assemble. The rudiments above seem equally keen when we explore overlapping constituents of a participative public sphere, however. I prefer to concentrate on them, therefore, while considering their effects on syntaxes of civic engagement in advance of what follows.

1) Openness and accessibility to users

In order for a space to be defined as appositely public, it is open and accessible to users. In this sense, public space is measured by the extent of its invitation to users, and its inhabitability among them—that is, the conditions under which occupants can use it in most circumstances. Public spaces offer wide latitude to those who use them. There are numerous implications when we treat space this way, of course, and problems may easily be imagined. Even observers who defend this benchmark suggest that unlimited openness and accessibility may threaten other ones, such as support for community practice. For example, Carr, Francis, Rivlin, and Stone define public spaces as:

² See Walter Benjamin, “The Flaneur,” in *The Arcades Project* (Cambridge, MA: Harvard University Press, 2002), pp. 416-53.

Open, publicly accessible places where people go for group or individual activities...functional and ritual activities...While public spaces can take many forms and may assume various names...they all share common ingredients. Public space generally contains public amenities...that support [the above] activities. It can also be the setting for activities that threaten communities, such as...protest.³

Accordingly, openness and accessibility necessitates amenities that are capable of supporting the widest possible invitation. These amenities produce appearances of public functionality and rights of entry to any and all prospective consumers of shared space. As we will see in the next chapter, these conditions have at times inspired conflicts. Yet the periodic clashes stirred by openness and accessibility have themselves transformed the practicability of public spaces, and have likewise advanced civil, if unruly negotiations within them.

2) *Support for community practice*

Next, public spaces anchor the uses to which individuals and groups put them. Public spaces furnish satisfactory conditions for individuals who seek to use them for repose, reflection, and deliberation. Yet, they also serve assemblies of people, who are rooted in their communities, and who seek to act in some collective capacity. Advocates look to the Athenian *agora* described by Barker earlier, as well as modern spaces such as local parks, where neighbors gather for social, perhaps civic purposes. In this sense, “no individual is sovereign in this sphere, but each, on entering it, renounces the right to dictate the terms upon which he communes and conflicts with others.”⁴ When they elect to use it in their solitary capacity, individuals may be entitled to self-determination within public space. If they happen upon collective uses, though,

³ Stephen Carr, Mark Francis, Leanne G. Rivlin, and Andrew M. Stone, *Public Space* (New York: Cambridge University Press, 1992), pp. xi and 50. Though protest may (and perhaps should) be disruptive, I question Carr, et al.’s contention that it represents a threat to community. I will return to this point again in my study, supported by post-Occupy Wall Street accounts that observe mutual criteria.

⁴ Roger Scruton, “Public Space and the Classical Vernacular,” in *The Public Interest*, Winter, 1984, pp. 5-16.

then they yield their practices to the community. Public space thereby furnishes possibilities for autonomy, while articulating social sacrifice and inclusion through its dimensional designs and rules of use.⁵ It also blunts hierarchy among the people who use it. Public space is critical to pluralism, then. When we inhabit it, we create and also translate symbols that state who we are and where we stand *vis-à-vis* our community. Public space is a locus of mutual visibility.⁶

3) *Visibility and revelation*

Public space provides its users the opportunity to articulate their values and beliefs. In this sense, embodied spaces are key sources of publicity itself, where identity and culture may be revealed to local audiences or others. According to Kohn, public space “create[s] a shared set of symbols and experiences that create solidarity between people who are separated by private interests...it is a shared world where individuals can identify with one another and see themselves through the eyes of others.”⁷ J.B. Jackson suggests that *every* public space be understood as a place of or for civic identification, regardless of its intended purpose:

It was, and in many places still is, a manifestation of the local social order, of the relationship between citizens and between citizens and the authority of the state...where the role of the individual in the community is made visible, where we reveal our identity as part of an ethnic or religious or political or consumer-oriented society, and it exists and functions to reinforce that identity...Every traditional public space, whether religious or political or ethnic in character, displays a variety of symbols, inscriptions, images, monuments, not as works of art but to remind people of their civic privileges and duties...⁸

⁵ See also Lyn Lofland, *A World of Strangers: Order and Action in Urban Public Space* (New York: Basic Books, 1973), pp. 122-25.

⁶ Ari Adut, “A Theory of the Public Sphere,” *Sociological Theory*, Vol. 30, No. 4, 2012, pg. 252.

⁷ Margaret Kohn, *Brave New Worlds: The Privatization of Public Space* (New York: Routledge, 2004), pg. 8.

⁸ J.B. Jackson, “Forum Follows Function,” in *Discovering the Vernacular Landscape* (New Haven: Yale University Press, 1984), pp. 16-17.

Jackson's conception helps us see public spaces as the physical structures on which people configure natural or ascribed identity, and then negotiate relationships within—where they locate their identities within a wider ecology. Public space catalyzes the exposure of commonality, then, while presenting geographical opportunities for expressions of difference.⁹

Public space likewise conveys meaningful openings for collective self-examination and encounter. It involves *others*, and it perpetually occasions contact and myriad intersubjective negotiations demanded within physical environments. While television, radio, and the Internet may valuably reinforce images of pluralism and integration, the idea here is that I identify who I am and how I fit in through the reflection of others when we are in physical proximity. Facebook's worldwide market notwithstanding, flattened cyber-interaction is biased toward strategic promotion and capitalization, rather than personal self-reference.¹⁰

Demonstrating the overlapping needs of public space and public sphere outside the state, Sennett contends that most intimate, and, therefore, pressing human interests must be addressed visibly. The alternative is a general lack of assembly, which fosters isolation and exclusion, what Durkheim described as *anomie*.¹¹ In the public eye alone, Sennett writes—linking the needs above to social theory—can individual self-improvement and collective self-fashioning occur.¹² Relying on this connection (and Habermas' theory of the public sphere, which I will

⁹ While I will suggest the limits of her critique of the modern public realm below, the view here does in some way overlap with the agonistic notion espoused by Hannah Arendt, who posits that realm as an antidote to mass societies and spaces in which differentiation has become impossible.

¹⁰ This view is sure to provoke some dispute, which will not be taken up or resolved here. There is little doubt that Facebook, Twitter, and other social network/media platforms may prove valuable for rallying collective action within embodied spaces. The Occupy and Tea Party movements provided impressive evidence in this regard. So, too, did the "Arab Spring" and other effective protests around the world, when publics assembled in physical spaces.

¹¹ Perhaps demonstrating the point through his dismissal of concern for sociological disaggregation, Koolhaas has argued on behalf of an anti-architectural notion of public space—suggesting that modern cities have maximized development through a *laissez-faire* "evacuation of the public realm," in which *anomie* turns into their "main attraction." See Koolhaas, "The Generic City," *S,M,L,XL* (New York: Monocelli Press, 1998), pg. 1251.

¹² Richard Sennett, "The Public Domain," in *The Fall of Public Man* (New York: Knopf Publishers, 1977), pp. 3-5.

consider below), Warren develops the view that public space is the prime site of construction for what pragmatists such as Dewey called “organized intelligence”:

The public sphere (or, more accurately, *spheres*) is the space of public judgment that is supported by the associational structure of civil society....public spheres...provide the means for forming opinions and developing agendas...States and markets organize themselves through the media of power and money, and for this reason limit the communicative logic that inhabits public spheres. In contrast, the institutionally ‘unbound’ qualities of public [spaces] are essential for allowing the logics of public discourses to take their course...their very existence depends upon generating the distinctive resource of *influence*, or communicative power. For this reason public spheres should be able to carry information and enable judgments with more authenticity than those developed within the state...The public sphere is, in this sense, the spatial representation of the...notion that social collectivities ought to be able to guide...with their well-considered...opinions.¹³

Public space is the nucleus of political association, storing self-knowledge and civic capacity. It is where public opinion is formed and made legible to the members of a political culture. At its most democratic, it is a medium for communicating rationale perspectives. It may contain the relationships forged among members of civil society, and it may facilitate mutual transparency and trust in processes of participation, cornerstones of self-representation.

There may be an unintended consequence here, which at least bears acknowledgement. While Sennett and the others are saying that public space relies on visibility and revelation, these ingredients may also pose threats to freedom. There is sufficient historical evidence to recommend a cautious approach, therefore. The collective self-fashioning made possible within visible and revelatory public spaces may also open the door to the forms of *peer surveillance* that Michel Foucault traced in *Discipline and Punish*, Part One of *The History of Sexuality*, and throughout much of his later work. In Foucault, the architecture and engineering of shared space is often conceived in Orwellian terms, particularly as Enlightenment values such as visibility and

¹³ Mark E. Warren, *Democracy and Association* (Princeton: Princeton University Press, 2001), pg. 77. Author’s emphasis.

revelation yield a contemporary matrix of repressive relationships within the very public sphere that touted liberty.¹⁴ In this view, the paradoxes of modern public space and sphere are conveyed within their theories of liberation. The irony is perhaps best exhibited in the political philosophy of Jean-Jacques Rousseau. Rousseau went to extraordinary lengths to build his ideas of democracy and justice atop a visible and revelatory landscape. Rousseau's dream of democracy, best expressed in his "civil religion" construct (no less in his glorification of Geneva), attaches to the *most* public of spaces.¹⁵ In them, we find the transparency and trust critical to the creation of a democratic public sphere. But there are other uses for these abstract tools, and not a few totalitarian regimes in the 20th and 21st centuries have manipulated physical space, discerned dissent made visible inside, and then revealed their own sovereignty to the body politic forced to inhabit it. So, too, did post-Revolutionary War Americans, who at times violently imposed a new conformity on countrymen who displayed residual loyalty to the British crown. Draft rioters used open public spaces in New York to expose and intimidate abolitionist reformers, while visibly terrorizing African Americans during the height of the Civil War.¹⁶

Following Tocqueville in the 19th century, and Hannah Arendt in the 20th century, Sennett answers the concern above by submitting that visible and revelatory public space still promises a strong defense of freedom via mutual observations within. The transparency that indicates public space also harnesses the interpersonal responsibility behind checks and balances of power, while diminishing popular abuses. It is the interdependent ecology of public space that supports human agency and a spirit of cooperation. This agency and public spiritedness

¹⁴ For Foucault's arguments in this regard, see *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1977), esp., pp. 143-48, and *The History of Sexuality: An Introduction* (New York: Vintage Books, 1978), esp. pp. 15-17. I will return to Foucault in the next chapter, citing additional works in which space is politicized and turned into a tool of what he calls "micropower."

¹⁵ See Jean-Jacques Rousseau, *The Social Contract* (New York: Penguin Publishers, 1968), pp. 176-87; also *Politics and the Arts: A Letter to D'Alembert* (Ithaca: Cornell University Press, 1960), pg. 59 and pp. 92-125.

¹⁶ See, for example, Lisa Keller, *Triumph of Order: Democracy and Public Space in New York and London* (New York: Columbia University Press, 2010), pg. 44.

transform users into guardians of their own moral codes of “getting along,” helping to reorganize the “eye of power” traced by Foucault into a paradoxical instrument of civil liberty.

One may reasonably question their orderliness and impact; however, the “General Assemblies” of the Occupy Wall Street movement in 2011 were exemplary in this regard. *Within* the space of the Occupy protests themselves, a visible and accountable structure was routinely practiced, one that was respectful to its participants. That loose organizational structure revealed an alternatively modeled, non-judgmental decision-making apparatus under threatening circumstances. Many movements create this space. As this chapter progresses and attempts to reconcile built environments and the public sphere, we will see that democratic space relies on visible and reproducible renegotiations of the social contract. Public space thereby enhances our capacity to recognize other points of view in spite of our civic pursuits and prejudices. It serves as a natural check on repression, according to champions like Dewey and free speech advocates such as John Stuart Mill. Without visible and revelatory space, subjectivity retreats inward, individuals abandon agency, and citizens relinquish self-determination and their collective freedoms.

4) *Diversity, tolerance, and accommodation*

Provided that favorable conditions are produced by the benchmarks previously mentioned, a fourth indicator is the diversity of users *and* uses of public space, tolerance towards those users and uses, and accommodation of new users and uses. According to Sennett, it is the very nature of public space “...to intermix persons and diverse activities” that makes it worth producing. For environmental psychologists, a chief concern of public space “...is whether people are free to achieve the types of experiences they desire...most simply, the feeling that it is

possible to use the space in a way that draws on its resources and satisfies personal needs.” The corollary is a diverse notion of public space as “a place that accommodates people...and becomes, over time, a site that people rely on to meet, relax, protest or market.”¹⁷ Crawford elaborates on the pluralism of public space as an architectural creation:

Public space should be viewed not as a single, unified physical and social entity but as a situation that can be experienced in multiple, partial, and even paradoxical ways. Thus there is no single public space but as many different public spaces as there are different publics.¹⁸

What is interesting about this marker is that it elicits an echo among supporters that non-traditional spaces are often well suited to the demands of diversity in particular, as well as tolerance and accommodation. Spaces purposefully designated for public use are often poorly appointed to host diverse users and uses. This may be so because customized place is only able to tolerate prearranged uses. It cannot accommodate new or heterogeneous use frameworks, which are frequently isolated from the signs and symbols relied upon by users in the visibility criterion above. On the other hand, as Glazer and Lilla point out, it is inside unconventional environments, such as shopping districts (and the interstitial spaces that connect them to non-commercial activities), that a diversity of users may discover opportunity to assemble and negotiate publicly.¹⁹ Indeed, it may be the mixed activities and rules of bargaining that govern such spaces that make them so desirable to diverse users and uses. “Everyday spaces,” to borrow a term popularized by Crawford, represent an attractive substitute to “the carefully planned, officially designated, and often underused spaces of public use that can be found in most American cities...” Franck and Stevens describe “loose spaces” as those in which any number of

¹⁷ Carr, et al., op cit., pp. 137, 50.

¹⁸ Margaret Crawford, “Suburban Life and Public Space,” in David J. Smiley and Mark Robbins (Eds.), *Sprawl and Public Space: Redressing the Mall* (New York: Princeton Architectural Press, 2002), pg. 22.

¹⁹ Nathan Glazer and Mark Lilla, *The Public Face of Architecture: Civic Culture and Public Spaces* (New York: The Free Press, 1987), pp. x-xii.

users practice assorted uses, generating collective capacity “with or without official sanctions and with or without physical features that support those activities.” And in an even more assertive endorsement of diversity, Jeffrey Hou advocates a distinction between institutional public spaces—the conventional ones referred to above, such as parks, where people routinely observe prescribed rules of behavior—and *insurgent public spaces*, where people may ignore such guidelines. Most notable among these latter spaces are protests.²⁰

Events in Lower Manhattan further illustrate how a diversity of users and uses may redefine unconventional spaces. While post-Occupy scholarship in urban geography, planning, and architecture raised consciousness about privately owned public spaces (POPS), they were subjects of consideration prior to 2011. Following Jane Jacobs’ widely celebrated study of neighborhood streets and community spaces in *The Death and Life of Great American Cities*, a leading defense of diversity was developed by William Whyte, who studied POPS in several American cities, including New York. Whyte conducted what was thought to be a highly unusual study of publicly accessible plazas, skyways, concourses, and other urban places. He interviewed scores of planners, developers, architects and, most importantly, users of POPS. Without putting too fine a point on it, Whyte’s discovery was that spaces designated as public were problematic, indeed counter-intuitive. They were consistently unaccommodating to outside users, intolerant of any but the most limited uses, and unlikely to channel any public practices. Whether it was a matter of uncomfortable appointments, an absence of light and visibility, or a pervasive difficulty with even locating them, the POPS observed by Whyte categorically failed to meet their designated purposes.

²⁰ In order, see Margaret Crawford, “Introduction,” in J.L. Chase, M. Crawford, and J. Kaliski (Eds.), *Everyday Urbanism* (New York: The Monacelli Press, 1999), pp. 9-10; Karen Franck and Quentin Stevens, *Loose Space* (New York: Routledge, 2006), pg. 2; Jeffrey Hou, ed. *Insurgent Public Space: Guerilla Urbanism and the Remaking of Contemporary Cities* (New York: Routledge, 2010). I will elaborate on unexpected activities and their defining power below.

In Whyte's view, the failure was most regrettable in New York City. It boasted a series of zoning incentives given to developers in return for open and accessible public space. New "bonus plazas" were mandated, as givebacks to the public. They were intended to offset the loss of open space and light, when office towers grew taller in the City's central business districts. Instead, Whyte complained, the towers grew taller, but very little functional public space was added to the urban landscape. Whyte's study proved instrumental, prompting revised design requirements through a new city planning regime that demanded more from developers. The latter would have to deliver utilizable public places to inhabitants after any rezoning. Open space development has enhanced the accessibility and visibility of New York's bonus plazas and those in other cities, while supporting a surfeit of community uses and practices, even after the terrorist attacks on 9/11. POPS have been transformed into the highlights of urban business districts in many cities—helping to fuel metropolitan population increases in the last Census.

From another point of view, however, Whyte's work may have fallen victim to its impact on the planning community. The spaces at the heart of his critique became objects of widespread concern among urban planners, as well as reorganization with respect to their public design. This is a good thing on its face, but planning improvements on public places may sometimes diminish their accessibility as diverse, tolerant, and accommodating spaces, an unintended consequence of the reforms that followed from Whyte's fieldwork.²¹ Police actions undertaken during the Occupy movement in 2011 reveal a paradox of enhancement within POPS and other shared urban spaces. The renovation of these places has arguably been encoded with rigid planning values, aimed at leveraging capital investment and spurring economic development, rather than the accommodation or toleration of diverse public uses. Echoing criticisms once

²¹ William H. Whyte, *City: Rediscovering the Center* (New York: Doubleday, 1988). Whyte's examination here follows his earlier volume on such places. See Whyte, *The Social Life of Small Urban Spaces* (New York: Anchor Books, 1980)

leveled by Lefebvre in France, and later by Graham in England, Brash decries the “urban neoliberalism” that now surrounds post-Whyte reorganizations of public space. As he reminds us, the claim advanced by the owners of Zuccotti Park in their effort to remove protesters—a claim heeded and then forcibly administered by the New York Police Department—mostly targeted littering and problems of aesthetics generated by the Occupy movement, while eschewing the civil rights of its members.²²

Thus, one may argue that planning itself has channeled misuses of Whyte’s admonitions in favor of improved public articulation within privately owned spaces. It has animated the design of fungible spaces, which spurn public practices that do not generate revenue. Absent real diversity, the optics of these spaces presents opportunities for use that are seemingly participative for users, yet limited by strict codes of programming. These codes are evidenced by the regulations posted at the entrances of POPS and other public places once condemned by Whyte as inadequately planned and hostile to personal or entertainment functions.

An innovation on Whyte’s argument from accommodation is found in the work of J.B. Jackson. Jackson indicates public space as a nucleus of tolerance, which is engineered not by planners or environmental designers, but rather by the users who annex it for their own diverse needs, including civic uses. His work therefore anticipates an emerging canon of thought, which posits public space as the outcome of client negotiation and, at times, contestation.²³ Jackson, too, reflects Whyte’s concerns about bonus plazas and the like. However, he aims to transcend design restrictions, urging those who inhabit shared space to diversify or claim it for civic uses,

²² Julian Brash, “Politics Out of Place: Occupy Wall Street and the Rhetoric of ‘Filth,’” in Shiffman, Bell, Brown, and Elizabeth, *Beyond Zuccotti Park: Freedom of Assembly and the Occupation of Public Space*, op cit., pg. 64. See also Henri Lefebvre, *The Production of Space* (Cambridge: Blackwell, 1991), and Stephen Graham, *Cities Under Siege: The New Military Urbanism* (New York: Verso, 2010).

²³ See, for example, Hou, op cit., pg. 91; Gregory Smithsonian, “A Stiff Clarifying Test is in Order: Occupy and Negotiating Rights in Public Space,” in Shiffman, et al., op cit., pg. 34.

that is, to appropriate environments for collective action. Jackson recommends commercial establishments as first order public spaces in the making, all the more dynamic insofar as patrons use them in great numbers.²⁴ In essence, Jackson politicizes unused space; he recommends that individuals and groups enhance their citizenship by fashioning practicable public forums:

I think we have finally come to recognize that we no longer know how to use the traditional public space as an effective political instrument, and that we need a wide choice of very different kinds of public space... We are better off than we suppose; our landscape has an undreamed of potential for public spaces of infinite variety. When we look back a century, or even a half- century, we realize how many new public or common spaces have appeared in our towns and cities, spaces where people come together spontaneously and without restraint.²⁵

This argument from appropriation, specifically, Jackson's claim that non-traditional places must be *made* public, requires further consideration when we examine jurisprudence that has legally circumscribed free speech and assembly within contemporary places. There is indeed a history of tolerance and accommodation within diverse spaces. Yet, much of that history reflects exclusions of the public from spaces that Jackson and other observers use to emplace civic engagement. In many cases, those exclusions are enacted by competing stakeholders, such as private property owners. When conflicts ensue between these public and private interests, the state frequently mediates between them, thereby determining legal access to space, a fact often overlooked by scholars of design and practice, including Jackson and his successors.

²⁴ J.B. Jackson, "Forum Follows Function," *Discovering the Vernacular Landscape*, op cit., pp. 19-20.

²⁵ *Ibid.*, pg. 20.

5) *Authenticity and unexpectedness*

The last point above raises a complex issue, one that resurfaces throughout this examination: approved and unapproved functions of publicly accessible space. The geographic dimensions of an inclusive, participatory civic sphere are also beginning to take shape, I trust. The continuum between that sphere and its spatiality and functionality where political activity is concerned may be elaborated further through one last indicator of public space, namely, its authenticity and unexpectedness. Jackson defined public spaces as those in which people can “come together spontaneously and without restraint.” Carr, et al. treated public spaces, first and foremost, as places of association and civic expression: “With the assembly of people, a sharing and unity are possible that can give expression to communal feelings and an exercise of rights, sometimes leading to political action.”²⁶ These notions suggest an intimate connection between public landscape and popular sovereignty, such as the links observed by Tocqueville, and later by Dewey. But they also reflect current arguments for a spatialized public sphere, the kind encouraged by social theorists, such as Wolin and Barber, who both rely on the communal bonds constructed by people when they act collectively to authenticate the spaces they use.²⁷

It is the civic production of spaces that makes them both public and genuine in this view. And it is unanticipated negotiations within those public spaces that can interrupt political inertia, by stemming the kinds of passive spectatorship in the civic sphere that work against democratic association. Without active authentication of public spaces, civic capacity is less likely to develop organically outside state institutions; community is weakened, leaving individuals or groups marginalized by dominant political processes vulnerable to the weight of majoritarianism,

²⁶ Carr, et al., op cit., pp. 34-35.

²⁷ While her focus is on neighborhood gentrification and its politics, there is little doubt that Zukin is ascribing this power to authenticate space to communities of users, too. See Sharon Zukin, *Naked City: The Death and Life of Authentic Urban Places* (New York: Oxford University Press, 2011), pp. 16-31.

ideological orthodoxy, and exclusion.²⁸ Given authentic public spaces, users are presented with opportunities to participate in collective processes of *their own* making, democratic procedures that feed engagement and allow for negotiation, both of differences and common interests.²⁹

In turn, authentic spaces may be appropriated in unforeseen ways. Prescribed forms rarely routinize publicity. Nor is shared space easily encoded with contents prior to common use. In Carr, et al., “Public space is the stage upon which the drama of communal life *unfolds*.”³⁰ Reflecting Walt Whitman’s poetry of urban interaction and democracy, Lofland argues that the sincerest indicator of public space is what she dubs the “encounter,” noting that users “relish the adventures and encounters” that occur within.³¹ One of urbanism’s greatest champions, Jane Jacobs, relied on her observations in *The Death and Life of Great American Cities* to spread the idea that public spaces are *improvised* through people’s unrehearsed contacts. When free exchanges gird those spaces to their users, interpersonal bonds flourish and become transformed into chosen trusts, which political scientists generally regard as cornerstones of democracy.³²

²⁸ I am mostly thinking about the conformity harnessed by social opinions, as well as those pertaining to politics. This concern was well expressed by Tocqueville, who foresaw a cultural despotism in democracies. This despotism is more to be feared than state despotism because it is self-imposed. For example, rather than risking ostracism by my neighbors, I censor personal expressions that seem to differ from the views of the majority. This *soft* tyranny is more insidious, because *I squelch myself* and potentially deprive the body politic of heterodox viewpoints and negotiations of identity, which sustain healthier democratic energies. See Alexis de Tocqueville, *Democracy in America*, Volume II (New York: Vintage Classic Books, 1990), pp. 11-12

²⁹ Examples of this view are also found in Tocqueville’s *Democracy in America*, Volume I, op cit., esp. pp. 191-99; see also, John Dewey, *The Public and Its Problems* (Athens: Ohio University Press, 1954), esp. pp. 149-53; Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (Berkeley: University of California Press, 1984), pp. 213-35; Sheldon S. Wolin, *The Presence of the Past: Essays on the State and the Constitution* (Baltimore: The Johns Hopkins University Press, 1989), pg. 191. Tocqueville and Dewey are the progenitors of this view. Though they appear to see association and community as products of artifice, their views are not incompatible with the authenticity advocated within more recent observations above. The art of association (Tocqueville) and the promise of community (Dewey) demands that individuals transcend self-interest. But collective action must address organic needs. It therefore requires authentic spaces, according to contemporary adherents, such as Barber and Wolin. In turn, those spaces are animated by immediate needs, but are nonetheless responsive to changing real world conditions. Thus, these spaces are never abstract or intended to serve the passive consumption of ideas.

³⁰ Carr, et al., op cit., pg. 3. My emphasis.

³¹ Lyn Lofland, *A World of Strangers: Order and Action in Urban Public Space*, op cit., pp. 134-42.

³² Jane Jacobs, *The Death and Life of Great American Cities*, (New York: Random House, 1961), pp. 53-73. For arguments relating to the importance of interpersonal trust to democratic development and consolidation, see: Sidney Verba, “On Revisiting the Civic Culture: A Personal Postscript,” in Gabriel Almond and Sidney Verba, *The*

This idea corresponds to Walzer's expression, "open-minded spaces." These spaces are defined principally by the *unexpected activities* that occur inside.³³ Walzer looks to bridge urban planning and participation with his communitarian theory of politics, by suggesting that when the unexpected happens within shared spaces, the public good is diffused more equitably and democratic relationships ensue among users of different castes. Though he ostensibly grumbled about diluted discourses on a mixed-use *agora*, this may be the reason why Aristotle proposed a split between marketing and civic activities in his *Politics*. As Lerner notes, Aristotle had a profound fear of spontaneous collective action, overdriven by egalitarian concerns: read revolution.³⁴ Revolution, of course, is characteristically unpredictable. And it is true, for example, that medieval and early-modern public markets—Europe's central civic spaces, as we will see in the next chapter—hosted extemporaneous food riots and other kinds of turbulences seen as so distasteful to Aristotle.³⁵ He may have been eager to segregate any upheavals away from the *agora*, then, bifurcating publicly accessible Athenian space and thereby reducing the likelihood of unplanned contact between commercial and political users.

By definition, the purpose of planning is to ensure that unexpected things do not happen. Thus, we see a persistent gap between the development and control of accessible public place, on the one hand, and the spontaneous, practicable space engendered by public appropriation and legitimation of unsanctioned uses, on the other. As Staeheli and Mitchell remind us, this political terrain is always subject to contestation:

Civic Culture Revisited (Thousand Oaks, CA: 1989), pp. 401-02; Ronald Inglehart, *Culture Shift In Advanced Industrial Society* (Princeton: Princeton University Press, 1990).

³³ Michael Walzer, "The Pleasures and Costs of Urbanity," *Dissent*, Fall, 1986.

³⁴ See Max Lerner, "Introduction to Aristotle's *Politics*," in Aristotle, *Politics* (New York: The Modern Library, 1943), pp. 24-26.

³⁵ An analysis of the food riots—as political action—in the public markets of Medieval and early-Modern Great Britain is found in: James Schmiechen and Kenneth Carls, *The British Market Hall: A Social and Architectural History* (New Haven: Yale University Press, 1999), pp. 11-14, 52.

[S]pace is produced out of a struggle between designers, planners, engineers, or other powerful actors who seek to create a space of order and control, and users of the space who necessarily perceive space differently and thus act in it in ways not necessarily anticipated by their designers.³⁶

Whether we think of it as a product of designation or practicability, this struggle pertains to a wide range of spaces today. Yet, it has played out over centuries, well before the idea of a vibrant public sphere was tested against its spatiality in the United States. In Europe, where that idea was born, the publicity of political democracy has always been contoured by traditions of exclusion carried over from feudal days. Those traditions have hinged on a dispute over space, heterogeneity, and inclusion in places where people gather. This dispute demands further attention now, if we are to reconcile American law with our designs and practices later.

Political theory and the public sphere: the problem of inclusion

As the indications above show, constructs of public space should address the following questions: What are its permissible uses, and who are its legitimate users? From the ancient *agora* to medieval and modern markets, urban POPS, and the suburban shopping malls that will concern us later, determinations about uses and users depend on whether built environments are accessible to and supportive of their adjacent communities; whether they improve visibility for identity claims; whether they furnish diverse uses; and whether they accommodate public-producing acts, or at least tolerate unexpected activities by users? As we prepare for historical examples, I want to relate the question of access to a debate about pluralism in the public sphere. Should built environments be reconciled with political oppositions among publics? This inquiry

³⁶ Lynn Staeheli and Don Mitchell, *The People's Property? Power, Politics, and the Public* (New York: Routledge, 2008), pg. 119.

may be framed in two ways: Is it acceptable to use civic space to animate multiple causes? Conversely, is it permissible to use any shared space to engage in public discourses?

For the remainder of this chapter, I will address the first question by examining the ideas of social debate and inclusion in the work of Jürgen Habermas—a contemporary political theorist who most conspicuously dedicates his intellectual efforts to the *desiderata* of a public sphere. The reverse question will be examined more closely in the next chapter, against the historical backdrop of discursive practices within embodied spaces.

I have elected to focus on Habermas for three reasons. First, Habermas makes the public sphere a centerpiece of his political thought.³⁷ Second, Habermas couches his conception of the public sphere as part of an argument about its degeneration under contemporary conditions, an idea that reappears in the following chapters. Third, Habermas champions a notion of the public sphere that implicates modern commercial space, an important advance on Hannah Arendt’s work, specifically, the “space of appearance” on which she constructs her theory of the public realm. In this sense, Habermas is engaged in a contest with Arendt over people’s access to the political domain. That is certainly the case in *The Structural Transformation of the Public Sphere*, which he first published in 1962, and then revised thirty years later.³⁸ Habermas’ criticism of accommodation in Arendt’s public realm sheds greater light on the indications of civic space above, therefore. Moreover, it requires *us* to wrestle with the exclusion of conflict, as well as the practicability of discursive space within publicly accessible environments.

As I noted above, Habermas develops his theory of the public sphere, in part at least, to overcome intolerance he detected in Arendt’s writings. As the 20th century progressed, and the

³⁷ Habermas’ examination of the public sphere provides the foundation for his theory of “communicative action,” which informs almost all of his writings. Habermas is also considered a progenitor of “deliberative democracy,” an approach reflected throughout this study.

³⁸ Craig Calhoun, *Habermas and the Public Sphere* (Cambridge: MIT Press, 1996), pg. 5.

aftermath of the Second World War disclosed the costs of totalitarianism to Europe especially, political theory began to concentrate on the public domain as vital to the study of governments. Arendt's work was instrumental in this regard, since it proffered a view of civic engagement. However, the "space of appearance" she conceived in *The Human Condition* turned inaccessible to citizens of a modern, pluralistic world.³⁹ So, while Habermas shared Arendt's concerns with an eclipse of the public realm in contemporary politics, as well as her conceptualization of public space as a locus of communication and action, he saw no bridge between her antiquated construct of embodied space and the demand for diversity, tolerance, and accommodation within the modern public sphere. Arendt's agonistic space revealed a disdain for the socio-economic antagonisms that take center stage in modernity. Concerns of the household might not seem as principled as abstract moral debates, but the kinds of justice sought by philosophers, including Aristotle and Tocqueville, recommended a politics based on lived realities, rather than exclusions of all but the noblest ideas or participants.⁴⁰

In Habermas' space, civic engagement is generated in response to both public and private conditions, so it cannot segregate them, as Arendt tried to do. Perhaps anticipating the pluralist critiques of Iris Marion Young and other contemporaries, Habermas defines the relationship between the public and private spheres with greater fluidity than Arendt, exhibited in the nexus "between state and economy, freedom and welfare, political-practical activity and production." A public realm defined by singularity could not contain the complex and dynamic interplay among modern polities, economies, societies or liberties. Habermas therefore posts his main criticism of Arendt, on behalf of a more timely conception of the public sphere, one in which civic capacity is harnessed by social differentiation:

³⁹ Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958), pp. 28-34.

⁴⁰ Calhoun, *op cit.*, pp. 211-14.

Arendt rightly insists that the technical-economic overcoming of poverty is by no means a sufficient condition for the practical securing of political liberty. But she becomes the victim of a concept of politics that is inapplicable to modern conditions when she asserts that the ‘intrusion of social and economic matters into the public realm...necessarily frustrate[s] every attempt at a politically active public realm...’ I want only to indicate the curious perspective that Hannah Arendt adopts: a state which is relieved of the administrative processing of social problems; a politics which is cleansed of socio-economic issues; an institutionalization of public liberty which is independent of the organization of public wealth; a radical democracy which inhibits its liberating efficacy just at the boundaries where political oppression ceases and social repression begins—this path is unimaginable for any modern society.⁴¹

Habermas now looks to reinvest a liberal theory of publicity with substance. In *The Structural Transformation*, he borrows on the expressions of public space produced during the Enlightenment, within a “bourgeois public sphere,” made of “private persons assembled to form a public” inside 17th and 18th century cafes and salons.⁴² Private discourse therein relates to the miscellany of public affairs at the time, when political policy begins to be evaluated outside of the traditional spaces of royal courts. The public sphere thereby expands its membership. Where the Arendtian public realm only included elites, practically speaking, Habermasian public space could at once be accessed by the new bourgeoisie, irrespective of their excluded claims on formal titles or influence on the state. That access stimulated free debates about existing socio-economic problems, a form of insurgency that slowly engendered visibility among members of the bourgeoisie—allowing it to become aware of itself and its shared identity, while using its newfound consciousness to question an outdated system of economic distributions, feudalism, and then enact innovations, eventually transforming mercantilism into capitalism.⁴³

⁴¹ Jürgen Habermas, “Hannah Arendt’s Communications Concept of Power,” in Lewis P. Hinchman and Sandra K. Hinchman, *Hannah Arendt: Critical Essays* (Albany, N.Y.: State University of New York Press, 1994), pp. 219-20.

⁴² Jürgen Habermas, *The Structural Transformation of the Public Sphere* (English Translation, Cambridge: MIT Press, 1991). NB: These were gendered spaces, it must be said. Cafes were used predominantly by male merchants and customers, while salons tended to be meeting places for women.

⁴³ Jürgen Habermas, “The Public Sphere,” in Robert E. Goodin and Philip Pettit (Eds.), *Contemporary Political Philosophy: An Anthology* (Cambridge, Mass.: Blackwell Publishers, 1997), pp. 105-08.

Habermas' bourgeois public sphere exhibits four conditions, which distinguish its geography from previous incarnations. First, it is built on new conditions of access and social exchange.⁴⁴ Groups who inhabit shared spaces in the 17th and 18th centuries enjoy greater levels of inclusion than their feudal counterparts. That is, membership in the modern public sphere no longer depends on ranks of royalty. Rather, and secondly, participation becomes a function of the rationality of members' arguments.⁴⁵ Third, the publicly accessible spaces of the modern period become sites for the "problematization of areas that until then had not been questioned."⁴⁶ Topics such as religion and politics, previously the purview of church and crown, become subjects of public opinion. Finally, as a result of the conditions above, the emerging public sphere—its spaces and its publics—becomes less exclusive. Everyone who could acquire what Calhoun calls the requisite "cultural products," that is, information and experience that enabled them to become suitably versed in public opinion, could lay claim to the debates that transpired in places like English coffee houses and French salons.⁴⁷

Using the conditions above to situate the modern public sphere, Habermas goes on to define it as a *normative* space, in two ways. The sphere outlined in *The Structural Transformation* is rendered public through the *quality* of discourse expressed therein, as well as through the *quantity* of discourse accepted within. Thus, it is both the nature and volume of expressive contact within publicly accessible places like cafes that defines the modern public sphere. Habermas is eager to distinguish these interactions from affairs of state in the strict

⁴⁴ Craig Calhoun, "Introduction: Habermas and the Public Sphere," in Craig Calhoun, *Habermas and the Public Sphere*, op cit., pp. 12-13.

⁴⁵ In this regard, Habermas shares some traits with Arendt's agonistic view. Both theorists focus on argumentation and rational persuasion within shared spaces. There is an important difference between them, however. Habermas posits rationality alone as the price of admission to the public sphere, while Arendt concentrates on competition among elites, following their entry. There is certainly greater overlap in their views regarding association and discourse. Later, I intend to suggest that Habermas shares more in Arendt's agonistic perspective than he admits.

⁴⁶ Habermas, *The Structural Transformation of the Public Sphere*, op cit., pg. 36.

⁴⁷ Craig Calhoun, "Introduction: Habermas and the Public Sphere," in Craig Calhoun, *Habermas and the Public Sphere*, op cit., pg. 13.

sense, as well as from the marketplace. The modern civic sphere he is outlining is an intermediary product, a new form of agency built atop emergent public opinions. It exists to bridge the relationship between the state and civil society, and it does include the economy as an object. Nevertheless, its key organizational feature, in other words, its driving force, is rational deliberation about the state.⁴⁸ More people can contribute to the body of rational opinion, but engagement must be structured through civilian discussions of public administration.

Habermas is surely establishing a more moderate public-private division than the one defended by Arendt, who sought to spatialize political discourses *against* practices in the household and the marketplace. However, Habermas appears to produce a different hierarchy, by assigning a greater public value to rational deliberation about the state, and a lesser value to economy.⁴⁹ In so doing, he may be destabilizing his own construct—specifically, the quality and quantity signposts he relies on to demonstrate his idea of modern public space. That is, while Habermas’ public sphere initially promises to reflect indications described earlier in this chapter and thereby overcome Arendt’s exclusion of heterogeneous discourse from the modern sphere, the former’s normative account begins to display inattention to the need for visibility and diversity within embodied spaces. As Villa points out:

Both Arendt and Habermas see the public sphere as a *specifically political space* distinct from...the economy, an institutionally bounded discursive arena that is home to citizen debate, deliberation, agreement, and action. Yet they also see this sphere as overwhelmed by the antipolitical forces unleashed by modernity...The

⁴⁸ Jürgen Habermas, “The Public Sphere,” in Robert E. Goodin and Philip Pettit, *Contemporary Political Philosophy*, op cit., pg. 105.

⁴⁹ By extension, Habermas associates functions of the marketplace with household matters and he has been criticized by feminists for failing to see the political nature of subject-object relationships within the family. For related arguments, see: Nancy Fraser, “Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy,” *Social Text*, No. 25/26, 1990, pp. 56-80; Seyla Benhabib, “Models of Public Space: Hannah Arendt, the Liberal Tradition, and Jürgen Habermas,” in Calhoun, op cit., pp. 89-92; Thomas McCarthy, “Practical Discourse: On the Relation of Morality to Politics,” in Calhoun, op cit., pp. 54-68.

result is the destruction of the space of democratic decision making, a realm now ‘colonized’ by technical-administrative imperatives.⁵⁰

In his examination of the evolving public sphere, then, Habermas seems to join Arendt in lamenting the contemporary corrosion of discursive space, following an earlier, rational heyday. Habermas’ distinction between “lifeworld” and “systemworld” suggests a more inclusive idea of agonistic space, but it is nonetheless agonistic—that is, space in which politics ought to be bracketed from the mix of pluralistic practices ushered by modernity. Habermas is discomfited by excessive annexation of the public sphere by increasingly well-organized interests inside the marketplace of ideas. And while Arendt seems to distrust the modern public’s expression of its organic needs, Habermas is reasonably apprehensive about the engineering of public opinion through mediated manipulations of demand or the mass marketing of what Calhoun calls “apolitical sociability,” and “passive culture consumption.”⁵¹ The upshot of these distortions, Habermas argues, is no less than a diminution of *all* civic capacity. This result merits attention. So, too, does Habermas’ reflection on the deliberative quality and quantity of public space.

With respect to quality of discourse and its signal of public space, Habermas elaborates the modern public sphere emerging in cafes and salons by highlighting its origins in rational discussion. Quality in this sense corresponds to the shift in public exchanges during the Enlightenment. No longer did the potency of political arguments attach strictly to *who* communicated them. It was the logic of *what* one said that mattered, and this new currency could be accumulated outside royal courts. As a result, the emergent public sphere began to influence political development both in and outside government, because the administrators of fledgling European states started hearing a newer and richer public opinion. It was informed,

⁵⁰ Dana Villa, “Postmodernism and the Public Sphere,” *American Political Science Review*, Vol. 86, No. 3, September, 1992, pg. 712. See note 58, *supra*, for a qualification of this particular point.

⁵¹ Craig Calhoun, “Introduction: Habermas and the Public Sphere,” in Calhoun, *op cit.*, pg. 23.

and in turn shaped by spaces where objects previously unaddressed by mixed social classes were now being deliberated.⁵² In effect, political deliberation within cafes and salons catalyzed those same cafes and salons politically. Rational discourse began to yield human geographies that were at once more accessible and predisposed to question feudal authority. Thus, a modern public sphere was harnessed through unexpected activities inside environments where people gathered habitually, producing new forms of civic space that thrived on criticism.

Habermas even suggests that the discourses that transformed the structure of the public sphere included concerns about commerce and private production:

Because, on the one hand, the society now confronting the state clearly separated a private domain from public authority and because, on the other hand, it turned the reproduction of life into something transcending the confines of private domestic authority and becoming a subject of public interest, that zone of continuous administrative contact became 'critical' also in the sense that it provoked the critical judgment of a public making use of its reason

And later,

The bourgeois public sphere may be conceived above all as the sphere of private people come together as a public; they soon claimed the public sphere regulated from above against the public authorities themselves, to engage them in a debate over the general rules governing relations in the basically privatized but publicly relevant sphere of commodity exchange and social labor. The medium of this political confrontation was peculiar and without historical precedent: people's public use of their reason.⁵³

These expanded expressions of the public sphere beckon Habermas' second indicator: quantity of discourse. They may also signal a pivot in Habermas' argument, when he exhibits more unease about the growing synergies between public and private, politics and markets, discourse and mediation. As he turns his attention to the decline of the modern public sphere, Habermas detaches civic activity from commercial intercourse and social reproduction. And though he is

⁵² Jürgen Habermas, *The Structural Transformation of the Public Sphere*, op cit., pg. 18

⁵³ Ibid., pp. 24 and 27, in order.

critical of Arendt for historicizing a golden age based on a misinterpretation of the ancient *agora*, Habermas may himself be guilty of romanticizing the bourgeois public sphere and spatiality during the Enlightenment. As the structural transformation of the public sphere magnified the scale of access among new users, the permeable qualities first celebrated by Habermas becomes the sources of decay within that sphere. In turn, his anxiety over the spatialization of that sphere in the mass marketplace leads him to adopt a normative view of space, which is exclusionary.

Habermas' concentration on the modern public sphere shifts from membership in the discourses that comprise it to the size of the discourses that undermine it. Surges in civic participation were influenced by democratic upheavals that took place in Europe during the 17th and 18th centuries. Liberalized access to political spaces in England, and later on within the Continent, was propelled by the ascendancy of bourgeois social classes—what Benhabib calls new “autonomous publics” produced by greater diversity among discussions and discussants. Given these expanded scales of inclusion, the geography and content of the public sphere is reshaped by multiplicity. Its functionality begins to outgrow its form:

Public space...is viewed democratically as the creation of procedures whereby those affected by general social norms and collective political decisions can have a say in their formulation, stipulation, and adoption...The public sphere comes into existence whenever and wherever all affected by general social and political norms of action engage in a practical discourse, evaluating their validity. In effect, there may be as many publics as there are controversial general debates about the validity of norms. Democratization...can be viewed as the increase and growth of autonomous public spheres among participants.⁵⁴

This escalation in scale, which Habermas likewise finds in the United States, intensifies rapidly in the 19th century. And though he hailed the inclusivity of 17th and 18th century public spaces, such as cafes and salons, these new scales have led Habermas to conclude that the post-

⁵⁴ Seyla Benhabib, “Models of Public Space: Hannah Arendt, the Liberal Tradition, and Jürgen Habermas,” in Calhoun, *op cit.*, pg. 87.

Enlightenment public sphere has largely deteriorated in proportion to its expanded social and commercial integration.⁵⁵ So, the quality and quantity measures Habermas initially used to build his theory eventually resist one another. Calhoun notices this opposition, too:

The early bourgeois public spheres were composed of narrow segments of the European population, mainly educated, propertied men, and they conducted a discourse not only exclusive of others but prejudicial to the interests of those excluded. Yet the transformations of the public sphere that Habermas describes turn largely on its continual expansion to include more and more participants (as well as on the development of large scale social organizations as mediators of individual participation). He suggests that ultimately this inclusivity brought degeneration in the in the quality of discourse...⁵⁶

At the heart of Habermas' interpretation of an escalating quantity of participation, on the one hand, and degenerating quality of discourse, on the other, is market penetration of public opinion about state policies and any number of civic concerns. New memberships in the public sphere excite all sorts of infiltrations into the marketplace of ideas by supply-side interests, along with innumerable strategies aimed at enhancing competitiveness in that market. Rational input diminishes, as political space becomes multifunctional and promotional. Proliferating discourses channel away the logics Habermas first lauded, appropriated by new groups of contributors who are scarcely "subtle reasoners."⁵⁷ Thus, the public sphere declined as its geography grew more inclusive, that is, when its spaces became embodied legally on larger scales.⁵⁸ The bourgeois public sphere of cafes and salons is now displaced in Habermas' criticism of contemporary discourse, transformed into mass-produced public spaces. Habermas sees a kind of Gramscian

⁵⁵ Habermas, op cit., pp. 175-76.

⁵⁶ Calhoun, op cit., pg. 3.

⁵⁷ Habermas, op cit., pg. 135.

⁵⁸ As Kohn argues, though, we should be fair to Habermas on the question of embodiment, since he was initially defining a historical public sphere assembled in the shadows of cafes, salons, and the like, places that were considered insurgent by dint of their existence. See, Margaret Kohn, *Brave New Worlds: The Privatization of Public Space*, op cit. pg. 19.

hegemony playing out in these spaces.⁵⁹ Serving so many interests, markets intersect with and ultimately colonize the public sphere and all rational decision-making.⁶⁰ Habermas therefore turns suspicious about newer, diverse ecologies, in which public goods amount to publicly marketed ones. As Fraser notes, Habermas' public sphere becomes universally

distinct...it is not [and should never be] an arena of market relations but rather one of discursive relations, a theater for debating and deliberating rather than for buying and selling.⁶¹

In its earliest formulation, then, Habermas' normative iteration of the public sphere bears a questionable relation to what Fraser considers *actually existing democracy*.⁶² Bernstein takes the argument further, urging that Habermas' exaltations of modern public space recall Arendt's reification of an upper *agora*, where few people can go as a result of its access requirements.⁶³ Habermas' effort to historically distill *desiderata* for publicity decouples economy and polity, and it may thus elide discourses in spaces inhabited by large segments of that public, who plainly spend their time and resources therein. Bracketing inclusive, albeit commercial space may produce a public sphere that satisfies normative objectives, but it may also become insensitive to the social problems experienced by significant cross-sections of its membership.

Pluralists, perhaps best represented by Young, argue that multiply determined discourses require ongoing political negotiations among diverse groups. These discourses and negotiations may actually elevate values of rationality promoted by Habermas throughout his exposition of the normative public sphere, while safeguarding social difference and ideological heterodoxy for

⁵⁹ Michael Kahan, *Media as Politics: Theory, Behavior, and Change in America* (New Jersey: Prentice Hall, 1999), pp. 32-33.

⁶⁰ Seyla Benhabib, *Critique, Norm, Utopia* (New York: Columbia University Press, 1986), pp. 188-96.

⁶¹ Nancy Fraser, *op cit*.

⁶² *Ibid.*, pg. 78.

⁶³ Richard Bernstein, *Beyond Objectivism and Relativism* (Philadelphia: University of Pennsylvania Press, 1983), pp. 182-223. NB: Bernstein's critique corresponds to my mention of Aristotle's proposal for an upper and lower agora, which is split between political discourse and marketing, respectively. I will revisit the Athenian rejection of that proposal in the next chapter.

purposes of communicative action.⁶⁴ As Calhoun points out, social groups commonly form themselves into movements, who then create or deploy space to press for justice in variable arenas.⁶⁵ Occupy Wall Street used publicly accessible spaces to raise consciousness about income inequality, while Tea Party activists generated debate about taxation. Notwithstanding their diametrically opposed positions, they each produced visible public spheres, circulated controversial opinions through shared spaces, and modeled alternatives to the mass-mediated discourses criticized by Habermas. As I intend to show in the next chapter, ordinary people have assembled in marketplaces to press social, economic, and political causes, thereby forging themselves into the very “autonomous publics” Habermas wants to identify.

As his thought continued to mature, that is, as he gained further independence from the intellectual pessimism inculcated by his teachers at the Frankfurt School, Habermas acknowledged heterogeneity and prospects for autonomy within multifunctional public spaces—spaces extended past the shadows of the early bourgeois public sphere and built on social differentiations associated with *public address* among marginalized groups.⁶⁶ He also recognized that the chronicle of access and decline outlined in *The Structural Transformation* engendered its own exclusions of existing publics. Challenged by his contemporaries in political economy, pluralism, and post-structuralism, Habermas amended his views and demonstrated his openness to diverse practices of public space outside the state. Thirty years after he posited a highly universalized public sphere, Habermas conceded his initial position:

In fine, my diagnosis of a unilinear development from a politically active public to one withdrawn into a bad privacy, from a ‘culture-debating to a culture-consuming public,’ is too simplistic. At the time, I was too pessimistic about the resisting power and above all the critical potential of a pluralistic, internally much

⁶⁴ Iris Marion Young, “Polity and Group Difference: A Critique of the Ideal of Universal Citizenship,” *Ethics*, Volume 99, 1989, appears in Goodin and Pettit, *op cit.*, pp. 259-63.

⁶⁵ Craig Calhoun, “Introduction: Habermas and the Public Sphere,” in Calhoun, *op cit.*, pg. 37.

⁶⁶ Kurt Iveson, *Publics and the City* (Oxford: Blackwell, 2007), pp. 23-27.

differentiated mass public whose cultural usages have begun to shake off the constraints of class.⁶⁷

His construction of the public sphere remains a work in progress, therefore. This is to the good, I would argue. The need for publicity and place has only grown since he published his seminal analysis, particularly within the metropolitan environments to be considered later in this study.

In each of the indications above—among the numerous disciplines represented in this chapter—we see contests over the public functions of shared space. As I hope to show in the next chapter, these contests transcend the universality of Habermas’ public sphere and its critiques. They extend to civic practices within embodied spaces, where people actually assemble; inside historical landscapes where they have mobilized politically and formed themselves into publics. Owing at times to inclusive planning and design, contests have been replaced by continuum, as well as mutual accommodations among stakeholders who inhabit or practice open space. Yet, at other times, unexpected activities inside built environments have been met with regulation or outright exclusion, especially in publicly accessible, but privately controlled space. The face-offs precipitated by Occupy Wall Street in New York and other cities across the nation suggest that spatiality and contestation will continue to evolve together as themes within urbanism. However, the challenge to understand or indicate practicable space will also confront the edges of American cities, where increasingly diverse metropolitan publics or would-be publics *must* forge new meanings and expressions of place if they are to successfully build civic capacity in the 21st century.

⁶⁷ Jürgen Habermas, “Further Reflections on the Public Sphere,” in Calhoun, *op cit.*, pp. 438-39.

Chapter Two

Historical Practices of Public Space: From Agora to Agora-phobia, and Again

As we saw in the previous chapter, public space may be indicated in a variety of ways. It is viewed differently within design circles, among students of urbanism, and throughout Western social theory. Political theorists seeking to understand the meaning of the modern public sphere convey no less diversity in addressing its topographical scale and tolerances. I would argue that challenges to determine the values of public space and sphere have helped shape the historical arc of civic engagement in the West, not to mention jurisprudence precipitated by expressive practices in America. While jurists may not debate the work of Jane Jacobs or Jürgen Habermas for that matter, they do have occasion to weigh questions related to the environment and practice of public space when they rule on the legality of free speech therein. Similarly, judicial review of the public sphere speaks in some measure to benchmarks addressed in the last chapter: access, community, visibility, accommodation, and unexpectedness. And it often does so within the dialectic between private property rights “enshrined in law,” on the one hand, and public spaces many regard as essential to democratic processes of participation and representation, on the other.¹ As Mitchell argues, “The ability for citizens to move between private property and public space [has] determined the nature of public interaction in the developing democracy of the United States.”² Rarely has such public space and interaction been produced without struggle, as the events surrounding Occupy Wall Street should attest.

¹ Lynn A. Staeheli and Don Mitchell, *The People’s Property? Power, Politics, and the Public* (New York: Routledge, 2008), pg. 149; Kurt Iveson, *Publics and the City* (Oxford: Blackwell Publishing, 2007), pg. 13; Nancy Fraser, “Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy,” *Social Text*, No. 25/26, 1990, pp. 56-80.

² Don Mitchell, “The End of Public Space? People’s Park, Definitions of the Public, and Democracy,” in *Annals of the Association of American Geographers*, 85 (1), 1995, pg. 116.

The first chapter signaled some of the disputes that arise when public space and interaction ensue *inside* privately owned locales. As we saw, competing interpretations of public space and sphere have often fallen along a continuum that includes publicly accessible settings where politics and markets are mutually inclusive, and those where they are not. This continuum comes to life in the history of practicable space, where civic access has cyclically expanded and contracted in the places where people go. As that history has unfolded, it has reproduced its own dialectics of space, which can help us to understand more fully the relationship between political exchanges and exclusions within built environments. As Mitchell argues elsewhere, the mediation of these relationships in law has radiated in large part from interpretations of history and practice in publicly accessible but privately owned spaces.³

The purpose of this chapter, then, is to trace historical examples of public functionality within commercial spaces—in particular, the use of marketplaces for civic activity. It will demonstrate that temporal relationships between marketplaces and political practices within urban spaces have often been characterized by ebb and flow. While marketplaces have at times supported commercial and civic activities in common, or have at least tolerated some mingling between them, at other times the evidence points to a lack of accommodation. In all instances, alternating patterns of amalgamation and separation have reflected historical shifts that are long-term and subtle, rather than abrupt or easily pronounced.

The account here will be a condensed one. Rather than reviewing the entire history of urban marketplaces in which public practices have been included or excluded, I will survey selected spaces within defined periods. Beginning in ancient Athens and her contemporary Greek city-states in the 5th century B.C., I segue to Rome in the 3rd century A.D. I then proceed

³ See, for example, Don Mitchell, “The Liberalization of Free Speech: Or, How Protest in Public Space is Silenced,” *Stanford Agora*, Vol. IV, No. 1, 2004.

from medieval and early-modern markets in Europe to their latter-modern successors. Next, I cross the Atlantic Ocean. I examine America's colonial markets, followed by ones found during its democratic transitions in the 1820s and 1830s. Later I look at a rapidly urbanizing America, still healing from its wounds after the Civil War. Finally, I advance to the 20th century, specifically, the United States of city streets in the first half, and then a suburbanized nation marked by massive urban exoduses in the second half. Notwithstanding the 1950s and 1960s, during which widespread, if short-lived expressions of civic space occurred, the latter 20th century witnessed a growing chasm between America's public and non-public domains.

In order to better understand that gap, I will survey America's urban flight and the suburbanization of commercial space in the 20th century, both of which ushered decreases of publicly functional geography in the United States, according to many observers. Likewise, scholars point to the decline of cities and the growth of suburbs to explain the degeneration of America's public sphere.⁴ This interpretation of declining civic capacity is found in a variety of academic traditions, including social and political theory. During the last decade, it seems, there has been more integration of these theoretical discourses, as well as others through which the late 20th century demise of public space has been historicized. This is an important step forward as we confront the changes above in the 21st century. However, I believe that the prevailing literature has committed too little attention to the role of the state in conditioning civic practices through its organization of space. Evidence of that power will surface in what follows.

Before we begin, the reader should be advised that the timelines I wish to establish are not entirely linear, nor are they constitutive of any particular methodology. They generally derive from secondary interpretations of environmental design and spatial practices inscribed in

⁴ The most frequently cited account in this regard comes from Putnam. See, for example, Robert Putnam, "Bowling Alone: America's Declining Social Capital," *Journal of Democracy*, Vol. 6, No. 1, 1995, pp. 65-78.

architectural histories of ancient and medieval gathering places, themes collected from modern exposition and theory, and contemporary argumentation. Though I stand by the forthcoming narratives, and the conclusions drawn from them here, they are in no way intended to serve as primary sources of data, longitudinal or otherwise.

Flow and ebb in the Greek agora and Roman forum:

According to Carr, Francis, Rivlin, and Stone, it is possible to trace “some form of public marketplace...to the Mesopotamian cities of 2000 B.C.,” however, “the major precursors of the latter-day public spaces occurred in the cities of Ancient Greece and Rome.”⁵ The most celebrated expression of these public spaces was the Athenian *agora*. Yet, the *agora* did not become a practicable public space in Greek topography until the fifth century B.C., when it replaced the Acropolis and the rituals staged upon it as the nucleus of public life in democratic Athens. What is significant about this secularized space, aside from its openness and importance to Athenian democracy, is that it served not only as the social meeting place of the *polis*, but its central market. Notwithstanding an aggressive divide between politics, militarism, and other activities in Hippodamus’ city planning, or more measured proposals advanced by Aristotle to the Athenians, the mix of commerce and civic engagement atop a multifunctional *agora* became integral to the environmental and social landscape of Greece’s premiere city-state.⁶

Perhaps unsurprisingly, the *agora* and its open marketplace became the most frequented gathering place in democratic Athens. The popularity of the *agora* may be explained by its

⁵ Stephen Carr, Mark Francis, Leanne G. Rivlin, and Andrew M. Stone, *Public Space* (New York: Cambridge University Press, 1992), pg. 52.

⁶ There appear to be counterexamples to this mixed-use design, in Hippodamus’ own Miletus, and Thessaly, which Aristotle refers to in the *Politics*, (New York: The Modern Library, 1943), Book VII, Chapter 12, pg. 302. As Barker and Wycherley, point out, Aristotle was unable to persuade the Athenian democrats to adopt his plans for separate agoras. See notes 7 and 8, *supra*.

physical centrality, but equally by its spatial toleration for mixed social practices, including public deliberation. Commercial and political intercourse combined as quotidian attractions, producing diverse and unexpected atmospherics, as well as a rich communal experience, described by Barker during my introduction to this study.⁷ Wycherley has also celebrated the geography of the agora in an illuminating portrait of Ancient Greek design within its city-states. As he argues, the *agora* engendered unity through its accommodation of multiplicity:

The agora was in fact no mere public place but the central zone of the city, its living heart...It was the constant resort of all citizens, and it did not spring to life on special occasions but was the daily scene of social life, business and politics...The same free space sufficed for all kinds of purposes...in fact the Greeks thoroughly mixed up the elements of their lives, for better or for worse, and this fusion is clearly seen in the *agora*... The true Hellenic *agora* was the inner zone, the nucleus, and was closely knit into the fabric of the city. The Greek did not sort out his life into neat insulated compartments, but let each element act upon the others, and the *agora* is a manifestation of this spirit.⁸

More to the point, the arrangement of the *agora* blurred environmental and practical distinctions between politics and markets:

No clear line was drawn between civic center and market. The public buildings and shrines were in the *agora*; meat and fish and the rest were sold in the same *agora*...the two areas are not to be differentiated clearly or opposed to one another in function....The *agora* was still not clearly divisible according to function; *even less were there two agoras, one political, one commercial.*⁹

Evidently, Fifth century Athenian designers opted not to incorporate proposals for a divided *agora*, though they were aware of the likelihood that market activities might spill into the public sphere, and vice versa, particularly in the multicultural spaces peopled by new traders and consumers after the Peloponnesian War in 404 B.C. Their rejection of split zoning schemes

⁷ Ernest Barker, *Greek Political Theory* (London: University Paperbacks, Methuen & Co., 1960), pp. 20-21.

⁸ Richard Ernest Wycherley, *How the Greeks Built Cities: The Relationship of Architecture and Town Planning to Everyday Life in Ancient Greece* (New York: W. W. Norton & Company, 1976), pp. 50-51 and 67-68.

⁹ *Ibid.*, pp. 65-75. My emphasis.

reflected their distaste for the authoritarianism and popular inaccessibility of Hippodamus' city plans, and the political conservatism reflected by critics of Athens' democracy, such as Aristophanes.¹⁰ Similarly, their decision to emplace commerce and politics on one *agora* suggested a repudiation of Aristotle's arguments against democracy, and an environmental commitment to public life among citizens.¹¹ This pledge to participation and open discourse fostered conditions through which the Athenian marketplace flourished, while rational philosophy matured there by 386 B.C.¹² As Wycherley remarks, Socrates used the *agora* to engage in his public dialogues; "thus the first step was taken towards the creation of a philosophical school," where, ironically, Plato and other opponents of the democratic franchise could espouse their views.¹³ These historical uses seemed to cast doubt on Aristotle's argument that commingling marketplaces and political discourses ultimately degraded the latter.¹⁴

The democracy that crystallized within the Greek city-state was more or less articulated in the unregimented public spaces of the *agora*. Another Greece develops later in history, however. Its topographies were characterized by "greater formal structure and architectural grandeur."¹⁵ This later Greece, that is, the host of new city-states under the dominion of Aristotle's most powerful pupil, Alexander the Great, witnessed expansions of political control and an overshadowing of public life. As they faded and gave way to the rise of the Roman Empire, the geography of public life transformed markedly, especially within post-Augustan landscapes expressed from the first to third centuries A.D.¹⁶ The Roman conception of public

¹⁰ Ibid., pg. 66.

¹¹ Ibid.

¹² Barker, op cit., pg. 127.

¹³ Wycherley, op cit., pp. 67-68. The last clause is attributed to Barker, op cit., pg. 374.

¹⁴ For Aristotle's view on the *agora*, see my introduction; see also, Wycherley, op cit., pg. 67.

¹⁵ Carr, et al, *Public Space*, op cit., pg. 53.

¹⁶ Lisa Keller, in *Triumph of Order: Democracy and Public Space in New York and London* (New York: Columbia University Press, 2010), pp. 17-19. See also Lisa Keller, "The Grass is Always Greener: A Brief History of Public

space was exemplified in its *forum*. While each forum featured the cultural diversity of its Greek precursors, it did away with the openness, access, and unexpectedness of the Athenian *agora* in which democracy spread during the fifth century B.C.¹⁷ That is because much great formalism was associated with the architecture of Roman forums, which were supplied with many monuments and other physical structures omitted from the open space of the *agora*, particularly from the third century A.D. onward.¹⁸ That formalism was coupled with a rigid segmentation of public practices inside gathering places throughout the Empire.¹⁹

Even though plans for the forum positioned market stalls and the Roman civic apparatus inside what Mumford calls “a whole precinct,” they tended, based on commands from above, to divorce different spheres of activity by dispersing them to separate zones.²⁰ Jackson adds that merchants and craftsmen were excluded from the interior spaces of the Roman forum, which were “reserved for a superior order of citizens: for political action and the exchange of ideas.”²¹ In both accounts, these decisions about space were fundamentally political. Emperors mandated them, even Augustus, who touted republicanism in his later life. They looked to solidify their rule within an ever increasingly multicultural landscape by isolating Rome’s spaces of public engagement from its centers of commercial interaction.²²

While the forum was not divided as a matter of design, Roman planners were infinitely more faithful to Aristotle’s civic-commercial split than the Athenians he hoped to influence in his *Politics*. Whyte and others attribute the spatial separation of market activities from political

Space and Protest in New York City and London,” in Bell, Brown, Elizabeth and Shiffman, *Beyond Zuccotti Park: Freedom of Assembly and the Occupation of Public Space* (Oakland, CA: New Village Press, 2012), op cit., pg. 188.

¹⁷ Henri Lefebvre, *The Production of Space* (Malden, MA: Blackwell, 1991), pg. 237.

¹⁸ *Ibid.*, pgs. 159, 216, 247-49.

¹⁹ William H. Whyte, *City: Rediscovering the Center* (New York: Anchor Doubleday Books, 1988), pp. 339-40; Richard Ernest Wycherley, op cit., pp. 82-83; Carr, et al., op cit., pg 53.

²⁰ Lewis Mumford, *The City in History* (New York: Harcourt, Brace & World, 1961), pg. 189.

²¹ J.B. Jackson, *The Necessity for Ruins, and Other Topics* (Amherst, MA: University of Massachusetts Press, 1980), pg. 59.

²² *Ibid.*, pg. 221

practices in the Roman forum to its distance from city centers, along with its remoteness to surrounding streets, where ingress often began hundreds of yards away from the interior of the forum itself. As Whyte maintains, “the *agora* was part of the street network of the city; it was not enclosed or segregated from the rest of the city but vitally linked to it.”²³ On the other hand, “the cities of the Roman Empire were centered *around* the forum,” according to Carr, et al. They also “reflected a rigorous spatial order and grandeur beyond that of the Greeks.”²⁴

As a result, says Wycherley, the city itself “lost something of its old quality” and had “a less intimate relation with all the varied activities of the community.”²⁵ It may not surprise us to learn, then, that segregations of place from assembly in post-democratic Greece and Imperial Rome led to a “disintegration” of their cities.²⁶ Not only did city spaces come apart, however; so did the *res publica*, which Sennett defines as a form of urban life:

A *res publica* stands in general for those bonds of association and mutual commitment which exist between people who are not joined together by ties of family or intimate association; it is the bond of a crowd, of a “people,” of a polity, rather than the bonds of family or friends.²⁷

He also addresses the consequences of splitting this publicity from open political involvement in Rome and its territories: individual passivity and a decline in civic participation. Roman subjects went through their communal motions and public obligations, but they abandoned the urbanism of an earlier democratic era in Athens and retreated into private realms of mysticism:

As the Augustan Age faded, Romans began to treat their public lives as a matter of formal obligation. The public ceremonies, the military necessities of imperialism, the ritual contacts with other Romans outside the family circle, all became duties—duties in which the Roman participated more and more in a

²³ William H. Whyte, *City: Rediscovering the Center*, op cit., pg. 339. NB: Both Whyte and Wycherley suggest that characteristics found in the Roman forum originated towards the close of Greek dominance in the B.C. era. Latter day Greek *stoas* more closely resemble the forum—where mixed uses become spatially segregated.

²⁴ Carr, et al., op cit., pg. 53. My emphasis.

²⁵ Wycherley, op cit., pg. 82.

²⁶ Whyte, op cit., pg. 340.

²⁷ Richard Sennett, “The Public Domain,” *The Fall of Public Man* (New York: Knopf, 1977), pg. 3.

passive spirit, conforming to the rule of the *res publica*, but investing less and less passion in his acts of conformity. As the Roman's public life became bloodless, he sought in private a new focus for his emotional energies, a new principle of commitment and belief. This private commitment was mystic, concerned with escaping the world at large and the formalities of the *res publica* as part of that world.²⁸

This recoil towards privacy and mysticism would eventually lead to the advent of Christianity and the Christianization of the Roman Empire, which Sennett adds is “a new principle of public order.” Let me be clear. I do not wish to offer any critique of Christianity.²⁹ Rather, I want to argue that the eclipse of mixed-use public space in Rome led to a decline in civic engagement and capacity. In tracing the relationship between public space and political association within an ever-expanding reach of Roman imperialism, Wolin echoes a theme raised in the previous chapter: visibility. In his argument, the immediacy of a “visual politics,” once harnessed through the multifunctional space practiced within the *agora*, was transformed into an “abstract politics,” in which “men were informed about public actions which bore little or no resemblance to the economy of the household or the affairs of the market-place.” The result was an aggrandizement of power by emperors from Augustus forward, and a polity that largely functioned to inculcate citizens on the authority of the state, rather than the *res publica*.³⁰

This transformation may be juxtaposed with the democracy of Athens. The practice of public space in the Athenian *agora* was “sloppy,” as Berman tells us, but it engendered great

²⁸ Ibid., pp. 3-4.

²⁹ Still, it is worth mentioning the “Grand Inquisitor” parable, in Dostoyevsky’s *The Brothers Karamazov*, which suggests that Christianity dwells within an infantile populace, divided by religious faith from the self-actualization needed to fuel civic capacity. Dostoyevsky’s parable shares a thread with Tocqueville’s arguments, i.e., that too much privacy may lead to despotism unless it is tempered by a rich associational life among citizens. See Fyodor Dostoyevsky, *The Brothers Karamazov* (New York: Penguin Classics, 1973), pp. 288-311; Alexis de Tocqueville, *Democracy in America*, Volume II, (New York: Vintage Classic Books, 1990), pp. 316-22.

³⁰ Sheldon Wolin, *Politics and Vision: Continuity and Innovation in Western Political Thought* (Boston: Little, Brown and Company, 1960), pg. 77. NB: Wolin’s account is based on an exponential increase in the size and sheer number of participants brought on by the Roman conquest of new and amassing colonies.

political vitality.³¹ After the Roman forum succeeded it, stiff arrangement of that space became mandated and ultimately led to the isolation of political circles from the rest of the community, citizen participation, and public opinion. Eventually, the disengagement reached critical mass and no *res publica* existed to sustain Rome in its last days.

*Openness to enclosure: medieval and early modern markets*³²

After the fall of the Roman Empire in the Fifth Century A.D., populations dispersed, moved to the countryside, and left a great void where publicly functioning centers once sat. In the 10th century, churches and courts began to be built within enclosed settlements, for protection purposes, and central environments again took shape in Britain and on the European continent.³³ The construction of walled towns generated a revival of open marketplaces. These medieval markets evolved slowly. They operated one day a week to begin with, then a few days, during defined hours.³⁴ As people and technological innovations continued to spread across Europe, marketplaces became permanent fixtures, though they remained fairly unstructured with respect to their spatiality and design.³⁵

These open markets were located within existing street grids. They sparked the return of urban atmospheres fragmented as a result of Roman environmental planning and architecture.³⁶ The revitalization of medieval towns grew out of “a unique constellation of forces,” according to Mumford, but it signaled a common thread in European spatial development: an emphasis on

³¹ On the Greek *agora*, see Marshall Berman, “The Romance of Public Space,” in Bell, Brown, Elizabeth and Shiffman, *Beyond Zuccotti Park*, op cit., pg. 198.

³² Medievalism period dates back to 436 A.D., I will focus on historical evidence from the 15th century onward.

³³ Carr, et al., op cit., pg. 53.

³⁴ James Schmiechen and Kenneth Carls, *The British Market Hall: A Social and Architectural History* (New Haven: Yale University Press, 1999), pp. 12-13.

³⁵ Lewis Mumford, “The Medieval Town,” *The City in History* (New York: Harcourt, Brace & World, 1961), pp. 301-02.

³⁶ Carr, et al., op cit., pg. 54.

centralization and multi-functionality.³⁷ No matter the circumstances that precipitated their physical arrangement, medieval towns sited their marketplaces within centers, where myriad activities converged. Marketplaces were adjacent to cathedrals, which bordered civic squares; these three elements were housed in the town center, in order to maximize common access and usage.³⁸ The outcome of this built ecology was a kind of public mosaic, according to Mumford.

People from different social classes shared space in fulfilling their diverse functions:

In the medieval town, the upper classes and the lower classes had jostled together on the street, in the marketplace, as they did in the cathedral: the rich might ride on horseback, but they must wait for...the blind beggar groping with his stick to get out of the way.³⁹

Mumford's rendition of the publicness above echoes Jackson, who elaborated on spatial accommodations in the last chapter. The latter likewise expounds on the diversity and unexpectedness of medieval marketplace practices enacted by citizens, the state, and the church. The markets of this period routinely affected a "geographical congregation," Jackson maintains. They hosted any number of impromptu functions along with buying and selling.⁴⁰ A guild might set up a stage for the performance of a play on one day; the next day a criminal might be punished, or a heretic tortured there; on another day, Sundays for instance, a congregation exiting the cathedral might hold a public gathering to solicit funds for a nearby almshouse. In essence, says Jackson, the medieval marketplace "recaptured the function of the...*agora*."⁴¹

While it is too intrepid to say that the blend of commercial and social activities in medieval marketplaces accounts directly for individual and collective participation in open political discourses there, it is possible that the multi-functionality of these centralized spaces

³⁷ Mumford, *op cit.*, pp. 303-04.

³⁸ Carr, *et al.*, *op cit.*, pg. 54.

³⁹ Mumford, *op cit.*, pg. 370.

⁴⁰ Jackson, *op cit.*, pp. 59-60.

⁴¹ *Ibid.*, pg. 307

fueled public attentiveness among people who used them. Such consciousness is but one measure of political efficacy, needless to say. Still, the evidence suggests that resurgent civic awareness generated political accountability in medieval cities. The immediacy of assembly and expression in spaces that accommodated commerce, religion and politics together nurtured new conceptions of publicity in medieval towns. Whereas the idea the public previously stood for something more abstract, as *res publica* implies, even, under medieval mixed-use conditions it began to manifest goods that were visible to inhabitants of space.⁴² By the 17th century, public connotations started to evolve and incorporate geography and plurality. Now, diverse strangers regularly shared space, topographical space, where popular interaction and mutual observation began to implicate the state and its apparatus.⁴³ The mix of marketplace and community affairs inside town centers, where long-dormant civic capacity resurfaced, whetted appetites for political association. At the same time, the architecture of medieval cities localized institutions of power and placed them within the gaze of mingling publics.

I do not wish to understate the rampant social inequality or political disenfranchisement among common people who lived within medieval cities. As I suggested at the outset, linear connections are dubious, given the evidence available on these historical timelines—in this case, between an evolutionary public in the Middle Ages, and later constructs of publicity, such as those assumed in social contract theory. Hobbesian notions of political obligation and Lockean arguments for government accountability would find reception later, during the modern era, when urban spaces re-assimilate marketplaces and public practices. During the interlude, Renaissance piazzas divorced commerce from civic engagement on behalf of a revisited

⁴² Aesthetic representations of this transforming notion of public are found in the emerging art of the late-15th and 16th Centuries. For example, the paintings of Pieter Bruegel in the 16th Century position members of multiple social classes, including peasants, in their foregrounds—a sign of how prevalent public formation had become.

⁴³ Richard Sennett, “The Public Domain,” *op cit.*, pp. 12-14.

rationale: that the former could undermine the soberness of the latter.⁴⁴ Thus, Renaissance era planners segmented space under the auspices of their new “civil architecture,” according to Glazer and Lilla. They subscribed to the view that this architecture demanded formal designations of the public environment, on the one hand, and the private realm, on the other.⁴⁵ Once again, then, politics and commerce were separated in Europe’s built spaces. It is worth noting, moreover, that the Renaissance split emanated from bolder ideas about privacy.

Renaissance planning appeared to be short lived, though. Pre-Enlightenment commercial spaces started to mix in public functions again, following the built-in singularity and splendor that characterized Baroque architecture and environmental design. Evidence of multifunctional space materialized later, in outdoor markets founded on the European Continent and in Great Britain during the 17th and 18th centuries.⁴⁶ Neither side of the English Channel offered the grandeur of Renaissance or Baroque public spaces at the time; however, the British markets of the 17th and 18th centuries are often depicted as particularly unattractive or downright messy. They are alleged to have hosted congestion, raucousness, and routine depravity. At the same time, though, they accommodated frequent public debates on administration and policy in the Parliament and among local governments. Schmiechen and Carls reflect on these forums: “In addition to an economic locus, the market served as the town’s principal public meeting place, both formal and informal.”⁴⁷ Throughout the heyday of the market, public deliberations and even squabbles shed light on political controversies and the economy in Great Britain.

⁴⁴ Carr, et al., op cit., pp. 54-55.

⁴⁵ Nathan Glazer and Mark Lilla (Eds.), *The Public Face of Architecture: Civic Culture and Public Spaces* (New York: The Free Press, 1987), pg. 114.

⁴⁶ NB: Constant disruptive activity during this period foments a return to more fragmented and controlled spaces in the post-Enlightenment period of the late 18th and 19th centuries, a point to which I will return below.

⁴⁷ Schmiechen and Carls, op cit., pg. 16.

In this sense, early modern markets such as British ones afforded public space—apart from the apparatus of the state—where locally experienced tensions, stemming primarily from the nation’s political economy, became visible.⁴⁸ They provided *de facto* centers for exhibitions of political antagonisms that resulted from economic shortages, thereby underscoring battles fought by common Britons for fairness, justice, and social inclusion in the broader market economy that was taking shape at the time. The British market became a locus for political contestation about that economy, according to Schmiechen and Carls:

As long as the town was not able to guarantee a regular and cheap supply of goods, the marketplace, *as a public space*, was apt to become a political battleground.⁴⁹

The authors go on to describe multiple instances of mobilization that occurred throughout Britain’s markets. One of them transformed from an unexpected activity into something more or less routine, but it rarely abated in its efficacy: the food riot. One of the most interesting things about food riots is that neither the individual towns nor the Crown would intervene on behalf of proprietors, as we might naturally expect in today’s climate. In fact, local and national governments tolerated food riots as reliable processes for ensuring fairness in pricing.

The British market offers an example of mutual functionality between politics and commerce within modern public spaces. It also underscores the significance of centrally located marketplaces in catalyzing creation of modern publics, as well as accommodating collective action among once isolated subjects. Food riots were colorful, spontaneous expressions of public scrutiny over markets, though they became more predictable over time. They were also tacitly supported by the state. In other parts of Europe, civic activities implicated the state itself.

⁴⁸ Sharon Zukin, *Landscapes of Power: From Detroit to Disney World* (Berkeley: University of California Press, 1991), pg. 6.

⁴⁹ *Ibid.*, pg. 14. My emphasis.

They tended to do so in unpredictable ways, in the centers of shared space on the Continent, and they eventually garnered the attention of its administrators.

This shift is exemplified in a frightful account of modern public space, elaborated by Foucault. Foucault examines new performances of political association, aided by the existence of heterogeneous spaces in which unexpected activities occur. The publicity made possible within these spontaneous spaces animates popular reactions to state policy. By the mid-18th century, it inspires an array of discernible practices that proceed from those reactions. These practices, once fragmented in nature, reach critical mass and even transcend the topographical limitations of town centers. They turn societal, that is, and imbue France's larger human geography with ideation about its regime. They also turn on criticism of its administration, leading it to conceive the body politic anew; to rethink that body's physical and psychical arrangement in chilling ways in the latter half of the 18th century.⁵⁰ Foucault is able to convey much of this transformation in *Discipline and Punish*. He depicts capital punishment, the spectacle that surrounds it, and the unforeseen public rejoinders that undermine the French Crown. He deploys monarchical public space and its forms of visibility. Then he traces the unfolding of modern political space during the Enlightenment, and in times that followed.

Foucault's account begins in a Parisian square, adjacent to the cathedral and the open market. The year is 1757. The public is assembled to witness the execution of Damiens, a regicide. However, he is tortured first, dismembered, and confessed for all to see. The violence exacted on Damiens' body in Foucault's opening pages continues for what seems like an eternity, given its graphic depiction. Rather than detailing Foucault's gory introduction bit by bit, though, I wish to emphasize the manner in which he historicizes the public square during

⁵⁰ See Michel Foucault, "Space, Knowledge, and Power," in Paul Rabinow, Ed., *The Foucault Reader* (New York: Pantheon Books, 1984), pp. 240-44.

Damiens' execution, as well as how onlookers are encouraged to participate by the authorities who carry out his punishment. Foucault phrases this pre-Revolution activity as the "spectacle of the scaffold." The scaffold is a political space. It elicits popular involvement and is meant to bring about recognition of the state's power. People are intentionally gathered in the city center, within its heart, no less, to share in the mutilation criminals such as Damiens.⁵¹ Moreover, they are invited and expected to join the humiliation that befell prisoners before they were finally put to death in the middle of the city. Public torture, then, is an interactive form. It has its own morphology: mixed-use space transforms into a determined political sphere.

In Foucault's reading of this space, and its interior practices, the conduct of capital punishment within the city's most peopled area, where its cathedral and marketplace sit, is intended to exhibit the power of the monarchy. Public torture, the "ritual," to use Foucault's expression, demonstrates that offenses against the Crown—regicide being the worst, of course—must result in superior bodily harm against their perpetrators. The open and visible spatiality of capital punishment is really engineered for its witnesses. Foucault imagines the power of the *ancien regime* resides in its ability to effectively publicize itself.⁵² Therefore, it is the spectacle of punishment that enables the monarchy and its administration to manifest political power on the very body of wrongdoers, while inscribing it throughout the burgeoning body politic described earlier. According to Foucault:

The public execution is to be understood not only as a judicial but also as a political ritual. It belongs, even in minor cases, to the ceremonies by which power is manifested...The public execution, then, has a juridico-political function. It is a ceremonial by which a momentarily injured sovereignty is reconstituted. It restores that sovereignty by manifesting it at its most spectacular.⁵³

⁵¹ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1979), pp. 58-63.

⁵² *Ibid.*, pg. 59.

⁵³ *Ibid.*, pp. 47-48.

Public executions are made into high profile political spaces. They aim to restore the sovereignty of the state, and rally ritual support for the monarch. They do this by signifying that there is a danger associated with breakdowns in political obligation. Public space is organized as a theater of deterrence, of obedience to authority. Public squares and adjacent marketplaces are selected to magnify the conspicuousness of the Crown. For Foucault, pre-Revolutionary space serves as the shared experience of a “gloomy festival,” such as the one above, realized through the spectatorship of all assembled to view the carnage.⁵⁴

Things begin to go awry from the point of view of sovereignty, however. A counter-narrative starts to form around these political spectacles, borne by the unpredictability of the space designated for the King’s grisly ceremony. As capital punishment continues to be practiced openly in the public square, it stirs the unexpected activities that helped indicate public space in Chapter One. In one sense, amassing large numbers of people within public squares rendered the spectacle of ritual punishment more widespread and visible. Yet, those assemblies likewise fed counterintuitive occasions. For instance, local lawbreakers took advantage of the mesmerizing display of torture and confession inside the city center. Paradoxically, the staging of public punishments facilitated criminality: pickpockets and other petty offenders circled the spectacle in search of easy opportunities to profit from the experience.⁵⁵

More troublingly, at least as far as the regime and its administration were concerned, publics assembled in the Parisian square began to rebuff the Crown on behalf of Damians and other criminals subjected to capital punishment, eventually protesting the authority behind those sentences. Compounding these unanticipated difficulties were the object lessons absorbed about retributivist expressions of political force: publics grouped together in the city center were

⁵⁴ Ibid., pg. 8.

⁵⁵ Ibid., pp. 63.

beginning to identify their solidarities and their mutual social status against the backdrop of despotism and monarchical violence. Similarly, they were beginning to see that that physical violence was itself an expression of sovereignty.⁵⁶ Of course, the latter message was taken to heart a few decades later, when Louis XVI and countless administrators were enlisted directly in the bloody spectacles of Paris' center, on the receiving end of the guillotine.

A detailed discussion of new punishments or practices of regime power in the wake of these developments is not called for in this history. It does bear repeating, however, that Foucault relies on them to show that spatial ordering transformed into a strategy deployed by administrations to manage urban publics after the 18th century.⁵⁷ Prior to that transformation, the Parisian square exemplifies how public space is reinterpreted and made unexpected through its users' activities. Moreover, it vindicates Sennett's iteration of open space preceding the Enlightenment, which is shaped by public scrutiny of the state. The messiness and turbulence generated by the physical diversity and popular spontaneity of that space did not escape the notice of governments, including those elevated to power by revolutionary and post-revolutionary publics. Recognizing how volatile they could be, late 18th and 19th century political leaders redressed the organization of urban spaces, as Foucault points out. At the same time, city planners meditated in earnest about the socio-spatial relationships of European cities changed by the ascendancy of an Enlightenment public sphere.

In Paris, a shift towards rigid segmentation and tight regulation of urban topography emerged immediately after the French Revolution. It grew more conspicuous later in the 19th century, when Baron Haussmann was charged to arrange meticulous Parisian streets and public

⁵⁶ Ibid., pg. 65.

⁵⁷ Michel Foucault, "Space, Knowledge, and Power," in Rabinow, op cit. pg. 241. See also Michel Foucault, "The Eye of Power," in Colin Gordon (ed.), *Power/Knowledge: Selected Interviews & Other Writings, 1972-1977* (New York: Pantheon Books, 1980), pp. 147-153.

squares. Haussmann's designs had the effect of depoliticizing human geography and openings for association, particularly in the spaces where people entered the economy through buying and selling. The spectacle of state power was restored to open spaces, along with audiences assembled to make that power legible within the body politic. In the mid 19th century, however, Haussmann's beautifully widened avenues and strategically appointed plazas also checked unexpected practices of public space, which plagued the *ancien regime* of an earlier Paris.

Harvey discusses the political economy of public space under "Haussmannization" in Paris after the Revolution.⁵⁸ A key to Harvey's interpretation of Haussmann's Paris is the idea that control of urban public spaces only becomes significant as a corollary of administrative decisions about private and commercial spaces.⁵⁹ Thus the famous or, as some would urge, infamous widening and fortification of Parisian streets and plazas impacts the use of public spaces among common people when Haussmann's designs drive their marketplaces away from the city's central core, dispersing them to its outer edges and eventually forcing them under arcades. Now, spatially stratified publics could continue to participate in Paris' economy, politics or culture after 1870, but doing so jointly becomes geographically prohibitive, especially for the poor living on the city fringes.⁶⁰ The shift is reminiscent of what took place in Rome during the third century, when commerce and community were split in deference to the architectural plans proffered by Vitruvius' in the first century. Like Haussmann's environmental designs for the Parisian center, they privileged public order, not civic engagement.

⁵⁸ David Harvey, "The Political Economy of Public Space," in Setha Low and Neil Smith, eds., *The Politics of Public Space* (New York: Routledge, 2006), pp. 21-28.

⁵⁹ *Ibid.*, pg. 32.

⁶⁰ For further detail on the development of shopping arcades in Haussmann's Paris, see Walter Benjamin, "Paris, Capital of the Nineteenth Century," in *Reflections* (New York: Harcourt Brace Jovanovich, 1978), pp. 146-49.

Across the English Channel, we find some comparable dissections of publicly accessible places, starting in the late 18th century and continuing in the 19th century.⁶¹ While politics and commerce were being split between Paris' newly widened avenues and its marketplaces on the metropolitan fringes, civic activity was simultaneously being regulated out of the central market halls of modern Britain.⁶² In a host of movements paralleled on the European continent, and post-Civil War America across the Atlantic Ocean, English markets underwent substantial spatial ordering. They began to take on the look of arcades in Haussmann's Paris, and ultimately provided the prototypes through which single use zoning would be cemented in the suburban United States' after World War II. The separations in Great Britain were intended to move marketplaces out of its nascent but rambunctious public sphere, as Zukin argues. In spite of London's unique and historic commitment to free association, most of England's planners were determined to make sure the spirited political assemblies that occurred in public spaces such as Trafalgar Square and other traditional venues did not transfer to commercial markets or dilute the "distinct entrepreneurial role" they played in the nation's economy.⁶³

The latter modern British market hall, considered a *tour de force* of commercial design, introduced many of the geo-political tactics found in Haussmann's Parisian spaces. It also displayed traits found within the disciplinary spaces that Foucault has traced in his genealogies. Newer marketplace developments in England seemed keen on distancing commerce from the volatility that dogged early modern incarnations, such as the food riots above. Market halls in late 18th and 19th century Britain were therefore appointed with material features that supported access control, order, and surveillance. These structural tools made it possible for proprietors to

⁶¹ Lisa Keller, *Triumph of Order: Democracy & Public Space in New York and London* (New York: Columbia University Press, 2010), pg. 59.

⁶² Schmiechen and Carls, op cit., pg. 29.

⁶³ Sharon Zukin, *Landscapes of Power: From Detroit to Disney World*, op cit., pp. 6-7.

police commercial spaces themselves; they included stationary, centralized entrances, narrowed walkways, and roofs.⁶⁴ Determined points of ingress permitted proprietors to circumscribe the relationship between nearby streets and the market hall as they wished. They could now regulate the flow of people seeking access to the marketplace, which was previously multifarious and unmitigated.⁶⁵ Similarly, narrow walkways helped marketers manage traffic, while insinuating spatial restrictions against large assemblages of crowds in the halls. Finally, enclosure from above, a precondition for today's surveillance technologies—also found atop the covered arcades on the fringes of Haussmann's Paris—helped emplace a sense of order, physically and psychologically. It also made it easier for proprietors to channel their gaze on patrons, as well as survey public outbreaks more readily. Along with rain and snow, the unexpectedness associated with the operation of early open markets could now be combated through new built ecologies of commercial space. The alterations were totally innovative in places like London. Proprietors and public officials must have welcomed them alike:

These...enclosed marketplaces were revolutionary, *for they freed the market from the non-marketing activities of the traditional marketplace*. Public access was usually limited to a number of carefully selected points for pedestrians and one for carts, thus giving the town officials greater control over who and what passed through the market...It was not unusual for the entire market to be eventually roofed over...The natural progression of the public market was from the traditional, open-air marketplace to a combination of marketplace and street market, to an enclosed market site, to a roofed market hall...Each step in this process further aided in the separation of marketing from the street.⁶⁶

Marketplaces modeled on the Athenian *agora* functioned to promote commerce and publicity in tandem. They had “long played a role in communicating local news, providing a

⁶⁴ Schmiechen and Carls, op cit., pp. 29-30.

⁶⁵ J.B. Jackson, “The Discovery of the Street,” *The Necessity for Ruins, and Other Topics*, op cit., pp. 64-65. NB: Jackson links the entire development of the medieval market as public space to the use of the streets from the 11th century onward.

⁶⁶ Schmiechen and Carls, op cit., pp. 30-31.

context for political behavior,” and had, quite literally, yielded “the grounds for demanding personal and political rights,” says Carr, et al.⁶⁷ Following the topographical innovations above, publicly accessible, privately operated markets could scarcely contribute to dissemination of news and public opinion about political events, nor could they house appeals for rights or liberties. Given the political upheavals of the early modern era, it should not surprise us to learn that detachments of commercial and expressive space were increasingly abided, and indeed underwritten, by state officials in Europe. Revisiting a social phenomenon evidenced in a decadent and declining Rome, Mumford argues that a chief byproduct of modern spatial separations was a diminution of civic engagement, coupled with a growing stress on privacy.⁶⁸ The idea of privacy would be culturally encoded during the Enlightenment. It would also govern all basic relationships between the state and civil society after the 17th century:

Privacy, formerly possible only for the upper classes, ‘a luxury of the well-to-do’ up to the seventeenth century, slowly began to trickle down to the lower classes...In time, privacy became a sacred quality of modern life in Western society, carefully guarded by constitutional law and public policy.⁶⁹

A culture of privacy, spurred by the Enlightenment and gradually embedded within publicly accessible spaces, was best expressed in the negative liberty theories of Locke and Hume, among others. No aspersions should be cast on theories of individual autonomy or self-determination. Indeed, they ought to be celebrated. However, it is worth recalling Habermas’ Enlightenment public sphere, specifically, the way it was spatialized inside small and somewhat exclusive locales, such as European salons and cafes, rather than the open marketplaces utilized routinely by common people. It seems that a political emphasis on privacy, something encouraged by the new arrangement and regulation of arcades and market halls, had eclipsed the

⁶⁷ Carr, et al, *Public Space*, op cit., pg. 23.

⁶⁸ Lewis Mumford, *The City in History*, op cit., pg. 383.

⁶⁹ Carr, et al, op cit., pg. 24.

perceived use value of open markets and other organic spaces where publics could discover their shared interests and civic capacities. The sphere that emerged from the spatial transformations above arguably produced quasi-public discourses, which more often than not barred the social groups who historically had the most to gain from freedom and equality.⁷⁰ In Europe's late modern geography, the spaces previously accessible to publics for functions of face-to-face assembly were transformed into sites of private management. The arcade and the market hall had become places where uses were scrutinized by private operators and public administrators, who now sanctioned commercial exchange to the exclusion of political association.

American public space before and after the Jacksonian era

The changes outlined above were eventually evidenced in the United States, too, though they commenced at a later time. America's early public sphere, and its spatiality, was decidedly multifunctional. Market activity was rapidly fused with civic engagement in unified places, while the Old World was slowly dividing commercial topography from practices of publicity. In colonial America, the democratization of political space animated calls for independence, expressed publicly in diverse arenas that included town squares and marketplaces, along with commercial ports. Where else in the latter 18th century could a moment of protest like the Boston Tea Party spark political upheavals that would reverberate through history, while informing equally impactful uprisings in France and other European nations?

⁷⁰ There is long tradition of cultural criticism, joined by a number of Habermas' early mentors less supportive than he of a liberal public sphere, who question the very premise of universal rights of participation espoused during the Enlightenment. See, for example, Matthew Arnold, "Culture and Anarchy," in S. Collini, ed., *Culture and Anarchy and Other Writings* (Cambridge: Cambridge University Press, 1993); Theodor Adorno and Max Horkheimer, "The Culture Industry," in *The Dialectic of Enlightenment* (New York: Continuum Press, 1972)

Civic space in pre-Revolution America seemed to proliferate in terms of use, as well as in the scale of its users.⁷¹ It was decidedly political space, moreover. The politicization of early American public space may be explained by colonial conditions, as well as by post-revolutionary transitions that took place throughout the late 18th century and into the 19th century. It was an intense stretch, indeed. In the midst of their colonial experience, large and small landowners made use of space to openly air dissent about British policy. Others used it to assuage and acclaim the Crown. Increasingly, all sides reflected on the nature of representation and the merits of self-government. Following the Revolutionary War, American public spaces were focal points for deliberation about the Articles of Confederation and proposals for a new Constitution, particularly in states such as New York, where a new battle over ideas ensued between Federalists and Anti-Federalists. In the early 19th century, newly enfranchised white male citizens joined political discourses. First wave immigrants settling towns and mushrooming cities along the Northeastern coastline slowly followed them.

We tend to imagine 18th and 19th century American discourse inside wealthy residences or town hall structures, where property owners engaged in haughty debates about political philosophy; or, alternatively, in outdoor squares where commoners reacted to fees and excise taxes. Yet a substantial portion of early American discourse unfolded in a communal manner. Membership in public dialogues often spread across the social strata in widely accessible, commercial venues.⁷² Lofland's study of public space, as the nexus in which strangers negotiate myriad relationships in the open, stressed the role of pubs in the making of the American

⁷¹ I would be remiss if I did not caution that women and slaves were excluded from discursive spaces, both before and after the American Revolution. Nor were the poorest colonists often included. In this sense, the first American public sphere was democratized according to limited franchise model of the Athenian *agora*.

⁷² Timothy Zick, *Speech Out of Doors: Preserving First Amendment Liberties in Public Places* (New York: Cambridge University Press, 2009), pp. 31-33.

Revolution.⁷³ Oldenburg has devoted much of his celebrated “third place” concept to public taverns, observing Alexander Hamilton’s comment on their multi-functionality and ability to deliver “a genuine social solvent with a very mixed company” of groups and classes.⁷⁴ We know that John Jay relied on New York’s Fraunces Tavern for feedback and composition of his submissions to the *Federalist* during the nation’s Founding period. Relying on taverns and public houses, pre- and post-Revolutionary activists also convened on the basis of their proprietary affiliations, pondering political policies and their implications for trade, according to Schudson.⁷⁵ In fact, American discourses of various kinds were routinely emplaced to harness marketplace interests, specifically, for example, in Mason’s lodges and other clubs whose meetings were made visible mercantile association storefronts.⁷⁶

Of course, these special discursive spaces were modest in number. They were often inaccessible to mixed publics that failed to meet their membership requirements. However, they were supplemented by revolutionary and post-revolutionary discourse in open marketplaces, not unlike those annexed by self-discovering publics in Europe during the previous centuries. And like their European precursors, the commercial spaces of 18th and 19th century America accommodated collective action framed in response to historical conditions. During the prelude to American Revolution in the 18th century, a series of dissident actions committed in colonial markets and squares—the Boston Tea Party and Stamp Act protests, for example—echo 17th century food riots that routinely erupted in British public markets. Colonial responses to taxation

⁷³ Lyn H. Lofland, *A World of Strangers: Order and Action in Urban Public Space* (New York: Basic Books, Inc., Publishers, 1973), pg. 121.

⁷⁴ Oldenburg describes “third places” as those outside the home and workplace (first and second places, respectively), where citizens encounter one another more casually, discuss current events, forge community ties, etc. See Oldenburg, *The Great Good Place: Cafes, Coffee Shops, Bookstores, Bars, Hair Salons, and Other Hangouts at the Heart of a Community* (New York: Marlowe & Company, 1999), pg. 74.

⁷⁵ Michael Schudson, *The Good Citizen: A History of American Civic Life* (Cambridge: Harvard University Press, 1998), pg. 42.

⁷⁶ *Ibid.*, pg. 43.

mirrored those undertaken by their mother country's poor, who recoiled at price gouging during the transition from a feudal economy to a mercantile one.

Less dramatic, perhaps, but equally pervasive were public uses of market squares during the period of America's founding. In them, we find open and accessible debates over ratification of the Constitution in and after 1787. The role of republican government was also a source of deliberation in marketplaces. Jackson argues that these marketplaces functioned publicly like most public spaces in the post-revolutionary 18th century. They were all "intended to be the setting for some collective, civic action...civic function characterized them all; people were present in them to perform some public service or play some public role."⁷⁷

Not too long after the ratification of the Constitution in 1789, and its Bill of Rights in 1791, the United States experienced what many historians regard as its most sustained period of democratization, beginning in the 19th century. During the 1820s, the new republic expanded its franchise to property-less white men, who were previously excluded from voting. Suffrage was nowhere near universal, as we know. Civil rights remained off limits to women and African-Americans bound in involuntary servitude. In the case of white men, on the other hand, most states waived property qualifications and began to extend voting rights prior to the presidential election of 1828.⁷⁸ The democratic electorate that grew out of representative enfranchisement in the early 19th century produced a party era by most accounts of American political development. It also furnished a market for the penny press and other mass media.

The era proved propitious for face-to-face association, too. In a rapidly populating, increasingly urban, and publicly engaged America, political space was practiced wherever people could identify accessible topography, especially in the concentrated commercial districts

⁷⁷ J.B. Jackson, "The American Public Space," *The Public Interest*, Winter, 1984, pp. 53-54.

⁷⁸ Richard L. McCormick, *The Party Period and Public Policy* (New York: Oxford University Press, 1986).

sprouting up in new cities and towns. Participatory democracy had originated from the colonial experience. It continued to flourish during the revolutionary and post-revolutionary periods. Later, it combined with the advent of 19th century urbanism to intensify civic engagement among newly included participants in open political discourses. Given the history of those discourses, I believe they were sustained in the first order by publicly functional marketplaces, accessed by Americans throughout the nation's townships and evolving cities.⁷⁹

There is ample evidence of discursive spaces and public involvement in the first half of the 19th century, particularly during the Jacksonian period of the 1830s. Civic engagement occurred in multiple settings, though, including streets, squares, and saloons. Tocqueville's observations about voluntary associations in the United States emphasized its New England style town meetings. Through subtle references to landscape, his *Democracy in America* situated widespread public participation in the growing density of early 19th century towns, villages, and cities.⁸⁰ Ryan reads this emergent urbanism and its connection to spatialized democratic activity in Tocqueville's fieldwork as a repudiation of the frontier thesis. The latter view held that Western geographic expansion explained the development of American political culture, as well as the individualism on which it has always been based.⁸¹ In Ryan's counterargument, the proximity of spatial encounters, made possible in towns and cities, determines the shape of 19th century political practices among Americans. Walt Whitman celebrated these practices of urban public space. Throughout his poetry, he introduced the visibility and unexpectedness of

⁷⁹ This notion of publicly expansive urban democracy might be read as a counterargument to Warner's thesis that "privatism" best explains the traditional development of American cities. See Sam Bass Warner, "The Environment of Private Opportunity," *The Private City: Philadelphia in Three Periods of its Growth* (Philadelphia: The University of Pennsylvania Press, 1968). My intention here is not to dispute Warner's thesis, though I am more inclined toward the views of Jacobs, Jackson, and Whyte (also cited in the previous chapter), who privilege the public underpinnings of 19th developing American cities.

⁸⁰ Alexis de Tocqueville, *Democracy in America*, Volume I, Chapter XII (New York: Vintage Classic Books, 1990), pg. 194.

⁸¹ Mary Ryan, *Civic Wars: Democracy and Public Life in the American City during the Nineteenth Century* (Berkeley: University of California Press, 1997), pg. 9.

democracy, renewed daily by the ubiquity of physical spaces and interpersonal associations inside the “city invincible.” An observer and champion of this diversity, Whitman was also able to show that the promise of urban democracy would always depend on its accessibility to common people who worked in and used the public spaces of cities.⁸²

There are other complementary interpretations of these new American spaces, of course. I would like to look further at Ryan’s, noted above. Her historical work is particularly useful in that it is careful not to reify the space or practice of associational democracy in the 19th century United States. Moreover, she is flexible in conceptualizing an unstable public sphere, during a tumultuous century. Ryan’s roadmap to historicizing space and sphere is therefore helpful for reconciling early practices of public space with accounts advanced by social theorists keen on democratizing it today. This is particularly so for contemporary pluralists, who aim to make space and sphere accessible to more users, including the historically under-represented.⁸³ Ryan’s chronicle is split between the first and second halves of the 19th century, rather than treated as one timeline. The split is intended to shed light on the disparity of America’s civic landscape before and after the Civil War—in New York City, San Francisco, and New Orleans. Ryan never denies the romance of early 19th century American public spaces. Rather, her study is animated by the goal of tracing the roots of their segregations in the latter half of the century, as well as discovering the impact of those exclusions on today’s public sphere.

Ryan examines civic uses of public space in the cities above along three timelines: 1825-1849; 1850-1865; and 1866-1880. I am condensing them to reflect generalized patterns and

⁸² Wilson Carey McWilliams, *The Idea of Fraternity in America* (Berkeley: University of California Press, 1973), pp. 416-19.

⁸³ Robin F. Bachin, Department of History, University of Miami, “H-Urban Review: Bachin on Ryan, *Civic Wars: Democracy and Public Life in the American City during the Nineteenth Century*,” in *H-Net Book Review*, published by H-Urban@h-net.msu.edu (March, 1999), pg. 1. NB: Ryan points to contemporary pluralists in this regard, notably, Nancy Fraser and Iris Marion Young.

changes in urban political participation before and after the Civil War. Prior to the War, emerging cities hosted widespread civic activity among increasingly diverse publics using the political franchise extended during the Jacksonian era. In the years following the Civil War, however, much of the civic capacity generated in the late 1820s and continuing through the 1850s, roughly, began to fade. The extent of the decline prompted Dewey's "eclipse of the public" lament and other negative characterizations of American political life in the second half of the 19th century.⁸⁴ In Ryan's narrative, the rise and fall of civic participation during the two halves is explained in large measure by a topographical switch, from more open, heterogeneous, and spontaneous spaces accommodated within built environments during the antebellum era, to new syntaxes of order, singularity and predictability found inside those spaces after Reconstruction. During the intervening period, publicly accessible spaces became objects of regulation, in response to multiple clashes among socially diverse classes and newer immigrants, who assembled freely prior to the start of war in 1861. Spaces of association, common or proprietary, were reserved when the Civil War ended. The geography of open deliberation and political demand making did not vanish, but it became much less visible after 1865.

In the opening of her book, "Heterogeneous Compounds and Kaleidoscopic Varieties: Creating a Democratic Public, 1825-1849," Ryan explores the physical arrangement of big cities. She describes how urban publics representing diverse identities and interests used the centers of the cities above to exercise "public sociability and democratic association."⁸⁵ Most urban interactions took place in parks and open squares. Yet a substantial portion of American associational life was practiced within publicly accessible spaces where the new variety of goods manufactured during the industrial revolution were bought and sold. Ryan's history reveals an

⁸⁴ John Dewey, *The Public and Its Problems* (Athens: Ohio University Press, 1954), pp. 116-22.

⁸⁵ Ryan, *op cit.*, pg. 23.

abundance of spatial negotiations among different classes, including instances in which representatives of upper, middle and lower strata openly fraternized and broached political subjects.⁸⁶ As their European predecessors did in early modern marketplaces, urban dwellers from a vast array of social backgrounds relied on commercial spaces as centers for community interaction and civic engagement, especially in the 1830s, during the heyday of American political democratization.

The street proved a chief public asset, too, providing access to multifunctional urban spaces in an antebellum 19th century. In Ryan's argument, city streets bridged the "symbiotic relationship" between economy and sociability in America.⁸⁷ The results were oftentimes untidy, to say the least. Public thoroughfares in all three cities above were "simply a mess." In New York, streets hosted rampant gang activity and open collusions with Tammany politicians in the heart of the five points.⁸⁸ Yet, the outcomes were also democratic and participatory. The publics that assembled in city streets during the first half of the 19th century were allowed to utilize makeshift spaces of commerce in the middle of sidewalks for "play as well as work."⁸⁹ These urban improvisations brought multiple users together and helped them to acquire what Ryan calls a "critical civic education in those same public spaces."⁹⁰ The heterogeneity served to crystalize constructs of a public good under the banners of community interest and visibility, while simultaneously revealing America's diversifying human geography. Perhaps it prefigured today's multicultural negotiations, which often ensue unexpectedly in metropolitan space.

Distinctions between public and commercial space were less clear in the cities of antebellum America. In a more turbulent decade immediately preceding the Civil War, however,

⁸⁶ Ibid., pp. 33-35.

⁸⁷ Ibid., pg. 42.

⁸⁸ Lisa Keller, *Triumph of Order*, op cit., pg. 49.

⁸⁹ Ryan, op cit., pg. 43.

⁹⁰ Ibid., pg. 49.

marketplaces grew increasingly difficult to manage. Proprietors, who traditionally welcomed the overlap between commerce and civic association in open markets, had become apprehensive about the behavior of progressively volatile publics congregating in and near their storefronts.⁹¹ Public volatility frequently turned to violence during the Civil War. So a new urban spatial order emerged after its conclusion in 1865. Indeed, it may be more accurate to say that spatial order emerged for the very first time in American cities during the post-War period. It entailed an early form of commercial zoning of marketplaces by local authorities, aimed at protecting property from the vicissitudes of crowd behavior. More conspicuously, it contained multi-determined strategies of regulation in which *all* public spaces became encoded with proprietary symbols.⁹² The creation or systematization of police departments in New York and other Northeastern cities was an important signal in this regard. It would grow in the two decades preceding the 20th century.⁹³ Union soldiers were also assigned to streets and marketplace boundaries in New Orleans and other conquered Southern cities. Police and soldiers would be posted in almost every large American city, to survey streets, squares, and parks. Further, urban space would be micromanaged. By the end of the 19th century, an assortment of local ordinances proscribed all but the most predictable collective activities.⁹⁴

State regulation of post-War urban topography seemed to inhibit the civic engagement associated with early 19th century democratization. It also combined with alterations in the arrangement of marketplaces to create new forms of shared space in late 19th century cities. The idea of the public sphere began to change after 1865. It appeared to be spatialized in far more

⁹¹ Ibid., pp. 129-37.

⁹² Ibid., pp. 188-213. See also, Zick, *Speech Out of Doors*, op cit., pp. 31-35. Zick also demonstrates that this spatial order was inscribed in local public policies about political speech and association at the end of the Civil War, as well as in federal jurisprudence at the end of the 19th century—a point to which I will return in the next chapter.

⁹³ See Keller, op cit., pp. 49-60.

⁹⁴ Ryan, op cit., pg. 218.

discreet ways throughout most American cities. It remained diverse in one way: it combined the assembly of large crowds with opportunities for commercial interaction. However, the publicity of marketplaces became non-civic in nature. Similarly, the growth of monitoring and homogeneity within commercial environments made them seem inorganic from the point of view of accommodation and association. As a result, they began to lose their appeal as free-flowing and tolerant places for open political discourse.

Specialized indoor venues overshadowed open markets, according to Ryan. So did a new built environment, the department store, which drew shoppers in with fanciful architectural and programmed amusements.⁹⁵ These structures were encoded with stricter commercial purposes. Invitations to use were limited to leisurely shopping, along with other members of the public. Unlike their street-based antecedents, they did not occasion assembly for any other public purposes. In fact, once people went inside, there was little to no space for any social interaction, let alone earlier forms of collective action. The spaces and opportunities for political discourse or association in the marketplaces of the latter 18th century and early 19th century were replaced by controlled commercial designs that reflected public enticement, while eschewing any sort of civic ecology. Warner's study of Philadelphia during the late 19th century seems to express the *fin de siècle* American city, which embraced architecture, but excluded space:

The effect of three decades of a building boom...was a city without squares...a city without gathering places... *Whatever community life there was to flourish from now on would have to flourish despite the physical form of the city, not because of it.*⁹⁶

The optics of these environments was infinitely more attractive; the variety of purchasable products was equally impressive. Their effects on civic capacity seem less

⁹⁵ Ibid., pp. 200-03.

⁹⁶ Sam Bass Warner, Jr., *Private City: Philadelphia in Three Periods of Its Growth* (Philadelphia: University of Pennsylvania Press, 1968), pg. 55. My emphasis.

auspicious, on the other hand. The topographical renovation and regulation of American cities diminished the post-War public sphere. Though its iteration in the years leading up to the Civil War left much to be desired when it came to orderliness, publicity demanded more than intermittent contact inside department stores built strictly to entice and then discharge consumers. The arrangement and management of late 19th century American cities and property fostered what Sennett lamented as “empty space” or “the paradox of isolation in the midst of visibility.”⁹⁷ Returning to Ryan, post-War spatial ordering spawned a profusion of “border territories,” within the centers of most cities. These territories engendered rapid movement amid department stores by the more well to do, and far fewer associations between social classes in regulated and vaguely public spaces. Urban gathering places were now pre-packaged with public experiences, where they previously relied on users’ mutual interpretations of public legitimacy within shared environments.⁹⁸ Despite the chronological distance, the result is reminiscent of what Sennett discerned in Imperial Rome prior to its dissolution:

In sum major spatial innovations of the 1870s were located in neither exactly private nor fully public spaces but in a border territory marked by the apartment house, the houses of public amusements, and streets defined by the shop windows that lined them. This pattern suggests that the changing built environment was channeling everyday urban life and imagination in a private direction, away from associated or civic consciousness.⁹⁹

Jackson insists that the redesign of post-War public spaces was part of a calculated plan. In his view, urban public administrators collaborated with the business community to remove spaces of commerce from the unexpected, “workaday activities” and social disorder that

⁹⁷ Sennett, “The Public Domain,” *op cit.*, pg. 12.

⁹⁸ I am borrowing the term “public legitimacy” from Peterson, who uses it to denote “the process by which any urban space or development becomes accepted as a representation of the general interest and/or collective identity of the local public, rather than representing the narrow private interest of those who produced the development.” See Matt Peterson, “What Makes Public Space Public?” Paper presented at the Michigan Social Theory Conference, University of Michigan, Ann Arbor, MI, March 2010, pg. 6.

⁹⁹ Ryan, *op cit.*, pg. 202.

transpired within multifunctional but scappier marketplaces of the 1830s through the 1850s.¹⁰⁰ Reversing Arendt's *space of appearances*, planners and architects delivered the appearance of space, while detaching users from one another and any discursive public realm. Urban practices became more predictable after 1865, absent myriad accommodations required within mixed-use city spaces. The price for that predictability was a loss of heterogeneity, Zukin argues.¹⁰¹ Post-War cities rationalized these spatial negotiations, confining them to commercial exchange, which had largely displaced open political discourse from places where people previously assembled and formed their associations.

Visible practices of civic space would be reanimated by changing socio-political conditions in the United States during the early 20th century, particularly in the wake of the First World War. Indeed, heterodoxy was sometimes publicized in more tolerant public spaces that bordered department stores and commercial districts built in the late 19th century. However, the intimacy between marketplaces of goods and those of ideas was scarcely revitalized within central city spaces. As the 20th century unfolded, physical and ideological constructions of public space had to compete with post-World War II urban development, and then adapt to it.

Urbanism itself would be forced to reckon with the advent of suburbs and the attractions they were able to deliver following considerable federal spending and what I consider to be state supported appeal of privacy. Cities experienced harsh impacts as a result of post-War disinvestment, though they have bounced back following many suburban triumphs. Yet, the adaptations of shared space both in cities and suburbs during the latter half of the 20th century have undermined its publicity and diminished the overall quantity and quality of political

¹⁰⁰ Jackson, "The American Public Space," op cit., pg. 61. Keller echoes this argument in her analysis of New York's revised policies for streets and squares in the late 19th century. In her chronology, the arc of these policies corresponded to perceived needs for public order after the 1863 draft riots and "The Great Fear" touted by property owners, policy makers, and the city's editorial boards alike. See Keller, *Triumph of Order*, op cit., pp. 185-90.

¹⁰¹ Sharon Zukin, *The Cultures of Cities* (Cambridge: Blackwell Publishers, 1997), pp. 194-95.

association in the United States. Some work needs to be done, therefore, to better understand the historical process by which space was eclipsed if we are to reimagine conditions under which democratic assembly and civic capacity may again be employed in America.

The rise and fall of open-minded space in an American century

Visible political association in the 20th century transformed from high intensity to wide scale disengagement within America's built environments. In the first half of the century, multifunctional public spaces flourished in poor and immigrant enclaves on the fringes of evolving cities. In their centers, however, a combination of street policing and fully commercialized districts—replete with large department stores erected during the late 19th century—enforced regulation and segmentation of publicly inhabited spaces. The transition was akin to Haussmann's reorganization of Paris. A gap in practicability split major downtown zones from the spaces of remoter communities in which less affluent, more marginal members of the public lived. Yet, the reorganization of political geography *within* early 20th century urban space would pale in comparison with the decentralization of public topography instigated by suburbanization during the latter half of the century.

In the first half of the century, specifically, during the stretch between World War I and II, dissent was commonly expressed in streets and adjacent marketplaces on the urban fringes. The sheer volume of these makeshift demonstrations prompted some of America's prudish social activists, such as Jane Addams and the founders of Hull House, to sue for peace in the streets and lobby for community centers and settlement houses, thereby bringing political association

inside.¹⁰² In a New Deal counter-movement, FDR's Works Projects Administration (WPA) organized the "Forum Division." It put indigent men to work building visible centers of patriotic sociability. Open exchanges of discourse would buoy civic education and channel diverse opinions, in order to "inoculate American democracy from the authoritarianism overtaking Europe." By 1937, there were over one thousand open forum projects across the nation. A few were even sited on the immediate borders of urban business districts.¹⁰³

The Forum Division and efforts that preceded it aimed to restore opportunities for democratic association eclipsed by the spatial arrangements of the late 19th century. They also reflected a counterattack on the ideology of those arrangements, led by public intellectuals in the 1920s and 1930s. Responding to the patent criticism of American participatory democracy that peppered the philosophies of publicity espoused by Herbert Croly and Walter Lippmann, who both pressed for esoteric administrations of government *in spite of* public opinion, a school of pragmatic theorists and reformers campaigned "to re-found democracy in face-to-face communities."¹⁰⁴ The champions of this latter approach—John Dewey, for example—were themselves inspired by leaders such as Woodrow Wilson, who held that political participation by laymen required more than individuated reaction to daily newspapers:

He cannot be said to be participating in public opinion at all until he has laid his mind alongside the minds of his neighbors and discussed with them the incidents of the day and the tendencies of the time.

Wilson maintained that the "plain fellows...the fellows whose muscle was daily up against the whole struggle of life" needed, in fact, were owed, public places in which to express and educate

¹⁰² Carr, et al., op cit., pp. 63-65; Michael Schudson, op cit., pp. 219-20.

¹⁰³ Schudson, op cit., pp. 221-23.

¹⁰⁴ Ibid., pg. 219. The immediate reference to Croly and Lippmann is mine. See Herbert Croly, *The Promise of American Life* (Boston: Northeastern University Press, 1989), 274-75; Walter Lippmann, *Public Opinion* (New York: The Free Press, 1965), pg. 143.

themselves, openly and in concert. The project of democratizing civic engagement in America meant expanding access to public space among these plain fellows, in other words, members of the working-class. Wilson aimed to unify publicity and opinion in common space:

[T]here is the place where the ordinary fellow is going to get his innings, going to ask his questions, going to express his opinions, going to convince those who do not realize that the vigor of America pulses in the blood of every true American, and that the only place he can find the true American is in this clearing-house of absolutely democratic opinion.¹⁰⁵

Dewey took up Wilson's mantle. The former postulated an inclusive public sphere prior to World War II, in *The Public and its Problems*. His definition of a diverse public realm, an aggregate of *every* place where people assembled and concertedly resolved the consequences of other people's actions, made face-to-face democracy adaptable to any number of shared spaces.¹⁰⁶ Dewey seemed to accept that his public realm encompassed the practices of ordinary people, who might take to the streets to protest American policy abroad or social conditions at home. He also appeared to take it for granted that the publicity he had theorized would engender heterodoxy; that public space was defined by civic expression, not popular amusement; that it might produce inconvenience or even conflict.

There were inconveniences in the first half of the 20th century. There was even conflict and violence in public places frequented by people looking for merchandise or repose. Kohn and Zick each detail how the "Wobblies" agitated in crowded city streets throughout the early 20th century, for example.¹⁰⁷ The IWW movement contested rules established for public space in the wake of the Civil War, and wound up loosening that space for heterodox expression, despite

¹⁰⁵ Woodrow Wilson, *The New Freedom* (New York: Doubleday, Page, 1913). Quoted in Schudson, op cit., pg. 220.

¹⁰⁶ Dewey, op cit., pp. 27-28.

¹⁰⁷ See Kohn, *Brave New Neighborhoods*, op cit., pp. 24-27; Zick, *Speech Out of Doors*, op cit., 43-44.

growing signs of police power or what Keller calls a “triumph of order” in cities.¹⁰⁸ Public markets near New York City’s Columbus Circle and Times Square later became hubs for political demonstration throughout the 1920s and 1930s.¹⁰⁹ Even though those spaces eventually fell out of use among the City’s left wing, Gratz and Mintz point out that Union Square remained “New York’s answer to London’s Hyde Park, the favorite site for political orators and protesters.”¹¹⁰ On the West Coast, in Los Angeles, where Frankfurt Scholars, Adorno and Horkheimer stockpiled their Arnoldian impressions about the wretchedness of American political culture, one could find marketplaces where citizens representing various trades assembled and advocated for workers’ rights from the 1920s through the 1940s.¹¹¹ Civic space dotted America’s urban landscape throughout the first half of the 20th century. At times, it included neighborhood commercial centers, where political association was tolerated.

In another example, Zukin remarks on her own neighborhood in North Philadelphia, where a diversity of spaces was sprinkled prior to 1950. She muses on popular “shopping streets” in Philadelphia, observing that they nurtured “a thousand different social interactions in public space, from face-to-face relations to more abstract transactions of commercial exchange.”¹¹² These mixed-use spaces became academies of social inclusion, of cultural identity and visible negotiation, where diverse groups were able to reveal and celebrate their differences, while collectively uncovering sources of accommodation and tolerance. Similarly, neighborhood streets and marketplaces served jointly to facilitate civic engagement. They stressed pluralism and enabled it to develop spontaneously. Multifunctional spaces of the early 20th century thus

¹⁰⁸ Keller, *The Triumph of Order*, op cit., pp. 226-29.

¹⁰⁹ Sharon Zukin, *The Cultures of Cities*, op cit., pg. 44.

¹¹⁰ Roberta Brandes Gratz with Norman Mintz, *Cities Back From the Edge: New Life for Downtown* (New York: John Wiley & Sons, Inc., 1998), pg. 213. NB: Union Square became a key staging area for the memorial expressions of grief and remembrance after September 11, 2001, which suggests its continued value as a public space in which people can come together and share messages of import with each other.

¹¹¹ Mike Davis, *City of Quartz: Excavating the Future in Los Angeles* (New York: Vintage Books, 1992), pg. 404.

¹¹² Zukin, op cit., pp. 193-94.

played an educational role in American culture. They provided opportunities for urban inhabitants to model their own interpretations of community, publicity, and democratic association to one another. Perhaps this is why Zukin adds that the supermarkets of her childhood were always located close to public libraries.

Gratz and Mintz view the spatialization of an urban public sphere through the lens of planning and architecture. In a pre-1950 “communal landscape,” marketplaces played a chief role in furnishing chances for publicity. “Public markets had an intentional, broader public purpose beyond the commercial function,” including “stimulating social interaction...[and] any number of public goals.”¹¹³ Markets stimulated the growth of other public spaces. In fact, they spatialized communities, turning neighborhood-shopping streets into main streets across the nation. These diverse spaces assembled, “in the most democratic of atmospheres, the groups of people that” (as I intend to show below) “development patterns have been separating in recent decades.” Though they may have been removed from city centers, marketplaces catalyzed urban civic capacity by bringing people together from many walks of life. Public markets in the United States of 1900-1950 were loose, political spaces:

Genuine ‘public places’ ...where planned, chance, formal, and informal meetings occur, the opportunity for people to come together, to hear about new ideas, share concerns, understand the dilemmas of others, listen to differing opinions, debate proposals for change, and, perhaps, even resolve differences.¹¹⁴

The openness and accessibility of urban public space rested largely on its relationships to streets. In the 1920s and 1930s, shopping streets and public markets were still immune from encroachments posed by urban expansion schemes calibrated to the anticipation of auto

¹¹³ Gratz with Mintz, *op cit.*, pg. 211. NB: The authors’ planning perspective is sometimes criticized for idealizing historical public spaces and treating their new iterations as means for generating capital investment in contemporary cities. See, for example, Michael Rios, “Emplacing Democratic Design,” in Shiffman, et al., *op cit.*, pp. 133-39.

¹¹⁴ Gratz with Mintz, *op cit.*, pg. 34.

traffic.¹¹⁵ In the 1940s, however, public marketing and other forms of interaction would begin to be affected by changes attendant to the motor age. After the explosion of automobile use in the 1950s, urban growth would itself be revolutionized, while planning for suburbs became the principal determinant behind almost every topographical development in a post-World War II United States. If Dewey and American Presidents with whom he was philosophically aligned created public space for political movements such as the Wobblies before World War II, now it was Robert Moses and the officials who got the 1956 Interstate Highway Act through Congress that spatialized the nation's public sphere.¹¹⁶ And the fate of public spaces, along with the civic engagements they helped realize, would change dramatically in light of the automobile boom and their rapid advances through more uniform metropolitan landscapes. Seeming to heed Croly and Lippmann's calls for a public sphere built on policy expertise, rather than civic input, a new generation of planners epitomized by Moses accomplished awesome feats of urban and suburban development without holding elective office. Notwithstanding a host of accomplishments on behalf of popular recreation in his earlier career, Jones Beach, for example, Moses appeared to view the public and its political associations as obstacles to administration and planning, not its ends. This seemed particularly evident after 1950.¹¹⁷

It may be impossible to consider open and accessible public space or a socially inclusive public sphere after World War II without reflecting on the rise of automobile use, government funded highway construction or the political geography of both phenomena. This is true for suburbs settled during the post-War population boom, as well as for cities from which the

¹¹⁵ Ibid., pg. 90.

¹¹⁶ Dennis R. Judd and Todd Swanson, *City Politics: Private Power and Public Policy* (New York: Addison Wesley Longman, 1998), pg. 129.

¹¹⁷ The most comprehensive account of Moses' works is of course found in Caro's history. This characterization also derives from Berman's remembrance of Moses' deconstruction of several South Bronx neighborhoods in order to build the Cross Bronx Expressway out of New York City. See Robert A. Caro, *The Power Broker: Robert Moses and the Fall of New York* (New York: Oxford University Press, 1969); Marshall Berman, *All that is Solid Melts into Air: The Experience of Modernity* (New York: {Penguin Books, 1988), pp. 290-312.

American people out-migrated in staggering proportions. Historical accounts developed by Jackson and Fishman, to name two, pivot directly from the post-War evolution of automobile reliance to the spatialization of built environments catered to individuals zooming about a vast suburban layout that valued motion above all else.¹¹⁸ Critics of the post-War public realm frequently connect suburban and highway development to the decline of urban economies and spaces. Downtown development and attendant spatial arrangements were no longer emphasized in older metropolitan areas, which were defunded in favor of liberally financed highway constructions intended to take people *out of the city*, starting in the 1950s.

The correlation above seems highly plausible, given the history of suburbanization to be summarized below. However, I would like to caution against over-emphasizing an historical ideal of urban public space and sphere, lest we understate ongoing topographical and geographical overlaps between cities and suburbs—to be visited in greater detail during the final chapter. For one, human geography has changed significantly in suburbs. Indeed, large numbers of suburbanites do not even own cars today. Further, topographical arrangements in cities, business improvement districts, for example, continue to privatize or delimit the public functionality of urban spaces. My point is that public spaces and spheres are not monolithic, in cities or suburbs. What remains to be seen is how highways and other innovations influenced civic space in suburbs, as well as why suburban landscapes seem to evidence a resilient split between commerce and publicity.

The goal of this chapter has been to historicize the emplacement and displacement of political practices within publicly accessible markets. I would like to devote what remains to the spatialization of privately owned commercial property and public intercourse in suburbs.

¹¹⁸ See Kenneth Jackson, *Crabgrass Frontier: The Suburbanization of the United States* (New York: Oxford University Press, 1985), pp. 246-51, and 257-61. Robert Fishman, *Bourgeois Utopias: The Rise and Fall of Suburbia* (New York: Basic Books, 1987), pp. 155-70.

Following heterodox political expression by radicals and other activists in city streets, squares, and public markets during the early 20th century, and then civil rights and antiwar protests in downtown public spaces and college campuses during the 1950s and 1960s, tolerance for civic practices declined precipitously in the 1970s and 1980s. The slide coincided with an intense upward trajectory in demographic migration to America's suburbs. Ever since the expansion of federal highway construction programs during those decades, suburbs have continued to sprawl, posing topographical impediments to practicable public spaces associated with early 20th century cities, while urban redevelopment strategies have tended to imitate the architectures of those suburbs, along with their limited tolerances for unorthodox public spheres.¹¹⁹ As the abrupt conclusion of Occupy Wall Street protests suggests, cities may resist public space, too. As the dénouement in Zuccotti Park and countless shared spaces in cities across the country also indicate, a growing split has ensued between privately owned places associated with commercial development, on the one hand, and publicly functional spaces where political association and unexpected activities are possible, on the other. As I intend to argue for the duration of this chapter, this split has widened in an era of suburbanization.

American suburbs were established well before the 1950s. The earliest ones were built during the early 19th century, in places like Brooklyn, New York. Wealthy families sought repose from the mounting bustle of city life by hopping aboard one of Robert Fulton's steam

¹¹⁹ This theme abounds in the literature on developmental overlaps between cities and suburbs. The seminal account appears in Jane Jacobs's exposition, *The Death and Life of Great American Cities*, op cit., pp. 4, 196. Zukin's exegesis on the "ambience of authenticity" modeled in *faux* historic downtowns is representative of more recent analyses. So, too, is Gratz's "suburbanized urban downtowns" and Boyer's suburban "city tableaux." Today, Lance Jay Brown and others heap criticism on "new urbanism" designs, which privilege small scale, capital-driven spaces in cities, too, while excluding others where collective expression may be practiced. See, respectively, Sharon Zukin, *The Cultures of Cities*, op cit., pg. 51; Gratz with Mintz, op cit., pg. 99; M. Christine Boyer, "Cities for Sale: Merchandising History at South Street Seaport," in Michael Sorkin, *Variations on a Theme Park: The New American City and the End of Public Space* (New York: Hill and Wang, 1992), pg. 189; Lance Jay Brown, "Public Space Then and in the Future," in Shiffman, et al., op cit., pg. 248.

ferries on the East River.¹²⁰ By mid-century, inner ring suburbs had grown further, although the development of “streetcar” or “railroad” suburbs coincided with electric trolleys and locomotives in the 1890s.¹²¹ This was merely a prelude to mass exoduses that took place after World War II, when millions of Americans settled in expanding outer ring suburbs. Fishman dubs this time an “age of suburbs.”¹²² Major waves of suburbanization were made possible by automobiles in the late 1940s, but exploded in the 1950s, 1960s, and 1970s, owing to new highways and housing.¹²³ Families able to escape from congested and deteriorating cities saw the American dream realized in suburban landscapes. As suburbs grew, government land use policies and budgets followed them, generally at the expense of central cities, which saw their resources shrink.¹²⁴ A cycle emerged in which older cities were unable to attract funding increasingly lavished upon newer suburbs. Revised spending formulas enacted in federal legislation were dedicated to suburban highways, housing, and economic development, while excluding urban roads, neighborhoods, and business districts. For example, federal “reinvestment” funding was applied strictly to undeveloped communities, where new population and infrastructure needs had grown.¹²⁵

The effects of these transitions upon public space may not be obvious at first glance, but they were substantial. I will look at the expression of contemporary suburban public space in a moment. As for cities during this period, sustained cycles of federal disinvestment wrought abandonment by middle class whites, which in turn led to retrenchment of local budgets. The attentions once afforded urban public spaces by government authorities and user publics declined substantially. Centers associated with civic engagement and open political discourse became

¹²⁰ Judd and Swanstrom, *op cit.*, pp. 181-82.

¹²¹ *Ibid.*, pp. 182-83.

¹²² Robert Fishman, *Bourgeois Utopias: The Rise and Fall of Suburbia* (New York: Basic Books, 1987), pg. 182.

¹²³ Judd and Swanstrom, *op cit.*, pp. 183-92.

¹²⁴ Sharon Zukin, *Naked City: The Death and Life of Authentic Urban Places* (New York: Oxford University Press, 2011), pgs. 5-10.

¹²⁵ Judd and Swanstrom, *op cit.*, pp. 220-23.

nuclei for anti-social behavior. The changes eventually embroiled working classes in the depreciation of urban public space after 1950, in one way or another:

[W]orking-class people as well were able to buy a piece of the American dream in the new higher-density suburbs, aided by Veterans Administration loans and massive federal highway funding. There began to be widespread concern about the ‘flight’ to the suburbs and ‘abandonment’ of the center cities to poor minorities. There is little doubt that the severe financial problems of many cities and the resulting lack of attention to public space were due, in part, to this exodus. Without middle-class support, the growth of [public] space systems was halted and they began to go into decline as other social demands on scarce public funds came to the fore. Rules of use in existing spaces were relaxed, and sometimes, as in the infamous case of Detroit’s Belle Isle in the 1950s, public spaces became battlegrounds in the growing social and racial conflict between less successful members of the white ethnic working class and people of color.¹²⁶

Urban public spaces fell into disrepute or were disused entirely. Where they transitioned from hubs of expression among Suffragettes, Wobblies, and many other social activists by the 1930s, to battlefields on which sizable movements fought for civil rights or against war in the 1950s and 1960s, they became largely desolate as the 1970s dawned. Suburban space did not offset the changes. Rather, the suburbanization of America’s landscape arguably fed a decline in publicly functional space, since sprawling urban peripheries contained so little of it.¹²⁷

It did not begin that way. Many original post-War suburban planners hoped to reproduce the sociability and public energy of urban life in the early 20th century, while leaving behind the grime and grievances expressed within the city’s shared spaces. The first design team in New York’s Levittown on Long Island—generally regarded as the quintessence of post-War suburban settlements—believed that communal and civic life would be principal features of its environmental plan.¹²⁸ In fact, the initial commitment to explicit community architecture in

¹²⁶ Carr, et al., op cit., pg. 67.

¹²⁷ Zick, *Speech Out of Doors*, op cit., pp. 36-42.

¹²⁸ Ellen Dunham-Jones and June Williamson, *Retrofitting Suburbia: Urban Design Solutions for Redesigning Suburbs* (Hoboken, New Jersey: John Wiley & Sons, Inc., 2011), pg. 111.

Levittown was driven by market analysis. This calculation suggests, at least to some extent, that its creators anticipated a demand for public space among the families to whom they wished to sell private property.¹²⁹ Similar projections were evidenced in the planning for Bucks County, Pennsylvania, Willingboro Township, New Jersey, and a host of suburbs outside Philadelphia and Boston.¹³⁰ Likewise, the new metropolitan suburbs built around fledgling Sunbelt cities in the American Southwest were intended to provide space in which ethnic whites returning stateside after World War II could build civic capacity.¹³¹

Any agenda for publicity in Levittown and other suburban developments was short-lived, however. At the behest of both government officials, who earmarked considerable public sums for suburban development, most environmental designers segregated suburban topographies into discrete “use zones” after 1950.¹³² These zones increasingly scattered the layout of post-War suburbs, commonly called “bedroom” suburbs. Representing the reverse of what I described in the previous chapter, they generated what Walzer regards as *single-minded spaces*; for instance, residential spaces that were designed separate and apart from commercial ones, commercial spaces separate and apart from recreational ones, and so on. This plotting was based on a kind of self-fulfilling prophesy about automobile use. Anticipated demand for driving from place to place meant that it would ultimately be necessary to do so. Use zones therefore required suburbanites to drive their cars from one single-minded environment to another. The policies

¹²⁹ Herbert J. Gans, *The Levittowners* (New York: Pantheon Books, 1967), pg. 180.

¹³⁰ *Ibid.*, pp. 182-85.

¹³¹ Stanley Feldstein and Lawrence Costello (Eds.), *The Ordeal of Assimilation: A Documentary History of the White Working Class 1830's to the 1970's* (New York: Anchor Books, 1974), pp. 381-83.

¹³² James Howard Kunstler, “The Public Realm and the Common Good,” *The Long Term View*, Vol. 4, No. 2, Spring 1998, pg. 21. For a more detailed discussion of public financing for post-War suburban development in the U.S., see Delores Hayden, “Building the American Way: Public Subsidy, Private Space,” in Setha Low and Neil Smith (2006), *The Politics of Public Space*, op cit., pp. 35-46.

behind them weighed against the construction of mixed-use environments.¹³³ For some who criticize a dearth of civil architecture in suburban design, the abandonment of multifunctional space likewise undermined opportunities for public engagement. According to Fishman, for example, single-minded spaces spread throughout post-War suburbs have tended to “exclude the liberating openness of genuine public space,” topographically thwarting the possibility of an authentic public sphere therein.¹³⁴

Notwithstanding an early interest in planning civically oriented suburban communities, late 20th century segmentation of suburbs along single use zones was hardly the consequence of public policy alone. The private developers who ultimately built Levittown and other suburbs were unconcerned with generating civic capacity among their inhabitants. Indeed, they were often motivated by suspicion and enmity towards political association, as Gans points.¹³⁵ The development of most suburbs disaggregated spaces in which that association might be possible, therefore. Despite initial projections of consumer demand for shared space in burgeoning suburbs, their physical development would be filtered through supply-side rationales obfuscated by advertising on the radio and, eventually, television. Aimed at countering public perceptions of suburban sterility, uniformity, and homogeneity, marketing and promotion campaigns allowed developers to reimage built suburbs as idealized communities, distinct from their disembodied iterations on the ground.¹³⁶ Validating Habermas’ cautions about a mediated public sphere, it

¹³³ Kunstler, op cit., pg. 17. NB: Kunstler and others are not sanguine about these new developments. While they replicate the mixed-use feel of older cities, critics charge that they merely transition commercial opportunities to central suburban cores, while withholding rights of publicity from users who routinely drive in and out of them. See, for example, Wayne Batchis, “Free Speech in the Suburban and Exurban Frontier: Shopping Malls, Subdivisions, New Urbanism, and the First Amendment,” *Southern California Interdisciplinary Law Journal*, Vol. 21, No. 301, 2012, pp. 351-57.

¹³⁴ Robert Fishman, “Towards an Open-Minded Space,” in David J. Smiley and Mark Robbins (Eds.), *Sprawl and Public Space: Redressing the Mall* (Washington, D.C.: National Endowment for the Arts, 2002. Distributed by: New York: Princeton Architectural Press, 2002), pg. 9.

¹³⁵ Gans, op cit., pg. 187.

¹³⁶ Marc Auge, *Non-Places: An Introduction to Supermodernity* (New York: Verso, 2009).

seems that post-War suburban developers relied on the airwaves to camouflage their divestment in all but the most negligible spaces where people could congress.

In the following decades, suburbs grew exponentially, both in scale and population. In 1950, less than a quarter of the American people lived in suburbs; in 1960, roughly one-third called them home; by 1970, more Americans resided in suburbs and metropolitan outskirts than cities.¹³⁷ In the 1990 Census, fully 54 percent of the population lived in suburban areas. The figure grew to 58 percent in the 2000 Census. It dropped a few raw percentage points in the 2010 tracts, owing to a burst housing bubble in the outermost reaches of the “exurbs” after 2007, along with stagnation in middle ring suburbs built between 1950 and 1980.¹³⁸ Overall, however, the American population now lives in metropolitan areas, with a growing share resettling cities and their inner ring suburbs.

These suburbs witnessed significant demographic shifts, particularly during the last decade. They have grown more racially, ethnically, and economically diverse than ever before. In fact, the human geography of inner ring suburbs is comparable to that of central cities today. Many cities recorded majority-minority compositions in the 2010 Census. So, too, have a small number of suburbs throughout the country. The average minority population of inner ring suburbs is now 35 percent. That growth owes to massive “black flight” from cities, as well as significant growth among Latino and Asian communities in the metropolitan United States.¹³⁹ The image of homogenous post-War suburbs, peopled by middle and upper-middle class whites

¹³⁷ Douglas Muzzio and Thomas Halper, “Pleasantville? The Suburb and its Representation in American Movies,” *Urban Affairs Review*, Vol. 37, No. 4, March 2002, pg. 555.

¹³⁸ See John McIlwain, “Suburbs 2.0: The Evolving American Suburbs,” in *Urban Land Institute Reports*, June, 2011.

¹³⁹ William Frey, “Melting Pot Cities and Suburbs: Racial and Ethnic Change in Metro America in the 2000s,” *State of Metropolitan America*, Report by the Brookings Institute, May 2011.

fleeing inner cities for detached houses and private lawns, is a far cry from the demographic diversity that characterizes metropolitan America today.¹⁴⁰

Yet, the man-made ecologies of suburbs are just beginning to adapt to their changing demography and social needs. Relatedly, the degree to which practicable space is available for interpersonal association in these sprawling landscapes remains modest. The inertia has led Barber to complain that suburbs have come to signal the “destruction of community” within the metropolitan United States.¹⁴¹ These criticisms persist, despite attempts to promote infill development in suburbs. The idea of infill mostly coincided with arrival of the new urbanism, a design canon that looks to reestablish early 20th century values of socio-spatial exchange inside suburban landscapes. Responding to sprawl and an absence of place on the peripheries of most cities, combined with post-suburbanization defenses of open and accessible social space by Jacobs and others such as Whyte, and later, Kayden, the new urbanism encourages the creation of “town centers” within suburbs. It promotes main street pedestrianism, which many of its boosters call “walkable urbanism.” It also eschews development patterns that have resulted from more than a half-century of resistance to mixed-use space in post-War suburbs.¹⁴² Not unlike seminal suburban planners, who wanted to indulge market demands for communal space, new urbanists have arrayed to enhance architectural density, human proximity, and elevated levels of

¹⁴⁰ Christopher Niedt, “Introduction,” in Niedt (ed.), *Social Justice in Diverse Suburbs: History, Politics, and Prospects* (Philadelphia: Temple University Press, 2013), pp. 3-6. See also, Nancy A. Denton and Joseph R. Gibbons, “Twenty-First Century Suburban Demography: Increasing Diversity Yet Lingering Exclusion,” in Niedt (ed.), op cit., pp.12-30. NB: I will elaborate further on demography in the final chapter.

¹⁴¹ Benjamin R. Barber, “Civic Space,” in Smiley and Robbins, op cit., pg. 34.

¹⁴² On “walkable urbanism,” see Christopher B. Leinberger, *The Option of Urbanism: Investing in a New American Dream*, (Washington: Island Press, 2009), pg. 101. On sprawl, see Kunstler, op cit., pg. 17. NB: Kunstler develops a critique of “cookie-cutter” suburbs in support of his criticism of an ersatz public realm. Whyte’s analysis of bonus plazas was elaborated in the previous chapter. See William H. Whyte, *The Social Life of Small Urban Spaces*, op cit. Kayden’s analysis is more recent. Interestingly, it seems to prefigure the occupation of Zuccotti Park in 2011. See Jerold Kayden, *Privately Owned Public Spaces* (New York: John Wiley & Sons, 2000), pp. 7-19.

environmentalism. They continue to advocate centralized topographies and the feel of smaller towns in sprawling suburbs in need of ecofriendly retrofitting and emplacement.¹⁴³

While Congress for the New Urbanism imaginaries proposed reduced sprawl and vehicle miles traveled (VMTs) in multifunctional spaces on the edges of central cities, the embodiments of this suburban design canon have almost always tendered rules of use that drastically inhibit popular assembly within their common areas. For example, new town centers such as Disney's Celebration, Florida, which was developed in 1996—with inspiration from new urban ideals first advanced in the 1980s—always ranked orderliness as its top priority, not publicity.¹⁴⁴ Codes of conduct were posted at the entrances and throughout the length of such centers, which were frequently located in middle ring suburbs and largely accessible to upscale visitors alone. Developments like Reston Town Center, outside of Washington, D.C., or Easton Town Center, near Columbus, Ohio have displayed written rules all along their pedestrian ways. Today, those rules continue to prohibit photography and other seemingly harmless social activities. They also exclude unauthorized expression.¹⁴⁵ Surveillance of public space is patent in new town centers, where all facilities are monitored. These are controlled spaces, first and foremost, many say. There are no unregulated spaces; no places for the unexpected.¹⁴⁶

Its goals are laudable; however, the new urbanism has seemingly unfolded as a tool for capital development, rather than revitalization of practicable public space that will tolerate diverse uses or users. In this sense, new town centers model the publicity of gated community environments, which have signaled stricter privatizations in residential landscapes, owing to

¹⁴³ Congress for the New Urbanism/Emily Talen (ed.), *Charter of the New Urbanism, Second Edition* (New York: McGraw Hill Education, 2013).

¹⁴⁴ Steven Miles, *Spaces for Consumption: Pleasure and Placelessness in the Post-Industrial City* (Los Angeles, CA: 2010), pp. 156-58.

¹⁴⁵ Mark Robbins, "Redressing the Mall," in Smiley and Robbins, *Sprawl and Public Space*, op cit., pp. 5-6.

¹⁴⁶ Batchis, op cit., pg. 312.

covenants against autonomy and prohibitions on political associations beyond boards of directors meetings.¹⁴⁷ The spatial development of suburbs during the last few decades has been skewed towards gated communities on the residential side, new town centers on the commercial and leisure side. In both cases, newer suburban forms cosmetically patch public squares and other simulacrum together, in order to stimulate growth and capitalize investment. Practicable space is treated as a zero sum game within these models, and uncontrolled assembly is considered a threat to stable economic development.¹⁴⁸ Add ongoing auto commutes to and from select single use environments, which Jacobs and Sennett addressed in their critiques of post-War suburbanization, and it may be fair to question the existence of *any* spaces where suburban publics can form and practice publicness.¹⁴⁹ The skeptical conclusion, that Americans drove out of the city *en masse* to escape publicity and raise families in the spirit of tranquility, is belied by visible and enduring community conventions in suburbs, not to mention soccer moms and other middle class artifices that reflect desires for association and participation.

This study is at least partly animated by concerns about the utility of those artifices in the context of today's suburbs, however. It seems that civic spaces of the past may be outmoded by social conditions of the present. In particular, the demography of suburbs is now comparable with the heterogeneity of central cities, both economically and culturally. Suburbs are more racially and ethnically diverse, and the baseline incomes of their residents are much lower than they used to be. Social needs that have catalyzed public space in cities, historically, will evolve

¹⁴⁷ Setha Low, "How Private Interests Take Over Public Space: Zoning, Taxes, and Incorporation of Gated Communities," in Low and Smith, op cit., pp. 81-102; see also, Margaret Kohn, *Brave New Neighborhoods: The Privatization of Public Space* (New York: Routledge, 2004), pp. 117-19 and 126-33.

¹⁴⁸ For further discussion of the economy of these developments, see Barber, "Civic Space," in Smiley and Robbins, op cit., pg. 34. For more recent analysis of the connection between aesthetics and capital investment, see Michael Rios, "Emplacing Democratic Design," in Shiffman, et al., op cit., pg. 136.

¹⁴⁹ This question has long troubled advocates of public space, and remains central to criticisms of a declining public sphere. See Jane Jacobs, *The Death and Life of Great American Cities*, op cit., pp. 338-71; Richard Sennett, *The Fall of Public Man*, op cit. pp. 12-13.

in suburbs, too. What remains to be asked, though, is where do increasingly diverse suburbanites localize public space? Where do they articulate social and political demands, given the persistence of sprawl and the exclusivity of environmental innovations alluded to above?

In light of privately enforced covenants in most gated communities, and micro-management of public conduct in homogenized new town centers, shopping centers appear to offer the most inclusive social access for diverse suburbanites, who might seek out heterogeneous assembly in multifunctional spaces. Suburban shopping malls remain popular and well-populated, notwithstanding recent declines spurred by a retail economy shifting towards online commerce and “big box” operations that siphon millions of erstwhile patrons. Indeed, the mall paradigm has penetrated urban design and development. Numerous cities now rely on shopping centers to anchor commercial revitalization initiatives, including the nation’s largest cities.¹⁵⁰ Following a brief outline of shopping mall characteristics, and the *projected* legacy of malls within suburban landscapes, I will begin to take up the issue of publicity inside these commercial spaces, as well as how their private ownership bears on civic practices inside.¹⁵¹

Shopping malls are generally acknowledged as the *de facto* public spaces of American suburbs, if only by default. Two observations from scholars cited above may demonstrate this point. In their study of public space, Carr et al. submit that the rapid growth of suburbs after

¹⁵⁰ In New York City, for example, two major developments are underway—in Willets Point, Queens, and on the West Side Rail Yards, in the heart of Manhattan. They each include plans for the construction of a large shopping mall, and will receive significant tax breaks. A mixed-use “lifestyle center” is currently planned for Coney Island, in Brooklyn. I will discuss lifestyle centers further in the concluding chapter.

¹⁵¹ NB: The discussion to follow is strictly intended to introduce space, practices, and exclusions in shopping centers, as a prelude to better understanding the legal contests to follow in Chapter Four, and their elaboration in Chapter Five. The characteristics presented here are extracted from materials available to members of the International Council of Shopping Centers. See, “ICSC Shopping Center Definitions: Basic Configurations and Types for the United States,” (New York: ICSC/Albert Sussman Library, 2013); see also, James DeLisle, “Shopping Center Classifications: Challenges and Opportunities,” *White Paper*, Runstad Center for Real Estate Studies (sponsored by ICSC), University of Washington, College of Architecture & Urban Planning, June 2007.

1950 “brought to prominence a significant new forum for public life—the shopping mall.”¹⁵² Zukin suggests that most Americans born and raised in the suburbs agree that shopping malls have become the “preeminent public spaces of our time.”¹⁵³ A third, by Garreau, who coined the term “edge city” in his description of metropolitan suburbanization, recommends that shopping malls serve as the “village square” of inner ring suburbs.¹⁵⁴

Like *agoras* and other urban environments, shopping malls bring together commercial and community activity in ways once identified with public marketplaces. The difference is that access and invitations are conditioned by the fact that malls are privately owned. Thus, an appreciation for shopping malls as public spaces in suburbs must be tempered by cautions about accommodation and tolerance towards diverse association there. The community comforts delivered inside malls are often far reaching. Moreover, they continue to expand in response to the commercial disadvantages faced by mall owners in an age of online shopping. Public permissions to use malls for unexpected activities, however, remain lean.

Nevertheless, shopping centers have become vital to suburbanites in search of social space. Once people enter malls, they are pedestrians. They visit the common areas of these commercial centers for sustained periods, though lengths have diminished in recent years. In response, many malls offer a variety of amenities to stimulate consumption inside, such as post office annexes, notaries and tax preparation offices, even voter registration tables. Similarly, to enhance their competitiveness, owners and operators have retrofitted malls with playgrounds, carousels, daycare facilities, and other non-commercial services, including libraries. Malls have been adopted by teenagers and by seniors alike, who use them as after school hangouts and recreational exercise spaces, respectively. They are used as Girl Scout camping grounds, dating

¹⁵² Carr, et al., *op cit.*, pg. 68.

¹⁵³ Zukin, *op cit.*, pg. 45.

¹⁵⁴ Joel Garreau, *Edge City* (New York: Doubleday, 1991), pg. 189.

and dining establishments, and meeting places for single adults.¹⁵⁵ The nation's largest, the "Mall of America," outside Minneapolis, provides direct shuttles to the city's airport and a fully appointed international business center. A major tourist attraction, it houses the world's largest indoor amusement park. At 4.2 million square feet, it functions like a fully independent city.

Historically speaking, suburban shopping malls assumed a host of functions associated with downtowns. In fact, most have availed some space for public activity, even political addresses by presidential candidates and other government officials. Originators of America's first regional shopping centers figured civic practices into their designs. The most renowned of them, Victor Gruen, an Austrian architect with strong socialist leanings and a history in the performing arts of his native country, fled to the United States to avoid Nazi persecution prior to World War II. Gruen designed enclosed shopping centers in the mid-1950s to be multifunctional. His malls would respond to the inner city department store arrangements that carried over from the late 19th century designs described earlier, which segregated commerce from the street and an unregulated public sphere too unpredictable for urban administrators and planners at the end of the Civil War.¹⁵⁶ Gruen's malls would environmentally harness social inclusion in his adopted home country, while centralizing suburban landscapes he believed hospitable to automobiles, rather than the American people:

An architect rather than a developer, Gruen attempted to redesign the suburban mall to recreate the complexity and vitality of urban experience without the noise, dirt, and confusion that had come to characterize popular images of the city. Gruen identified shopping as part of a larger web of human activities, arguing that merchandising would be more successful if commercial activities were integrated with cultural enrichment... He saw mall design as a way of producing new town centers or what he called 'shopping towns.' Thus he encouraged mall developers to include in their plans as many nonretail functions as possible, adding cultural,

¹⁵⁵ Paco Underhill, *Call of the Mall: The Geography of Shopping* (New York: Simon & Schuster, 2004).

¹⁵⁶ See Victor Gruen, "Introverted Architecture," *Progressive Architecture*, Vol. 38, No. 4 (1957), pp. 204-08; also, Gruen and Larry Smith, *Shopping Towns USA: The Planning of Shopping Centers* (New York, 1960), pp. 22-24.

artistic, and social events. He called this integration of commerce with community life ‘environmental architecture.’¹⁵⁷

Other mall designers shared Gruen’s seminal visions. James Rouse, perhaps most well-known for renovating Boston’s Faneuil Hall, adopted Gruen’s philosophy early on, allying with the latter to design New Jersey’s Cherry Hill Mall, the East Coast’s first indoor shopping center—and its largest by far when it was opened in 1959. Rouse was inspired by Gruen’s work throughout his own efforts to blur “the boundaries between the mall and the urban setting.”¹⁵⁸ Most developers did not share a vision of malls as mainstays of community, however, and their properties omitted interior spaces that were not fungible straightaway. Gruen’s groundbreaking influence was short-lived, therefore. The centers he planned never did counteract sprawl or privatization in the environmental and social landscapes of suburbs. Eventually, a disillusioned Gruen abandoned his hopes for an urban renaissance shaped by shopping malls. In the end, he deserted the United States altogether, returning to Vienna in the 1960s.

As Gruen’s story suggests, though, the design arc for shopping centers initially entailed public functionality. That mixed-use ideal is belied by what generally happens when people practice association or attempt to engage in unexpected activities within malls. While an assortment of *community* gatherings are allowed inside, Kohn argues, they are distinguished from public practices that may violate acceptable behavioral standards, which are formulated by mall owners and management.¹⁵⁹ Far from operating like the *open-minded spaces* advocated by Walzer, shopping malls have therefore tended to reproduce the use zones sprawled around suburbs more generally. They mirror *single-minded spaces*, in other words. As Mattson argues,

¹⁵⁷ Margaret Crawford, “Suburban Life and Public Space,” in Smiley and Robbins, op cit., pg. 24.

¹⁵⁸ Ibid., pg. 26.

¹⁵⁹ Kohn, *Brave New Neighborhoods*, op cit., pp. 191-93.

“the purpose of the mall as a one-dimensional environment for shopping is highlighted when citizens try to use malls for something else.”¹⁶⁰

If that singularity is any indication, then developers and owners seem to scoff at the multi-functionality that Gruen and Rouse imagined in malls. Rather, they administer something finite, with rules that are legible according to critical geographers. They show a propensity to enact what Blomley calls “cuts” in property—in this case, marking off the common areas of shopping centers from unexpected activities, territorializing space, and defining unsanctioned association as illegal trespass.¹⁶¹ All of this takes place while owners underwrite community experiences such as the ones above, in order to maintain competitiveness with online and big box markets. Developers overlook the inconsistency, too, as the malls they build express syntaxes of antipathy toward public space and association comparable with most privately owned environments in the suburbs. The effect is de-spatialization of publicity, as Crawford claims:

Shopping mall design [has] reinforced the domestic values and physical order of suburbia. Like the suburban house, which rejected the sociability of front porches and sidewalks for private backyards, the malls looked inward, turning their back on the public street. Set in the middle of nowhere, these consumer landscapes reflected the profound distrust of the street as a public arena...¹⁶²

The histories above include instances in which commercial space was at times peaceably united with political discourses, and at other times unpredictably destabilized by them. Through a combination of design and technology, and with law on its side, mall management has been able to stem unwanted forms of open publicity. Using regulatory tools unavailable to Vitruvius, Haussmann, or even designers of late 19th century American department stores, suburban

¹⁶⁰ Kevin Mattson, “Antidotes to Sprawl,” in Smiley and Robbins, *op cit.*, pg. 38.

¹⁶¹ See Nicholas Blomley, “Cuts, Flows, and the Geographies of Property,” in *Law, Culture and the Humanities*, 2010, Vol. 7, No. 2, pp. 205, 212-13.

¹⁶² Margaret Crawford, “The World in a Shopping Mall,” in Michael Sorkin (Ed.), *Variations on a Theme Park: The New American City and the End of Public Space* (New York: Hill and Wang, 1992), pg. 21.

shopping center developers and owners are able to totalize their environments. They deploy surveillance devices and security personnel. Interactions are closely monitored inside malls, while public use is confined to commercial intercourse and authorized assembly. As I hope to show in subsequent chapters, scrutiny and the threat of exclusion has the effect of structuring relationships within the mall. It has

...privatized the domains in which large numbers of strangers come together...It brought its quasi-public spaces in behind high walls, into the atria, open to the sun streaming through the skylights of the courtyards. There, patrol and control can operate at a high level...‘It’s pretty hard to walk on my property without seeing some sort of highly visible security,’...Guards wear uniforms that look like those of the Marines. ‘I don’t want them to be shy and subtle. I want them to be very overt.’¹⁶³

Observation and contact strategies used by shopping center management were unseen in multifunctional marketplaces of the past, yet they are beginning to inform use guidelines within cities, too. Neighborhoods and shopping streets celebrated by Jacobs and later Zukin tolerated diverse practices. So, too, did colonial marketplaces, which buttressed the democratic association remarked on by Tocqueville during the 19th century. Malls exclude unregulated public space, on the other hand. Unspecified invitations notwithstanding, their policies treat as prohibitive the use of common areas for most non-commercial activities. At the former Carousel Center, now “Destiny USA,” outside Syracuse, a mall manager speaks to the single-mindedness of that space, juxtaposing it with the multi-functionality of the city’s downtown:

We have the ability [to control functions in the mall]. It is private property. You probably get to the point where everybody thinks that it ought to be like a street corner and everybody can do what they want. But the mall is not a street corner... If I look at a downtown corner in the city, I think anybody could go there and stand on the corner and do what they want... I’m not sure that’s

¹⁶³ Garreau, op cit., pg. 190.

something we want... There's a lot of people here. They feel that they're not shopping downtown. They're shopping here.¹⁶⁴

Notwithstanding the communality expressed by Gruen and Rouse, or the natural opportunities for assembly they may otherwise offer in a sprawling suburban landscape that continues to dictate against association, malls often seem designed to conflate shopping with public space and democratic choice.¹⁶⁵ Barber shares this conviction, reprising Marcuse's *One Dimensional Man* and his own "MacWorld" of commercialism and conformity. Shopping malls colonize civic capacity, Barber charges. They transform agency into consumerism:

The mall stands as a powerful embodiment of the privatization and commercialization of space...Identity itself is increasingly associated with branding and commercial logos...This consumerist one-dimensionality achieves a palpable geography in the controlled and controlling architecture of the shopping mall. Malls are the privatized public squares of the new fringe city 'privatopia,' which uses secession from the larger common society—deemed vulgar, multiethnic, and dangerous—to secure a gated world of placid safety...The mall refuses to play host to...community...to political speech or civic leafleting...On entering an enclosed mall, we are asked to shed every identity other than that of the consumer.¹⁶⁶

Public space may be fairly indicated by the signposts I tried to establish in the last chapter: openness and accessibility; support for community; visibility; toleration and accommodation; unexpectedness. In spite of the millions of Americans who frequent them, and their periodic incorporation of some indications above, the regulation or exclusion of all but the most anodyne non-commercial exchanges in shopping malls compromises their capacity to serve as much needed public spaces in suburbs. I believe those denials of space for diverse practices of publicity in malls have actually produced unintended, negative consequences for the

¹⁶⁴ Quoted in Staeheli and Mitchell, *The People's Property*, op cit., pg. 80. NB: Carousel Center was converted from a regional center into the super-regional Destiny USA. I will discuss that conversion further in the last chapter.

¹⁶⁵ Miles, *Spaces for Consumption*, op cit., pp. 104-07.

¹⁶⁶ Benjamin R. Barber, "Civic Space," in Smiley and Robbins, op cit., pp. 31-33.

marketability of older malls, which I will discuss later. They have certainly encouraged no shortage of cultural criticism against older malls, which are often lumped in with other *dead spaces* in suburbs. Finally, they have dashed hopes that shopping centers will help suburbanites realize Gruen's promise of renewed civic capacity inside improved downtowns:

[M]alls can never replace the public realm. *A public street is a place of activity owned by its users; a mall is a private real estate and retail investment owned by its investors. No one can be in a privately owned mall, or engage in any activity that would be legal on a public street, without the tacit or written permission of a private landowner...Urban downtowns and town centers are by definition inclusive. Malls by definition are exclusive. It is no more complicated than that.*¹⁶⁷

But it *is* more complicated than that, I think. At a time when malls have proven to be less durable than expected, moreover, it is possible to imagine at least two future scenarios. In one of them, shopping center owners meet continuing changes in suburban demography and the growing commercial anxieties they face with continued scrutiny and exclusion of unexpected activities. They obscure indications of public space and practicability in malls, based on property rights recognized in the law. Among those are the rights of owners to dispose of their property as they see fit; further, to maintain relationships with their guests—pursuant to or structured by those property rights. These entail the right to exclude unwanted speech and activities, which may threaten bottom lines financially. Malls are commercial properties, first and foremost. Unauthorized public activity inside may interfere with pedestrian traffic flows or patronage inside the businesses housed by shopping centers. Customers who do not wish to participate in public activities or listen to non-commercial expression may avoid malls where such practices are permitted, which would adversely impacting commerce and profitability. Malls where civic activity takes place may also bear additional expenses. Public space and

¹⁶⁷ Gratz with Mintz, op cit., pg. 100. Authors' emphasis.

sloppiness have combined consistently throughout history, going back to the *agora*.¹⁶⁸ Should financially insecure developers and owners be required to subsidize political speech and assembly by paying for attendant costs, such as sanitation and insurance liability?

Owners enjoy constitutional protections, too, including rights to due process and safeguards against any takings of their property without just compensation. They also enjoy freedoms of expression, which entail freedoms *from* expression. And that raises a more complex question, perhaps: should shopping mall owners or their properties be required to speak on public subjects, even when they prefer to remain silent? Or should they be forced to provide space on their private property for dissemination of viewpoints with which they disagree? Patrons and passersby may logically associate ideas publicized inside malls with the opinions of owners perceived to permit expression of those ideas. What happens when political heterodoxy, for example, the radicalism of early 20th century streets runs counter to the convictions of mall owners or their intended customers? Shopping center owners express community values all the time, when they invite seniors in for exercise or permit Girl Scouts to rally. Still, they are private citizens. As such, they enjoy freedom of speech and silence, along with a right of refusal in the context of controversial expressions or practices.

In a second scenario, suburban shopping center owners facilitate publicity on their properties. They expand openness and accessibility in the common spaces of their malls, providing support for community interactions and discourse, even when it is an anathema to their ways of thinking. They accommodate or at least tolerate visible, diverse, and unexpected uses of their property. If current policies in most malls serve as any indication of the future for such expressive license, then prospects seem grim. Things appear more likely to proceed according to the first scenario, frankly, given positions taken by owners for decades now, coupled with the

¹⁶⁸ Berman, "The Romance of Public Space," in Shiffman, et al., op cit.

ones articulated by their interest group organization, the International Council of Shopping Centers (ICSC). Thus, expanding public space inside shopping centers will require outside intervention. Arguments for that intervention, that is, for an amelioration of public space in suburban malls, will comprise the focus of the final chapter in this study—after the property rationales above had had their day in court, so to speak.

The reciprocity between practices of public space and environmental design remains central to understanding how civic capacity may be harnessed for democratic participation and representation. However, when practice and design come into conflict, as they did during Occupy Wall Street protests throughout the nation, we must look beyond civil society, to the state, which has the unique ability to condition space in publicly accessible environments, while extending or withdrawing legitimacy among contestants within those environments. “To be public implies access to the sphere of private property,” Mitchell argues.¹⁶⁹ But he also observes that the ability to use space publicly for assembly and association “is always vetted through...a geography of law....”¹⁷⁰ Thus, the practice of space in any landscape is never guaranteed. It often competes with countervailing interests and rights engendered by American constitutionalism, specifically, property ownership, whether by government or private citizens.¹⁷¹ If we are weighing *individual and collective participation in open political discourses* in places built during an era of suburbanization, then we must consider legal determinations about which spaces are suited to free expression. The next chapter will therefore trace how contemporary spaces have been legally construed as forums for communication and association.

¹⁶⁹ Mitchell, “The End of Public Space?” *op cit.*, pg. 116.

¹⁷⁰ Don Mitchell, *The Right to the City: Social Justice and the Fight for Public Space* (New York: The Guilford Press, 2003), pg. 46.

¹⁷¹ *Ibid.*, pg. 33.

Chapter Three

Lost in Civic Space: Unexpected Activities and the Arc of the Public Forum Doctrine

“Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”

- Alexis de Tocqueville¹

Having traced indications of public space in design and theory, and its historical practice in the marketplaces of Europe and metropolitan America, I trust we are ready to address the ways in which it has been conditioned by the state; likewise, that we are ready to incorporate Mitchell’s admonition that rights to public space are always mediated through the “geography of law.”² As the previous chapters showed, we are dealing not only with mutual, but also competing rights to public, discursive space. Starting in this chapter, therefore, I would like to turn my attention to legal interpretations of space and publicity, as supplied by the United States Supreme Court, which has repeatedly ruled on political expression in public places. Judicial review did not pertain for much of the history examined in the last chapter. By the time the 20th century came to a close, however, it became pivotal, especially when socio-economic shifts and new built environments transformed much of America’s landscape into a suburban one.

The Court’s interpretation of publicly accessible space in an era of suburbanization results from two forms of consideration, in my view: legal doctrine and extra-legal environment. With respect to environment, the Court developed much of its free speech jurisprudence in the

¹ Alexis de Tocqueville, *Democracy in America* (New York: Mentor Books, 1956), pg. 74.

² Don Mitchell, *The Right to the City: Social Justice and the Fight for Public Space* (New York: The Guilford Press, 2003), pg. 46.

midst of major topographical change, particularly after World War II, when huge urban exoduses ensued in a post-War America shaped by significant social and political upheaval. Judicial decision-makers reviewing expressive practices within environments being built after 1950 had to factor in the transformation of urban space, as well as the evolution of new places and modes of assembly. Those changes, which included the eclipse of downtown business districts, have reconfigured the relationship between commerce and publicity in large part, as I hope to show in the next chapter.

Before I do that, I would like to explore a key legal doctrine through which the Court has endeavored to reconcile political expression with the suburbanization of American space: the public forum doctrine.³ Beginning in the late 1930s, many of the Court's free expression decisions have hinged on where *individual and collective participation in open political discourses* may attract Constitutional protection, rather than on whether the First Amendment affords protection to speech and assembly, absent spatial considerations. In response, the Court has generated an evolving doctrine through which expressive activity is refereed according to the *types* of fora where it ensues. The difference may not seem significant at first, but it is. Moreover, the Court's rulings on speech in shopping centers and new public places where people go are often rooted in the public forum doctrine, so it is important as we look ahead. It is comprised by a spectrum, ranging from quintessentially public places to exclusively private ones, with a constitutional middle ground that has proven more difficult to classify as American topography has changed. It is articulated through the syntax below:

³ Since this is the first use of the term "public forum" in this study, it is fair to question whether I intend to treat that term synonymously with "public space." While I sometimes use them interchangeably, as do many observers, the Court has delineated public space from public forum. In *Lehman v. Shaker Heights*, discussed below, the Court noted that a city bus was public space. However, it withheld any designation as a public forum where political advertising was concerned. Vernacular is key, of course. Whether the Court characterizes a public space as a public forum depends on its considerations of communicative content within that space.

- Traditional Public Forum: publicly accessible places that have always been associated with political expression and civic activity; streets, sidewalks, and public parks, for example;
- Designated Public Forum: publicly accessible places not traditionally associated with political expression and civic activity, but ones that government affirmatively opens to such practices, for example, student centers at public university campuses or municipal theaters. Rights and liberties that inhere within traditional public fora attach to these, too;
- Non-Public Forum: limitedly accessible places neither associated with, nor opened by the government to political expression and civic activity, for example, military bases;⁴
- Private Property: places fully owned and operated by private interests, where permitted expressive activities are determined exclusively by controlling authorities, for example, a private home.⁵

Using the typology above, I will devote this chapter to recounting key rulings used by the Court to establish its public forum doctrine. My aim is to elaborate the legal parameters within which it has decided contests over political expression in publicly accessible spaces deemed by governments at varying levels to contain some sort of proprietary value, following civil rights movements in the 1950s and 1960s. Before I begin, it is worth noting that the Court itself has postulated a relationship between expression and the publicity of space:

⁴ The Court codified these three classifications in *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788 (1985), though it made practical use of them in previous rulings, including *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983). See below.

⁵ G. Sidney Buchanan, "The Case of the Vanishing Public Forum," in *University of Illinois Law Review*, U. Ill. L. Rev. 950, 1999.

Although American constitutional jurisprudence, in light of the First Amendment, has been jealous to preserve access to public places for purposes of free speech, *the nature of the forum...*[has] remained important in determining the degree of protection afforded by the Amendment to the speech in question.⁶

While a complete chronicle of High Court rulings in this area would vastly outnumber those summarized here, the cases to follow are intended to demonstrate the evolution of the public forum doctrine as a response to unexpected activities within built environments turned prominent gathering places in an era of suburbanization. Thus, the doctrine can supply a useful signal of the Court's accommodation towards political association inside shopping centers and other publicly accessible spaces on America's modern topography.

In the preceding chapters, I invoked criticism of a declining public sphere, treating the problem as one of narrowing space in which civic engagement is possible. That problem is now endemic to both urban and suburban landscapes in the United States. While marketplace and attendant socio-economic transformations play a part, the Court has also underwritten a weakening of the public sphere. It has given way to proprietary imperatives proffered by the state as somehow tantamount to public interest, while failing to support the nation's expressive architecture. In fact, the historical arc outlined near the end of the previous chapter parallels a contraction in judicial protection for public space. The public forum, once encompassed within a far-reaching doctrine that pertained to downtown streets and sidewalks, grew narrower, judged along the typology above, itself shaped by dictates of comfort, order, and government budgeting. As the Court cultivated its doctrine, the protections afforded speech and assembly faded, even within spaces originally considered sacrosanct for purposes of publicity.⁷

⁶ *Lehman v. City of Shaker Heights*, 418 U.S. at 302-03 (1974). My emphasis.

⁷ Timothy Zick, *Speech Out of Doors: Preserving First Amendment Liberties in Public Places* (New York: Cambridge University Press, 2009), pp. 167-71. See also, Zick, "Speech and Spatial Tactics," *Texas Law Review*, 84 TX. L. Rev., 2006, 587; "Space, Place, and Speech: The Expressive Topography," *George Washington Law*

Opening salvo. The traditional public forum

Most observers trace the origins of the public forum doctrine to 1939 and *Hague v. Committee for Industrial Organization (CIO)*. *Hague* turned in large part on the Court's rejection of a late 19th century ruling, *Davis v. Massachusetts*.⁸ In *Davis*, the Court borrowed from an opinion by then Supreme Judicial Court of Massachusetts Justice (and future High Court jurist), Oliver Wendell Holmes, whose later defense of free speech in the 20th is still celebrated today. Both Courts upheld a Boston ordinance barring *anyone* from public speaking on city grounds without having been granted a permit by the mayor. The Court sustained the ordinance on the grounds that the Boston's public spaces were, in effect, the *property* of the local government. The majority used that property analogy to temper its view of publicity in the streets of the city:

For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.⁹

In effect, the Court maintained that the public interest was best served by fidelity to notions of municipal ownership, such as the one above, as well as what one observer claimed was a “near-total deference to state prerogatives inherent in...government power to restrict the use of public streets and parks by public speakers.”¹⁰

Review, 74 *Geo. Wash. L. Rev.*, 2006. In addition, see Don Mitchell, “The Liberalization of Free Speech: Or, How Protest in Public Space is Silenced,” *Stanford Agora*, Vol. 4, No. 1, 2004, pp. 13-14. Zick and Mitchell each argue that the doctrine established in *Hague v. CIO* set a standard by which rights to public space could always be subordinated in the interests of “general comfort,” even though the majority upheld the use of streets, sidewalks and parks for political expression. See also, Steven G. Gey, “Reopening the Public Forum—From Sidewalks to Cyberspace,” in *Ohio State Law Journal* 58 *Ohio St. L. J.*, 1536 (1998).

⁸ *Davis v. Massachusetts*, 167 U.S. 43 (1897). NB: The *Hague* Court did not expressly overturn the previous ruling, however.

⁹ *Ibid.*

¹⁰ Gey, *op cit.*, 1539.

Forty years later, however, the High Court distinguished the political background in its *Hague* decision. It also departed from a blanket defense of government property ownership, particularly when expression by individual citizens and groups was excluded from public spaces. The facts in *Hague* were straightforward. The Board of Commissioners of Jersey City passed an ordinance forbidding any meeting on streets and sidewalks, in parks and public buildings—including parades and other assemblies—without a permit first distributed by the Director of Public Safety. The Director was authorized to refuse applications for permits if he deemed it appropriate to do so. The ordinance was intended to quell expression by organizations that advocated the obstruction of government or its change by unlawful means. It subjected violators to fines and/or imprisonment by the police.¹¹

The fledgling CIO, an umbrella group of labor unions that promoted collective bargaining and sought to recruit new members through dissemination of information outlining workers' rights under the National Labor Relations Act (NLRA), was denied a permit. The organization was subsequently excluded from city streets on the grounds that its membership included communists, who attempted to spread propaganda and proselytize others into committing revolutionary acts. Relying on a second municipal ordinance, which prohibited distribution of subversive newspapers, periodicals, pamphlets and other printed materials, local officials routinely removed and arrested CIO organizers from Jersey City public spaces, compelling them to leave the city limits in many instances.¹² Citing the First and Fourteenth Amendments, the CIO challenged the first ordinance, specifically, its exclusion of free speech and assembly in the City's public places. The CIO contended that it disseminated materials

¹¹ *Hague v. CIO*, 307 U.S. 496 at 501.

¹² *Ibid.*, at 502. In several instances, protesters from the union were forcibly escorted to board ferries headed to New York, or were likewise relegated to remote areas well outside the city limits. The CIO also alleged that its members were subject to unreasonable searches and seizure by Jersey City police. I am confining my summary to actions against assembly and expression.

protected by the NLRA, too, and those materials advocated peaceful, legal methods of collective bargaining, pursuant to established workers' rights.

The Court concurred with the CIO, supporting its claim that members were engaging in legal political advocacy, while observing the spirit of the labor act. A plurality of the Court focused on two aspects of the controversy. First, the Organization and its affiliates enjoyed constitutional and statutory rights to assemble and share information about workers' benefits, as well as circulate discourse about collective bargaining:

[T]he findings sustain the allegation, that the respondents had no other purpose than to inform citizens of Jersey City by speech, and by the written word, respecting matters growing out of national legislation, the constitutionality of which this court has sustained...it is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States...The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.¹³

Second, and more importantly for my purposes, the Court held that Jersey City could not legally exclude the use of public space traditionally associated with political expression. Harkening back to ancient history and the *agora* we saw in previous chapters, the Court articulated a practical overlap between people's associations and public fora. It thereby spatialized the Constitution's protections of free speech and assembly:

Wherever the title of streets and parks may rest, they 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. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.¹⁴

¹³ Ibid., at 512-13.

¹⁴ Ibid., at 516.

The plurality expanded on its geo-political argument. It rejected Jersey City's ordinance, along with its *prima facie* authorization of unchecked government control over space:

We think the court below was right in holding the ordinance...void upon its face. It does not make comfort or convenience in the use of streets or parks the standard of official action. It enables the Director of Safety to refuse a permit *on his mere opinion* that such refusal will prevent 'riots, disturbances or disorderly assemblage.' It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs for the prohibition of all speaking will undoubtedly 'prevent' such eventualities.¹⁵

The Court had issued its first significant public forum ruling. It also re-articulated the relationship between civic practices and shared spaces, delivering the most extensive defense of place in First Amendment jurisprudence to that point in American history. From the perspective of free expression and its constitutionally protected emplacement, the New Deal plurality had now endorsed public space and its discursive value in a democracy. Reservations lurked in the background, however. Notwithstanding the new overlap between place and speech, *Hague* did not provide for unrestricted access to the most traditional spaces, even. The opinion by Justice Owen Roberts left a pinhole in the new doctrine, which would open more widely in rulings to follow.¹⁶ Bracketing the marketplace of ideas from the messiness of public spaces like the *agora*, the Court signaled its support for limits on embodied civic engagement:

The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order...¹⁷

¹⁵ Ibid.

¹⁶ The seminal account in this regard is attributed to Harry Kalven, in "The Concept of the Public Forum: *Cox v. Louisiana*," *The Supreme Court Review*, Sup. Ct. Rev., 1965, 1, 13; see also Zick, op cit., (2009) pp. 6-8; Mitchell, op cit., (2004) pg. 15, Gey, op cit., 1540.

¹⁷ *Hague v. CIO*, at 516.

That caveat would become a foregone conclusion in short order. Two years after *Hague* was decided, the Court reviewed a New Hampshire statute prohibiting parades, processions, and open-air meetings on streets and sidewalks—without a special license obtained through local selectmen or city licensing committees. When a group of Jehovah’s Witnesses violated the statute, by organizing a parade of single-file marchers in Manchester without the required license, the Court reaffirmed its reservations about unlimited access to public spaces.¹⁸ This time, moreover, a majority upheld a restriction on the use of streets and sidewalks characterized in *Hague* as traditional public spaces, because it was neutral with respect to the content of public expression. In *Cox v. New Hampshire*, the Court pursued a different course from *Hague*. It argued that there might be occasions on which the broadest protection of freedom necessitates regulation of space, in the interests of orderly association:

Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.¹⁹

The formulation above hinted at an alternative doctrine, one that regulated the use of public space, rather than excluding it: *time, place, and manner*. The time, place, and manner doctrine specified when, where, and in what mode speech and assembly *could* be exercised under the First Amendment. It applied to traditional public fora alone, however. When the Court addressed civic activity in the new landscapes of the latter 20th century, a much more abstract

¹⁸ NB: As to the political messages involved in the contest, the petitioners carried signs reading, “Religion is a Snare and a Racket,” “Serve God and Christ the King,” and “Fascism or Freedom. Hear Judge Rutherford and Face the Facts.” They also distributed leaflets announcing a public meeting during which a talk on government would be given, free of charge. *Cox v. New Hampshire*, 312 U.S. 569 (1941) at 572.

¹⁹ *Ibid.*, at 574.

public forum doctrine would control in cases where expression and association were considered in terms of space.²⁰

In fact, *Cox v. New Hampshire* did not differ too much from *Hague v. CIO* where physical setting was concerned. However, the exclusion in *Hague* was based on an arbitrary, invidious distinction between tolerable and unwanted expression. Both cases involved permit requirements, which were imposed on groups seeking to spread heterodox ideas. Yet the plurality in *Hague* concluded that Jersey City illegally excluded certain kinds of political speech on public property. The majority in *Cox* surmised that the marchers in that case would have received a permit had they requested one, and then observed its rules.²¹ The activists in *Cox*, unlike the CIO organizers in *Hague*, were never prohibited from distributing leaflets and other written materials, nor were they unconstitutionally prevented from meeting in public or communicating with larger audiences. The issue in *Cox*, the Court maintained, centered on reasonable requirements for the exercise of publicity, enforced without any prior restraint by the Manchester authorities: time, place, and manner rules that supported the free exchange of ideas in most public places, while preserving their use for all of the city's 75,000 residents.

Cox therefore held that regulated space protected speech for everyone in Manchester, New Hampshire. Lawful limits in the city qualified when, where, and how citizens might assemble and communicate with each other. Those limits expanded the scale of public space:

If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place, and manner in relation to the other proper uses of the streets.²²

²⁰ The time, place, and manner doctrine has been inveighed by Zick and Mitchell. They view the doctrine as a veiled attempt to suppress the efficacy of public expression by regulation, rather than outright exclusion under a public forum analysis. See Zick (2009), *op cit.*, pp. 54-61; Mitchell (2004), *op cit.*, pp. 16-18. My intention here is to distinguish time, place, and manner from the public forum doctrine—positioning the former as an alternative to the latter, rather than joining criticism of either at this stage in my examination.

²¹ *Ibid.* at 572.

²² *Ibid.*, at 576.

The Manchester limitation merely ensured that public events would be policed properly; that multiple parades did not conflict with one another, for example.²³ It provided order, without prejudice, in the public spaces characterized in *Hague* as *immemorially* associated with civic exchanges among citizens. Yet it did so from an alternative doctrine: time, place, and manner. That doctrine applied in legal situations involving quintessential public spaces, such as streets, sidewalks, and parks, at least until recently. When it came to new landscapes and unexpected activities after 1950, the Supreme Court generally turned to the doctrine it issued in *Hague*: the public forum. In its earliest iteration, the public forum doctrine seemed generous from the point of view of constitutionally protected speech and legally defensible space. As the second half of the 20th century unfolded, however, it would gradually be reformulated to safeguard what the Court came to define as government-owned *property*. In turn, the doctrine tended to position embodied association and expression against constructs of proprietorship. The impact of that doctrinal transformation on practicable public space is evidenced in the cases below.

New landscapes, new contests

The traditional public forum remained stable throughout the 1940s and 1950s, while it was regulated by time, place, and manner rules. Free association and exchanges of ideas on older urban topographies seemed secure under the Court's nascent doctrine. In a rapidly changing socio-economic landscape after 1960, however, coupled with growing scales of political activism during a new era of civil rights movements, the Court began to introduce wrinkles to its construction of the public forum doctrine. The first of those wrinkles imposed constitutional hurdles to the dissemination of controversial ideas in places the Court had

²³ *Cox*, at 577.

previously characterized as traditional public fora. While pure speech might still find First Amendment protection within such spaces, the Court turned its attention to what it deemed to be a new medium of political activity worthy of scrutiny: expressive conduct.

In *Cox v. Louisiana*, a 1965 decision that inspired Kalven's seminal analysis of the public forum doctrine, *The Negro and the First Amendment*,²⁴ the Court essentially reiterated its support for free expression in quintessentially public places. But now the Court distinguished pure advocacy from political "behavior" that transcended plain speech.²⁵ The distinction was hardly a minor one. Not only did it have a major impact on a watershed ruling during the civil rights era, but it also reshaped the Court's elaboration of the public forum doctrine.

Elton B. Cox, an ordained congregational minister and field secretary/advisor to the Committee on Racial Equality (CORE), was arrested and subsequently convicted in Baton Rouge for violating three Louisiana statutes. The first statute related to disturbances of the peace. It read as follows:

Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby...crowds or congregates with others...in or upon...a public street or highway, or upon a public sidewalk, or any other public place or building...and who fails or refuses to move on...when ordered so to do by any law enforcement officer of any municipality, or parish, in which such act or acts are committed, or by any law enforcement officer of the state of Louisiana, or other authorized person...shall be guilty of disturbing the peace.

²⁴ Harry Kalven, *The Negro and the First Amendment* (Chicago: University of Chicago Press, 1965). Two points are worth mentioning: 1) Kalven's book was an extension of an article he authored in the *Supreme Court Review*, "The Concept of the Public Forum: *Cox v. Louisiana*," S. Ct. Rev. 1965; 2) Kalven's work still stands as a unique examination of the public forum doctrine in a full volume format.

²⁵ *Cox v. Louisiana*, 379 U.S. 536 (1965), at 555; 379 U.S. 559 (1965), at 566. NB: *Cox v. Louisiana* actually consists of two individual, contiguous, rulings, as the two citations here should indicate. In effect, three charges were leveled against Cox; two of them—breach of peace and obstruction of public passages—were addressed in the first ruling, referred to as "*Cox I*." A third charge—picketing a courthouse—was considered in a subsequent ruling, called "*Cox II*."

Cox led a peaceful protest outside a Baton Rouge courthouse following the arrest of twenty-three young men, who were all awaiting trial for their involvement in pickets urging a boycott of racially segregated lunch counters. Cox's demonstration drew some 2,000 protesters to the State Capitol. Shortly thereafter, approximately 300 whites assembled near the protest, prompting a threat of violence, according to the testimony of several police officers that collected at the scene. As a result, the officers arrested Cox, who refused to leave after being ordered to do so by the chief of police. The former was also charged with violating a Louisiana statute that made it illegal to obstruct public passages and building entranceways.²⁶

In the case of each statute above, the Court overturned Cox's conviction by the Louisiana judiciary. It found the regulations on his speech to be too sweeping. Both laws raised the possibility of arbitrariness and abuse by local authorities, not like the ones struck down in *Hague v. CIO*. The prohibitions were overbroad, the Court argued, and local law officers might use them to exclude speech from public places based on its content. Discrimination of that nature was evidenced by a Baton Rouge police admission that it permitted demonstrations and even obstruction by labor unions, which threatened to disturb the peace, while withholding that right from individual and collective outcry for racial justice or equality.²⁷ Rather than creating invidious distinctions, and then barring unwanted expression, the Court declared, civil authorities were responsible for safeguarding free speech and assembly against open threats made by onlookers or counter-publics. Convicting Cox and circumventing conflict at the behest of counter-demonstrators, who might or might not engage in violence, unconstitutionally infringed on his First and Fourteenth Amendment liberties.

²⁶ *Cox v. Louisiana*, op cit., at 538-41. NB: The facts of the case are somewhat more complicated than the account summarized here. This summary is intended to establish a context for the Court's decisions and opinions as they relate to public space and forum.

²⁷ *Ibid.* at 557.

Having protected Cox's rights in the first decision, the Court articulated a different line of reasoning in its sequel, *Cox II*, which went against him. While the Court seemed to issue a distinction without a difference in *Cox I*, between speech and expressive conduct, the distinction turned out to prove important in *Cox II*. It became central in the immediate cases, and it would be expanded in later rulings. The majority ordered that embodied speech be given a wide berth within public places, in *Cox I*. The Constitution required that much, it said. However, expressive conduct, in the form of protests, pickets, and public obstruction—in other words, individual and collective action—engendered narrower constitutional protection. As the Court pointed out in *Cox I*:

We...reject the notion urged by [Cox] that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford those who communicate ideas by pure speech. We reaffirm the statement that 'it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'²⁸

The qualification above set the tone for *Cox II*, where the Court reviewed a third Louisiana statute, which outlawed picketing near a courthouse, aimed at obstructing the administration of justice. The statute read:

Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty pickets or parades in or near a building housing a court of the State of Louisiana...shall be fined not more than five thousand dollars or imprisoned not more than one year, or both.²⁹

Unlike the other statutes that pertained to obstruction of passageways and interference with public order, the Court believed that the courthouse picketing law above was better tailored to

²⁸ *Ibid.*, at 556.

²⁹ *Ibid.*, at 560.

proscribe “certain specific *behavior*” in places where it might normally be accommodated or tolerated.³⁰ As such, it passed the famous, to some, infamous, constitutional test posed by Justice Holmes in *Schenck v. U.S.*, a decision that also prohibited expression otherwise protected by the First Amendment when it presented a “clear and present danger.”³¹ Yet, there was no evidence of an imminent threat in the facts that precipitated *Cox*. The picketers’ hypothetical interference with the administration of justice was neither direct, nor inherent in any actions they actually took near the Baton Rouge courthouse. Still, Justice Goldberg and the majority *imagined* a number of scenarios in which public protests immediately outside that courthouse might somehow sway legal decision-making inside. The danger was a plausible one, they argued:

It is, of course, true that most judges will be influenced only by what they see and hear in court. However, judges are human; and the legislature has the right to recognize the danger that some judges, jurors, and other court officials, will be consciously or unconsciously influenced by demonstrations in or near their courtrooms both prior to and at the time of the trial.³²

Thus, the Louisiana statute satisfied the majority’s requirement that regulations on conduct be made pursuant to a “substantial state interest in protecting the judicial process.”³³

In the end, the Court rejected a racially motivated order of dispersal by the Baton Rouge police against Cox and his fellow demonstrators, but upheld the state’s courthouse picketing ban as a permissible restraint on expressive conduct, by dint of *where* that conduct took place. The reference to place was subtle, but terribly important to the majority’s rationalization of its

³⁰ *Ibid.*, at 562.

³¹ *Schenck v. U.S.*, 249 U.S. 47 (1919). NB: *Schenck* hinged on the fitness of expressive behavior, vis-à-vis its space and context. While responsibly warning of a “fire” in a crowded theater where one burned would not constitute a destructive act, Justice Holmes argued, doing so *falsely* in the same space might provoke unnecessary panic, chaos, and harm among audiences in such a context. Mitchell relays Holmes’ spatial analogy and its contextualization of free speech in his critical review of the public forum doctrine. See Mitchell (2004), *op cit.*, pp. 6-11.

³² *Cox v. Louisiana*, *op cit.*, at 563

³³ *Ibid.*

decision. All the ban did, said the Court, was regulate the space in which expressive conduct transpired, not the expression or the conduct itself. Further, the state's regulation of space was defensible inasmuch the geography of civil rights protests might intimidate or unduly influence judicial officers and thereby undermine impartial administration of justice. The ban never destabilized the abstract value of a public forum, nor did it infringe on free speech and assembly in and of themselves, according to the majority:

Nor does such a statute infringe upon the constitutionally protected rights of free speech and free assembly. The conduct which is the subject of this statute—picketing and parading—is subject to regulation even though intertwined with expression and association. The examples are many of the application by this Court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited...We are not concerned with such a pure form of expression as newspaper comment or a telegram by a citizen to a public official. We deal in this case not with free speech alone, but with expression mixed with particular conduct.³⁴

There were other dimensions to the *Cox* decisions to be sure. For my purposes, however, the cases may be said to hinge on a distinction between speech and conduct, on the one hand, and their spatialization by the Court, on the other. The link between speech, conduct, and place generated further variables for jurists to consider under the banner of the public forum doctrine. And though *Cox* is sometimes cited as a judicial expansion of the public forum, I would argue the reverse: the added connection of speech to conduct, based in large measure on where it took place, widened the berth for constitutionally permissible exclusions against individual and collective participation in open political discourses. Having tolerated restraints on political conduct such as pickets in quintessentially public streets and sidewalks, adjacent to other public spaces like courthouses, the Court began to restructure the public forum doctrine to admit more restrictions on association and expression within the American landscape, as Kalven and others

³⁴ *Ibid.*, at 563-64.

concede.³⁵ The Court would continue to enforce greater limits on the public forum, particularly as it applied the doctrine to new spatial types, not to mention ones it eventually deemed to be non-public. As topography changed and began to reflect the demographic and commercial shifts described in the second chapter, states and municipalities were increasingly obligated to compete with the rapidly sprawling geography of marketplace migrations into suburbs. In view of government's entry into that competition, the Court's enforcement of limits on the public forum might help explain why observers in the first chapter lament a decline in space and civic engagement in the United States.

Non-public space

Prior to its delineation of the *designated public forum*, the Court did weigh exclusions against free expression on suburban property. Its ruling in *Central Hardware CO. v. NLRB* helps propels us forward, therefore, towards contests in which shopping centers are the spaces of dispute. By the time the Court decided that case in 1972, it was well on its way to espousing a model of what was public and what was not, as well as mediating between competing tenets of free expression and private property under the law.³⁶ *Central Hardware* presented a couple of thorny issues, which perennially complicate overlaps of civic and commercial space in the late-20th century, especially. First, the case addressed exclusions against free speech that were imposed by a property owner. Next, it hinged on the categorical differences between public space and proprietary space. Decided on the same day as *Lloyd Corporation v. Tanner*—the Court's second major ruling on speech in shopping malls—the opinions in *Central Hardware*

³⁵ See Kalven, "The Concept of the Public Forum: *Cox v. Louisiana*," op cit. For a recent account, see also, Zick, *Speech Out of Doors: Preserving First Amendment Liberties in Public Places*, op cit., and "Speech and Spatial Tactics," op cit.

³⁶ *Central Hardware CO. v. NLRB*, 407 U.S. 539 (1972).

became a referendum on earlier rulings about speech and property: *Marsh v. Alabama* and *Amalgamated Food Employees Union v. Logan Valley Plaza*. Those two decisions focused on public expression in company towns and shopping centers, respectively, where speech was indeed required by the Court.³⁷ In response, the majority in *Central Hardware* rejected a public forum designation on popularly accessible, privately owned property, despite the minority's call for allowable expression on matters pertaining to that property. The point I wish to emphasize is that *Central Hardware* signaled post-civil rights movement recoil against multifunctional definitions of places treated as property, as well as antipathy toward expressive practices therein. The case helped establish a framework through which the Court narrowed its application of the public forum, as I hope to show throughout the remainder of this chapter and the one to follow. It also anticipated prevailing conditions under which deliberative functions would be legally segregated from proprietary spaces.

Central Hardware was decided in the 1972 term, which turned out to be a significant one for shopping center jurisprudence. I will revisit that term in the following chapter. For now, I would like to fast forward two years, to 1974, when the Court decided another important public forum case, *Lehman v. City of Shaker Heights*.³⁸ *Lehman* is routinely cited as evidence of the doctrinal maturation of the public forum. The brief opinion in that case continues to attract comment in legal reviews involving the public forum and it surely raises a host of salient issues for us here. Beyond its star power among contemporary First Amendment observers, *Lehman* turned out to be rife with challenges for judicial decision-makers responsible for shaping the public forum doctrine in relation to commercial property and publicly permissible political

³⁷ *Lloyd Corporation. Ltd. v. Tanner*, 407 U.S. 551 (1972); *Marsh v. State of Alabama*, 326 U.S. 501 (1946); *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968). I will examine each of these rulings at much greater length in the next chapter.

³⁸ *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

expression. Though it may not have been obvious at first, the ruling in *Lehman* promised to clarify predominant attitudes among members of the Court as they turned toward free expression in contemporary places. Moreover, *Lehman* should illustrate an argument that animates the end of this examination: Any effort to reconstitute shopping centers as civic spaces ought to be vetted through the High Court's reassessment of both the First Amendment and the public forum typologies it began to endorse in an era of suburbanization.

In 1970, Harry J. Lehman, a candidate for the office of State Representative to the Ohio General Assembly, sought to purchase car card space on the Shaker Heights Rapid Transit System. He hoped to do so for a three month period prior to a general election in November. The proposed advertisement read:

HARRY J. LEHMAN IS OLD-FASHIONED! ABOUT HONESTY,
INTEGRITY AND GOOD GOVERNMENT.

The management of the municipal transit system refused to sell him the car card space, however. It based its decision on a local ordinance, which deemed that no political advertisements could be placed on any bus in the municipality's surface transportation system. While transit system managers routinely sold advertising space to cigarette, liquor, retail and service establishments, as well as banking, savings, and loan companies, they refused to do so when it came to political campaigns and public issue ads.³⁹ Shaker Heights' rationale for excluding political advertisements was simple, yet it raises questions about the way in which free speech protections may engender expressive discretion for those who own or manage publicly accessible space, including private property developers: the city wished to avoid the appearance of political favoritism, which might stem from its sale of public spaces to select candidates or civic

³⁹ *Ibid.*, at 300-01.

organizations.⁴⁰ In the interest of ensuring a steady stream of revenue, moreover, local public officials and transit system administrators declined to sell temporary advertising space during election cycles, to avoid incurring the loss of more lucrative annual contracts with “innocuous and less controversial” commercial advertisers. The Shaker Heights ban on political advertising and issue advocacy was neutral and comprehensive. That is, it was not limited to any specific candidates, interest groups, or viewpoints.

Lehman challenged Shaker Heights’ restriction on political advertising. Since the buses belonging to the rapid transit system were municipally owned and operated, he contended, they constituted First Amendment public fora in which all forms of expression, including political and advocacy campaigns, were protected. Lehman continued, arguing that his freedom to publicly promote his candidacy for office had been violated.⁴¹ His cause fell on deaf ears, however, first in Ohio’s lower courts and then in its highest court. Ignoring dissenting arguments that no valid governmental interest was served by the ban on political advertising, a majority of the Supreme Court of Ohio held that dissemination of political views merited full protection in *spaces categorized as public* by the nation’s High Court, but Shaker Heights’ transit vehicles did not qualify as such.⁴²

Lehman countered that car card spaces on buses were quintessentially public fora. They therefore supported a guarantee of open access to political expression, too. He fared unsuccessfully when the case was reviewed in the federal Supreme Court. In its plurality decision, the Court disputed Lehman’s claim that the municipal transit system and its car card space functioned as a public forum for communication about politics. It conceded that public access to the bus system did pose one kind of public space. However, that space did not

⁴⁰ This issue will arise in a similar manner in *Pruneyard v. Robins*, the last case addressed in the following chapter.

⁴¹ *Ibid.* at 302.

⁴² *Ibid.*

transform any of the vehicles into public forums, by definition, nor did public access implicate political speech or related forms of expression. In declaring this view, the Court focused on the characteristics of the space in question. It relied on an opinion in a British case delivered long ago, which found it necessary to define the intended purpose of a space before adopting or adapting legal uses within it. As Justice Blackmun pointed out:

Although American constitutional jurisprudence, in the light of the First Amendment, has been jealous to preserve access to public places for purposes of free speech, the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question.⁴³

Thus, the Court's characterization of place determined the outcome for speech in *Lehman*. While municipal buses and car cards were publicly accessible spaces, any designation as public fora meant they would also perform as places of uninhibited expression. In order to trigger the protection of the First Amendment, Lehman would need to prove not only that the buses were characteristically public spaces, but that they also operated as public fora in the spirit of traditional places described above. Barring that evidence, the Court maintained, a city-owned bus and its car cards might well exhibit forms of open and accessible public space, but their functional value as legally protected public fora were other matters entirely.

In the opinion of the plurality, municipally-owned public spaces in Shaker Heights did not function like the traditional public forums considered in *Hague v. CIO*. As Blackmun pointed out, “[h]ere, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare.” On the other hand, the Court conceived city buses and their car cards as exclusive in purpose—a view that will be echoed when we turn to space and property in the next chapter. This characterization became important in *Lehman*. It afforded the city and its transit

⁴³ Ibid. at 302-03.

managers a “legitimate governmental interest” in reserving public transportation facilities and spaces for revenue generation. The city acted in a “proprietary capacity,” the Court concluded, and it therefore retained the right to advance its commercial objectives, even though that meant rejecting political speech on its buses. If the city had deployed its spatial advertising regulations to favor or disfavor any political candidates, or silence unwanted viewpoints, then its policies could have been invalidated. But its rules for use of public space pertained to revenue generation and they therefore functioned outside the scope of the First Amendment. The exclusion policy did not impact what Lehman wished to express, but rather where he could and could not do so. Owing to the commercial function of the municipal buses, over and above their public accessibility, argued Blackmun, no constitutional violation occurred, since “no First Amendment forum is here to be found.”⁴⁴

Lehman was decided in 1974, two years after the Court significantly conditioned free speech in shopping centers, and two years before it excluded *all* First Amendment protections therein.⁴⁵ In retrospect, the chronology is significant. The likelihood of expressive protection in privately owned shopping malls seems to narrow considerably in this era, given the Court’s interpretation of a municipally-operated transit system in proprietary terms; revenue values trumped political discourses. The distinction in *Lehman*, between a commercial and public forum, suggested that civic participation and representation in public spaces had dipped in value, well below the watermark set in the first half of the 20th century. As Supreme Court decision-making progressed further into the 1970s, the proprietary functions of public spaces began to uniquely define their perceived compatibility with free expression. Increasingly, those functions

⁴⁴ *Ibid.*, at 304. NB: The plurality, including Justice Douglas, who cast the decisive vote against *Lehman*, also focused on the issue of “captive audience,” arguing that transit system riders would be forcibly subjected to the candidate’s speech if he were permitted to buy ad space on the buses.

⁴⁵ The latter exclusion came in *Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976). As above, I will analyze this ruling in detail during the following chapter.

would redefine characterizations of public fora more generally. Notwithstanding the differences between city buses and shopping malls, then, *Lehman* shines a revealing light on the Court's shifting definitions of space in the post-civil rights era.⁴⁶

Ever since *Hague v. C.I.O.*, a crucial element of free speech jurisprudence has consisted in the Court's effort to order the geography of civic engagement in America, as it did in *Lehman*. Repeatedly, the Court has asked, how public are public spaces when embodied by people who want to use them for open discourse? The salience of this question grew in *Heffron v. International Society for Krishna Consciousness* (hereafter, this group will be referred to as ISKCON). In *Heffron*, the Court distinguished its doctrine further to include something it called the "limited public forum."⁴⁷ It also modified the rules of use in public spaces, narrowing them more than it had previously. That has prompted observers such as Buchanan to argue that *Heffron* ushered a "transformation principle," in which the Court became the principal arbiter of what was or was not publicly accessible space, preempting legislators and administrators. It likewise transformed an open space into a limited forum, where fewer First Amendment protections pertained, and free speech advocacy was impugned more generally.⁴⁸

Heffron involved an annual state fair organized by the Minnesota Agricultural Society, a public corporation empowered to make all rules and bylaws for the event, consistent with state and federal law. The Society issued a regulation that limited the distribution and sale of any printed materials on the fairgrounds to fixed locations, establishing that those activities had to be conducted exclusively from licensed booths. The same applied to any solicitation by individuals

⁴⁶ Zick considers the justices' changing attitudes toward embodied expression in public places to be a byproduct of the "architectural" shifts prompted by suburbanization and commercial development—along the lines of what I described in Chapter Two. He also notes the Court's reactions to controversially charged confrontations precipitated by civil rights and antiwar protests after 1960. See Zick, *Speech Out of Doors*, op cit., pg. 53.

⁴⁷ *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981).

⁴⁸ G. Sidney Buchanan, "The Case of the Vanishing Public Forum," op cit., pg. 957. NB: In *Heffron*, the Court explicitly rejected the arguments of Laurence Tribe, a renowned First Amendment scholar who argued several cases in this area of free speech jurisprudence.

or groups wishing to do so verbally or in print. The booths were leased on a first-come, first-served basis; failure to use a secured booth for the activities above was considered a misdemeanor. The requirement was categorical and content-neutral. Any organization that rented a booth was also free to openly communicate its views to visitors on the fairgrounds.

The fair grew to become a major public event in Minnesota. It attracted people from all over Minnesota and other parts of the country. Set on 125 acres, it averaged 115,000 fairgoers on weekdays, 160,000 on Saturdays and Sundays. Organizers agreed that the attendance numbers generated a high density of visitors on the grounds, given that acreage.⁴⁹

A controversy loomed on the eve of the fair, when ISKCON filed suit against Minnesota state officials. The group sought an injunction against the Agricultural Society's booth policy. It wanted the rule to be declared invalid on its face and also as applied under the First Amendment. ISKCON espoused the Krishna religion and therefore claimed that the regulation violated its rights to both free religious exercise and expression, since it excluded the group's primary means of publicizing its faith: Sankirtan. A religious ritual, Sankirtan instructs followers to access and roam public spaces to distribute or sell Krishna literature, as well as solicit donations. The practice was inherently peripatetic, argued the Krishnas. Therefore, the booth lease guideline established on the fairgrounds unduly interfered with ISKCON's liberty to express its beliefs and proselytize among the public on behalf of its faith. The Court faced the following question, which was framed by Justice White, who will figure prominently in the next chapter:

The question presented for review is whether a State, consistent with the First and Fourteenth Amendments, may require a religious organization desiring to distribute and sell religious literature and to solicit donations at a state fair to conduct those activities only at an assigned location within the fairgrounds even though application of the rule limits the religious practices of the organization.⁵⁰

⁴⁹ Ibid., at 643.

⁵⁰ Ibid., at 642.

The answer to that question was a resounding yes. Moreover, the Court used its opinion in *Heffron* to expand its public forum doctrine to new spaces, adding another wrinkle to the topography of embodied association in a post-civil rights era. The Agricultural Society's requirement of fixed locations for distributions, sales, and solicitations on the fairgrounds satisfied three conditions established by the Court to rationalize restrictions on expressive activity. First, restrictions on speech had to be neutral with respect to its content. Next, they had to be made pursuant to a "legitimate government interest." Finally, they could not exclude alternative channels for communicating ideas circumscribed within spaces affected by the rule.⁵¹ Treating the fairgrounds as a *limited public forum*, despite the traditional nature of the Minnesota event, the Court found the regulations consonant with its new spatial typology, along with others like it. It rejected ISKCON's claim that a large, well-attended state fair functioned in the way that city streets did; likewise, that organizers were required to provide unlimited access for speech and related forms of expression. Having differentiated the fairground space from the public forum it once delineated in *Hague*, the Court entertained tighter controls on diverse practices therein. After all, those controls on space did not preclude expression in-itself.

In Justice White's opinion, the Agricultural Society requirement applied impartially to any individual or group wishing to advocate its beliefs on the fairgrounds, no matter their religious or political affiliation. Therefore, ISKCON could not claim that the rule was drafted to quell its expression, nor that it was aimed to suppress its religious views. Rather, booth rentals were conducted on a first-come, first-served basis, with no other restrictions on what individuals or groups were eligible to lease them.⁵² Provided they leased a booth on the grounds, the

⁵¹ *Ibid.*, at 648.

⁵² *Ibid.*, at 644.

requirement did not affect the Krishnas' distribution or sale of written materials. Similarly, ISKCON's solicitation activities were never targeted in any way.

The Court saw no offense by fair administrators against the content of the group's speech. In fact, White countered, the Krishnas had advanced suspicious claims about the Establishment Clause and protections afforded them under the First Amendment. ISKCON's peripatetic communication of its religious beliefs could not be used to justify any guarantee of First Amendment easements left unavailable to groups or causes that engaged in other forms of speech and assembly. Religious demonstration meant equal rights to spaces of advocacy, not greater room for association than ideological or political representation.⁵³ Allowing ISKCON the unique liberty it sought, to distribute and sell literature, and spread its beliefs by roaming the fairgrounds effectively discriminated against others who might likewise wish to do so, but were prevented under the regulations issued by the Agricultural Society.

In view of its arguments pertaining to content considerations and special exemptions sought by ISKCON, I would like to look at the Court's view of alternative channels for expression on the fairgrounds, *en route* to its legitimation of government interest in *Heffron*. Denying any biases against the content of restricted speech and assembly on the grounds, the Court held that the Agricultural Society rule left ample spatial alternatives available to individuals and groups wishing to communicate their views or circulate printed materials. Justice White was indifferent to arguments made by Justices Brennan, Marshall, and the other dissenters, who complained that fair officials could meet their goals by deploying narrower, less speech-restrictive regulations. For example, organizers might have excluded distribution, sales, and solicitation from entrances and exits only. That would have reduced congestion at key chokepoints, while opening fairground space for ISKCON's expressive practices. The majority

⁵³ *Ibid.* at 652.

disagreed, concluding that the Krishnas enjoyed sufficient alternatives for their speech. First, any organization that leased a booth was also allowed to move about the grounds and air its views. Second, ISKCON was free to engage in Sankirtan *outside* the fairgrounds if it did not wish to rent a booth for its expressive activities. This was a special event, after all:

The Minnesota State Fair is a *limited public forum* in that it exists to provide a means for a great number of exhibitors temporarily to present their products or views, be they commercial, religious, or political, to a large number of people in an efficient fashion. Considering the limited functions of the Fair and the combined area within which it operates, we are unwilling to say that [the rule] does not provide ISKCON and other organizations with an adequate means to sell and solicit on the fairgrounds.⁵⁴

Owing to the large expanse and short duration of the State Fair, the Court saw fit to legitimate Minnesota's interest in regulating public space on the grounds. The Court's limited public forum rationale was closely connected with its notion of proprietorship. The same was true in *Lehman*, where rights to public space conflicted with the commercial prerogatives of a city. Where the state fair was concerned, the scale of the event, combined with its brief commercial operation, meant that authorities had a compelling interest in ensuring orderly movement among people who attended. Recall, though, that the Court dismissed ISKCON's analogy between the fairgrounds and city streets, which are spatially fixed and linked with free expression. On the contrary, the Minnesota fair was temporary in could not support the public infrastructure or functions associated with downtowns. If ISKCON and other groups were all permitted to practice their activities willy-nilly, argued the Court, chaos might ensue. In Justice White's opinion, the lower courts erred by failing to hypothesize the dangers that could result from unregulated flows of public space within the fairgrounds, where audiences would

⁵⁴ *Ibid.*, at 655. My emphasis.

imaginably assemble around speakers and solicitors.⁵⁵ The state's interest in order succeeded ISKCON's interest in space:

Given these considerations, we hold that the State's interest in confining distribution, selling, and fund solicitation activities to fixed locations is sufficient to satisfy the requirement that a place or manner restriction must serve a substantial state interest...In our view, the Society may apply its rule and confine the type of transactions at issue to designated locations without violating the First Amendment.⁵⁶

The restrictions above might not have been acceptable on city streets, White added. On the other hand, the judicial typology being animated by non-urban topographies shared by greater numbers of people fueled the Court's readiness to condition public space through its public forum doctrine. It was the disputation of place in *Heffron* that led the majority to rely on perceptions of state interest and legitimacy in limiting expressive activity at the fair. Given the differences between conventional city streets and improvised state fairgrounds, Minnesota had an interest in ensuring comfort and convenience among fairgoers. This was an important doctrinal shift. The Court's distinction of streets and newer spaces supported its alterations of the public forum catalogue. Where the Court once scrutinized government agendas aimed at suppressing heterodoxy or excluding it from the public sphere, comfort and convenience become valid justifications for tighter regulations on it. While it was always there, lurking in the background of the Court's reservations about unlimited public space, previous decisions such as *Hague* had never prioritized comfort and convenience. By the time the Court ruled in *Heffron*, however, it seemed to parlay the topographical changes in metropolitan landscapes to sustain proprietary interests expressed by the state, such as comfort and convenience, as it did in deferring to the

⁵⁵ *Ibid.*, at 654. NB: The issue of hypothetical scenarios, projected by jurists at the federal and state levels, will surface repeatedly in the following chapters. For now, it is fair to say that a significant amount of judicial reasoning about public space and forum has depended upon hypothesis, rather than direct evidence of interference or physical threats incurred by the use of public places for expressive activities.

⁵⁶ *Ibid.*

Minnesota Agricultural Society. In an era of suburbanization, public interest and publicity were further segregated in government policies and, increasingly, High Court opinions.

Public interests assigned to the comfort and convenience of space, not to mention its orderliness and fungibility, appeared to swell in relation to the Court's endorsements of state property assets, as well as its hypothesis that they were endangered by expressive practices. This anxiety applied in *Lehman*, continued in *Heffron*, and expanded in later cases, such as *Los Angeles City Council v. Taxpayers for Vincent* and *U.S. v. Kokinda*.⁵⁷ Public safety for fairgoers was an issue in *Heffron*. Yet, Justice White's repeated admonitions regarding Minnesota's legitimate state interest in orderly foot traffic on the fairgrounds seemed to turn on maximum marketability for the "variety of goods, services, entertainments, and other matters of interest" sold at the state-sponsored event. The purpose here is not to second-guess White's opinion in *Heffron*, nor disparage the Court's regard for government as a proprietary agent. Rather, it is to indicate one way in which the public forum doctrine has evolved in non-traditional public places, as well as to demonstrate the terms on which the doctrine has been modified to encompass the perceived needs of state proprietorship.

As the public forum doctrine matured, the Court was required to reason through more unexpected activities by individuals and group, in more embodied places. Public spaces that looked substantially different from the ones recapitulated at the outset of this chapter obliged the Court to update the continuum on which it judged speech in physical landscapes. It had to examine the quintessentially public, the private, and the in-between. And our post-War experience with constitutionally-adjudged civic space reflects some of the fluidity evidenced in the first half of the 20th century, to be fair. In *Widmar v. Vincent*, for example, decided during the same judicial term as *Heffron*, the Court appeared receptive to the idea that state-owned

⁵⁷ These cases are discussed below, with an emphasis on the latter.

property might be *designated* as a public forum in the interests of expression.⁵⁸ *Widmar* dealt with a state-run university, which prohibited the use of its campus for non-secular association, though it had opened its facilities to free speech in general. The Court required the university to accommodate unwanted religious assembly. It advanced an idea of accessible public space different from its prevailing public forum jurisprudence in 1981. It also constructed an argument that might even apply to a privately owned space: once the university opened its campus to a segment of the public (in this case, its students), it could not deny them the benefit of practicable space, nor could administrators include or exclude members of that public as they saw fit. The institution's commitment of common space to some forms of expression delineated a public forum, one that could not be retrenched under the First Amendment.

It would be before too long, however. If *Widmar* signaled a flow in publicity and practicable space, then the Court's decision two years later, *Perry Education Association v. Perry Local Educators' Association*, reasserted primacy for proprietary exclusions.⁵⁹ *Perry* resulted from a jealous battle between two rival unions that represented teachers in a local school system: Perry Education Association (PEA) and Perry Local Educators' Association (PLEA). For many years, both unions were charged with safeguarding collective bargaining rights for teachers and others employed by the Board of Education of Perry Township. Given their joint responsibility, PEA and PLEA enjoyed equal access to an inter-school mail system, the chief medium of communication between the unions and school employees. The system included teachers' mailboxes located in school buildings. Following disagreements over union policies, PLEA filed an election petition with the statewide Education Employment Relations Board in 1977. It challenged PEA for the lone mantle of principal bargaining representative among the

⁵⁸ *Widmar v. Vincent*, 454 U.S. 263 (1981).

⁵⁹ *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983).

schoolteachers. The challenge failed unambiguously, so much so that PEA was awarded a *de facto* right to negotiate for all teachers throughout the school system.

After a pursuant agreement between the PEA and system administrators, sanctioned by the statewide board, the union—now recognized as the voice of Perry schoolteachers—was earmarked to use the inter-school mail system and its teacher mailboxes.⁶⁰ PEA access to the mail system was deemed exclusive, moreover. No other “school employee organization,” code for the outcast PLEA, could use the system or its mailboxes. The mail system was similarly off limits to the general public, although a small number of outside organizations, such as the YMCA and Cub Scouts, were allowed access in order to communicate with teachers.

The agreement was initially ratified in 1978, and then renewed in 1980.⁶¹ PLEA reacted by filing suit against its rival and members of the Perry Township School Board. PLEA contended that PEA’s exclusive access to the school mail system and its teacher mailboxes violated the First Amendment’s free speech clause, as well as the Fourteenth Amendment’s equal protection clause. A federal district court ruled in favor of PEA. However, the Court of Appeals for the Seventh Circuit reversed the district court decision. The Court of Appeals held that once the school district opened its mail system and mailboxes to the incumbent PEA, it could not legally deny access to its rival, which still represented other schoolteachers within the Perry community.

Citing the internecine battles and its belief that the school board’s policy was drafted to unfairly advantage PEA, PLEA argued that the Perry inter-school mail system and system-wide teacher mailboxes functioned as a public forum. The exclusion of most outside users, coupled with selective inclusion of others, unconstitutionally suppressed the expression of speakers

⁶⁰ *Perry Education Association v. Perry Local Educators’ Association*, op cit., at 40-41.

⁶¹ *Ibid.* at 47.

wishing access to that forum. Responding to the quarrel and its implications for the First Amendment, the Court began where it did in the cases above. That is, the Court introduced its opinion by indicating that the characteristics of space determined its publicness, the degree to which it was legally accessible, and the standards by which speech and other forms of expression enjoyed protection or would be subject to exclusion. Justice White wrote for the Court again:

The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.⁶²

Positioning the character of the “property at issue” as the key variable in *Perry*, White developed a three-tier typology of the public forum. It was the Court’s most elaborate thus far, and it still serves today in most instances. First, he noted, there were “places which by long tradition or by government fiat have been devoted to assembly and debate,” where expression would be given the widest protection against exclusion.⁶³ White was referring, of course, to the traditional public forum outlined in *Hague v. CIO*, which comprised “one end of the spectrum,” according to him. Second, there was publicly accessible property designated by government for expressive activity—the limited public forum. This forum was not traditionally associated with speech, but it was still civic space. Rights of free expression still pertained, therefore, and they warranted constitutional protection, even when the forum was created for other purposes by the state.⁶⁴ For example, the fairgrounds in *Heffron* served as a limited public forum in this typology. Thus, the Court was keen to ensure that the Krishnas still could share their views outside those grounds in that case, along with spaces inside, subject to time, place, and manner regulations. Finally, said White, there was “public property which is not by tradition or

⁶² *Ibid.*, at 44.

⁶³ *Ibid.* at 45.

⁶⁴ *Ibid.*.

designation a forum for public communication,” and that space had to be “governed by different standards.”⁶⁵ Here was the Court’s invention of the *non-public forum*, the newest in its typological catalogue, and the clearest indication of its intention to use judicial doctrine to assign order to a landscape in which political association bordered proprietary interests in ways that seemed to privilege the latter over free expression.

Eschewing PLEA’s demand for open access, the Court ruled that the inter-school mail system and its teacher mailboxes constituted a non-public forum. The system was a recent innovation, White argued. It lacked historical connotations with traditional public spaces, such as the streets, sidewalks, and parks implicated in *Hague*. Further, although the mail system property in *Perry* was owned publicly, it had a unique purpose. It was created to facilitate communications among selected speakers who were invited to use the system, not anyone with something to say. Neither a tradition of open discourse applied to the mailboxes, nor did public designation by the school board or state reconfigure them for unrestricted use by the larger community. Simply stated, the system was intended for one use: transmission of information related to collective bargaining; and one user: the PEA, recognized as the representative union agency of teachers and employees in the school district. Disputing PLEA’s claim that the mail system was a limited public forum, at least, since groups like the YMCA and Cub Scouts were permitted to use it for communication, White countered that administrators’ invitations to certain segments of the community to use the space did not reconstitute it as public.

Once it reasoned that the forum inside the township’s schools was non-public, the Court met each of PLEA’s remaining claims with intensified scrutiny. For example, PLEA relied on its shared responsibility for collective bargaining over the course of a long history during which it enjoyed equal access to school facilities. The rival union therefore pressed for continued rights

⁶⁵ Ibid. at 46.

to communicate through the system, arguing that the history of open access had transformed its mailboxes into a traditional public forum. That claim fell flat, according to White. It overlooked the fact that nothing about the forum itself had changed following the contest between the two unions. Rather, the infrastructure of workplace relationships within the Perry school system had changed, and those were no more public than any other private relationship. The mail system existed to ease communication between teachers and their union, no more. Thus, the forum would continue to function as it always did:

PLEA's previous access was consistent with the School District's preservation of the facilities for school-related business, *and did not constitute creation of a public forum in any broader sense.*⁶⁶

The majority was equally unimpressed by a PLEA argument echoed by Justice Brennan in his dissent: the mail system exclusion was aimed at suppression of rival viewpoints. A cornerstone of its approach to the public forum, the Court has held that content-based discrimination against speech will meet with strict scrutiny in both traditional and limited public fora. Given the Court's fidelity to its typology above, however, content considerations did not pertain in the contest, notwithstanding the effects of the mailbox prohibitions. White offered two thoughts. First, the mail system did not function as a public forum, traditionally or limitedly; so content was not an issue in the mailboxes.⁶⁷ Second, the majority saw no evidence of bias against PLEA's views on collective bargaining. The Perry school system established a content-neutral access policy, following an arrangement under which the PEA assumed unique responsibility for the collective bargaining among union members. The latter argument cast a cloud over PLEA's position in the case. The former argument, however, expanded rights to exclude speech and related forms of expression in non-public fora:

⁶⁶ Ibid. My emphasis.

⁶⁷ Ibid.

Because the school mail system is not a public forum, the School District had no ‘constitutional obligation per se to let any organization use the school mail boxes...There is...no indication that the School Board intended to discourage one viewpoint and advance another. We believe it is more accurate to characterize the access policy as based on the status of the respective unions rather than their views. *Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property.*⁶⁸

In essence, PLEA’s appeal for viewpoint protection was rejected within the syntax of its unsuccessful bid to convince the Court that Perry’s inter-school mail system was a limited public forum. Absent the *categorical* outcome sought by PLEA, school administrators were free to reserve access to PEA, as well as privilege its lead in collective bargaining arrangements with teachers and other employees. PEA’s exclusive right to communicate through the system also fulfilled a legitimate governmental interest, “insuring labor peace within the schools.” The administration had legitimately deployed the mailboxes for their intended purpose. White’s coda on the contest addressed the singularity of the space in question:

[T]he internal mail system is not a public forum. As we have already stressed, when government property is not dedicated to open communication the government may—without further justification—restrict use to those who participate in the forum’s official business...On government property *that has not been made a public forum*, not all speech is equally situated, and the State may draw distinctions which relate to the special purpose for which the property is used.⁶⁹

The *Perry* ruling rested on the following argument: rights of expression could be legally barred from places not conceived specifically for purposes of public communication. Unless a shared space was built or designated for discourse, there were *always* circumstances in which speech and other forms of expression could be excluded by the authorities that controlled it.

⁶⁸ Ibid. at 49. My emphasis.

⁶⁹ Ibid. at 54-56. My emphasis.

This argument raises some obvious complications, which will surely be exacerbated in the years to come by the growing commercialization of social media such as Facebook, Twitter, and Tumblr. With respect to embodied spaces besides state capitols and government institutions, we are reminded that it is impossible today to identify *any* contemporary public place strictly built for the purpose of communicating ideas.⁷⁰ The Court has acknowledged that there are traditional spaces historically associated with speech and assembly. But even the streets, sidewalks, and parks cited in *Hague* were originally devised for other ends. Insofar as *Perry* hinges on an argument from original designation, then, the Court's opinion elevated the bar on what constituted a public forum according to its doctrine, while concurrently lowering it on lawful exclusions against expression in public spaces.

Thus, the Court contracted the ecology of association in *Perry*, by withholding space not categorically conceived as public fora from it. The typology laid out in that case imposed a new threshold for spaces in which expressive practices might be necessary for fair political competition among diverse interests. If discursive spaces are only indicated by design, then few, if any, can be found in our physical landscape. Dissenting opinions shared this concern, arguing that the First Amendment protected speech and assembly in public places besides government buildings and others traditionally reserved for expression by representatives of the state. Justice White defended the majority's decision, noting that alternative channels of communication were available to PLEA. For example, there were no restrictions on the use of bulletin boards or meeting facilities on the school grounds. PLEA could also communicate its messages through the United States Post Office. Finally, both unions enjoyed temporary access to the inter-school mail system when they contested each other in periodic elections.

⁷⁰ See, for example, Margaret Kohn, *Brave New Neighborhoods: The Privatization of Public Space* (New York: Routledge, 2004), pp. 50-54. Also, Steven G. Gey, "Reopening the Public Forum—From Sidewalks to Cyberspace," in *Ohio State Law Journal*, 58 Ohio St. L. J. 1998, at 1537.

The *alternative channels* rationale proved important in *Perry*, as it did in *Heffron* and other cases in which the Court has weighed access to public fora against their proprietary control. Still, the *Perry* principle, that a public forum exists where space is designed for communicative purposes, affected free speech jurisprudence profoundly, while undermining legally protected association in diverse spaces used by individuals and groups outside the mainstream of given communities. Much the same happened a year later, in *Los Angeles City Council v. Taxpayers for Vincent*.⁷¹ That ruling dealt with political expression (campaign poster “sniping”) during an election. It involved government owned property (utility poles) atop the streets and sidewalks proclaimed traditional public fora in *Hague*. Yet, the Court stuck to its *Perry* principle. It concluded that space is public when it was uniquely dedicated to deliberation by the city, though municipal officials potentially stood to lose as a result of political expression that was critical and competitive. A public forum could be excluded as long as government demonstrated an interest in combating substantive evils—in this case, aesthetic blight and incidentals incurred in the removal of campaign ads.⁷² Retrenching another expressive easement through its narrowing public forum doctrine, the Court held that Los Angeles’ urban beautification program outweighed the low cost campaign needs of a third party political candidate, who could not afford newspaper ads or electronic media buys obtainable to his competitors from the two major parties. Unfortunately for him, the Court’s interpretation of the free speech clause determined that the utility poles on which he sought to disseminate his views were not traditional enough to serve as designated public fora under its typology of contemporary spaces.⁷³

In *Vincent*, White and the majority treated Los Angeles as a property owner, explicitly. The characterization was more than a rhetorical one. It was substantive, in my view, and it

⁷¹ *Los Angeles City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

⁷² *Ibid.*, at 810.

⁷³ *Ibid.*

represented further emplacement of proprietorship above free expression in the new geography of First Amendment jurisprudence. Putting aside criticism that the *Vincent* opinion overlooked hurdles faced by minor party candidates seeking office, the Court's ruling legally excluded political expression in a major metropolitan city where traditional public spaces were routinely flooded with product advertisements and other forms of commercial speech. True, an argument might be made about the projected expense of poster removal. As Justice Brennan pointed out in his dissent, however, evidence to support that claim never appeared in the case record.⁷⁴

After doubling down on its typology in *Cornelius v. NAACP Legal Defense & Education Fund*,⁷⁵ decided one year after *Vincent*, the Court clarified its jurisprudence from the point of view of legal scrutiny exercised over speech exclusions in public spaces. Expressive restrictions in spaces defined as *traditional public fora* would be scrutinized most closely, meaning that a strict burden of proof fell on contestants seeking to suppress speech. The same level of scrutiny would apply in spaces construed by the Court as *designated public fora*. Posing some complications, the concept of a designated public forum remained amorphous. The Court scarcely clarified matters by proffering a subset of designated fora: the limited public forum. The only defining thread here seemed to be that the Court would require case-by-case evidence that government or a controlling authority created an expressive space, reconfiguring the burden of proof above and placing it on speakers to establish that evidence.⁷⁶ In each instance above, First Amendment access to the public forum could be legally regulated through time, place, and

⁷⁴ *Ibid.*, Brennan dissenting, at 817. Brennan's remark on actual costs is significant, both within this public property arc and the private property rulings to be traced in the next chapter. Once again, the estimated impact of free expression in proprietary spaces is often projected to be negative, financially. Yet, the Court does not provide any evidence that speech materially distresses topography. This omission is consistently repeated in the Court's rulings on free expression in shopping centers, to be discussed.

⁷⁵ *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788 (1985). Besides providing a more authoritative statement about what constitutes a public forum, categorically, *Cornelius* is less remarkable for my purposes in this chapter, at least when compared with the cases detailed herein.

⁷⁶ Zick, *Speech Out of Doors*, op cit., pg. 54.

manner guidelines. That part of the doctrine persisted following the Court’s establishment of such guidelines in its *Cox* and *Heffron* precedents.

Turning to publicly accessible spaces defined as *non-public fora*, the role of the state as property owner would grow and eventually encompass the federal government in *United States v. Kokinda*.⁷⁷ In fact, the Court expanded its conclusions in *Vincent*. Now, the “immemorially” public space held open to individuals and groups in *Hague* was characterized as property and suspended for expressive activity, in order to safeguard its capitalization by government entities. In defending this transformation, the Court had charted a jurisprudential course more than fifty years in the making. In a new milieu, it declared “reasonableness” to be a constitutionally applicable justification for proprietary curbs on speech and political association.⁷⁸

Kokinda dealt with expression in the kind of space that will be revisited at the start of the next chapter: a sidewalk near the entrance of a United States Post Office. Several members of an advocacy group, the National Democratic Policy Committee, including a volunteer, Marsha Kokinda, set up a table immediately outside the Bowie post office in suburban Maryland. They hoped to distribute literature, sell books and subscriptions to the group’s newsletter, and solicit contributions. The sidewalk where they placed their table was the only pathway from the post office entrance to an adjacent parking lot. Both the walkway and the lot rested on Post Office property. Following a 1970 federal restructuring, the U.S. Postal Service replaced the old Post Office Department. The new service operated pursuant to a congressional mandate that required it to function “more like a business than had its predecessor...”⁷⁹

⁷⁷ *United States v. Kokinda*, 497 U.S. 720 (1990).

⁷⁸ *Ibid.*, at 730. In fact, later in her opinion, Justice O’Connor, appeared to adopt the position that the prohibition on expression in this case was “hardly unreasonable,” suggesting a new and lower constitutional threshold than the one touted above. *Kokinda*, at 735.

⁷⁹ See U.S.C. 403 (a); 403 (b)(1); H.R. Rep. No. 91-1104, pp. 1, 5, 11-12, 17, 19 (1970). I will revisit this congressional mandate shortly.

National Democratic Policy Committee members manned the sidewalk table for several hours during the day. When roughly fifty complaints about the table were addressed to various postal employees, the Bowie postmaster asked them to leave. They refused.⁸⁰ Postal inspectors eventually arrested Kokinda and other members of the advocacy group. Their table was seized, along with several pieces of literature and other belongings. They were tried and convicted by a United States Magistrate in the District of Maryland for violating a 1989 law against soliciting contributions and campaigning for public office on postal premises.⁸¹ Kokinda was fined \$50 individually and sentenced to ten days' imprisonment. She appealed her conviction in a district court. The court affirmed, on the grounds that the sidewalk was not a public forum and the Postal Service ban was reasonable. Her conviction was reversed by the United States Court of Appeals, which held that the sidewalk was a traditional public forum. The appeals court also held that the Postal Service had no significant interest in excluding expression. Time, place, and manner regulations were available to achieve the purpose of ensuring ingress and egress from the post office to its parking lot. The Supreme Court granted review.

Authoring the Court's opinion, Justice O'Connor began by addressing levels of scrutiny that might pertain to the Postal Service prohibition under a First Amendment analysis. O'Connor's ordering of the issues in the case was important. It telegraphed her intention to review the exclusion in Bowie through the physical space involved, as in previous rulings, and then through the prism of the Court's more mature public forum typology. In both instances, a topographical determination would be used to assess the reasonableness of Kokinda's eviction from the post office property. The question, then, was whether the space where she and the rest of the political advocates expressed their ideas also served as a public forum under legal

⁸⁰ NB: The exact nature of the complaints was never reflected in judicial records.

⁸¹ *U.S. v. Kokinda*, *op cit.*, at 724-25.

standards established in the cases above? O'Connor indicated as much in the preamble of her opinion, where she noted that the contest would be judged "to an extent determined by the nature of the relevant forum."⁸² Things would grow more interesting from here, particularly from the point of view of reconciling expressive rights with proprietary ones.

First, the Court decided that the post office sidewalk resembled, but did not function like a traditional sidewalk. As Justice O'Connor argued:

The postal sidewalk was constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city.⁸³

Owing to its restricted purpose, O'Connor considered the postal sidewalk a non-public forum. It neither functioned like a traditional public forum, as did the bulletin boards inside the post office building, nor a designated one, in spite of numerous examples of public access accommodated or at least tolerated near government owned property.⁸⁴ In the Court's new jurisprudence, a public forum was never engendered by government passivity. The state designated one "only by intentionally opening a nontraditional forum for public discourse," according to O'Connor.

Having settled on a non-public typology where the contested space was concerned, the Court turned to the level of judicial scrutiny under which the Postal Service exclusion would be examined. First Amendment scrutiny depended on public forum typology, confirmed O'Connor. As a result, the level of scrutiny in the case had diminished in direct proportion to the Court's

⁸² Ibid., at 721.

⁸³ Ibid., at 728.

⁸⁴ O'Connor seemed to be responding to Justice Kennedy's concurring opinion here. Kennedy had concluded that the postal sidewalk was indeed a *designated public forum*. In doing so, he commented on the decline of public space in a way that might well have appeared at the end of the previous chapter: "As society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place. It is true that the uses of the adjacent public buildings and the needs of its patrons are an important part of a balance, but there remains a powerful argument that, because of the wide range of activities that the Government [sic] permits to take place on this postal sidewalk, it is more than a nonpublic forum." Ibid., at 737.

definition of the post office sidewalk as non-public, as well as its identification of the government as a property owner in the contest with Kokinda and her fellow advocates:

The Government's ownership of property does not automatically open that property to the public. It is a long-settled principle that governmental actions *are subject to a lower level of First Amendment scrutiny when the governmental function operating...[is] not the power to regulate or license, as lawmaker...but, rather, as proprietor, to manage [its] internal operations.*⁸⁵

O'Connor cited *Lehman, Heffron, Perry*, and other late 20th century decisions handed down by the Court to validate her argument that the primacy of First Amendment speech and assembly had become suspect on public property when government "engaged in commerce." Given that reevaluation, it was the Court's responsibility to appreciate the history of the new Postal Service mandate, in other words, that it "be run more like a business than had its predecessor, the Post Office Department." This new commercial agenda implicated revised rules of use for expressive practices on postal property. It also triggered a lower threshold for reasonable restriction of association when those rules came under any legal scrutiny as part of the Court's free speech jurisprudence.⁸⁶

The postal sidewalk provided ingress to and egress from the facility. The Service intended the sidewalk to facilitate easy foot traffic between the parking lot and the building entrance. The space was therefore created to support business practices, *not* expressive practices. Indeed, opined the Court, Kokinda's table, from which her group solicited funds had produced interference with foot traffic flows and might likewise generate disincentives to use the Bowie branch. After all, there were patron complaints. Moreover, an analysis submitted to the Court

⁸⁵ *Ibid.*, at 725. My emphasis. NB: O'Connor would draft an ironic concurring opinion two years later, in *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992), at 686, where she compared a NY/NJ Port Authority-operated airport terminal to a commercial shopping mall, which possessed multiple functions that seemed to make the space more suitable for expressive activities.

⁸⁶ *Ibid.*, at 734.

suggested that solicitation could result in functional obstructions on publicly accessible property. The exclusion against that activity was a reasonable exercise of proprietary decision-making, therefore. It had less to do with *what* Kokinda said, and more to do with *where* she and her associates were saying it. The postal service had met its exclusive obligations under an order of Congress, O'Connor concluded. It addressed the public interest, relying on a rational calculation that pertained to the effects of civic activity on its property. Its formulation of a solution was sufficiently reasonable, whether or not there were less speech-restrictive options available.

This fidelity to a new and more facile test of reasonableness provoked a spirited dissent from Justice Brennan. In his objections, Brennan essentially encapsulated the gamut of problems with public forum jurisprudence where spaces like Bowie's postal sidewalk were contested on behalf of open political discourses. Brennan took on the Court point by point. He challenged all three arguments it relied upon to uphold the exclusion against Kokinda. In the first place, he criticized O'Connor's delineation of the postal sidewalk as a *non-public forum*. That delineation raised a broader issue, thought Brennan, joined not only by judicial restraint proponents, namely, Justices Stevens and Blackmun, but also by Thurgood Marshall, who will figure prominently on questions of space and property in the next chapter. Citing Kalven's study of the public forum, Brennan indicted the Court's doctrine generally. In his view, the typology upon which that doctrine was ultimately constructed—quite apart from *its* intended purpose: protecting free expression—had been transformed in most of the cases above to deprive citizens of their rights to free speech and assembly under the First Amendment. The doctrine's arc had closed space where it was supposed to open it, Brennan argued:

Ironically, these public forum categories—originally conceived of as a way of preserving First Amendment rights...have been used in some of our recent decisions as a means of upholding restrictions on speech... I have questioned

whether public forum analysis, as the Court has employed it in recent cases, serves to obfuscate rather than clarify the issues at hand...

Today's decision confirms my doubts about the manner in which we have been using public forum analysis.⁸⁷

Transitioning to the case at hand and the Court's misguided application of its morphing typology to the public space in *Bowie*, Brennan protested that the evolution of the doctrine had finally gone too far. The postal sidewalk used by *Kokinda* and the others was surely a public forum under any traditional analysis. Spatially, the sidewalk was identical to fora previously determined to be "immemorially" open to expressive activity. To decide otherwise now, Brennan contended, the Court had to depend on a "strained and formalistic" logic of space:

It is only common sense that a public sidewalk adjacent to a public building to which citizens are freely admitted is a natural location for speech to occur, whether that speech is critical of government generally, aimed at the particular governmental agency housed in the building, or focused upon issues unrelated to the government. No doctrinal pigeonholing, complex formula, or multipart test can obscure this evident conclusion...

Public access is not a matter of grace by government officials, but rather is inherent in the open nature of the locations.⁸⁸

Brennan turned to the public functionality of the postal sidewalk, scoffing at O'Connor's claim that was constructed for a singular purpose. However, the real liability here rested with the Court's awkward formulation of the *designated public forum*. It was a tenuous formulation, at best. There was little doubt that the postal sidewalk was built to ease foot traffic between the entrance to the *Bowie* post office building and the outside parking lot. But its original design no more prevented it from functioning politically for speech and assembly than any public space shared by people carrying out complex functions:

⁸⁷ *Kokinda*, op cit., at 741-42, Brennan dissenting.

⁸⁸ *Ibid.*, at 743.

It is irrelevant that the sidewalk at issue may have been constructed only to provide access to the Bowie Post Office. Public sidewalks, parks, and streets have been reserved for public use as forums for speech even though government has not constructed them for expressive purposes. Parks are usually constructed to beautify a city and to provide opportunities for recreation, rather than to afford a forum for soapbox orators or leafleteers; streets are built to facilitate transportation, not to enable protesters to conduct marches; and sidewalks are created with pedestrians in mind, not solicitors. *Hence why the sidewalk was built is not salient.*⁸⁹

Brennan closed his dissent by admonishing the Court's citation of more recent precedents, adding that early public forum analysis never engaged in aggressive fact-finding missions as O'Connor and the plurality had with respect to foot traffic interferences and the like. Nor did it give in so uncritically when reviewing rationales for exclusions against citizens by government in its guise as proprietor. In doing so this time, the Court had "collapsed the distinction between exclusions that help define the contours of the forum and those that are imposed after the forum is defined." Brennan was vexed about the Court's reliance on a vague idea of "reasonableness" to sustain Kokinda's exclusion, as well as its contention that her removal had nothing to do with the content of the advocates' expression. The exclusion had *everything* to do with the content of her expression. In Brennan's view, the group's solicitation *was* the content of its speech and assembly. Thus, any government interest in its removal was tantamount to suppression of expressive content. Moreover, the Court's reliance on a congressional mandate that the Postal Service operate "more like a business" was a suspicious element in First Amendment jurisprudence. Barring any evidence that Kokinda's expression was unusually disruptive, O'Connor and the Court had engaged in pure speculation and thereby

⁸⁹ Ibid., at 744. My emphasis.

constructed judicial policy that swept “an entire category of expressive activity off a public forum solely in the interest of *administrative convenience*.”⁹⁰

Certainly, there were indications in the earliest public forum decisions that comfort and convenience might one day trump political association, a point that Brennan seems to have overlooked. Nevertheless, his dissenting opinion in *Kokinda* plainly voices some of the key contradictions of a relatively young, still opaque doctrine, one that curves towards ownership and regulation of space, rather than open access and civic practices there. More controversies followed *Kokinda*, including a very recent case that further contracts the public forum on municipal sidewalks *on the outside perimeter* of post office property, past the dedicated walkways designed to ease pedestrian flow between the entrances and parking lots above. The Court denied the case a place on its docket this year. The upshot of that denial is more far-reaching exclusions of speech and assembly at an almost fiscally insolvent Postal Service.⁹¹

More contemporary spaces would fall to the Court’s doctrine. For example, its arc would reach publicly accessible airport terminals two years later. More than any space above, they project the look and feel of privately owned commercial property, specifically, shopping malls. The airport terminal cases of 1992, *Lee v. International Society for Krishna Consciousness* and its companion case, *International Society for Krishna Consciousness v. Lee*, have therefore garnered considerable attention in scholarly and popular circles, I think. I am electing not to detail them for two reasons, however. One, innumerable observers in and outside legal circles have addressed them previously, *ad nauseum*, in fact. Two, not unlike *Heffron* above, a key point of contention in *Lee* was *Sankirtan* inside an airport terminal operated by the Port Authority of New York/New Jersey.

⁹⁰ *Ibid.*, at 753. My emphasis.

⁹¹ *Initiative and Referendum Institute, et al. v. United States Postal Service*. The Court denied certiorari on April 15, 2013.

Without attempting to disparage that activity, I would argue that solicitation as civic practice in that particular case may concern us less than Justice Kennedy's concurring opinion in the decision, which excluded it from the airport terminal. In his opinion, Kennedy urged his colleagues that no modern public space, not an airport terminal, nor a shopping mall, is ever designed for free expression. Echoing Justice Brennan's dissent in *Kokinda*, Kennedy believed the Court's excessive reliance on the purported function of non-traditional public fora would narrow the legal exercise of free speech and assembly, notwithstanding their compatibility with contemporary environments. Decisions like those above would make speech-compatible spaces increasingly unlikely in an era of suburbanization, when Americans spent more of their time in airports, cars, and privately owned places where the First Amendment did not pertain, owing to the Court's property doctrines.⁹²

In general, property both has and is a legal effect, which contours spatial relationships and sets boundaries between people, as Blomley notes.⁹³ The legal effect of *Kokinda*, *Lee*, and others that fell inside the arc of the public forum doctrine was a transformation of practicable public space into some-*thing* privileged as public property. This is what Zick means when he argues that the Court helped transform publicly accessible place into *res*.⁹⁴ The change also marked a shift in the political relationship between American government and people who wished to petition it for redress of grievances. Mitchell, who was cited at the top of this chapter,

⁹² *Lee v. International Society for Krishna Consciousness*, 505 U.S. 672 (1992), at 698. The companion case, *International Society for Krishna Consciousness v. Lee*, 505 U.S. 830 (1992), involved leafleting, which was legally permitted in an airport terminal operated by the Port Authority, subject to time, place, and manner restrictions. Ironically, it was the author of the *Kokinda* decision, Justice O'Connor, who contrasted airport terminals with shopping malls, hinting in her concurring opinion that malls were *more* functional as public spaces. NB: Both companion cases were decided in the same year as *Lechmere v. N.L.R.B.*, 502 U.S. 527 (1992), where the Court overturned labor law protections for speech and assembly in privately owned shopping centers, its last statement to date on such properties.

⁹³ Nicholas Blomley, *Unsettling the City: Urban Land and the Politics of Property* (New York: Routledge, 2004).

⁹⁴ Zick, *Speech Out of Doors*, 2009, op cit., pg. 8.

joins Staeheli to point to the conceptual and geographical conversion of civic spaces into territories of the state. In their view, the kinds of spatial contests I have attempted to outline here—combined with countless others—have largely repositioned government in relation to the public sphere outside the state. The former has transformed from “a sovereign to a landlord, from the embodiment of ‘the people’ to the owner of land, from the protector of the rights of the public to the enforcer of the rights of (its own) property.”⁹⁵ This change becomes particularly salient in the context of the First Amendment and Ely’s view on government’s recalcitrance in the face of democratic association that might challenge its power, an idea I will come back to later in this examination.⁹⁶

Private property is yet to be discussed in this examination of legally conditioned space. Yet, the typology outlined in this chapter will offer a hint about how the Court will define First Amendment speech and assembly there. It is true that a typology of space does not amount to a theory of space, *de facto* or *de jure*. And that may confirm the delicacy of the Court’s public forum doctrine as we move forward. Moreover, it might recommend hopes for a judicially constructed notion of public space that is transparent and inclusive of indications described in the first chapter, as well as the practices historicized in the second. In the short run, however, the conditions that underlie the Court’s typology of public space will be explored in the chapter that follows, which looks at private property, specifically. To be sure, those conditions shape the Court’s valuation of political expression in suburban era places where commerce is very much a part of the public experience.

⁹⁵ Lynn Staeheli and Don Mitchell, *The People’s Property? Power, Politics, and the Public* (New York: Routledge, 2008), pg. 133.

⁹⁶ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980), pp. 103-06.

Chapter Four

Occupied Mall Street? Case Histories of Property and Space In American Shopping Centers

“[S]hopping is arguably the last remaining form of public activity”
- Rem Koolhaas, et al.¹

While the diminution of public space at times lamented in the first two chapters is surely multi-determined, the rulings traced in the third chapter also explain how the nation’s highest court has helped to underwrite that decline. As the Supreme Court advanced its public forum doctrine further, support for practicable space weakened, particularly in contests over free speech in contemporary environments. Seemingly convinced that expressive activity would have a zero-sum effect on the value of public property, the Court constructed an increasingly formalistic typology that included the *non-public forum*, where open political discourse and association could be excluded in spite of the First Amendment. The new doctrine represented a departure from the view espoused in *Hague v. CIO*, that the state held public places in trust for speakers and listeners. By the time the Court handed down decisions in *Kokinda* (1990) and *Lee* (1992), the government was construed in an entirely different way: as a proprietor of public space.

The arc of the public forum doctrine has led Zick and other observers to grumble that First Amendment jurisprudence now precludes a theory of place; that the trajectory of judicial decision-making has chipped away at what the Court itself dubs “breathing space,” required by citizens in order to express their views freely, and educate themselves about matters of import.²

¹ Chuihua Judy Chung, Jeffrey Inaba, Rem Koolhaas, and Sze Tsung Leong, *The Harvard Design School to Shopping* (New York: Taschen Books, 2002), pg. 38.

² Zick has argued this point in multiple law review essays, as well as in his study of the public forum doctrine and the problem of place. See, Timothy Zick, *Speech Out of Doors: Preserving First Amendment Liberties in Public*

Shying away from a more robust concept of civic space in its decisions, the Court reified public property. It transformed practicable space into something static—what Zick calls “place-as-res.” Further, the Court inscribed publicly owned property with a government brand, privileging its management prerogatives over the people’s rights to practice citizenship.³ This criticism, also reflected in work by Staeheli and Mitchell, among others, centers on publicly controlled spaces, where we tend to expect greater First Amendment protection for speakers and listeners, but which appear to have diminished since the mid- to late 20th century.⁴

What happens, then, when we broach that fourth category mentioned in the opening of the last chapter: private property? Challenges over expression become more complex, owing to an American constitutional tradition that must delicately balance political association, on the one hand, and legally protected rights of ownership, on the other. If the city of Shaker Heights, the state of Minnesota, or the U.S. Postal Service can deploy publicly accessible space to maximize revenue, as well as restrict activity that might interfere with that revenue, do property owners enjoy less liberty to control their space, even when expressive freedoms are compromised? This question merits consideration of privately owned, publicly accessible property following World War II, when the First Amendment variously brushed against statutory trespass codes, the Fifth and Fourteenth Amendments, all before the Court.

The tension between public expression and private property rights is evidenced in American shopping centers. The purpose of this chapter is to explore that tension, in the context of the judicial doctrine outlined in the last chapter, as well as others. My focus, again, is on

Places (New York: Cambridge University Press, 2009). NB: The term “breathing space” was first used by Justice Brennan in *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963).

³ Timothy Zick, “Speech and Spatial Tactics,” *Texas Law Review*, 84 TX. L. Rev. 2006, 587; “Space, Place, and Speech: The Expressive Topography,” *George Washington Law Review*, 74 Geo. Wash. L. Rev. 2006, 439.

⁴ Lynn A. Staeheli and Don Mitchell, *The People’s Property? Power, Politics, and the Public* (New York: Routledge, 2008), pp. 5-21; Margaret Kohn, *Brave New Neighborhoods: The Privatization of Public Space* (New York: Routledge, 2004), pp. 49-55.

Supreme Court jurisprudence. The Court initially championed free speech and public space in shopping centers, in 1968. In 1972, however, it significantly limited its support for public expression in malls. By 1976, it withdrew the First Amendment from malls entirely. In 1980, the Court decentralized the contest between speech and property in malls, holding that individual states could extend expressive protections under their own constitutions.

Many applauded that last decision, including Justice Thurgood Marshall, who wrote the Court's first full opinion on space and expression in modern commercial shopping centers. It seemed fitting to restructure free speech jurisprudence related to malls, that is, to let states balance competing property rights according to their own civic ecologies. The author of this chapter's last opinion, Justice William Rehnquist, frequently remarked that the states were the best laboratories of public policy.⁵ Yet an absence of federal free speech protection in shopping centers has led to legal fragmentation, while adding very little "breathing space" where the American people can either advocate or confront their politics. In the next chapter, I turn to more recent decisions from the benches of New Jersey and New York, bordering states where the High Court's rulings have been interpreted in opposing ways. In view of the inconsistency, I will conclude by recommending revitalized First Amendment protection for practices of public space within malls and their newest incarnations. These new urban iterations demonstrate a thirst for architectures of public space among contemporary designers and developers. They also point to growing suspicion about the virtues of exclusion inside older shopping centers, which are similarly reflected in their current underperformance as financial assets in suburbs. To the extent that today's malls are struggling commercially, it may be time to revisit the ways in which civic engagement, inclusion, and design are valued therein—particularly at a time when

⁵ See, for example, Tinsley E. Yarbrough, *The Rehnquist Court and the Constitution* (New York: Oxford University Press, 2000), pp. 95-100.

metropolitan geography is transforming, and needs for diverse and visible space continue to grow among residents and would be shoppers throughout our suburbs.

Prologue: Marsh, public function, and the preferred position of speech

The contest between free expression and publicly accessible private property was first adjudicated in *Marsh v. Alabama*, alluded to briefly in the previous chapter. *Marsh* represents the opening salvo in an ongoing debate over speech and assembly on private property—a debate continually reshaped by changing physical topography and commercial patterns in the United States. The case also set the tone for subsequent arguments in this area of First Amendment jurisprudence. This is especially true in the context of shopping malls, which revolutionized late 20th century American commerce and continue to influence consumer behavior to this day. Indeed, observers who still squabble over inclusion and exclusion of non-commercial expression in shopping centers tend to speak in unison about the salience of the *Marsh* decision.⁶

A brief analytical pause is in order, which will help us understand the outcome in *Marsh*, and its relationship to mall jurisprudence, generally. In their analysis of legal reasoning and Supreme Court decision-making, Carter and Burke argue that final rulings are often staked on a consensus formed by the justices about “social background facts.”⁷ Social background facts are defined as the cultural phenomena—demographic shifts or technological innovations, for instance—that color most disputes faced by the Court. In order for it to decide a controversy, the justices must not only develop a consensus about the immediate facts in front of them, but also the surrounding circumstances that precipitate those facts.

⁶ See note 7, below.

⁷ Lief H. Carter and Thomas F. Burke, *Reason in Law*, 6th Edition (New York: Addison Wesley Longman, 2002), pg. 10.

A consensus on social background facts was critical to the jurisprudence in *Marsh v. Alabama*, not to mention subsequent contests involving shopping centers. In fact, *Marsh* is widely regarded as the prologue to the Court’s mall rulings.⁸ In *Marsh*, the Court weighed the constitutionality of criminal trespass sanctions imposed against an individual who distributed religious literature on the private property of a company-owned town.⁹ Company-owned towns featured multipurpose plants built and run by commercial firms in need of labor for industrial operations, such as mills and mines. They also included self-contained residential facilities for employees and their families. Largely defunct in the wake of shifts toward the service sector over the last several decades, company-owned towns became widespread during the post-War boom of the late 1940s and 1950s.¹⁰ They were the industrial parks and corporate campuses of their day. In view of their sheer number, as the Court noted in *Marsh*, many American citizens called them home.¹¹ Some company-owned towns delivered a complete array of services to residents, including public amenities and conveniences, such as federal post offices and waste treatment facilities. That consideration, and the social background facts involved in *Marsh*, would help determine its legal outcome.

Chickasaw, a town suburb outside Mobile, Alabama, was owned and operated by the Gulf Shipbuilding Corporation. The town consisted of several residential properties, a street

⁸ A preponderance of law review articles advocating different positions nevertheless treat *Marsh* as the key precedent behind later shopping mall rulings. See, among others, Wayne Batchis, “Free Speech in the Suburban and Exurban Frontier: Shopping Malls, Subdivisions, New Urbanism, and the First Amendment,” *Southern California Interdisciplinary Law Journal*, Vol. 21, No. 301, 2012, 351-57; Samantha Barbas, “Creating the Public Forum,” *Akron Law Review*, 44 Akron L. Rev. 2011, 862; Paul J. Weinberg, “The Shopping Center as Hyde Park Corner: Free Speech or Invasion of Property Rights?” in *Zoning and Planning Law Report*, Vol. 32, No. 11, December, 2009, pp. 2-3; Gregory C. Sisk, “Uprooting the Pruneyard,” *Rutgers Law Journal*, 38 Rutgers L. J., Summer 2007, 1145; Mark C. Alexander, “Attention, Shoppers: The First Amendment in the Modern Shopping Mall,” *Arizona Law Review*, 41 Ariz. L. Rev. Spring 1999, 18. The foregoing citations reflect a small sample of law review essays considered in this section.

⁹ *Marsh v. State of Alabama*, 326 U.S. 501 (1946).

¹⁰ For a more detailed analysis and history of company towns, see, Hardy Green, *The Company Town: The Industrial Edens and Satanic Mills That Shaped the American Economy* (New York: Basic Books, 2010)

¹¹ At their peak, there were roughly 2,500 company-owned towns throughout the U.S., and 3% of the American population lived in these settlements. See Green, op cit., note 9, pg. 145.

grid, sewer system and sewage disposal plant, and a business block that fairly resembled a traditional downtown shopping center. A full range of goods and services could be purchased there. A deputy of the Mobile County Sheriff policed Chickasaw. A branch of the U.S. Post Office housed there delivered mail inside and outside the town. Interestingly, and significantly as it turned out, the property lines of the company-owned town were largely indistinguishable from those of its surrounding neighborhood. Nearby residents shopped and satisfied a host of commercial needs on Chickasaw's business block.¹²

The Gulf Shipbuilding Corporation posted numerous signs on storefronts in the town's shopping center. They read, "This is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted." Disobeying the signs, a Jehovah's Witness named Grace Marsh stood on the business block sidewalk, outside the U.S. Post Office branch, and distributed religious literature to passersby.¹³ Marsh was told that she was not allowed to distribute literature without a permit, that no permit would be issued, and that she must leave. When she refused to do so, she was arrested and convicted under an Alabama statute that made it illegal to enter or remain on private premises without permission. Marsh claimed her guarantees of free speech and religion under the First and Fourteenth Amendments had been violated by the state. The Alabama Court of Appeals upheld Marsh's conviction, however, maintaining that the Gulf Corporation owned the sidewalk on which she passed out literature. It could therefore exclude her under state law.¹⁴

¹² *Marsh*, at 502-03.

¹³ While members today rely on more limited, door-to-door interfaces with private citizens, there is a rich history of public space practices by the Jehovah's Witness sect, which were intended to assert identity claims and establish visibility for its religious beliefs. See Zick, *Speech Out of Doors*, op cit., pp. 75-78. See also, Margaret Kohn, *Brave New Neighborhoods: The Privatization of Public Space* (New York: Routledge, 2004), pg. 13.

¹⁴ *Ibid.*, at 504.

The Supreme Court declared Marsh’s conviction unconstitutional and reversed it. Before doing so, a majority conceded at the outset of its opinion that the Corporation’s ownership of the business block complicated Marsh’s claims to uninhibited expression there. The protection afforded free speech and assembly under the First Amendment would surely have been greater on publicly owned sidewalks than on privately owned ones, it said.¹⁵ Yet, the Court could not “agree that the corporation’s property interests settle the question” raised in the case.¹⁶ Rather, by making its business block accessible to public use—by employees, residents, and neighbors alike—the Gulf Shipbuilding Company surrendered some of its property rights. Justice Black the majority’s opinion:

Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.¹⁷

Chickasaw, Black wrote, was not functionally distinct from any other city or town with publicly owned streets. Its business block served as a community hub, frequented by Gulf’s workers, residents, and visitors from a nearby neighborhood, who used it as a shopping center. The community characteristics of the company town were linchpins to Justice Frankfurter, an advocate of judicial restraint, who nevertheless saw fit to describe them in detail in his concurring opinion. Frankfurter treated the cornucopia of public amenities inside Chickasaw as its main social background fact, noting, “a company-owned town is a town. In its community aspects it does not differ from other towns. These community aspects are decisive...”¹⁸ And in a remarkable echo of the viewpoint defended by Jackson in the first chapter, which argued that the

¹⁵ Ibid.

¹⁶ Ibid., at 505.

¹⁷ Ibid., at 506.

¹⁸ Ibid., at 510.

functions of public space transcend their designated purpose, Frankfurter believed that civil rights on Chickasaw's business block derived from the fact of how people used the shopping center, rather than who held its legal deed:

Title to property as defined by State law controls property relations; it cannot control issues of civil liberties which arise precisely because a company town is a town as well as a congeries of property relations.¹⁹

Aware that a private owner had excluded Marsh, not the state, Black nevertheless concluded that her freedom to use the business block grew in proportion to the *public function* served by Chickasaw property. Given the publicity of that space, the Court broached democratic theory and its view that Marsh's expression conduced to greater civic capacity. Beyond her individual liberty under the First Amendment, other users of the company-owned town at once had a right to be informed by Marsh's speech, which they needed in order to exercise their collective claims on citizenship—not unlike municipal inhabitants anywhere in the nation. The majority coupled Marsh's personal sovereignty within a functionally public space to civic demands for association. It envisaged a *preferred position* for the First Amendment, therefore, one that preempted the unfettered right of owners to exclude speakers from their property.²⁰

The Court's interpretation of practicable public space in Chickasaw ran afoul of Justice Reed's view. Reed dissented from the majority and its "novel Constitutional doctrine."²¹ He saw the decision as a violation of the company's rights, noting that it was the first time the Court had permitted expression on private property, against an owner's wishes. Marsh, he thought, could have passed out her literature anywhere *near* the company town, outside its legal property

¹⁹ Ibid., at 511.

²⁰ Ibid., at 509. NB: The doctrine of "preferred position" maintains that First Amendment freedoms of press, speech and religion should be weighed more heavily when they conflict with other fundamental rights. It was first formulated by the Court in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), to help temper the "clear and present danger" test that guided First Amendment jurisprudence for decades.

²¹ *Marsh v. Alabama*, at 512.

lines. Requiring that she be allowed to do so in the middle of Chickasaw's business block amounted to an unconstitutional taking of its owner's property without just compensation.²²

Reed did not dispute the right to free speech, but rather its preferred position:

A state does have the moral duty of furnishing the opportunity for information, education and religious enlightenment to its inhabitants...but it has not heretofore been adjudged that it must commandeer, without compensation, the private property of other citizens to carry out that obligation.

The rights of the owner, which the Constitution protects as well as the right of free speech, are not outweighed by the interests of the trespasser, even though he trespasses in behalf of religion or free speech.²³

Reed's argument for mutual protection for property rights did not carry the day in *Marsh*. In the end, and notwithstanding the absence of direct *state action* in Marsh's exclusion, the protections of the First Amendment were still triggered in Chickasaw's shopping center.²⁴ Since the privately owned town catered to "all" basic municipal needs, it assumed another important public function: to provide space where residents and visitors might acquire information and cultivate their citizenship tools:

Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.²⁵

²² *Ibid.*, at 515.

²³ *Ibid.*, at 515-16.

²⁴ NB: The state action doctrine holds that constitutional protections only apply to actions undertaken by government, not those of private citizens. The language of the 14th Amendment (which incorporates the Bill of Rights, including the First Amendment) is as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States..." This requirement stands unless it can be shown that a private entity has delivered a public function routinely associated with government, or if there is a significant nexus/entanglement between the state and some private agency that interfaces with members of the public. See, for example, Daphne Barak-Erez, "A State Action Doctrine for an Age of Privatization," *Syracuse Law Review*, 45 *Syracuse L. Rev.*, 1995, at 1175-78. Though the doctrine appears in this chapter, I wish to reserve its fuller discussion for Chapter Five.

²⁵ *Ibid.*, at 508-09.

The *Marsh* ruling emplaced freedom of expression within a new variety of space, on behalf of a well-informed citizenry and participatory democracy. It set a high bar for judicial review of exclusions from publicly functional private property, in this case, accessible property owned by an industrial corporation, rather than governments we saw in the previous chapter. As the United States continued to disengage from military commitments following World War II—and significant financial support flowed from the federal government, in the form of highway funding and new housing policies—thousands of families settled in America’s burgeoning suburbs, while others migrated there from central cities during the next few decades.²⁶ Given the massive geographic shifts that took place after *Marsh* was decided in 1946, the spatialization of American commerce was bound to change, too. One of the most pronounced topographical manifestations of that change, the contemporary shopping center, exploded on the landscape after 1950, facilitated by a host of tax policies and eminent domain decisions.²⁷ Its ubiquity, its impact on economy, community, and publicity in the suburbs, especially, would combine to form a whole new set of social background facts after *Marsh*. The Court first confronted them in 1968, in the case of *Logan Valley Plaza*.

Public space flows in the plaza: Logan Valley Plaza

When we envision them today, it is worth remarking that the seminal Supreme Court decision over public space and the First Amendment in shopping centers involved expression that never reached into an enclosed mall. *Amalgamated Food Employees Union Local 590, et al. v. Logan Valley Plaza, Inc., et al.* involved a mall development still in its nascent stages, when a

²⁶ Dolores Hayden, “Building the American Way: Public Subsidy, Private Space,” in Setha Low and Neil Smith (eds.), *The Politics of Public Space* (New York: Routledge, 2006), pg. 35.

²⁷ *Ibid.*, pg. 44. See also Kevin Mattson, “Antidotes to Sprawl,” in David Smiley and Mark Robbins (eds.), *Sprawl and Public Space: Redressing the Mall* (New York: Princeton Architectural Press, 2002), pg. 39.

battle transpired over free speech outside the facility.²⁸ When the contest first ignited in 1965, the Logan Valley Mall, built in a suburb outside of Altoona, Pennsylvania, Logan Township, consisted of only two anchor stores: Weis Markets, Inc., a supermarket chain, and Sears, Roebuck and Co. Fifteen more businesses opened by the time the Court handed down its ruling in 1968.²⁹ By today's standards, and those in the immediate wake of a shopping center boom during the years that followed, Logan Valley was a modest example.

There was indeed a pedestrian mall, covered by a porch that reached around the entire facility, right up to the Sears store and its garage, where patrons could bring in their automobiles for repair while they shopped. At the other end of the mall was the Weis Market, fronted by the overhead porch and two entrances, one for employees and one for customers.³⁰ Just off the customer entrance, and between the supermarket and the center's huge parking lot, was a thirty-foot long, five-foot wide parcel pickup area. This is where patrons deposited goods they purchased into cars, with the help of employees stationed to expedite the transfers. Beyond the parking lot, five approaches provided ingress and egress from two intersecting roads: Good's Lane and Plank Road (also known as U.S. Route 220, a highway). Good's Lane and Plank Road were separated from the parking lot by earthen berms, which were twelve and fifteen feet wide. The distance between Good's Lane and the Weis Market was 350 feet, while the distance between Plank Road and the supermarket doors was roughly 500 feet.

²⁸ *Amalgamated Food Employees Union Local 590, et al. v. Logan Valley Plaza, Inc., et al.*, 391 U.S. 308 (1968). Hereafter referred to as *Logan Valley Plaza*. NB: According to Bauman, the Court declined to rule on the First Amendment in a previous case involving a labor picket in a privately owned shopping center, in 1957, *Amalgamated Meat Cutters Union v. Fairlawn Meats, Inc.*, 353 U.S. 20, 24. See Gus Bauman, "Private Business Districts and the First Amendment: From Marsh to Tanner," *Urban Law Journal; Journal of Urban and Contemporary Law*, 7 Urb. L. Ann. 199, 201 (1974).

²⁹ In fact, Weis Market would soon be replaced as the second anchor tenant in 1967, by a JC Penney store, a note that appeared both in oral arguments, as well as in briefs submitted by the property owners.

³⁰ Details on the mall are reflected in briefs submitted to the Court, as well as in transcripts of the oral arguments made before the Justices. NB: Throughout the remainder of this chapter, I will reference briefs and oral arguments in footnotes, unless otherwise included in the body. Plain indication of briefs and oral arguments, along with page numbers, will appear. For example, the physical description here is recorded in a diagram included in the Brief for Appellees, pg. 86, and Oral Arguments for Appellants, pp. 2-3.

Weis Market opened in 1965. Its employees were all non-union. Owners posted a sign at its entrance, prohibiting trespass and solicitation by non-employees on its front porch and adjacent parking lot. A few days into its opening, members of the Amalgamated Meat Cutter's, Local 590, who worked for Weis' competitors, launched pickets against the market. They donned signs that read, "THIS STORE IS NONUNION, EMPLOYEES ARE NOT RECEIVING UNION WAGES OR OTHER BENEFITS." The pickets were stationed at the entrances, in the parcel pickup zone, and on a nearby section of the parking lot. The union members behaved peacefully. Their numbers ranged between four and 13, averaging six. They made no threats of violence, though they produced periodic congestion in the parcel pickup area.

Ten days after the first union picket, the owners of both Weis Market and the Logan Valley Mall sought and obtained an injunction from the Court of Common Pleas of Blair County. The order enjoined the picketers from trespassing on shopping center property, specifically, the supermarket's parcel pickup zone, its pedestrian mall, the adjacent parking lot, and the entrances and exits to and from that parking lot. The intent of the injunction was to exclude the picketers from the private property entirely, move them away from the shopping center and onto the publicly owned berms past the parking lots, which bordered each highway road.³¹ The union members peacefully transitioned to the berms, where they continued to picket. They also tried to distribute handbills, urging prospective customers to boycott the supermarket, in objection to its labor practices.

While the protest continued off the property, Local 590 challenged the injunction in court, under the First and Fourteenth Amendments. The Court of Common Pleas decided for the owners. It rejected the union's constitutional claims, and concluded that the injunction had been

³¹ Oral Arguments for Appellees, pp. 29-31.

issued pursuant to a valid statutory protection of Weis and Logan Valley’s ownership rights.³² In a 4-3 decision, the Pennsylvania Supreme Court affirmed the injunction against Local 590. It concluded that *conduct* by the labor union—in other words, its picket—constituted illegal trespass on private property. Hence, one of the wrinkles added to the public forum doctrine, “speech-plus,” described in the last chapter and announced just two years earlier, in *Cox v. Louisiana* (1965), became a definitive part of Pennsylvania’s jurisprudence in the case. There was more than speech on the mall, according to Pennsylvania’s highest court.

The union appealed to the United States Supreme Court, where a majority of six members reversed the state court ruling. Justice Thurgood Marshall wrote the opinion for the Court. Marshall defended the picket on three grounds. He argued that the First Amendment protected speech *and* expressive conduct in publicly accessible spaces, provided they did not interfere with other rights; that public expression could be legally regulated where privately owned property was accessible to the community, but could not be banned entirely; that Logan Valley Plaza functioned as the equivalent of a downtown commercial district—just like the business block in *Marsh v. Alabama*. The state’s trespass laws could not be used to exclude members of the public, therefore; not when they wished to express themselves “in a manner and for a purpose generally consonant with the use to which the property is actually put.”³³ The phrasing of that last argument would become significant in subsequent cases.

Marshall wasted little time before enplacing the free speech provisions of the Constitution’s First Amendment:

³² In fact, there was a further consideration in the lower court ruling, involving the National Labor Relations Act and whether the injunction violated the union’s statutory right to solicit membership. An affirmative judgment might have preempted the exclusionary rights of the Weis owners. However, the Pennsylvania Supreme Court declined to take up the N.L.R.A. question. Likewise, the High Court mostly overlooked it. I will therefore limit my account to the Court’s consideration of First Amendment free expression on private property in the case.

³³ *Logan Valley Plaza*, at 319-20.

We start from the premise that peaceful picketing *carried on in a location open generally to the public* is, absent other factors involving the purpose or manner of the picketing, protected by the First Amendment.³⁴

At a quick glance, Marshall’s statement appeared to concentrate on the mode by which Local 590 expressed its cause at the Weis Market. Similarly, he distinguished pure speech from picketing, noting that the latter connoted action that could “be subjected to controls that would not be constitutionally permissible in the case of pure speech.” This seemed to be a nod to the two property owners, who both urged the Court to agree that the union’s expressive practices were certain to become violent, had they continued their protest.³⁵ Yet the case law cited by the owners was intended to rationalize a *complete ban* against the pickets. This “speech-plus” strategy did not withstand First Amendment scrutiny, said Marshall, for two reasons. First, the Court had upheld previous prohibitions against picketing on commercial property, but only after hearing evidence that its aim was unlawful—a secondary boycott against employers not implicated in the contest, for example.³⁶ Second, and more importantly for Marshall, the precedents cited by the property owners never addressed the nature of the *location* on which proscribed speech and expressive conduct took place. That consideration was critical, Marshall thought. And it is at this stage in his opinion that *Logan Valley Plaza* flows from considerations of both human geography and physical topography in booming post-War suburbs, a new social background fact analyzed by the Court.

It is also where Marshall takes up his second and third arguments, where his construction of public space in *Logan Valley Plaza* is shaped, and where the battle lines become more evident

³⁴ *Ibid.*, at 313. My emphasis.

³⁵ Oral Arguments for Appellees, pp. 33-35. .

³⁶ *Logan Valley Plaza*, at 314. In fact, the union argued that the effect of the injunction in contest was to force them to areas outside the shopping center, where they might have been perceived to be advocating a secondary boycott of other businesses that were starting to lease space on the property. Oral Arguments for Appellants, pg. 24.

in relation to the First Amendment inside shopping malls. Marshall turned to the effect of the legal injunction on the pickets' location, vis-à-vis the Weis Market. In his view, the injunction stymied the union's capacity to advocate its cause in an *effective* manner. It forced the picketers to the far reach of the complex, indeed off the property, where they were unable to communicate with their target audiences: supermarket employees and customers. The situation was inconsistent with the center's general invitation to the public, said Marshall. Its openness and accessibility produced constitutional rights, not unlike those found in cities:

It is clear that if the shopping center premises were not privately owned but instead constituted the business area of a municipality, which they to a large extent resemble, petitioners could not be barred from exercising their First Amendment rights there on the sole ground that title to the property was in the municipality.³⁷

Marshall cited *Hague v. CIO* now, and he found a parallel with the traditional public forum outlined in that earlier case. In view of a perceived overlap, he welcomed a regulatory approach to expression in the mall, such as the time, place, and manner scheme endorsed in *Cox v. New Hampshire*.³⁸ His colleagues in the majority seemed to agree. During oral arguments, a number of the Justices probed the counsel for Logan Valley. They questioned whether the shopping center's position would have been stronger had its owners instituted more narrow guidelines for the union's expression and association in the parcel pickup area. Neither proprietor would countenance a regulatory approach, however, so a blanket injunction was obtained, and the pickets were relegated to public berms, some 500 feet away from the supermarket porch. There the pickets were free to roam the berms, don their signs, and offer handbills about labor conditions in the Weis Market. Of course, the considerable distance between the berms and the Market meant that neither its employees nor its patrons could see the

³⁷ *Logan Valley Plaza*, pg. 315.

³⁸ Both cases were discussed in the previous chapter.

union's message, as Justice Douglas pointed out in his concurring opinion.³⁹ Moreover, there was little opportunity for union members to handbill publics, who traveled in automobiles at high speeds between the feeder roads off the highway and the shopping center's parking lots. In fact, Marshall added, it was quite dangerous for them to do so.⁴⁰

While the injunction sought by the mall owners never impinged on what the picketers could say, it effectively excluded their ability to say it where and to whom they intended. By enjoining the union, Marshall continued, the state courts defended outdated constructs of private property and trespass, even though modern shopping centers were unlike other public places where people go. Both the owners and the lower courts went too far. They failed to recognize that open invitations to shoppers and the general public introduced expanded constitutional freedoms within those centers:

That the manner in which handbilling, or picketing, is carried out may be regulated does not mean that either can be barred under *all* circumstances...simply by recourse to traditional concepts of property law concerning the *incidents of ownership* of real property.⁴¹

Marshall's opinion assumed a more rhetorical tone now. His argument expanded beyond Pennsylvania to civil liberty within the *American* shopping center. In order to universalize the matter, he turned to *Marsh v. Alabama*, the case that established a *preferred position* for the First Amendment on private property, that is, when it served a public function. Marshall, who began by asking, "whether peaceful picketing" could be prohibited in the Logan Valley Mall, as well as whether unexpected activity inside the shopping center constituted an "invasion of the property rights of the owners," seemed intent on re-testing the *Marsh* analogy between private property and public space. After reflecting on social background facts and jurisprudence in *Marsh*, he

³⁹ Ibid., at 326.

⁴⁰ Ibid., at 322-23.

⁴¹ Ibid., at 316. My emphasis.

looked at the shopping center as a model of public functionality. He found that the company-owned town of Chickasaw was a proper case study through which to define the publicness of contested space in Logan Township. As far as Marshall was concerned:

The similarities between the business block in *Marsh* and the shopping center in the present case are striking... The general public has unrestricted access to the mall property. The shopping center here is clearly the functional equivalent of the business district of Chickasaw involved in *Marsh*.⁴²

Marshall conceded that the company town included its own private residential enclave, where expressive conduct practiced at the Logan Valley Mall would have stretched the Constitution farther than property rights could fairly tolerate. However, open public access to the *commercial* spaces of both sites, specifically, meant that the First Amendment could be legally embraced within their property lines:

While it is probable that the power to prevent trespass broadly claimed in *Marsh* would have encompassed such an incursion into the residential areas, *the specific facts in the case involved access to property used for commercial purposes*.⁴³

If Grace Marsh was at liberty to share her views with passersby in Chickasaw's publicly accessible shopping center, then Local 590 was likewise free to engage in expression and association in a forum that delivered the functions of most urban spaces:

We see no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to *property functioning as a business district* should be limited... Here the roadways...within the mall and the sidewalks leading from building to building *are the functional equivalents of the streets and sidewalks of a normal business district*.⁴⁴

⁴² Ibid., at 318.

⁴³ Ibid.

⁴⁴ Ibid., at 319.

Long before “new town centers” or “lifestyle centers” became part and parcel of the commercial design vernacular in metropolitan America:

The shopping center premises are open to the public *to the same extent as the commercial center of a normal town*. So far as can be determined, the main distinction in practice between use by the public of the Logan Valley Mall and of any other business district, were the decisions of the state courts to stand, would be that those members of the general public who sought to use the mall premises in a manner contrary to the wishes of the respondents could be prevented from so doing.⁴⁵

Borrowing on the company town analogy in *Marsh*, Marshall claimed a preferred position for the First Amendment in malls, too. Free expression flowed from analogous environments that presented downtown characteristics, even though neither was part of an urban mix. Marshall’s opinion seems more remarkable now, given the ongoing contests for public space throughout today’s cityscapes, not to mention the great lengths to which the property owners were willing to go to prevent on-site protest in the Logan Valley Mall. Marshall acknowledged the pitch in the contest. He also reiterated the theoretical acceptability of regulation in shopping centers, to prevent an anything goes atmosphere there. In a major concession to property owners, moreover, he added that public place and expression needed to bear a practical relationship to one another. That is, the objects of speech and assembly in malls had to relate to commercial activities that took place there. Marshall’s defense of speech, therefore, only prohibited the use of “trespass laws, *wholly* to exclude those members of the public wishing to exercise their First Amendment rights on the premises *in a manner and for a purpose generally consonant with the use to which the property is actually put.*”⁴⁶

⁴⁵ Ibid. My emphasis.

⁴⁶ Ibid., at 319-20. NB: In his own footnote on this point, Marshall indicated that the Court was never asked to decide on speech that did not pertain directly to the business activity conducted in the mall. This turned out to be a

In this case, the mall owners relied on a state trespass law to exclude the union outright, though its members sought to publicize their cause in the very spaces where they might claim identity with the interests of other supermarket employees with no collective representation. According to Marshall, the ban therefore caused a “substantial” interference with Local 590’s advocacy. Conversely, there was little evidence that the pickets obstructed business operations at the Weis Markets, or that they adversely impacted the commercial bottom line for the new center. Absent that evidence, Marshall denied “any significant claim to protection of the normal business operation of the property...” In essence, the property owners staked their position on total discretion to include and exclude the public. Marshall returned that “unlike a situation involving a person’s home, no meaningful claim to protection of a right of privacy” could be sustained in a shopping mall. “Naked title is essentially all that is at issue.”⁴⁷

Marshall closed with what many observers call *obiter dicta*. And yet his broader analysis at the conclusion of *Logan Valley Plaza* sheds light on the social background facts behind the case, as well as the impact of suburban development on commerce and publicity in contemporary spaces. Marshall couched his opinion in terms of the massive suburban exodus mentioned in Chapter Two. He recognized the commercialization of common space as an inevitable result of the trends that had accelerated after World War II. The mall had now become a fixture in America’s rapidly suburbanizing landscape:

The economic development of the United States in the last 20 years reinforces our opinion of the correctness of the approach taken... The large-scale movement of this country’s population from the cities to the suburbs has been accompanied by the advent of the suburban shopping center, typically a cluster of individual retail units on a single large privately owned tract.⁴⁸

major caveat in his argument, one that he would have to reckon with throughout the arc of shopping mall jurisprudence. I will analyze it more fully when we turn to the penultimate ruling in this chapter.

⁴⁷ *Ibid.*, at 324.

⁴⁸ *Ibid.*

Marshall thought that the First Amendment had to flow where the American public did; that it needed to go where the people were, if they were to engage civically. At the same time, the Constitution and free expression could hybridize malls. They could level the playing field in such a way that cities would not be disadvantaged by prophylactic variations on publicness in the suburban commercial sphere that was fast evolving. There was nothing neutral about the architecture of suburban economic development, not if the Logan Valley Mall could legally exclude any public criticism that might arise from business practices on the property. The shopping center boom in the years and decades following *Logan Valley Plaza* largely outmoded Marshall's data.⁴⁹ Still, his argument illuminated the idea of public space, as well as the capacity of the Court to support its practice, or stifle it on behalf of unfettered property rights in the suburbs. Marshall alluded to the difference at the end of his opinion:

These figures [see note 48, below] illustrate the substantial consequences for workers seeking to challenge substandard working conditions, consumers protesting shoddy or overpriced merchandise, and minority groups seeking nondiscriminatory hiring policies that a contrary decision here would have. Business enterprises located in downtown areas would be subject to on-the-spot public criticism for their practices, but businesses situated in the suburbs could largely immunize themselves from similar criticism by creating a *cordon sanitaire* of parking lots around their stores. Neither precedent nor policy compels a result so at variance with the goal of free expression and communication that is at the heart of the First Amendment.⁵⁰

In Marshall's view, suburbanites enjoyed a *right to the city*, a right to practice public space, which I will discuss further following my legal analysis in the next chapter. Moreover, the state could not exclude that right entirely under the First Amendment, not in publicly functional shopping centers where people naturally associated in an era of suburbanization.

⁴⁹ Marshall and the Court included statistics on the growth of suburbs and shopping centers around the United States, at 324-25. The data are outdated now, and are therefore not reflected here.

⁵⁰ *Ibid.*, at 325.

Black and White and Reed all over: the dissents

Marshall and the majority may have enjoyed the final word against Weis Market and the Logan Valley Mall, but they certainly did not have the last one in *Logan Valley Plaza*. Two dissents would weigh heavily against the Court's opinion, specifically, its notions of public function and the preferred position of the First Amendment over mall owners' rights to dispose of their private property as they wished. The first dissent was drafted by none other than Justice Hugo Black, who authored *Marsh v. Alabama*—the decision on which Marshall relied to buttress his arguments above. To put it mildly, Black had become impatient with protest by this point in American history. He also took exception to what he considered a misinterpretation of the legal argument he made in 1946. Black objected to Marshall's generous parallel between shopping centers and company towns, as well as the latter's analysis of the social background facts in Logan Township. He therefore joined Justice White in dissent, where both members recapitulated Justice Reed's disagreement with the *Marsh* ruling twenty-two years earlier.⁵¹

Like Marshall and the majority, Black began his opinion by focusing on the space contested in the shopping center: the parcel pickup area and porch outside the Weis Market, adjacent to the parking lot in the Logan Valley Mall. However, the important social background fact was not the rise of suburbs in America, as Marshall had concluded. Rather, the key circumstance surrounding the case was what Black called a "phenomenon" of supermarkets and the widespread use of automobiles. The combination generated consumer demand for bulk purchases at places like Logan Valley Mall. In particular, the Weis Market and its parcel pickup area functioned to speed egress from a relatively narrow corridor in which shoppers now used

⁵¹ There are many accounts of Justice Black's shifting positions on free speech. They changed radically following civil rights contests in the 1950s and 1960s. The prevailing view is that his First Amendment absolutism took a conservative turn later in his career. See, for example, John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass: Harvard University Press, 1980), pp. 109.

cars for commerce. It seemed strained, he thought, to suggest that kind of space was suited to free speech in any way; likewise, that expression was generally compatible with the rapid motion typified in shopping centers. The facts in *Marsh* were unlike the ones here:

It seems clear to me, in light of the customary way that supermarkets now must operate, that pickup zones are as much a part of these stores as the inside counters... I cannot conceive how such a pickup zone, even by the wildest stretch of *Marsh v. Alabama*, [citation] could ever be considered dedicated to the public or to pickets...

It would be just as sensible for this Court to allow the pickets to stand on the check-out counters, thus interfering with customers who wish to pay for their goods, as it is to approve picketing in the pickup zone which interferes with customers loading of their cars.⁵²

Black seemed to accept single-use patterns on suburban property—the kind described in Chapter Two—at least in commercial environments like the Logan Valley Mall. To that extent, he considered the injunction against the union to be good law. The state courts addressed the basic facts in the case, submitted Black, not ones they thought desirable. And the central fact was that Logan Valley Mall was private property, unfit for public expression that aimed to undermine its profitability. Therefore, the Court’s denial of ownership protections irked Black, who sensed an activist social agenda in Marshall’s opinion, one that could neither be reconciled with the space in question nor with the Constitution:

[W]hether this Court likes it or not, the Constitution recognizes and supports the concept of private ownership of property. The Fifth Amendment provides that ‘no person shall...[sic] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.’ This means to me that there is no right to picket on the private premises of another to try to convert the owner or others to the views of the pickets. It also means, I think, that if this Court is going to arrogate to itself the power to act as the Government’s agent to take a part of Weis’ property to give to the pickets for their use, the Court should also award Weis just compensation for the property taken.⁵³

⁵² Ibid., at 328-29 (J. Black, dissenting).

⁵³ Ibid., at 330.

Given the uniqueness of the shopping mall and the newness of its relationship to the Constitution, thought Black, the only course through which the majority could have “arrogated” it away from its owners, and then supplied it to the union for a picket, was to invoke his opinion in *Marsh*. “But Marsh was never intended to apply to this kind of situation.” The company town in that case was a *complete* space, he argued, one that provided *all* the amenities found within a traditional downtown. The Gulf Shipbuilding Co. not only developed a shopping center for consumption in Chickasaw. It also built residences, streets, sewers and a sewage system, and other public amenities, including a post office branch. Nothing like that existed in the Logan Valley Mall. Marshall’s analogy was overly generous, at best. Unlike super-regional shopping centers and outdoor formats to come—the latter appointed with on-site condominiums in many instances—the commercial complex near Altoona served as a pretty poor comparison with the company-owned town of Chickasaw, Black continued:

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... All I can say is that this sounds like a very strange ‘town’ to me.⁵⁴

Marsh was the “only possible authority” for *Logan Valley Plaza*. Yet, the facts in the first case bore “very little resemblance” to the situation in the second, making Marshall’s analysis suspect. No rationale existed to deny property rights in a place that performed some, but not *all*, of the public functions of a downtown business district or even its privately owned equivalent. Any answer to Black’s question in both cases, “Under what circumstances can private property be treated as though it were public?” did not pertain in shopping malls. To

⁵⁴ *Ibid.*, at 331. My emphasis.

emplace one there, to protect union picketers on the privately owned property where they sought to deprive Weis Market of its lifeblood, was “to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests” in the United States. Black agreed that the union enjoyed the freedom to speak and make its case against the supermarket. But its members did not have a corollary right to compel property owners to furnish space for their protest. That sort of affirmative right was not within the scope of the First Amendment he preferred in his *Marsh* opinion two decades earlier.

Justice White stood with Black, apart from the Court. In his dissenting opinion, he offered remarkable foresight and a look ahead to future decisions involving shopping centers. White agreed that *Marsh* was an inapposite in Altoona, since Logan Valley’s property owners never took on the mantle of the state.⁵⁵ White also objected to Marshall’s overlapping spatialization of public access and function on the property. The shopping center’s invitation to outsiders pertained to one practice inside, commercial intercourse:

Logan Valley Plaza is not a town but only a collection of stores.... The public is invited to the premises but only in order to do business with those who maintain establishments there. The invitation is to shop for the products which are sold. There is no general invitation to use the parking lot, the pickup zone, or the sidewalk except as an adjunct to shopping... The point is that whether Logan Valley Plaza is public or private property, it is a place for shopping and not a place for picketing.⁵⁶

If the majority’s reasoning was extended to its logical conclusion, argued White—perhaps predicting subsequent struggles for the Court—then all sorts of unorthodox activity could ensue on shopping mall property, including speech and related forms of expression having little or nothing to do with its commercial ends. Marshall’s take on association was too unbounded:

⁵⁵ *Ibid.*, at 337 (J. White, dissenting).

⁵⁶ *Ibid.*, at 338.

This rationale, which would immunize nonobstructive labor union picketing, would also compel the shopping center to permit picketing on its property for other communicative purposes, *whether the subject matter concerned a particular business establishment or not...* I do not agree that when the owner of private property invites the public to do business with him he impliedly dedicates his property for other uses as well.⁵⁷

Neither would the rest of the Court in just a few short years. The mall was now a disputed space in First Amendment jurisprudence. A constitutional conflict, a tension over what Habermas calls an “ideal speech situation,” was now spatialized by Marshall and the dissenters in *Logan Valley Plaza*. That battle between free expression and private property was waged outside the doors of Weis Market in the mid 1960’s. In the next case, public space would be contested in the climate-controlled environment of a fully enclosed shopping mall. The Court would be faced with the kind of heterodoxy anticipated by Justice White in *Logan Valley Plaza*. It would have to determine whether speech was protected *inside* malls under the logic of the cases above, or whether private property rights gave owners the power to arrange their shopping center communities by excluding unwanted practices of publicity.⁵⁸

Speech goes inside the mall, gets turned back: Lloyd Corporation

Not long after *Logan Valley Plaza*, and just days after the election of President Richard Nixon in 1968, a group of Vietnam War protesters walked onto one of the pedestrian malls inside the Lloyd Center, a large commercial complex located east of the Willamette River in Portland, Oregon, and began handing out leaflets to passersby about a nearby demonstration. Their ejection triggered the second major shopping mall contest, *Lloyd Corporation, Ltd. v.*

⁵⁷ *Ibid.*, at 339. My emphasis.

⁵⁸ Kohn’s (2004) distinction between community and publicity in shopping malls was discussed in some detail in the second chapter.

Donald Tanner, et al, decided in 1972.⁵⁹ I will return to the facts of the case in a moment. The spatial dimension in *Lloyd Corp* bears mention, however, because this time the Court ruled on a free speech controversy *inside* a shopping center of the modern, iconic variety. To the extent that the rights contested in *Logan Valley Plaza* a few years earlier became implicated in an archetypical mall—a model built in more places outside the United States today than within its borders—the geography of the *Lloyd Corp.* decision is a good deal richer, spatially and legally. The challenge between public space, indicated in part by Walzer’s unexpected activities, and the constitutional authority of a private property owner to exclude those activities, had now commenced within the interior of that mall, too.

Lloyd Center opened in 1960, following years of construction on publicly owned property that was vacated and then razed for the complex. Development of the site was initially made possible through a 1954 land clearance ordinance approved by the city. In 1958, emergency legislation was adopted by Portland to allow developers additional time to finish construction of the mall, without prejudice, thereby satisfying bond terms included in the city’s agreement with the Center.⁶⁰ Upon completion, the shopping center was fully enclosed and spanned more than twenty-five acres, including 850,000 square feet of parking, enough to accommodate more than one thousand cars. The mall itself contained over sixty business and professional offices, all located within a single facility, on multiple levels. There were six streets that bordered the complex. None of the streets traversed the Center’s commercial mall, though a small number of stores inside could also be accessed from adjacent public sidewalks outside.

⁵⁹ 407 U.S. 551 (1972); hereafter referred to as *Lloyd Corp.* NB: While it is within the city limits, Portland on the eastern side of the Willamette River is its low-rise half, shaped by much lower densities than the city’s downtown on the western half. The dual landscapes were striking to me during a recent visit. They are also highlighted in Oral Arguments for Appellees, pg. 29.

⁶⁰ Evidence of this background appears in Oral Arguments for Appellees, pp. 29-30, as well as in multiple briefs submitted by the respondents in the case. NB: Justice Marshall included a number of these details in his dissenting opinion, too. *Lloyd Corp.*, at 575-76.

Most were accessible from the interior mall alone. In fact, there was evidence to suggest that Lloyd Center's mall was segregated from the city's streets, by design.⁶¹

By today's standards, Lloyd Center was modest in size, but comparable in scale with large shopping malls at the time. It was much larger and more commercially diverse than Logan Valley Mall, housing a mix of retail and office space, as well as gardens, statues, murals, and other aesthetic niceties. It included a skating rink and a public auditorium, where non-profit groups, such as the Girl Scouts, could secure reservations at no charge, while other groups could rent space at the owner's discretion.⁶² On the mall itself, a host of community events took place, including football rallies, musical performances, political candidate forums, and even visits by Presidential hopefuls. Similarly, a variety of civic organizations were permitted to use space in the mall, including charitable associations such as the Salvation Army and the American Legion.⁶³ According to the management, all non-commercial activities were aimed to attract maximum foot traffic into the mall, enhance community comfort on the property, and generate "customer motivation," for business growth.⁶⁴

Lloyd Center employed several security guards. The guards were commissioned by the city of Portland, at the request of owners, and given full police authority within the mall.⁶⁵ They were licensed to carry firearms, and their uniforms closely resembled those of police officers. When five members of the "Resistance Community," a group opposed to American involvement in Vietnam, entered the complex and began handing out invitations to an antiwar protest at

⁶¹ Ibid., at 554. The majority footnoted lower court proceedings, in which an architectural expert was sworn in and described the purpose of the interior malls: "In order to make shopping easy and pleasant, and to help realize the goal of maximum sales, the shops are grouped about special pedestrian ways or malls. Here the shopper is isolated from the noise, fumes, confusion and distraction which he normally finds along city streets, and a controlled, carefree environment is provided."

⁶² Oral Arguments for Appellees, pg. 30

⁶³ Ibid., pp. 33-34.

⁶⁴ Oral Arguments for Appellants, pp. 6-10.

⁶⁵ Ibid., pg. 15.

another venue, the guards approached them and informed them that they were trespassing on private property and could be arrested if they continued distributing their flyers.⁶⁶ The guards advised the protesters about the Center’s policy against handbilling, which was intended to facilitate pedestrian movement, reduce litter, and prevent any activity that might create customer discomfort or become incompatible with commerce. The Center’s policy was codified in its “rules of use” notices, posted throughout the mall:

NOTICE – AREAS IN LLOYD CENTER USED BY THE PUBLIC ARE NOT PUBLIC WAYS BUT ARE FOR THE USE OF LLOYD CENTER TENANTS AND THE PUBLIC TRANSACTING BUSINESS WITH THEM. PERMISSION TO USE SAID AREAS MAY BE REVOKED AT ANY TIME. LLOYD CORPORATION, LTD.⁶⁷

There was no evidence of disruption, though the trial record did show one complaint in the security log, along with a few unsympathetic reactions by patrons.⁶⁸ The guards indicated that the activists could distribute their handbills on the streets and sidewalks outside the mall, which they did, in order to avoid what they perceived as an imminent arrest. Afterwards, they filed suit in the U.S. Court for the District of Oregon, seeking an injunction and relief against the Lloyd Corporation. They claimed the owner violated their rights to free speech and assembly. Declaring the mall open to the public and a “functional equivalent of a public business district,” the District Court granted the injunction. It was later upheld by the U.S. Court of Appeals, which also focused on the public function of the Center, citing *Marsh v. Alabama* and *Logan Valley Plaza* to support First Amendment expression therein.

⁶⁶ Portland did have a local ordinance against unlawful trespass on private property, which is referred to in the majority opinion, at 556.

⁶⁷ Cited in the Court’s opinion, at 554-55.

⁶⁸ One shopper asked an on-duty guard, “What’s going on here?” When the guard informed her about the activity, she responded, “Well, I don’t like those views.” Another shopper urged one of the leaf letters to “Drop dead,” while a third asked them to “Stop bothering her.” Quoted in Oral Arguments for Appellees, pp. 35-36.

Lloyd Corporation appealed to the Supreme Court. It claimed that its private property protections had been unconstitutionally denied, that the protesters' activity undermined the Center's commercial purpose. It also argued that the decision in *Logan Valley Plaza* did not apply in Portland, where alternative venues were available for antiwar activism outside the mall. Thus, what began as a narrower dispute over free speech and assembly in the mall had become more multidimensional by the time the Court agreed to hear the case. It was now asked to reconcile First Amendment safeguards with the sovereignty of private property protected by the Fifth and Fourteenth Amendments.⁶⁹

In a narrow decision, five members of the Court ruled for the mall owners. A recent appointee of President Nixon, Justice Lewis Powell, wrote the opinion for the majority. Powell focused on three arguments. While the *Logan Valley Plaza* decision was supported by the facts in suburban Altoona, where union pickets were aimed directly at commercial practices inside the Weis Market—that is, where speech pertained to the space protesters hoped to impact—handbills being passed out in Lloyd Center were about a conflict in Southeast Asia and had nothing to do with the immediate purpose of the shopping center in Portland. Next, since the handbills did not relate to the Center directly, antiwar expression could be effected on the surrounding streets and sidewalks outside the mall, without harm to activists or property owners. Finally, because the privately owned Lloyd Corporation excluded Donald Tanner and his Resistance Community speech, no state action was involved in the case.

After distinguishing the social background in *Marsh* and *Logan Valley Plaza*—and highlighting Justice Black's critique of Justice Marshall's interpretation of the first to substantiate the second—Powell turned to the factual differences between the Lloyd Center and *Logan Valley*. Unlike the union picket, the Vietnam protesters' use of a Portland shopping mall

⁶⁹ Justice Powell, who wrote for the majority, couched the dispute this way, at 570.

to promote opposition to a foreign war raging thousands of miles away did not satisfy a crucial requirement in *Logan Valley Plaza*: that First Amendment expression on private property be directly related to the purposes of that property. As Powell noted, “The handbilling by respondents in the malls of Lloyd Center had no relation to any purpose for which the center was built and being used.”⁷⁰

The protesters had claimed that the mall was open to the general public; therefore Lloyd Corporation was legally prohibited from excluding their handbills. They relied on the Court’s earlier decision in *Logan Valley Plaza*. Powell disagreed. He maintained a need for immediacy between the day-to-day activities that took place inside publicly accessible private property and the constitutional protection of expression there. Reprising Justice Marshall’s opinion in *Logan Valley*, Powell interpreted it as an argument against unexpectedness in the mall. He therefore rejected the antiwar activists’ free speech position:

It is...argued by respondents that, since the Center is open to the public, the private owner cannot enforce a restriction against handbilling on its premises. The thrust of this argument is considerably broader than the rationale of *Logan Valley*. It requires no relationship, direct or indirect, between the purpose of the expressive activity and the business of the shopping center. The message sought to be conveyed by respondents was directed to all members of the public, not solely to patrons of Lloyd Center or any of its operations. Respondents could have distributed these handbills on any public street, on any public sidewalk, in any park, or in any public building in the city of Portland.⁷¹

There had to be an admissible context for expression and association on the property, Powell contended. The unlimited invitation interpreted by the war activists was simply never made by the Lloyd Corporation. The Center was built for commercial intercourse, alone. Borrowing from Justice White’s dissent in *Logan Valley Plaza*, Powell admonished the

⁷⁰ Ibid., at 564.

⁷¹ Ibid.

protesters about the nature of the shopping mall, whose owners had been enjoined by the lower courts from preserving their property's protected purpose:

Respondents' argument...misapprehends the scope of the invitation extended to the public. The invitation is to come to the Center to do business with the tenants.

In parrying the Resistance Community's complaint that the Center had routinely permitted numerous non-commercial activities within its enclosed mall, Powell defended the bottom line for the Lloyd Corporation, as White had tried to do unsuccessfully in *Logan Valley*. Of other occasions in the mall, Powell argued, the goal was nonetheless commercial in nature:

The obvious purpose, recognized widely as legitimate and responsible business activity, is to bring potential shoppers to the Center, to create a favorable impression, and to generate goodwill. There is no open-ended invitation to the public to use the Center for any and all purposes, *however incompatible with the interests of both the stores and the shoppers whom they serve.*⁷²

In his view, the corollary of antiwar handbills in the mall was unfettered expression on commercial property "across the country," with scarcely any distinction between the remoter "private enclaves" of suburban Pennsylvania, and metropolitan areas like Portland, where an abundance of public spaces were available for protest. Powell now turned to his second argument in defense of the Lloyd Corporation and its property rights: the presence of alternative venues for speech, which scarcely existed in *Logan Valley Plaza*. To Powell, "the union pickets in that case would have been deprived of all reasonable opportunity to convey their message," had the injunction stood. The demonstration in suburban Altoona was relegated well beyond the reach of publics to whom they wished to speak. Moreover, picketers incurred safety risks while circulating their message from narrow earthen berms that bordered roadways some 500 feet away from their intended audience. In this case, on the other hand, the Resistance Community

⁷² Ibid., at 564-65. My emphasis.

could well have continued to handbill audiences, which they did when asked to leave the mall. Powell saw no adverse consequences as a result of their exclusion. Therefore, the situation in Lloyd Center was totally unlike the one in *Logan Valley Plaza*.⁷³

Given the differences, the Court of Appeals' reliance on *Logan Valley Plaza* to require handbilling in the Lloyd Center mall stripped its owners of their property rights under the Fifth and Fourteenth Amendments. Yet, it did not augment available space for public expression in Portland. The cost-benefit ratio failed to satisfy Powell. In his view, the Lloyd Corporation enjoyed constitutional rights, too:

It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative venues of communication exist. Such an accommodation would diminish property rights without significantly enhancing the asserted right of free speech.⁷⁴

After deploying Justice White's dissent in *Logan Valley Plaza*, Powell offered his final argument in *Lloyd Corp*. His inspiration came from Justice Black's dissent in the previous contest this time. He addressed state action—in First Amendment jurisprudence, a doctrine that prevents government alone from abridging free speech in publicly accessible places, under all

⁷³ There was a great deal of disagreement about the extent of the differences. During oral arguments, Lloyd Corporation's counsel reiterated the proximity of the Center to available city streets and sidewalks, which were part of the property's spatial fabric and were therefore hospitable alternatives for the leaflets. See Oral Arguments for Appellants, pp. 4-8. Tanner's counsel, on the other hand, argued that the antiwar handbills offered to passing automobile drivers on the surrounding streets were rarely accepted; that there were considerable safety risks in attempting to distribute them that way. Moreover, audience size on the sidewalks outside the Lloyd Center was characterized as suspect, owing to a reduction of street life there, following its construction. Similarly, because the mall was not well served by public transportation, most people entered from its covered parking lots, meaning that they never traversed the streets bordering the Center on foot. See Oral Arguments for Appellees, pg. 49. This account appears to mirror developed later, by Mitchell and Staeheli. The authors describe the public vacuum generated by the development of a large shopping mall in downtown San Diego, the Horton Plaza. Construction of the property seemed to overshadow and then draw the public away from the surrounding streets, sidewalks and parks. See Don Mitchell and Lynn Staeheli, "Clean and Safe? Property Redevelopment, Public Space, and Homelessness in Downtown San Diego," in Setha Low and Neil Smith, *The Politics of Public Space* (New York: Routledge, 2006), pp. 152-58.

⁷⁴ *Lloyd Corp.*, op cit., pg. 567.

but a few circumstances.⁷⁵ Private actors, however, may be left to their devices in this regard.⁷⁶

Powell framed the issue of state action inside Lloyd Center as follows:

The basic issue in this case is whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against *all* handbilling. In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* action, not on action by the owner of private property used nondiscriminatorily for private purposes only. The Due Process Clauses of the Fifth and Fourteenth Amendments are also relevant to this case...

Although accommodations between the values protected by these three Amendments are sometimes necessary...this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only.⁷⁷

Powell targeted Justice Marshall's opinion in *Logan Valley Plaza*. In that case, Marshall had reimagined the shopping center as the analogue of public property, functionally speaking, rather than a static object of private ownership. Tanner's argument, Powell believed, relied heavily on Marshall's analogy, which elicited a view of state action based on the functions of mall space. In effect, the antiwar protesters had rationalized their usufruct of privately owned property using it. They contended that Lloyd Center's interior mall functioned like any downtown, giving them the "same right of free speech" therein. Powell scoffed at the analogy, while raising concern about the implications of blurring private property and public space. He would not disavow the public function rationale used in *Marsh v. Alabama* itself, but he did

⁷⁵ In the words of the 1st Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

⁷⁶ NB: The Court has identified a limited number of conditions that may satisfy the state action requirement in cases where constitutional protections are denied by other citizens. One condition involves the assumption of a "public function" by a private entity. This exception controlled in *Marsh v. Alabama*. It was held to do so again by Justice Marshall in *Logan Valley Plaza*, which Powell criticizes. I will discuss state action and its exceptions in more detail during the concluding chapter.

⁷⁷ *Ibid.*, pp. 567-68. Powell's emphasis.

quarrel with its application in *Logan Valley*, as well as in the lower courts. Finally, he attempted to stem any further misappropriation of that parallel inside the Lloyd Center:

The argument reaches too far. The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use... In the instant case there is no comparable assumption or exercise of municipal functions or power.⁷⁸

While Powell and the Court declined to overrule either of the two precedents above, they would treat neither one of them as determinative on the grounds of the Lloyd Center. The invitation extended by the mall's owners was a limited one, to shoppers only:

Nor does property lose its private character merely because the public is generally invited to use it *for designated purposes*.⁷⁹

Interestingly enough, Powell concluded his opinion by hinting that the public function threshold might obtain within a privately owned shopping center of superior scale and spatial diversity—the kind that flooded America's suburban real estate market after he handed down the Court's decision in *Lloyd Corp.* Inside Lloyd Center's modest environment in 1972, however, the mall did not occasion such public functionality. Therefore, it was neither possible to argue that free speech occupied a preferred position vis-à-vis property rights within the Center, nor that that its mall functioned like public space. Powell concluded:

We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights.⁸⁰

⁷⁸ *Ibid.*, at 569.

⁷⁹ *Ibid.* My emphasis.

⁸⁰ *Ibid.*, at 570.

The mall is where the people go. Marshall's dissent

Having written for the majority four years earlier, in *Logan Valley Plaza*, Justice Marshall now found himself in the minority on the Court, dissenting on behalf of free speech and public space in a privately owned shopping center. From Marshall's point of view, Justice Powell posed a distinction without a difference, by refusing to endorse some form of reciprocity between *Marsh* and *Logan Valley*, and then by failing to apply the public function analogy in both of those cases to the situation in *Lloyd Corp.*⁸¹ Did the Court mean to jettison the doctrine of preferred position, wondered Marshall? Had it permanently placed a burden of constitutional proof onto speakers vying to practice expression inside functionally public spaces that might play host to civic engagement? Constitutional challenges over speech in places where publics assembled had once implicated First Amendment freedoms, as in *Marsh* and *Logan Valley*. Now they seemed to hinge on private property rights under the Fifth and Fourteenth Amendments, posing a threat to public space and association. Observing this unfortunate shift, Marshall summarized the dilemma in *Lloyd Corp.*:

The question presented by this case is whether one of the incidents of petitioner's private ownership of the Lloyd Center is the power to exclude certain forms of speech from its property. In other words, we must decide whether ownership of the Center gives petitioner unfettered discretion to determine whether or not it will be used as a *public forum*.⁸²

With the issue reframed in this way, Marshall touted the Court's previous rulings, which spatialized free expression on publicly accessible private property according to the practical roles those properties played for people who spent time there. Turning to Portland's Lloyd Center, Marshall saw an even greater synergy between the private complex and ways in which its mall functioned publicly—both inside the property and within the city where it was built. For one, the

⁸¹ Dissent by J. Marshall, at 571.

⁸² *Ibid.*, at 573. My emphasis.

Center was much larger than the Logan Valley Mall. It also delivered a more diverse array of commercial *and* non-commercial services to visitors. The mall had been completely integrated into the city's economic redevelopment scheme, which was driven by an urgent need for jobs. As above, the Center was spearheaded through a municipal ordinance that cleared several city streets for its construction. Moreover, Portland gave the mall's security guards full police authority, at the request of the property owners, in the interest of broadly protecting public safety. The mall was a vital part of the city's fabric, therefore. In fact, Lloyd Center was a much more public space than the Logan Valley Mall, Marshall argued:

In sum, the Lloyd Center is an integral part of the Portland community. From its inception, the city viewed it as a 'business district' of the city and depended on it to supply much needed employment opportunities. To insure the success of the Center, the city carefully integrated it into the pattern of streets already established and planned future development of streets around the Center. It is plain, therefore, that Lloyd Center is the equivalent of a public 'business district' within the meaning of *Marsh* and *Logan Valley*. In fact, the Lloyd Center is much more analogous to the company town in *Marsh* than was the Logan Valley Plaza.⁸³

Treating Lloyd Center as publicly functional space, and citing considerable municipal involvement in its creation and operation, not to mention Portland's fiscal dependence on it, Marshall now elaborated his objections to the Court's indifference to free speech and assembly inside. Marshall reminded the majority that the First Amendment had always protected peaceful, non-obstructive political dissent—in this case, handbilling against the Vietnam War, which was not widely criticized at the time that Tanner and his group entered the Center in 1965. Marshall also focused on common uses of the interior mall for non-commercial speech, including many of the activities mentioned above. In view of those activities, he concluded, Lloyd Center functioned as a space for discourse on a wide variety of public interests.

⁸³ *Ibid.*, at 576.

Marshall was now forced to shift into another gear, rhetorically. Since he had argued in *Logan Valley Plaza* that the First Amendment protected free speech and assembly on publicly accessible private property, but that such expression needed to relate to the basic function of that property, Marshall urged that Lloyd Center's mall served conventionally as an expressive space. The owners invited outside communication in the mall, not unlike the proprietors in *Marsh* or *Logan Valley*. As Marshall maintained, "Lloyd Center had deliberately chosen to open its private property to a broad range of expression...having done so it could not constitutionally exclude respondents..." Inasmuch as the Center functioned publicly as a First Amendment space, he continued, the Resistance Community could no more be banished than the Girl Scouts, or the American Legion. They ought to have enjoyed equal accommodation with Presidential candidates who appeared in the mall at election time, and who "presumably" stumped on "war and peace," too. Marshall defended political heterodoxy within the space:

I perceive no basis for depriving respondents of the opportunity to distribute leaflets inviting patrons of the Center to attend a meeting in which different points of view would be expressed from those held by the organizations and persons privileged to use Lloyd Center as a forum for parading their ideas and symbols.

I believe that...respondents' activities were directly related in purpose to the use to which the shopping center was being put.

I cannot see any logical reason to treat differently speech that is related to subjects other than the Center and its member stores.⁸⁴

Marshall held that unpopular speech was nevertheless protected speech; that the size and diversity of Lloyd Center's mall, combined with its many non-commercial invitations to public use, demanded toleration for the views of antiwar activists and others outside the mainstream.

⁸⁴ *Ibid.*, 579-80. My emphasis.

Indeed, he went further, suggesting that the preferred position once accorded expression in places such as Chickasaw now be revisited by the Court in the Lloyd Center:

We must remember that it is a balance that we are striking—a balance between the freedom to speak, a freedom that is given a preferred place in our hierarchy of values, and the freedom of a private property owner to control his property. When the competing interests are fairly weighed, the balance can only be struck in favor of speech.⁸⁵

The mall's value as a place for civic engagement grew in proportion to increased commercial intercourse inside, Marshall added. Given the abundance of goods and services available at the Lloyd Center—not to mention challenges faced in trying to communicate with patrons driving in and out of its parking lots from surrounding city streets—Marshall considered the pedestrian mall to be Portland's best available site for political association. As Presidential candidates and others knew, Lloyd Center was where Portland's citizens were to be found. Yet, protesters did not enjoy the resources of those seeking high office. To Marshall, that made the mall even more critical as public space. So, too, did its totality, not unlike Chickasaw's:

For many Portland citizens, Lloyd Center will so completely satisfy their wants that they will have no reason to go elsewhere for goods or services. If speech is to reach these people, it must reach them in Lloyd Center.⁸⁶

Given the prohibitive costs of mass communications, face-to-face democracy inside the mall was an only option for Tanner, his group, and most other advocates:

The only hope that these people have to be able to communicate *effectively* is to be permitted to speak in those areas in which most of their fellow citizens can be found. One such area is the business district of a city or town or its functional equivalent. And this is why respondents have a tremendous need to express themselves within Lloyd Center.⁸⁷

⁸⁵ Ibid., at 580.

⁸⁶ Ibid.

⁸⁷ Ibid., at 581. My emphasis.

Marshall acknowledged the potential for annoyance among mall goers being given unwanted handbills. Still, he dismissed the claim that “customer motivation” would decline as a result of leafleting in the Lloyd Center. Free expression was more important in any case, urged Marshall, who was unmoved by Lloyd Corporation’s argument that the handbills caused excessive litter in the mall, along with impediments to foot traffic. In fact, antiwar speech was less likely to be disruptive than the on-site pickets upheld in *Logan Valley Plaza*, since the latter were intended to motivate employees to unionize, and customers to boycott. Hinting at the politics of Supreme Court appointments and judicial realignment under President Nixon, following *Logan Valley*, Marshall suggested that picayune issues such as litter were a cover for the Court’s ideological swing after that decision was handed down in 1968.⁸⁸

Still eager to unearth the meaning of social background facts in shopping malls, Marshall concluded that the bigger issue in *Lloyd Corp.* was a continued shift in American geography, along with continued abatements of what Zick calls our “expressive topography.” In Marshall’s view, the suburbanization of commerce inside shopping malls had propelled privatizations of urban public space by municipal administrations like Portland’s, which were keen on attempting to keep pace with rapid economic development in suburbs. The city’s land clearance ordinances and other accommodations it made to Lloyd Center’s construction were merely tips of an iceberg.⁸⁹ Seeming to anticipate contemporary public-private arrangements, for example, today’s business improvement districts, Marshall feared that public space for open political discourses would be overwhelmed by urban development—as had city streets outside Lloyd

⁸⁸ In his criticism of the decision in *Lloyd Corp.*, Bauman goes even further. He argues that the Court’s new majority, realigned under Chief Justice Burger (appointed by Nixon, along with Justice Powell), was intent on rolling back—or at least halting—broad construction of the public forum doctrine in shopping malls and other spaces analogized with the traditional ones in *Hague v. CIO*. See Bauman, *op cit.*, pg. 217. Some students of judicial reasoning, such as Dworkin, assert their view that the Burger Court made a top priority of turning back Warren Court decisions in the areas of civil rights and liberties. See Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard University Press, 1977).

⁸⁹ *Lloyd Corp.*, *op cit.*, at 585.

Center, and protest groups such as the Resistance Community inside it.⁹⁰ The effect of these changes would be inauspicious, not unlike the Court's decision in *Lloyd Corp.*:

As governments rely on private enterprise, public property decreases in favor of privately owned property. It becomes harder and harder for citizens to find means to communicate with other citizens.

When there are no effective means of communication, free speech is a mere shibboleth.⁹¹

In view of the perils above, Marshall recapitulated his support for a return to the legal reasoning in *Marsh*, as well as his own emplacement of free expression in *Logan Valley Plaza*. He exuded confidence that the latter remained on solid ground; that it was still a “binding” interpretation of the First Amendment in shopping malls, “unless and until...overruled.” Four years later, that eventuality would come to pass before Marshall's eyes.

*Morphology in the mall and the final unraveling of public function: Hudgens*⁹²

An Associate Justice of the Supreme Court, Thurgood Marshall was the most vociferous champion of public space in modern American shopping centers, I would argue. He was also one of the most outspoken in defense of free speech in contemporary spaces, too. Though there is no immediate evidence to prove it, the combination may explain why he drafted the Court's opinion in *Logan Valley Plaza*. In writing for the Court, Marshall had to resolve a contest between two of the nation's oldest values against inside a totally new environment: the freedom of expression in shopping malls that were replacing traditional public forums, versus the right of

⁹⁰ For a more recent analysis of this particular topic, see Wayne Batchis, 2010, “Business Improvement Districts and the Constitution: The Troubling Necessity of Privatized Government for Urban Revitalization,” *Hastings Constitutional Law Quarterly*, 38 *Hastings Const. L.Q.* 91, esp. pg. 128.

⁹¹ *Ibid.*, at 586.

⁹² Staeheli and Mitchell use the expression “spatial morphology” to describe the process by which public spaces are transformed into accessible property, more narrowly, through government intervention on behalf of private developers and other interested parties. See Staeheli and Mitchell, *The People's Property*, op cit., 2008, pg. 122.

owners to dispose of their property as they wished. At the same time, he had to construct an argument that would attract the votes of a majority of his colleagues. The responsibility was unenviable, notwithstanding the support of Chief Justice Warren, who presided over many of the Court's most celebrated decisions in favor of free speech and press.

In carrying out his assignment, Marshall insisted on an important qualification for First Amendment speech in malls. He stipulated that speech was only protected in shopping centers when those properties served as the functional equivalents of the business district in *Marsh v. Alabama*, and then only insofar as that speech pertained *directly* to the purpose of any contested space—in *Logan Valley Plaza*, the parcel pickup area outside Weis Market. Some of his colleagues, for example, Justice White, who dissented in *Logan Valley*, considered that qualification a torturous one. It survived scrutiny in *Lloyd Corp.*, but would finally unravel four years later, in *Scott Hudgens v. National Labor Relations Board, et al.*⁹³

Given the evolution of environments and proprietary relationships within modern shopping centers, Marshall's qualification was sure to provoke legal challenges. In *Lloyd Corp.*, the publicness of malls depended on both the context and the content of the discourses inside. Whether he appreciated it or not, this was the byproduct of Marshall's ruling in *Logan Valley Plaza*; that much seemed to be settled in *Lloyd Corp.* But the geometry of space and speech was often difficult to determine inside increasingly mammoth shopping centers sprouting up in the United States. How, then, would questions of commercial access and political association be reconciled in a constitutionally consistent manner? Were malls public space, under *Logan Valley*, or were they private property, under *Lloyd*? Did the content of expressive practices express publicity within the context of large shopping centers?

⁹³ 424 U.S. 507 (1976). Hereafter, *Hudgens*.

These questions would be settled, on the federal level at least, through the ruling in *Hudgens*. The case history was more circuitous than those that preceded it, owing to its legal and statutory background. There were also extra constitutional considerations, specifically, the National Labor Relations Act (NLRA), a federal law that has regulated employee-employer relationships since the New Deal. It created separate free speech protections for unionized workers.⁹⁴ And yet some of the complication in *Hudgens* resulted from the logic Justice Marshall relied on to enmesh the First Amendment in malls in his *Logan Valley Plaza* opinion, as well as the awkward fit between that case, and its successor, *Lloyd Corp.*

The *Hudgens* contest began in 1971, when a small group of warehouse employees from the Butler Shoe Company went on strike to protest their employer's tactics during contract negotiations with their union.⁹⁵ The strikers organized a picket outside Butler's somewhat remote warehouse. They also planned protests in front of each retail shoe store owned by the company, nine in total. One of those stores was located inside the North DeKalb Shopping Center, in suburban Atlanta. Briefs submitted to the Court indicate that North DeKalb's architectural design resembled that of Lloyd Center, though it was larger in size. It consisted of one enclosed mall complex, surrounded by parking lots for 2,600 automobiles. The Center housed more than sixty retail stores. Most of them were accessed through the interior mall alone, including the one owned by Butler.⁹⁶

Four strikers entered the North DeKalb mall, carrying placards that read, "BUTLER SHOE WAREHOUSE ON STRIKE, AFL-CIO LOCAL 315." Their picket was not aimed at the shopping center, but rather at the shoe store leased inside the mall. When the strikers entered the

⁹⁴ NB: I will confine myself to a review of the First Amendment issues that arose in *Hudgens*, briefly touching on statutory questions only as necessary to avoid confusion.

⁹⁵ The sticking points in the contract negotiations were of the garden variety, generally, relating to wages, benefits, and working conditions in the warehouse. Brief for Appellees, pp. 14-15.

⁹⁶ *Hudgens*, at 509. Oral Arguments for Appellant, pg. 9.

property, however, the mall's general manager approached them and indicated that they were prohibited from picketing inside the center and its parking lots. He also informed them that they would be arrested under a Georgia criminal trespass statute if they did not leave the facility. The employees exited, but they returned a short time later and began to picket near the entrance to the Butler shoe store. After thirty minutes, the general manager confronted the picketers again, promising arrest this time. They all left. Following the incident, the union for the warehouse employees filed an unfair labor practice claim with the National Labor Relations Board (NLRB) against the mall owner, Scott Hudgens. The union cited a legal right to organize under the National Labor Relations Act (NLRA), and alleged that Hudgens interfered with that right. It claimed that the pickets were aimed at other shoe company employees.

The NLRB issued a cease and desist order against Hudgens, in response. Because the pickets related to the operation of the shoe store, the Board cited *Logan Valley Plaza*. It also relied on organizational/non-interference provisions of the NLRA, but concluded that *Logan Valley* fully protected the strikers' First Amendment freedoms inside the mall. Hudgens petitioned the Court of Appeals. While his request was being weighed, in 1972, the Supreme Court handed down *Lloyd Corp.*, along with a decision mentioned in the last chapter, *Central Hardware CO. v. NLRB*. That ruling upheld exclusions against labor organizers on a privately owned parking lot.⁹⁷ In light of *Lloyd Corp.* and the companion ruling, the Court of Appeals remanded the case back to the NLRB, with instructions to reconsider its cease order against the mall. The NLRB now enlisted an Administrative Law Judge, to review the dispute in the North DeKalb Shopping Center—specifically, in the context of conflicting Supreme Court rulings on rights of ownership, labor law, and the First Amendment. The judge agreed that Hudgens had committed an unfair labor practice. He also agreed that the striking workers had used the

⁹⁷ 407 U.S. 539 (1972). NB: *Central Hardware* focused on parking lots, outside a single retail property.

shopping center property in the appropriate spirit of the NLRA. In effect, the judge supported the NLRB order, holding that labor pickets on the mall were the most effective, least intrusive form of public advocacy, vis-à-vis rights of workers and owners.

The NLRB wanted a more robust determination, however. It contended that free expression in the North DeKalb mall was a corollary of First Amendment jurisprudence in *Logan Valley Plaza*, not *Lloyd Corp.* That is, the decision in *Lloyd Corp.* needed to be reconciled with *Logan Valley*. The union local and Hudgens were both content to maintain their challenge at the level of the NLRA for their different reasons.⁹⁸ On the other hand, the NLRB was poised to fight for a more open “free speech zone” in the North DeKalb center, where strikers could reach other workers, but also people who shopped there. It contended that the First Amendment emitted from Hudgens’ invitation to the general public, not just the protection of discourse that related to his property, specifically. There was a spatial dilemma, however. Although the pickets were aimed at the Butler store alone, its entrance was ultimately located in a large enclosed mall, immediately adjacent to numerous other stores.⁹⁹ In such an atmosphere, where a mall owner maintained concomitant interests in all leased property, including shops and stores of no moment to the union activists, the commercially adverse consequences seemed more significant. Were the pickets sufficiently associated with Butler’s labor dispute, and therefore protected under *Logan Valley Plaza*? Or did the modern architecture of indoor shopping malls mean that the union’s expression reached beyond the shoe store and became seemingly unrelated to the dispute, thereby triggering ownership rights protected by *Lloyd Corp.*?

⁹⁸ In my reading of *amicus* briefs and oral arguments, the union might have relied on the NLRA, rather than the First Amendment, since its organizational rights were likely to be better protected by the statute. Conversely, Hudgens may have preferred to pursue the case through the NLRB, in hopes of avoiding any expansion of First Amendment speech on his privately owned property.

⁹⁹ In fact, and though it is not reflected in the opinion or written record, a diagram of the North DeKalb Shopping Center interior mall reveals that the Butler shoe store was bordered by another shoe store, “Rice Casual Shoes.” One might imagine that shoppers could confuse messages intended for Butler’s store with its nearby trade competitor, or even that its competitor could be unfairly advantaged by the controversy.

Seemingly exasperated by these questions, not to mention the mystery surrounding applicable precedents, Justice Potter Stewart delivered an opinion for five members. It was joined separately by Justice White, a dissenter in *Logan Valley Plaza*. Ultimately, Stewart saw the dispute as a product of the misfit between the principal interpretations of free expression in shopping centers: *Logan Valley* and *Lloyd Corp.* Stewart, who had joined Justice Marshall's dissent in *Lloyd Corp.*, believed that case failed to resolve the confusion created by *Logan Valley Plaza*, where easements for First Amendment expression were emplaced in a privately owned shopping center, owing somehow to the property's public function. *Logan Valley* misconstrued *Marsh v. Alabama*, thought Stewart. It overlooked the fact that the Constitution protected citizens against actions by the state, not other citizens. True, *Marsh* exempted the state action requirement and upheld free speech on private property, based on the public function analogy. It was an exception that proved the rule, however. The property in that case delivered *all* public services to visitors. Shopping centers did not.

Thus, the fit between the business block in *Marsh*, on the one hand, and shopping malls in *Logan Valley Plaza* and *Lloyd Corp.*, on the other, was Procrustean, Stewart complained, and it produced incompatible constitutional outcomes in those cases. It also fomented a torturously complex contest between Hudgens and a small group of strikers, who had no dispute with him, his business practices, *or his mall*. *Lloyd Corp.* withdrew protection for unauthorized expression that had no relationship to commercial operations inside shopping centers. But it still left the First Amendment in place when outside speech related to the property relationships there. The problem, for Stewart, was that such speech would most certainly reach, and might indeed be aimed to influence, unrelated audiences, for example, customers and other proprietors in the North DeKalb Shopping Center. That kind of situation fell outside the protection of free speech

in *Logan Valley*, and *Lloyd Corp.* failed to address it. In other words, *Logan Valley* posed unjustifiable threats to property rights, while *Lloyd Corp.* let them stand. A more muscular jurisprudence was in order, therefore, and Stewart indicated his mission to deliver it:

The Court in its *Lloyd* opinion did not say that it was overruling the *Logan Valley* decision... But the fact is that the reasoning of the Court's opinion in *Lloyd* cannot be squared with the reasoning of the Court's opinion in *Logan Valley*.¹⁰⁰

So, Stewart expressly overturned *Logan Valley Plaza*. In undertaking this bold move against the First Amendment, he anticipated the objections of Justices Marshall and Brennan, Warren Court holdovers and stalwarts on free speech at a time of ongoing transition into the Burger era:

It matters not that some Members of the Court may continue to believe that the *Logan Valley* case was rightly decided. Our institutional duty is to follow until changed the law as it is now, not as some Members of the Court might wish it to be. And in the performance of that duty we make it clear now, if it was not clear before, that the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case...the ultimate holding in *Lloyd* amounted to a total rejection of the holding in *Logan Valley*.¹⁰¹

The First Amendment, severely circumscribed in shopping centers in *Lloyd Corp.*, had now been excluded from malls entirely. In defending the Court's decision, Stewart parlayed its public forum doctrine, notably, the requirement that restrictions on speech and related forms of expression be content neutral. In effect, he used the qualification that Justice Marshall placed on public space in *Logan Valley Plaza* to overturn it. Free speech required on private property in *Logan Valley* ought not have depended on Marshall's parsing of related content if that property was really analogous to a public forum. Indeed, that distinction would be constitutionally intolerable under First Amendment analysis. Marshall had linked publicity to shopping center

¹⁰⁰ *Hudgens*, at 518.

¹⁰¹ *Ibid.*

speech and apposite activity. Such stipulations were unnecessary when publicly accessible spaces functioned as public fora, Stewart countered:

If a large self-contained shopping center is the functional equivalent of a municipality, as *Logan Valley* held, then the First and Fourteenth Amendments would not permit control of speech within such a center to depend upon the speech's content.¹⁰²

Time, place, and manner regulations might have been more suitable in shopping malls, provided the public forum applied legally, Stewart suggested. It did not, however. Marshall's content considerations in *Logan Valley Plaza*, followed by the Court's opinion in *Lloyd Corp.*, proved that much. Turning private property into public space through the qualifications above demonstrated how tenuous Marshall's analogy was. The union pickets at Logan Valley Mall were no more entitled to protection under a state action exception than the antiwar handbills were inside the Lloyd Center. So it was with the strike in the North DeKalb mall:

[I]f the respondents in the Lloyd case did not have a First Amendment right to enter this [sic] shopping center to distribute handbills concerning Vietnam, then the pickets in the present case did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike against the Butler Shoe Co.

We conclude, in short, that under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this.¹⁰³

Given how unusual they are, there was some internal commentary about the overrule—Justice Powell indicating in hindsight that he might have gone as far in *Lloyd Corp.*, Justice White suggesting that *Lloyd* was decided correctly, though it did not, contrary to Justice

¹⁰² *Ibid.*, at 520.

¹⁰³ *Ibid.*, at 521. NB: The remainder of the Court's opinion focused on the NLRA. The case was ultimately remanded back to the Court of Appeals, and then to the NLRB, which upheld the strikers' pickets as acceptable organizational activity under the NLRA (230 N.L.R.B., No. 73, 1977). Since the NLRA was contingent on the speech content involved in labor disputes, Stewart believed the contest should be resolved statutorily. Application of the First Amendment was therefore precluded in the mall.

Stewart's assertion, overturn *Logan Valley Plaza* by itself.¹⁰⁴ In any case, Hudgens' privately owned shopping center was not alienable under the public function analogy carried over from *Marsh v. Alabama*. Nor did *Marsh's* doctrine of preferred position for speech pertain to First Amendment analysis in malls. The Court had constructed a new, narrow morphology in the mall. It unequivocally denied the argument once made by Justice Marshall, and now the NLRB: that the interdependence of commercial and public invitations in malls made them mutually compatible as spaces of consumption and association.¹⁰⁵

Blomley uses the term *hybridization* to explain his idea that the singularity of private property may always be threatened by the flow of outside users.¹⁰⁶ Staeheli and Mitchell complement this geographic analysis, arguing that rights of publicity logically flow from popular access to property, and may actually stimulate acceptable forms of usufruct there.¹⁰⁷ The antithesis of this flow is what Blomley calls *territorialization*, a segregation of property, and static control exercised by its owner. That control may be sustained by legal force, when the state regards the title to property to be a zero-sum good.¹⁰⁸ In looking at how First Amendment jurisprudence unfolded in publicly accessible but privately owned shopping center spaces, it appears that the hybridization of *Logan Valley Plaza* became conditioned in *Lloyd Corp.* In *Hudgens*, however, it was finally done in by the Court's territorialization of all mall property.

¹⁰⁴ *Hudgens*, at 524.

¹⁰⁵ Oral arguments for Appellee, pp. 33-36; pg. 49.

¹⁰⁶ Nicholas Blomley, "Cuts, Flows, and the Geographies of Property," *Law, Culture and the Humanities*, Sage Publishers, Vol. 7, No. 2, 2010, pp. 207-08.

¹⁰⁷ Staeheli and Mitchell, *The People's Property*, op cit., pp. 141-46.

¹⁰⁸ Blomley, op cit. On the state's imprimatur, and its power to enforce territorialization of property, see also, Nicholas Blomley, "Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid," in *Annals of the Association of American Geographers*, 93 (1), 2003, pp. 122-23; pg. 134.

A coda on space in the mall: Marshall's eulogy to public functionality

Justice Marshall's dissenting opinion in *Hudgens* seemed a culmination of the argument he had been trying to construct for eight years, ever since he handed down *Logan Valley Plaza* in 1968. Marshall opened by remarking on an extraordinary undertaking by the Court, which overruled *Logan Valley* less than ten years after handed it down, an unusually short lifetime for a Supreme Court decision.¹⁰⁹ Reprising his opposition in *Lloyd Corp.*, Marshall argued that embodied speech in an immensely popular modern place, the suburban mall, had been dealt a major blow. In *Hudgens*, moreover, the advocates of controversial ideas, recently cut off from some audience segments in the mall, would no longer be able to speak to anyone inside.¹¹⁰ At the heart of Marshall's dissent, joined by Justice Brennan, was his criticism of the Court's exclusion of all First Amendment speech and assembly from the mall. He bemoaned the overrule that accomplished this undoing:

Turning to the constitutional issue resolved by the Court, I cannot escape the feeling that *Logan Valley* has been laid to rest without ever having been accorded a proper burial.¹¹¹

Marshall never agreed with the decision in *Lloyd Corp.* However, he did believe it could coexist with his own opinion in *Logan Valley Plaza*. The majority's ruling to the contrary in this case substantively ignored the social background facts of suburban commercial development, not to mention the privatization of huge swaths of public space throughout the United States. Citizens in such places were entitled to civic discourse, too.¹¹² The Court had recognized a right to expressive space in *Marsh*, Marshall suggested. It therefore treated Chickasaw as prototypically municipal place, even though it was privately owned. And there was "nothing in

¹⁰⁹ *Hudgens*, at 532.

¹¹⁰ *Ibid.*, at 534.

¹¹¹ *Ibid.*, at 535.

¹¹² *Ibid.*, at 538.

Marsh to suggest that its general approach was limited to the particular facts of that case.”¹¹³ More than any other, the issue in that seminal decision was public citizenship, a something that was justifiably preferred to private ownership. Marshall’s majority understood this in the Court’s first shopping center ruling, where it constructed mall space based on how it functioned publicly, not on who owned it. The current Court had failed to follow suit, however:

In Logan Valley we recognized what the Court today refuses to recognize—that the 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. The roadways, parking lots, and walkways of the modern shopping center may be as essential for effective speech as the streets and sidewalks in the municipal or company town.¹¹⁴

Since places like Chickasaw and the North DeKalb mall both stood in for the public fora traditionally protected by the First Amendment, Marshall protested, the Court was really overruling *Marsh*, too, whether or not Justice Stewart admitted it. To the extent that Justice Black found state action in *Marsh*, the Court was now displacing *two* hard earned precedents, which had balanced property rights with much needed publicity in American constitutional law. In his final remarks, Marshall chided Stewart for overlooking the Court’s preference for free expression in *Marsh*. He also anticipated Justice Brennan’s critique of judicial formalism, which stripped First Amendment fora of space, as we saw at the end of the last chapter:

In the final analysis, the Court’s rejection of any role for the First Amendment in the privately owned shopping center complex stems, I believe, from an overly formalistic view of the relationship between the institution of private ownership of property and the First Amendment’s guarantee of freedom of speech. No one would seriously question the legitimacy of the values of privacy and individual autonomy traditionally associated with privately owned property. But property that is privately owned is not always held for private use, and when a property owner opens his property to public use the force of those values diminishes.¹¹⁵

¹¹³ *Ibid.*, at 539.

¹¹⁴ *Ibid.*, at 539-40.

¹¹⁵ *Ibid.*, at 542.

As for *Hudgens*, and the property relationships he voluntarily formed with the thousands of visitors in his mall:

A degree of privacy is necessarily surrendered; thus, the privacy interest that petitioner retains when he leases space to 60 retail businesses and invites the public onto his land for the transaction of business with other members of the public is small indeed.¹¹⁶

Marshall acknowledged *Hudgens*, the *Lloyd Corporation*, each owner at the Logan Valley Mall, and the Gulf Shipbuilding Company as self-interested proprietors. But he hoped to reimagine them as members of what Staeheli and Mitchell call *civitas*, the larger community, an idea traced to Roman republicanism and associated with democracy for centuries:

And while the owner of property open to public use may not automatically surrender any of his autonomy interest in managing the property as he sees fit, there is nothing new about the notion that that autonomy interest must be accommodated with the interests of the public.¹¹⁷

Marshall seemed keen on the constitutionality of public space in the shopping mall, particularly when speech and related forms of expression pertained to its commercial functions, as in *Logan Valley Plaza*. His dissent in *Hudgens* did not look at political activity in the mall, as it did in *Lloyd Corp*. Still, he would be given one more opportunity to weigh in on the shopping center as a “space of appearance” in matters that were expressly political. Likewise, the Court seemed to wrap things up neatly where First Amendment flows posed a threat to property protections found in the Constitution. The evolution of the shopping mall as practicable public space was not yet complete, however. A new dispute would pit free speech against property rights in a different judicial arena. It would also place them in their most evident relief thus far.

¹¹⁶ Ibid.

¹¹⁷ Ibid. NB: The term from Staeheli and Mitchell comes from *The People’s Property?* 2008, op cit., pp. 92-93.

That evolution meant that Mitchell's "geography of law" would be dispersed, and would generate more legal contestation over public space, if not more public space, necessarily.

Pruneyard and American federalism in the shopping mall

One of the things that distinguished the Supreme Court's consideration of public space in the shopping mall is how rapidly the storyline of its rulings unfolded. In a matter of eight years, the Court had opened shopping centers to commercially oriented expression, hardened them against political dissent, and then closed their doors to First Amendment speech entirely. In fact, the controversy that precipitated the Court's decision in *Hudgens* was barely underway when *Lloyd Corp.* was handed down. Similarly, oral arguments in *Lloyd Corp.* suggest that the owners of the shopping center in eastern Portland had just finished amending their non-commercial speech policy, in response to *Logan Valley Plaza*, when antiwar protesters entered the mall with their handbills.¹¹⁸ Precedents were practically set and renounced before the ink had dried on old rulings being disclaimed by new ones in malls.

The breakneck pace of legal determinations on private property versus publicity in shopping centers meant that the Court was furiously relating a myriad of new social background facts spreading throughout the nation to old constitutional tenets. As the size and number of suburban shopping centers grew, the environmental changes once projected by Justice Marshall in *Logan Valley Plaza* turned out to understate the scale of uses and legal interests in their now ubiquitous malls. And as attendant civic concerns related to malls continue to grow, the Court saw fit to distribute the labor of judicial review over free expression inside. It did so in its final First Amendment ruling, *Pruneyard Shopping Center, et al. v. Robins, et al.*¹¹⁹

¹¹⁸ *Lloyd Corp.* See Oral Arguments for Appellant, pg. 10.

¹¹⁹ 447 U.S. 74 (1980). Hereafter, *Pruneyard*.

The facts in *Pruneyard* took place in California, perhaps the most resonant locale for large shopping malls in our collective imagination. The Pruneyard Shopping Center, owned by Fred Sahadi, was a newer regional variety in Santa Clara County’s suburb of Campbell, just outside the city of San Jose. It sat on twenty-one acres of land—sixteen of which provided the foundation for an enclosed mall filled with 75 shops and restaurants, as well as a cinema. The remainder of the property was made up of adjacent parking lots. The Center was square-shaped, bordered on two sides by other business complexes, and on two sides by public streets.

On a Saturday afternoon in 1975, two high school students from San Jose’s Temple Emanu-El, Michael Robins and Ira David Marcus, entered Pruneyard. Accompanied by a schoolteacher, Roberta Bell-Kliger, they set up a card table in the mall’s principal common space, the “Grand Plaza.” Their aim was to meet with shoppers, pass out pamphlets, and collect signatures for two petitions to be sent to the President and Congress. One petition called on the United States to denounce Syria for its persecution of Jews, who were trying to emigrate out of that country. The second called for opposition to a United Nations resolution that labeled Zionism as a form of “racism.”¹²⁰

According to their briefs, the students set up the table in Pruneyard on a Saturday because of school and because most streets and outdoor public spaces in San Jose were normally empty on weekends, when vast numbers of city residents were in shopping malls.¹²¹ The students were peaceful. There were no complaints from mall goers.¹²² Nevertheless, shortly after they entered, a security guard approached the students and informed them that they had to leave. Their petitioning effort had violated the Center’s ban on non-commercial expression in the mall. The

¹²⁰ Brief for Appellees, pg. 6.

¹²¹ *Ibid.*, pg. 7.

¹²² The lower court record indicated that many patrons approved of the students’ petitions, a fact reflected in the California Supreme Court opinion for the majority. See *Michael Robins, a Minor, et al. v. Pruneyard Shopping Center, et al.*, 23 Cal. 3d 899 (1979), at 902. Hereafter, *Robins*.

policy was universal and non-discriminatory. It did not include any exceptions or special permissions. After conferring with the guard's supervisor, who suggested they adjourn to public streets outside the Shopping Center, the students left. They did not continue to speak with people or collect additional signatures on nearby streets.

Following the exclusion, a guardian and attorney for Robins filed suit in the California Superior Court of Santa Clara County. Robins asked the Court to enjoin the Center from denying access to its interior mall for the purpose of petitioning. The trial court declined to issue an injunction. It held that Pruneyard was privately owned, and therefore the students were not free to petition inside, under the federal or state constitutions. The lower court also argued that there were "adequate, effective channels of communication," namely, the streets outside the Center, where the students were permitted to set up their table. The California Court of Appeals affirmed the ruling. Robins appealed to the California Supreme Court. In a 4-3 vote, the California Court ruled in favor of the students, relying on the free speech and petition provisions in the *state's* constitution.¹²³

Robins v. Pruneyard: political space and welfare in a Californian milieu

The California court weighed the impact of *Lloyd Corp.* on the state's free speech and petition provisions, especially in relation to its unique political culture, and its structural need for practicable public space to support citizen participation.¹²⁴ This meant analyzing California's civic demands against the backdrop of the Fifth and Fourteenth Amendments. Those federal

¹²³ The court looked at two provisions of the California Constitution: Article I, Section 2, which states, "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Article I, Section 3, "The people have the right to instruct their representatives, petition the government for the redress of grievances, and assemble freely to consult for the common good."

¹²⁴ The California Supreme Court did refer to the *Hudgens* decision, but it focused on *Lloyd Corp.*, since the First Amendment was not determinative in *Hudgens*.

amendments protected the private property rights of shopping center owners, under *Lloyd Corp.* In balancing the state's constitutional free speech protections with property rights, the California court's determination provided the foundation for the federal Supreme Court's decision that will follow below. A thorough account of the state court's holding is necessary to understand the stakes in the larger contest, therefore.

In reviewing Robins' challenge, the California court faced two questions. First, did the federal reading of property rights in *Lloyd Corp.* prevent California from using its own free speech and petition provisions to permit civic activity in a shopping mall, notwithstanding a ruling against First Amendment expression in that case? Second, if the U.S. Constitution did not fully immunize property rights, then did California's speech and petition articles protect the high school students inside Pruneyard and other shopping malls in the state?¹²⁵

The answer to question one turned on whether *Lloyd Corp.* also spoke to property rights under the Fifth and Fourteenth Amendments, versus the First Amendment alone. Pruneyard argued that *Lloyd Corp.* did more than exclude antiwar protest from Portland's Lloyd Center. It guaranteed federal protection for property rights. The Constitution's Supremacy Clause, in Article VI, meant that those rights were privileged in California, too. Therefore, the state could not deny Sahadi's substantive right to property without due process, under the Fourteenth Amendment, nor could it take his property for public use without due compensation, under the Fifth.¹²⁶ Robins countered that *Lloyd Corp.* never really addressed property rights; that it only excluded the antiwar protesters' free speech rights, as they were enumerated in the First Amendment. Moreover, Robins claimed, it was fully within California's power to regulate private property in the public interest—in this case, to safeguard a mall user's liberty to freely

¹²⁵ *Robins*, op cit., at 903.

¹²⁶ *Ibid.*, at 903-04.

speak and petition. These freedoms were essential to the state’s political scheme, which relied on citizen initiatives, referenda, and recall.¹²⁷

In deciding the property rights question, a slim majority of the California court argued that *Lloyd Corp.* was “primarily a First Amendment case.” Writing for the Court, Judge Frank Newman limited the Fifth and Fourteenth Amendment issues in *Lloyd Corp.* to the state action dispute. In his interpretation, the only property inquiry in that case was whether the privately owned Lloyd Center functioned publicly for First Amendment purposes, as had the company town in *Marsh*. Next, could the mall be exempted from the doctrine of state action, as a First Amendment space? *Hudgens* had raised the property issue, but that case exposed shopping center owners to enforceable regulations through common law and statutory protection of free expression, even though the First Amendment did not.¹²⁸ In short, the existing case law may have preferred property to expression, but it did not place the shopping mall outside the legal reach of free speech interests. As Newman pointed out, “*Lloyd* by no means created any property right immune from regulation” where speech interests were at stake.¹²⁹

Neither did *Lloyd* or *Hudgens* place shopping mall ownership above the state’s general welfare. Property was a cherished right in California, said Newman. However, it was not the supreme right. Under certain circumstances, “property rights must yield to the public interest.”¹³⁰ In this instance, the suburbanization of the state’s commercial landscape might undermine other constitutionally prescribed practices in California, unless the court intervened. San Jose’s emptied public streets, coupled with the imperative of automobile use throughout the

¹²⁷ *Ibid.*, at 904.

¹²⁸ This point became significant when the Supreme Court considered *Pruneyard*—specifically, when it weighed its legal capacity to hear the case on appeal from the California court. The High Court deemed that it could review the case under a section of federal law (U.S.C. 1257), which legally transformed the California Court ruling into a reviewable “statute” falling within the nation’s appellate jurisdiction.

¹²⁹ *Robins*, *op cit.*, at 905.

¹³⁰ *Ibid.*, at 906.

state, pushed Robins' civic activity in Pruneyard over the owner's right to exclude him. The card table in the Grand Plaza expressed the grammar of California's political culture, as well as the state's unique commitment to direct democracy. Quoting an earlier California opinion that also tempered the Fifth and Fourteenth Amendments on behalf of free speech, Newman framed the state's regulation of private property as a form of political self-protection:

'As the interest of society justifies restraints upon individual conduct, so, also, does it justify restraints upon the use to which property may be devoted. It was not intended by these constitutional provisions to so far protect the individual in the use of his property as to enable him to use it to the detriment of society. By thus protecting individual rights, society did not part with the power to protect itself or to promote its general well-being. Where the interest of the individual conflicts with the interest of society, such individual interest is subordinated to the general welfare.'¹³¹

Notwithstanding *Lloyd Corp.*, therefore, California was within its authority to regulate private property in the public interest. That also meant the state's highest court was empowered to respond to changing circumstances:

[T]he power to regulate property is not static; rather it is capable of expansion to meet new conditions of modern life. Property rights must be 'redefined in response to a swelling demand that ownership be responsible and responsive to the needs of the social whole.'¹³²

The California court found that the social background facts in the case had changed quite a bit after the advent of suburban shopping centers. Echoing Justice Marshall's seminal argument in *Logan Valley Plaza*, Newman relied on data supplied by Robins to support the view that Californians had abandoned central business districts all around the state. They now lived in suburban areas, where they were fully dependent on shopping centers to meet many of their

¹³¹ Ibid. Quoted from *Agricultural Labor Relations Bd. V. Superior Court*, 16 Cal. 3d, 1976, at 403.

¹³² Ibid., at 906-07.

commercial needs. As Marshall argued later, in his *Lloyd Corp.* dissent, malls were where people go in an era of suburbanization. Robins would have to reach them in those malls.¹³³

The situation was especially urgent in California, Newman thought. Shopping centers uniquely important to the state's scheme for political association. More than citizens of other states, Californians voted on statewide initiatives, public referenda, and recall of elected officials. Public deliberation and petitions were especially crucial in California, therefore, and those forms of activity necessitated practicable space in every reach of the state. To permit shopping mall owners to exclude sorely needed public space on their property, to protect an unlimited right "to prohibit expressive activity in the centers," was to "impinge on constitutional rights beyond speech rights." Proprietary exclusions of the kind in *Pruneyard* threatened California's system of government, which relied on constant engagement and input by members of the public. Newman saw Robins' exclusion as no less than a public health problem:

To protect free speech and petitioning is a goal that surely matches the protecting of health and safety, the environment, aesthetics, property values and other societal goals that have been held to justify reasonable restrictions on private property rights.¹³⁴

In view of the social and political demands above, the California court decided that the state's Constitution protected expressive activity in the mall, notwithstanding the Supreme Court's First Amendment jurisprudence. Newman and the majority were sure to specify that their decision applied to large-scale shopping centers, visited by at least 25,000 people per day. Time, place, and manner rules could be assigned, too. These concessions did little to satisfy Judge Richardson and the dissenters. They argued that the California court ignored the letter of the law in *Lloyd Corp.* The majority had thereby relegated the rights of shopping center owners

¹³³ *Ibid.*, at 907.

¹³⁴ *Ibid.*, at 908.

“to a secondary, disfavored, and subservient position vis-à-vis the ‘free speech’ claims of” Robins and his friends.¹³⁵ Echoing briefs submitted by the International Council of Shopping Centers (ICSC), Richardson claimed that Newman had ignored the primacy of property rights in a federal precedent, “creating” a *de novo* right to free expression in shopping centers, in violation of the nation’s Constitution.¹³⁶

Judge Newman and his side prevailed, though. The California court constructed its own state constitution to supplement the First Amendment in *Lloyd Corp.*, as well as to circumvent the wholesale removal of that amendment in *Hudgens*. Public space could be legally practiced inside shopping centers in the state. Under federal law, however—and over the objections of Robins and several “friends of the court,” who did not fancy their chances in the nation’s High Court—California’s free speech provisions were still reviewable as statutes, *de facto*.¹³⁷ The decision of the California court, therefore, would not be the last word on Robins’ exclusion from the Pruneyard Shopping Center.

Pruneyard v. Robins: a myriad of considerations

By the time the Supreme Court granted review of the case, the contours of the dispute had shifted and expanded. The contest now involved Robins’ free speech and petitioning rights in the mall, *as construed by the California court*, versus the Fifth and Fourteenth Amendment rights of its owner, Fred Sahadi, to exclude him. But a new wrinkle was added: Sahadi’s First Amendment right *not* to speak, specifically, his freedom to withhold his private property from

¹³⁵ Ibid., at 911.

¹³⁶ Ibid., at 912-15. For ICSC arguments in this regard, see its Brief for Appellant, pg. 11.

¹³⁷ In fact, a battle of briefs was waged even before the High Court agreed to review the case on the merits. Robins argued that American federalism meant California was free to regulate property under its police power, while Pruneyard countered that constitutional questions were raised under the First, Fifth, and Fourteenth Amendments. I will focus on questions of merits throughout my account.

open political discourse on which he wished to take no public position. This cocktail of considerations left the High Court with a complicated task. It would have to make a decision about the elasticity of California's free speech provisions, vis-à-vis its previous determinations against expressive activity in the mall; property rights within the meaning of the Fourteenth Amendment and due process protections guaranteed to the mall's owner; the Fifth Amendment's takings clause, since California's interpretation had deprived Sahadi of his ability to exclude unauthorized speakers from his own property; and, now, for the first time, a mall owner's right under the First Amendment to maintain his privacy by declining to speak on public affairs.

In spite of this multiplicity of questions, and in notable contrast with the preceding cases, the Court handed down a unanimous decision (with concurrences, unsurprisingly). An Associate Justice in 1980, William Rehnquist wrote for the Court. Rehnquist began by pointing out that the case fell within the Court's federal purview, much to the chagrin of Robins' supporters.¹³⁸ Their concerns would be allayed, however, when he affirmed the California court ruling and upheld Robins' right to use the mall for his political petition. Rehnquist supported the California court decision on three grounds. First, the Fourteenth Amendment's due process clause did not prohibit the state from interpreting its constitution to extend expressive freedoms beyond the scope of the First Amendment. Second, the California court's interpretation of its own constitution did not constitute a taking of Pruneyard's property without just compensation, nor did it violate the Fifth Amendment. Finally, Robins' attempt to publicize his petition inside the mall did not force Sahadi to speak against his will or infringe on his First Amendment right to refrain from doing so on his own property.

¹³⁸ To quote Rehnquist, "We initially conclude that this case is properly before us as an appeal...that a state constitutional provision is a 'statute' within the meaning..." of the federal law cited above. *Pruneyard v. Robins*, *op cit.*, at 80.

Pruneyard and its allies, the ICSC, in particular, were less than charitable towards the California court in their written briefs. They alleged that the state bench had committed multiple offenses in ruling against the mall owner. In their collective view, the relationships articulated by Judge Newman, between the Californian constitution, the state’s general welfare, and the availability of public space were matters of “sketchy analysis.” As they argued, Robins’ petition was unrelated to any statewide initiative, referendum, or recall.¹³⁹ To privilege his public canvass inside the mall—on behalf of a written petition aimed at officials all the way in Washington, DC—was to ignore “controlling precedent” in *Lloyd Corp.* Denying settled law in the contest, the California court “sacrificed Mr. Sahadi’s constitutional rights on the altar of its own notion of public policy.”¹⁴⁰ In fact, the ICSC urged, the situation inside the Pruneyard mirrored the one in *Lloyd* to the letter: the speech in both malls was unrelated to their daily operations; there was never any dedication of common spaces to unauthorized use; and there were adequate alternatives for political advocacy, outside each complex. Similarly, no ban had been imposed on *what* Robins said, only *where* he said it.¹⁴¹ Joining that last argument, Pruneyard reminded the High Court that speakers might be fairly consigned to spaces they did not like. In the wake of *Lloyd Corp.*, especially, and the protections it afforded private property via the Fourteenth Amendment, those who wished to advocate public positions were never guaranteed “the best available soapbox,” nor the most convenient one.¹⁴²

Justice Rehnquist and his colleagues saw things differently. While there is no evidence that they endorsed the political substance of Judge Newman’s analysis, nor his argument that free speech in shopping malls could help mitigate a decline of civic space in the state—as Robins

¹³⁹ Brief for Appellants, pg. 17.

¹⁴⁰ *Ibid.*, pg. 21.

¹⁴¹ Amicus brief for Appellant, by ICSC, pg. 10.

¹⁴² Brief for Appellants, pp. 20-21.

had urged—they did support the California court’s judicial authority to advance that analysis as part of its jurisprudence.¹⁴³ That court, said Rehnquist, considered the state’s interest in free expression to be vital to its well-being. Notwithstanding First Amendment limitations in *Lloyd Corp.*, the Fourteenth Amendment’s due process clause did not constrain California’s judicial construction of free speech in its own law:

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*...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.¹⁴⁴

Appearing less than eager to share the mantle with Justice Marshall’s concurring opinion, that is, that a decision for *Pruneyard* would amount to substantive due process, *circa* late 19th judicial activism,¹⁴⁵ Rehnquist began to bridge his second argument:

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.¹⁴⁶

The mall owner’s Fourteenth Amendment claim went hand in hand with his Fifth Amendment argument against the California court ruling. The brief submitted by *Pruneyard* to the Supreme Court contended that the freedom to exclude *Robins* was so essential to its owner’s due process rights that any interference with that ability amounted to a “taking” without just compensation.¹⁴⁷ During oral arguments, *Pruneyard* complained that the California court decision had turned *every*

¹⁴³ For arguments by *Robins*, and supporters such as the ACLU, see Briefs for Appellees, pp. 9-10; 13, 16, and especially, 44-47, where an analysis of mall growth in California is included.

¹⁴⁴ *Pruneyard*, *op cit.*, at 81. NB: *ex proprio vigore* is translated as “by its own force.”

¹⁴⁵ J. Marshall’s concurring opinion. *Pruneyard*, at 94.

¹⁴⁶ *Ibid.*, at 81. My emphasis.

¹⁴⁷ Brief for Appellant, pg. 12.

shopping center, large or small, into the functional equivalent of a municipality, a complete mischaracterization of private property and mall ownership. The effect of this interpretation was to treat the proprietor like a homeowner, one who held a small garage sale, yet, was somehow required to host a neighbor's political expression on his lawn and in his driveway.¹⁴⁸ The Fifth Amendment prevented this kind of taking, maintained Pruneyard. So, too, did the High Court, in its prevailing shopping center decisions.

Rehnquist sided with Robins, however. The latter argued that Pruneyard's general invitation to the public meant it had "waived its right to exclude" the students' petition. When the mall opened its doors to customers every day, it instigated an organic sequence in which the public assembled in the mall's common spaces. That assembly conduced to public expression, a "natural byproduct" of shared space. Any exclusion of this sequence inside the mall transcended legal exercises of property rights; it attempted to control the rights of publics.¹⁴⁹ Rehnquist and the Court agreed that the Fifth Amendment never extended that far. While the opinion acknowledged that property, too, was heterogeneous, even exclusionary at times—and that the California court had indeed committed a limited "taking" of some kind—the threshold required for Fifth Amendment protection had not been reached in the Pruneyard:

It is true that one of the essential sticks in the bundle of property rights is the right to exclude others. And here there has literally been a 'taking' of that right to the extent that the California Supreme Court has interpreted the State Constitution to entitle its citizens to exercise free expression and petition rights on shopping center property. But it is well established that 'not every destruction or injury to property by governmental action has been held to be a "taking" in the constitutional sense.'¹⁵⁰

¹⁴⁸ Oral Arguments for Pruneyard, pp. 14-16.

¹⁴⁹ Brief for Appellees, pgs. 35 and 42.

¹⁵⁰ *Pruneyard*, op cit., at 82.

In essence, Pruneyard had failed to demonstrate substantial deprivation of relational power enjoyed by property owners. Under the California court’s interpretation of free speech both inside and outside the shopping center, a burden of proof now fell on owners. According to Robins, *Lloyd Corp.* never prevented reapportionment of that burden, while *Hudgens* had proved that speakers could find protection in malls, on “non-First Amendment grounds.”¹⁵¹

Rehnquist found no evidence that the property had been usurped materially, either.¹⁵² Limits on Sahadi’s relational rights to exclude them aside, the students’ speech and assembly caused no physical or financial damage to the Pruneyard. If his property could be degraded by easements on expressive activity—that is, if civic engagement impinged the mall’s commercial client base so dramatically—then it was unlikely that Robins would have used it for public outreach in the first place. In point of fact, many patrons exhibited appreciation for Robins’ message, according to the trial court record. The shopping center was a big facility, with both community and regulatory capacity. If a forcible taking had occurred inside the common spaces of the mall, Rehnquist thought, Pruneyard was unable to show it:

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 Takings 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 [sic] 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.

A state is, of course, bound by the Just Compensation Clause of the Fifth Amendment, but here appellants have failed to demonstrate that the ‘right to

¹⁵¹ Brief for Appellees, pp. 18-19. NB: Robins was making a reference the NLRB decision to uphold the strikers in the North DeKalb Shopping Center, after the Court remanded the case.

¹⁵² In oral arguments, counsel for the mall argued that they entertained little doubt that the permitted speech and petitioning would drive away business inside. Rebuttal by Pruneyard, pg. 46.

exclude others' is so essential to the use or *economic value* of their property that the state-authorized limitation of it amounted to a 'taking.'¹⁵³

Thus, California's interest in political participation among its citizenry had legitimated free practices of public space within its shopping malls. The state court's construction of public interest had trumped Sahadi's rights to private property as a form of due process shielded by the Fourteenth Amendment. In the same way, the High Court reasoned, civic interests outweighed his protection against unconstitutional takings under the Fifth Amendment.

But what about Sahadi's free speech—in this case, his freedom *not* to speak, a right guaranteed by the First Amendment? That question had never been addressed in any of the previous cases. In fact, *Pruneyard* had not raised it before the case was appealed federally, to the Supreme Court. Nevertheless, in briefs and oral arguments, *Pruneyard* maintained that its policy against non-commercial expression inside the mall applied to all users, irrespective of content, because its owner wished to avoid any public association with political controversies outside the Center. The ban included speech by non-controversial groups, such as the Salvation Army, who were denied permission to solicit donations, even during the holidays. No public forum obtained here, it was that simple.¹⁵⁴ Speech activity inside the mall was sure to produce the impression or the misimpression that the owner was advancing certain points of view, *Pruneyard* contended. In effect, Sahadi had been "forced" to speak about the petition against the United Nations, first by Robins, and then by the California court, whether or not he chose to do so. Citing a 1977

¹⁵³ *Pruneyard*, op cit., at 83-84. My emphasis.

¹⁵⁴ Oral Arguments for Appellant, pp. 4-5; 12-13. NB: There is a striking overlap between the argument advanced by the shopping center, and the one we saw in the last chapter, from the city transit system in *Lehman v. Shaker Heights*.

precedent against compulsory political speech by private citizens, Pruneyard contended that the First Amendment proscribed speech thrust on Sahadi by Judge Newman and the state court.¹⁵⁵

The argument impressed Justice Powell, who had written the Court's opinion in *Lloyd Corp.* Powell agreed that the California court was authorized to rule for Robins. However, he reserved his full concurrence on this particular point. Powell thought the decision in this case could place property owners in inconvenient positions. When it came to political ideas that engendered intense emotions, or worse, perhaps, one could envisage harms befalling proprietors. They might be misperceived as expressing solidarity with viewpoints publicly addressed in malls. Powell imagined out loud about a rally organized by the Ku Klux Klan, or the American Nazi Party. How would Sahadi's customers respond if they encountered hate speech on the Grand Plaza, he wondered?¹⁵⁶ To say the least, such occasions would be bad for business, as the ICSC had suggested in its brief for Pruneyard. The situation would be worse inside the countless shopping centers that were too small to absorb the unintended consequences of extreme speech or divisive conduct.¹⁵⁷ Rehnquist's opinion, complained Powell, seemed to do too little to support an owner's freedom to exclude heterodoxy on mall property. Although Pruneyard did not prove its case in this instance, Powell noted, he believed property owners might indeed be able to do so under different circumstances:

I agree that the owner of this shopping center has failed to establish a cognizable First Amendment claim in *this* case. But some of the language in the Court's opinion is unnecessarily and perhaps confusingly broad. In my view, state action that transforms privately owned property into a forum for expression of the

¹⁵⁵ Brief for Appellant, pg. 14. NB: Pruneyard relied on *Wooley v. Maynard*, 430 U.S. 705 (1977), to substantiate its First Amendment claim. *Wooley* dealt with the right of New Hampshire drivers to cover the State motto, "Live Free or Die" on their license plates, if they did not wish to be associated with the ideological message of that motto.

¹⁵⁶ *Pruneyard*, at 99. NB: Pruneyard did not raise the issue of extremist content. Nor did the Pruneyard side ask the justices to consider how Sahadi's First Amendment rights might be impinged if he had in fact disagreed with any speaker content now permitted by the California Court on his property. These omissions appeared to be key for Powell, who ultimately voted with the rest of his colleagues.

¹⁵⁷ Amicus Brief for Appellant, submitted by ICSC, pp. 13-15. Powell's qualification on the type of shopping center involved in the case appears in *Pruneyard*, at 96.

public's views could raise serious First Amendment questions...A person who has merely invited the public onto his property for commercial purposes cannot fairly be said to have relinquished his right to decline to be an instrument for fostering public adherence to an ideological point of view...even when no particular message is mandated by the State, First Amendment interests are affected by state action that forces a property owner to admit third-party speakers.¹⁵⁸

Rehnquist saw no evidence of advocacy forced on Sahadi by the California court, nor any proof that Pruneyard's owner had somehow been obliged to publicize Robins' cause therein. Instead, Rehnquist agreed with the respondents, who reprised an idea once promoted by Justice Marshall, in his *Lloyd Corp.* dissent: the prodigious scale of the Pruneyard, along with its commercial atmosphere, made it unlikely that the property owner would be perceived as culpable for the many viewpoints communicated on its Grand Plaza.¹⁵⁹ Rejecting the garage sale analogy above, Rehnquist maintained that the huge regional shopping center admitted twenty-five thousand people inside on a daily basis; its sheer size and openness to the public addressed the hypothetical concerns raised by Justice Powell in his concurring opinion:

Most important, the shopping center by choice of its owner is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner.¹⁶⁰

In light of this rediscovery of the mall's publicness, following *Lloyd Corp.* and *Hudgens*, the Court endorsed Robins' claim that Pruneyard's owner had never been obligated to referee orthodoxy versus heterodoxy, nor sanction the Center's "community voice" in any way. By the same token, however, Sahadi's First Amendment liberties did not empower him to censor open

¹⁵⁸ *Pruneyard*, at 97-98. My emphasis.

¹⁵⁹ Brief for Appellees, pgs. 13 and pp. 39-40. As above, Marshall was focusing on the usefulness of the mall to outside speakers, due to its attractiveness as a commercial space.

¹⁶⁰ *Pruneyard*, at 87.

political discourse on his publicly accessible property, either.¹⁶¹ In Rehnquist’s view, any concerns about the property owner’s involuntary association with unwelcome viewpoints could be addressed practically, since he always maintained the capacity to publicly distance himself from the contents of non-commercial communication in his mall:

Finally, as far as appears here appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law.¹⁶²

Of course, signage required the owner’s affirmative effort, which missed the point, according to Powell. In his opinion, the California court had placed Sahadi in a precarious position. If Sahadi remained silent—his right under the First Amendment—then he ran the risk that customers would think he lent tacit consent to expressive practices inside the Pruneyard. On the other hand, if he accepted Rehnquist’s invitation and publicly disavowed a petition such as the one Robins had circulated, then he had communicated, even though he preferred not to speak at all. Powell believed, therefore, that Sahadi “has lost control over his freedom to speak or not to speak on certain issues.” Similarly, “[t]he mere fact that he is free to disassociate himself from the views expressed on his property” left Powell unsatisfied that the California court had not “impermissibly” damaged Sahadi’s privacy rights through its interpretation of the state’s speech and petition articles.¹⁶³

In general, Powell seemed disinclined to endorse a judicially prescribed arrangement in which the owner of a private shopping center would be required to host members of the public who wished to use his mall for unauthorized expression. Yet, he still supported the Court’s final

¹⁶¹ Brief for Appellees, pg. 42.

¹⁶² *Pruneyard*, at 88.

¹⁶³ *Ibid.*, at 100.

determination. In the end, Pruneyard failed to offer more persuasive First Amendment objections to California's interpretation of its constitution. Powell therefore joined Justice White, who was also sufficiently satisfied that the Center's size and scale distinguished it from smaller properties, which might be adversely affected by the Court's ruling. They both agreed with Rehnquist's stipulation that the California court decision applied to Pruneyard's common spaces alone. Further, they reaffirmed that its proprietor maintained his use of time, place, and manner rules to regulate expressive conduct in the mall.

Powell qualified his support for the decision in another way. His closing condition was that the Court's judgment never be interpreted "as a blanket approval for state efforts to transform privately owned commercial property into public forums."¹⁶⁴ This was a significant disclaimer, particularly in light of the cautions added by Justice White in his concurring opinion. Neither the California court ruling, nor the High Court's affirmance, impacted the already circumscribed relationship between private property, free speech, and practicable space in malls, under the federal Constitution. And nothing in Judge Newman's mandates applied to any other state's interpretation of property, space, and expression inside its shopping centers. I will elaborate on White's qualifications in a moment.

For now, it seems fair to say that inside twelve years, the Supreme Court's jurisprudence ran a gamut between public space and private property in shopping malls. In 1968, the High Court handed down *Logan Valley Plaza*. It reinterpreted the public function analogy in *Marsh v. Alabama*, and adapted it in order to reimagine the fast multiplying shopping center as an American *agora*. Four years later, however, the Court's composition changed. So, too, did the contested mall space—this time, an enclosed model, the kind many of us imagine today. In turn, a realigned majority closed the mall to unauthorized expression if it was unrelated to the

¹⁶⁴ *Ibid.*, at 101.

operation of the property. *Lloyd Corp.* abandoned the public function analogy drawn in the two opinions above, along with the notion that the First Amendment was always preferred to the property rights of shopping center owners. That swing was crystallized in the 1976 *Hudgens* decision. There, the Court went a step further, removing the First Amendment entirely from privately owned shopping malls. It was hardly returned in *Pruneyard v. Robins*, where a mall owner unsuccessfully invoked *his* First Amendment right to free speech, albeit in an effort to maintain his silence on public affairs. However, the 1980 ruling did signal a shift, insofar as free expression was permitted in the common space of a large California mall. While the First Amendment remained off limits to speakers and listeners after *Pruneyard*, individual states might open public space in malls, via free speech provisions found in their constitutions.

A multiuse conception of the mall might have appeared imminent, legally encoded in American federalism and the Court's commitment to judicial self-restraint under the Chief Justices that followed Warren. After 1980, states could interpret their own constitutions and social background facts when resolving contests between private property and public discourse inside shopping centers. In California, an independent policy analysis led that state's highest court to interpret its constitution to protect public space in a context in which geographical opportunities for civic capacity building had been undermined by the commercialization of its heavily suburban landscape. Alleging a causal connection between more shopping malls and fewer public spaces, the California court concluded that reopening discursive terrain could ameliorate popular participation in the state's democratic process, though it acknowledged that doing so might "impose a public forum burden on shopping centers."¹⁶⁵ When the Supreme Court affirmed that position, as well as California's legitimacy in protecting speech and

¹⁶⁵ James Marcus Bowman, "Robins v. Pruneyard Shopping Center: Free Speech Access to Shopping Centers under the California Constitution," *California Law Review*, Volume 68, Issue 4, 1980, pg. 656.

petitioning inside the Pruneyard Shopping Center, the larger contest for public space in malls may have seemed settled in favor of speakers. Surely, the encouragement taken from the judicial outcome in California remains strong among advocates of civic engagement in new mixed-use shopping center formats sprouting up around the country, in American suburbs, and even within numerous cities that continue to emphasize redesign of commercial malls as reliable tools of urban economic development.¹⁶⁶

It may therefore seem fitting to conclude this chapter with a note about Justice Marshall's concurring opinion in *Pruneyard*. Marshall, whose participation in the mall debate has been featured throughout this case history, once complained that the Court moved in an interminably bad direction in the cases that preceded *Pruneyard*. That much is evidenced in his dissents in *Lloyd Corp.* and *Hudgens*. So he praised the California decision, which represented a nod to his earlier rationale in *Logan Valley Plaza*. In Marshall's view, the socio-economic conditions that steered his argument in *Logan Valley* had only become more compelling in the twelve years between his 1968 opinion and the 1980 decision in *Pruneyard*. If his colleagues were still intent on excluding the First Amendment from the mall, then the adjustment in the lattermost case at least freed the California court and others to conduct their own analyses of social background facts, namely, property, space, and free expression therein:

I applaud the court's [sic.] decision, which is a part of a very healthy trend of affording state constitutional provisions a more expansive interpretation than this Court has given to the Federal Constitution.¹⁶⁷

As we have seen on previous occasions, however, Marshall rarely enjoyed the final word in federal shopping center jurisprudence. In the last analysis, his celebration of the *Pruneyard*

¹⁶⁶ See, for example, June Williamson, "Protest on the Astroturf at Downtown Silver Spring," in Christopher Niedt (Ed.), *Social Justice in Diverse Suburbs: History, Politics, and Prospects* (Philadelphia: Temple University Press, 2013), pg. 68; Kohn, *Brave New Neighborhoods*, op cit., pp. 73-74.

¹⁶⁷ *Pruneyard*, at 91.

decision and the High Court's support for California's construction of public space in its malls needs to be considered against the backdrop of the other concurring opinions in that case. I cited Justice Powell's caveats above. His criticisms against the objectionable treatment of ownership rights in *Pruneyard* must loom over any further federal analysis in this area, particularly because the Court has never reintroduced the First Amendment into shopping malls, old or new.

Yet, it is Justice White's concurring remarks that most warrant our attention at this stage, given both legal and substantive developments during the last three decades. Having dissented in *Logan Valley Plaza* and then sided with the majority in *Lloyd Corp.* and *Hudgens*, White qualified the outcome in *Pruneyard*, as well as the privately owned property on which any subsequent jurisprudence might be effected:

I agree that on the record before us there was not an unconstitutional infringement of appellants' property rights. *But it bears pointing out that the Federal Constitution does not require that a shopping center permit distributions or solicitations on its property.*¹⁶⁸

In addition, and anticipating my interests in the remaining chapter, White urges us to remember that the California court's interpretation of public space produces no legal requirement for any other state to follow suit—barring a return of First Amendment protections for free expression and political association inside privately owned shopping malls:

Insofar as the Federal Constitution is concerned, therefore, a State may decline to construe its own constitution so as to limit the property rights of the shopping center owner.¹⁶⁹

From the point of view of appreciative advocates of public space—and much to the chagrin of their opponents, who tend to champion the private property rights of mall owners—California has sustained its defense of free expression in commercial shopping centers. In fact,

¹⁶⁸ *Ibid.*, at 95. My emphasis.

¹⁶⁹ *Ibid.*, at 96.

the state's highest court reaffirmed Judge Newman's decision above as recently as 2008.¹⁷⁰ However, thirty years after *Pruneyard* was handed down, and notwithstanding the birth of super-regional centers such as the world famous Mall of America—or new urbanist innovations sprouting up around the country—all but a few states have expressly declined the Supreme Court's invitation to extend free speech and assembly inside malls under their constitutions. I will detail the figures in Chapter Five, but suffice to say for now that half have failed to even reconsider the relationship between property and space inside malls, in light of *Pruneyard*. I believe this raises some fair questions about the positive value of that judicial decision where the practice of public space is concerned, particularly in view of major geographical changes and the emergence of new commercial topographies where people go. I will turn to these questions in what follows.

¹⁷⁰ *Fashion Valley Mall, LLC. v. National Labor Relations Board*, 42 Cal. 4th 850. NB: The California Supreme Court handed down its 4-3 decision in 2007, and refused a rehearing in 2008. For a critique of the decision, see Weinberg, *op cit.*, note 7, *supra*, pp. 7-8.

Chapter Five

Will *Pruneyard* Do? Toward a Second Chance for the First Amendment in Third Places¹

“[N]o one is free to perform an action unless there is somewhere he is free to perform it”
- Jeremy Waldron²

By the time the Supreme Court handed down its *Pruneyard* decision in 1980, First Amendment expression was excluded from privately owned shopping centers. Once accessible by virtue of the Court’s early interpretations of mall space, legal protections were suspended in short order for speakers seeking listeners inside the common areas of those centers. Not unlike the one surveyed in the third chapter, then, the arc traced in Chapter Four bent away from defense of speech and related forms of expression in spaces now construed by the Court to be functionally non-public. In *Pruneyard*, though, the Court determined that California’s judiciary could extend that state’s free speech protections to its citizens, thereby expanding practicable space in its regional shopping centers if it saw fit to do so. This conditional invitation to public expression in shopping malls was well received by Thurgood Marshall. Marshall had framed his mall opinions in order to defend place and public function inside the commercial hubs he thought tantamount to America’s downtowns. So he put his faith in the rightness of California’s free speech position, and its scalability throughout the rest of the country.

Things may have appeared equally promising to civil libertarians and other free speech advocates when *Pruneyard* was announced. More than two-thirds of the states have speech and

¹ I am borrowing the term “third places” from Ray Oldenburg, who uses it to describe spaces outside the home and workplace, where people can meet regularly and forge civic bonds. See Ray Oldenburg, *The Great Good Place: Cafés, Coffee Shops, Bookstores, Bars, Hair Salons, and Other Hangouts at the Heart of a Community* (New York: Marlowe and Company, 1999). My decision to do so here anticipates a later section, in which I describe the new urbanism that relies on Oldenburg’s idea as an important component of its design canon.

² Jeremy Waldron, “Homelessness and the Issue of Freedom,” *UCLA Law Review*, 39 *UCLA L. Rev.*, 1991, pg. 296.

petition provisions in their constitutions, including the nation's largest and most populace ones.³ Similarly, California and other states have structured their free expression articles around more affirmative language—unlike the First Amendment, which mandates that “Congress shall make no law...” abridging freedom of speech and assembly.⁴ Yet *Pruneyard*'s promise has scarcely been realized during the three decades after it was decided. Since 1980, only a few states have accepted the High Court's invitation to extend their constitutional freedoms beyond the scope of the First Amendment or the rulings that excluded it in the 1970s. In this regard, we should reflect once more on Justice White's concurring opinion in *Pruneyard*. White pointed out that the expressive protections found conclusive in California had no bearing on the First Amendment, since its free speech clause was not applicable to malls—at least not in light of prevailing federal jurisprudence. Similarly, White maintained that California's interpretations of space and speech did not apply to the private citizens of any other state in the nation.

The purpose of this final chapter, then, is to reimagine public function and expression in privately owned but state subsidized shopping malls, notwithstanding the formalism of the Court's current doctrines or the inconsistencies that have arisen from independent interpretations by inferior courts. The goal is not to settle each legal argument reflected in this complex debate. Nor can one account address the full patina of social and economic considerations that surround that debate. Rather, I hope to stir discussion about the possibility of “re-inviting” the First Amendment onto commercial property; to create space for further deliberation.

The ideas that follow are not intended to disparage rights of ownership, which are also protected by the Constitution. Nor are they intended to deny shopping center developers any

³ See Gregory C. Sisk, “Uprooting the Pruneyard,” *Rutgers Law Journal*, 38 Rutgers L. J., Summer 2007, 1145, 1164. According to Sisk, thirty-four states have free speech articles in their constitutions.

² Mark C. Alexander, “Attention Shoppers: The First Amendment in the Modern Shopping Mall,” *Arizona Law Review*, Spring 1999, 41 Ariz. L. R. 1, 32.

substantive benefits that attach to real estate. Indeed, the reverse may be imagined, especially in view of marketplace swings that have occurred since *Pruneyard* was handed down, a point to which I will return. My argument proceeds from the idea that shopping malls work best as multifunctional, and therefore multi-determined spaces in a diversifying American landscape, its suburbs, in particular; likewise, that their discursive functions as public fora can and should be expanded as the nation's human geography continues to change in the 21st century.

The judicial doctrines traced in the two previous chapters have tended to segregate publicly accessible space from property, though there were some instances in which built environments were hybridized via constitutional construction. In my view, the prevailing legal position toward speech in shopping centers does disservice to the intersecting interests of publics that spend time inside malls, and owners who have regrettably looked to immunize them from the unexpectedness that makes urban spaces vital to the production of civic capacity. A zero-sum game approach has yielded a decline in constitutionally protected expressive space, while it has done little to relieve the commercial stresses that haunt mature shopping centers in need of renewal.⁵ The market is adapting to those stresses now, moving beyond malls to suburban environments built to articulate the space and publicness of the city, in some measure at least. Three decades after *Pruneyard*, however, the law will need to catch up with the new urbanism that informs commercial development across our increasingly diverse suburbs.

A review of post-*Pruneyard* decision-making reveals fragmentation among the states that have weighed the legality of free speech in their malls. Though a small number of state courts require civic activity in privately owned shopping centers, most have recapitulated the Supreme Court's exclusion of expression there. In order to highlight the principal division between these

⁵ I will discuss the financial difficulties currently facing older shopping malls below. I would be remiss, however, if I did not admit at the outset that there are multiple causes behind those difficulties—including newer patterns of commercial development and consumerism.

states, I will examine judicial interpretations of private property versus public space in New York and New Jersey, respectively. These two nearby states share nearly identical free speech articles, along with comparable political traditions. Yet their courts treat *Pruneyard*'s invitation differently, embracing opposing meanings of publicity inside shopping malls as a result. The polarity between states like New York and New Jersey might be resolved by reintroducing the First Amendment in malls, as a matter of law. This would allow that law to properly mediate the impact of social background facts evolving in America's landscape, specifically, changes to design and practice explored in the first two chapters of this study. I will come back to these following my survey of the legal terrain on which public space has been adjudicated.

The unbearable lightness of Pruneyard: declined invitations and status quo in the states

It is fair to say that many have been less than enamored with the outcome in *Pruneyard*. Quite apart from the argument advanced here in support of a more speech-protective federal standard, the decision has its share of detractors on the opposing end. Before the Supreme Court ruled in that case, an ICSC *amicus* brief argued that any judgment against the mall owner would undo an “evolutionary process” that had rightly removed the First Amendment from his property. After the High Court ruled in 1980—and following affirmations of free speech by the California court as recently as 2008—reproaches against *Pruneyard* have become *de rigueur* among defenders of property protections for the state's mall owners.⁶ One legal scholar has emphasized their point of view in a recent critique. Eschewing more temperate calls to “prune” *Pruneyard* on behalf of property claims, Sisk urges a radical fix:

⁶ For example, a noted real estate attorney in California, Paul J. Weinberg, has criticized that state's Supreme Court for what he considers its baseless application of *Pruneyard* to defeat regulations of labor union activity in a regional mall, in *Fashion Valley Mall, LLC. v. National Labor Relations Board*, 42 Cal. 4th 850. See “The Shopping Center as Hyde Park Corner: Free Speech or Invasion of Property Rights?” in *Zoning and Planning Law Report*, Vol. 32, No. 11, December, 2009.

Pruneyard is not...an overgrown tree that, if carefully trimmed, may productively be tended in its own orchard. Rather, Pruneyard is a weed in the garden of constitutional jurisprudence. Pruneyard should be shorn off at the roots, lest its noxious vegetation crowd out the growth of a healthier approach to constitutional interpretation.⁷

Notwithstanding criticism of legally required free speech and petitioning in Californian malls, *Pruneyard*'s net impact on practicable public space in regional shopping centers around the country has been modest, to say the least.⁸ Appellate level courts of twenty-four states have interpreted their constitutions' free speech, petition, and election articles in deciding cases involving public expression inside shopping centers.⁹ This means, of course, that more than half have yet to judge the matter at all. Within those states, in turn, rulings issued in the 1970's stand, meaning no legal safeguards exist for expressive activities inside shopping malls.

Among the state courts that have weighed contests over free speech in shopping centers following *Pruneyard*, practicable public space has not fared too well. Quite apart from *any* substantive consideration of space for speech in malls, most have framed their legal contests in terms of state action versus private agency. That is, they have elected to weigh the right of property owners, as one class of private citizens, against the right of speakers, yet another class of private citizens.¹⁰ Given the duality they establish between state actors and mall owners, these courts have overwhelmingly concluded that their charters do not require non-commercial expression or association in regional shopping centers. A few—Florida, Maryland, and Texas,

⁷ Sisk, *op cit.*, pp. 1148-49.

⁸ NB: Regional shopping centers are currently categorized as those consisting of 400,000-800,000 square feet in Gross Leasable Area (GLA). See: "ICSC Shopping Center Definitions: Basic Configurations and Types for the United States," International Council of Shopping Centers, 2004.

⁹ This figure is the product of cross-research from multiple sources, including Sisk, *op cit.*, pg. 1151. I have settled on the number listed by the ICSC, which has tracked the issue closely on behalf of its membership, some 60,000 shopping center owners, worldwide. See "Scorecard of *Pruneyard* Litigation," Edward J. Sack, Esq., for the ICSC.

¹⁰ Alexander, *op cit.*, pp. 32-34. For an early yet effective analysis, see also, Curtis J. Berger, "*Pruneyard* Revisited: Political Activity on Private Lands," *New York University Law Review*, 66 NYU L. Rev., 1991, 633, 661. My repeated use of the term "private" is intentional and will bear on a discussion of the state action doctrine, below.

for example—have only tried the issue in their courts of findings, likewise denying access to malls for speech and related expression.¹¹

That leaves a mere five states that currently endorse some form of speech-protected space in their shopping malls: California, Massachusetts, Washington, Colorado, and New Jersey. I will elaborate on the last state in a moment. First, it should be noted that the highest courts of Massachusetts and Washington protect speech and association only in relation to elections and ballot initiatives, and strictly along limited timelines that correspond to voter petitions and signature gathering requirements in those states.¹²

Colorado has taken a more tolerant position on free expression in the common spaces of its shopping centers, based on evidence of state action inside them. Its highest court has banned the prohibition of pamphlet distribution and issue-based petitioning in malls, arguing that “the First Amendment is a floor” for speech protection in that state. In *Bock v. Westminster Mall Co.*, the court identified multiple examples of government intervention in a large regional shopping center. In addition to its location across the street from city hall, the mall housed a police substation and holding facility within the commercial complex. The property also received over \$2 million in infrastructure improvements, financed by local government through the sale of municipal bonds.¹³ *Bock* focused almost exclusively on state action via bond sales and the police substation. The court in that case indicated that the publicness of the mall was an upshot of the

¹¹ The following states have expressly declined to accept *Pruneyard*'s invitation to expand their free speech provisions beyond the scope of the federal First Amendment: Arizona; Connecticut; Georgia; Hawaii; Illinois; Indiana; Iowa; Michigan; Minnesota; Missouri; Nebraska; Nevada; New York; North Carolina; Ohio; Oregon; Pennsylvania; Rhode Island; South Carolina; Wisconsin. Source: James M. Hirschhorn and Jeffrey H. Newman, “Managing ‘Free Speech’ at the Mall,” *Shopping Center Legal Update: The legal journal of the shopping center industry*, published by the International Council of Shopping Centers, Vol. 23, Issue 1, Spring 2003.

¹² See *Batchelder v. Allied Stores International*, 445 N.E. 2d 590 (Mass. 1983), and *Southcenter Joint Venture v. National Democratic Policy Committee*, 780 P. 2d 1282 (Wash. 1989).

¹³ *Bock v. Westminster Mall Co.*, 819 P. 2d 55 (Colo. 1991).

city's economic development policy, as well as municipal operations housed inside.¹⁴ It did not focus on the public functionality of malls as civic spaces.

There are multiple indices of government involvement in malls. Consider the largest, the Mall of America. One conservative comment has estimated that public financing accounts for twenty-one percent of the Mall's development.¹⁵ The Minnesota Supreme Court itself put the figure at \$105 million in tax increment financing for the mall itself, and \$80 million in bond sales for highway reconstruction around the property.¹⁶ Those sums did not factor in the daily operation costs associated with policing the 4.2 million square foot facility. Nor did they include the expenses borne by taxpayers for a larger police substation than Colorado's, a post office, or a public school building on the property. Finally, they do not speak to the role the Mall plays in adjacent communities, or the civic and recreational activities frequently sponsored inside the huge complex, such as a giant amusement park. The Mall of America is one of the nation's premiere destinations. Yet, despite substantial public investment and entanglement, the Minnesota court has refused to protect speech access in the mall.

My point here is that legal analysis of expression and association in shopping centers should include but not be limited to government involvement. It should involve a "thicker" theory of public place and functionality inside malls. The Supreme Court once posited the idea of public function, in *Marsh v. Alabama*, when it posed an important counterargument to the claim that civil liberties were immune from interferences by the state alone. It is true that *Marsh* looked at the nexus between private property and its municipally styled services, such as the sewer system in Chickasaw. But the Court's opinion concentrated on the actual use of that

¹⁴ Sisk, *op cit.*, pg. 1193. NB: This state action focus in Colorado was referenced in the opinion handed down by the New Jersey Supreme Court, its first ruling on shopping malls, in contrast to its own public function analysis.

¹⁵ *Ibid.*, pp. 1194-95.

¹⁶ *State v. Wicklund*, 589 N.W. 2d 793 (1999), at 795-96.

property, I would argue, as well as the broad scope of invitations supplied by owners to surrounding publics. *Marsh* also defended property's significance to democratic engagements, and the role of public place in sustaining them. This concept of public function was carried over in *Logan Valley Plaza*, but abandoned by the time the Court turned to *Lloyd Corp.* and then *Hudgens*. It was rediscovered in California, in the lead up to *Pruneyard*.

As I hope to show below, an argument for the public functionality of shopping malls is found in New Jersey, in contrast with most states. Most state benches remain faithful to the doctrine decried by many free speech observers as both confusing and outmoded: state action.¹⁷ In New York, where an early post-*Pruneyard* test took place—and where a recent ruling has reinforced that test—indices of state action are nowhere to be found in malls according to its Court of Appeals, notwithstanding many overlaps between government assistance, property development, and tenancy. The state's largest super-regional mall, "Destiny USA," in Syracuse, was reconstructed in 2007 with PILOTs and other public supports described below.¹⁸ In the downstate region, a shopping mall complex on Manhattan's West Side is currently slated to receive \$328 million in city tax abatements over a 20 year period. In Brooklyn, elected officials worked with the state's Metropolitan Transit Authority to expand surface transportation to Kings Plaza Mall, a 1.2 million square foot property, thereby enhancing community access to shoppers without automobiles, while turning back two decades of financial losses.

A good deal of fragmentation appears on the post-*Pruneyard* landscape, then. In order to illuminate the divisions in this regard, specifically, the gaps that exist between the doctrines of

¹⁷ See, for example, Timothy Zick, *Speech Out of Doors: Preserving First Amendment Liberties in Public Places* (New York: Cambridge University Press, 2009), pp. 165-67; Gary Peller and Mark Tushnet, "State Action and a New Birth of Freedom," *Georgetown Law Journal*, 92 Geo. L.J., 2004, 779; Alexander, op cit., pp. 23-27, 43; Owen Fiss, "Free Speech and Social Structure," *Iowa Law Review*, 71 Iowa L. Rev, 1986, 1405. I will elaborate on state action further in subsequent sections of this chapter.

¹⁸ See Lynn A. Staeheli and Don Mitchell, *The People's Property? Power, Politics, and the Public* (New York: Routledge, 2008), pp. 77-78. "PILOT" stands for Payments In Lieu Of Taxes.

state action and public function in malls, I would like to examine key rulings in New York and New Jersey. Besides their geographic proximity, the constitutions of these two states contain identical free speech provisions.¹⁹ Yet they are poles apart on a legal spectrum that encompasses private property versus state action, on the one hand, and the bond between public functionality and practicable space, on the other.

New York versus New Jersey, or state action formalism versus avant-garde public functionalism

Appetites to test *Pruneyard*'s implications were whetted rapidly in New York State, as evidenced in *SHAD Alliance et al. v. Smith Haven Mall*.²⁰ In July 1980, just one month after the Supreme Court handed down its opinion in *Pruneyard*, "No Nukes" activists from the SHAD Alliance entered the Smith Haven Mall on Long Island and began handing out leaflets opposing the use of nuclear power.²¹ The group's tactics were educational and non-violent. Members took to the mall to encourage its customers to attend a series of demonstrations against a nearby nuclear production facility, the Shoreham Nuclear Power Plant. The Mall imposed a blanket policy against political leafleting and other public activities on the property, though its owners periodically welcomed community events on their parking lots. Elected officials would meet with senior citizens and veterans there; healthcare functions, such as blood and eye exams were also permitted on the lots. Following their exclusion from both the interior mall and parking lots for hand billing, the SHAD Alliance activists challenged the shopping center owners under Article I, Section 8 of the New York State Constitution, which reads:

¹⁹ Indeed, in *State v. Schmid*, a key precedent in New Jersey's seminal shopping mall ruling, the justices noted that their constitution's free speech article "was modeled" on the language of New York State's 1821 free speech article, below. See *State v. Schmid*, 423 A. 2d 615, 627 (1980). I quote both free speech clauses in the case studies below.

²⁰ 66 N.Y. 2d 496 (1985). Hereafter, *SHAD Alliance*.

²¹ "SHAD" is an acronym for Sound and Hudson Against Atomic Development. The group was influential in the Northeastern United States, especially.

Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.²²

In weighing the Alliance’s charges against the Mall, the Court of Appeals wasted no time remarking that First Amendment safeguards would not be forthcoming in light of previous federal decisions, such as *Lloyd Corp.*, which held that the nation’s free speech clause prevented government alone from proscribing expression, as opposed to property owners. With that proviso out of the way, the only question on Long Island was whether New York’s charter should be interpreted to waive the Supreme Court’s state action requirement, as California had done five years earlier. Writing for the state’s top court, newly appointed Judge Vito Titone—a proponent of judicial restraint—focused his opinion on the origins of New York’s free speech provision. Responding to SHAD Alliance’s argument, that the affirmative wording of the 1821 article meant it reached farther than the First Amendment’s free speech clause, Titone found nothing in the text or tradition of the state constitution to merit legal protection for expression by activists in privately owned shopping centers:

Plaintiffs...urge us to construe our State Constitution’s free speech provision more broadly. The linchpin of their argument is that no State action requirement exists or should exist under our State Constitution so that the free speech provision may be read as imposing an affirmative limitation on private conduct. The history of the State action requirement, traditional usage and understanding and contemporary approaches to constitutional adjudication, lead us to a contrary conclusion.²³

²² The wording of the two separate clauses has fueled ongoing debates about original intent among the framers of the New York State Constitution, i.e., whether the affirmative language of the first clause should be combined with the omission of any specific government actor in the second clause to apply to state action and private agency in kind. Sisk, *op cit.*, pg. 1171, has argued that such a combination is unwarranted, based on omissions in other parts of the constitution that pertain to state action alone, for example, its due process clause. Okula has argued for a more flexible reading of the free speech provision following publication of the opinion below, based on the very same due process clause. See Stanley Okula, “Towards Rendering New York’s Free Speech Clause Redundant: SHAD Alliance v. Smith Haven Mall,” *St. John’s Law Review*, Issue 4, Volume 60, Summer 1986, 799, 809.

²³ *SHAD Alliance*, *op cit.*, at 500.

In support of his finding, Titone produced a history lesson on New York's constitutional convention and its 19th century free speech article. At the heart of his lesson was an oft-repeated observation that the state's charter shielded public expression from government prohibitions alone, rather than exclusionary actions by private citizens, namely, property owners. The idea was self-evident, Titone thought:

That a Bill of Rights is designed to protect individual rights against the government is standard constitutional doctrine...while the drafters of the 1821 free speech clause may not have envisioned shopping malls, there can be no question that they intended the State Constitution to govern the rights of citizens with respect to their government and not the rights of private individuals against private individuals.²⁴

SHAD Alliance had no right to leaflet in the Smith Haven Mall, therefore. To hold otherwise, Titone argued, was to overlook a chief tenet of constitutionalism: preventing abuse of civil rights by the state. He maintained, in turn, that a different declaration would violate the separation of powers, which was also embedded in the original design of the state's charter. A judgment for the Alliance would signal judicial activism, the kind evidenced in California, where that state's highest court had recently created "a blueprint for the judiciary to turn what it perceives to be 'desirable' social policies into law."²⁵ Eschewing Judge Newman's broad constructions on the West coast, Titone suggested that the legislature would have to act first to change New York's state action limitations, no matter how "socially desirable" his colleagues in the minority thought free speech in shopping centers might be.²⁶

Having disclaimed direct state action in the Smith Haven Mall, the court held that there was no further cause for judicial scrutiny in the case. Specifically, there was no need to inquire

²⁴ Ibid., at 502-03.

²⁵ Ibid., at 504.

²⁶ In fact, a bill was introduced in the New York State Assembly, in the 2003-2004 legislative session, A. 4163-A. It would have amended the state's civil rights law to require free expression in shopping malls. The bill was referred to the Committee on Governmental Operations, where it was never reported out and therefore died.

whether the property functioned publicly among shoppers or residents of the Long Island town. Holding that the mall was “not the functional equivalent of a government,” Titone concluded that his only legal interest pertained to whether the town itself was involved in the exclusion of the anti-nuclear activists from the property. As a later case in the Upstate region should demonstrate below, this threshold question continues to color New York’s analysis of state action and free speech in malls, and it is rarely resolved on behalf of public functionality or association. In *SHAD Alliance*, Titone held that “the characterization or the use of the property is immaterial to the issue of whether State action has been shown. Nor can the nature of property transform a private actor into a public one.”²⁷ As we saw in *Hudgens v. NLRB*, the center’s practical function as a gathering place was of no moment. Nor were previous instances of community and political assembly on its grounds. Only state action mattered, legally speaking.

In fact, Titone went a little farther than the Supreme Court in *Lloyd Corp.* and *Hudgens*. He tied free speech protections on New York property to demonstrable evidence of *significant* state action in malls like Smith Haven’s—hardly a semantic difference, as I hope to show towards the end of this section. That reductionism prompted a dissent from the Court of Appeals Chief Judge, Sol Wachtler, who viewed the Smith Haven Mall as a functionally public place. He also thought its open invitation to visitors warranted a broader, more diverse interpretation of the property’s characteristics. Wachtler protested that the Mall’s potential for nurturing civic capacity on suburban Long Island had been undermined by Titone’s doctrinal devotion to state action. The majority’s formalism meant that an almost impossible burden of proof had to be met by speakers before the state constitution could be invoked on publicly accessible private property. In practical terms, people did not just shop in the Mall, Wachtler complained. They

²⁷ *SHAD Alliance*, op cit., at 506.

assembled and simply lingered, relying on public amenities provided by the owners to do so. They also experienced community life on the property, in myriad forms.

The majority's retrospection on the history of New York's constitution made little sense, then, particularly when its founders incorporated an affirmative right to free speech in text they drafted in 1821 ("Every citizen may freely speak..."). More to the point, Wachtler argued that the framers could not have anticipated that privately owned shopping malls "would come to replace town squares and downtown business districts as the public gathering centers in many communities."²⁸ The advent of these commercial spaces required greater flexibility than Titone and the majority had allowed in their narrow reading of New York's free speech article. As Wachtler added, it was due to "the willingness of courts to interpret such constitutional provisions in light of changing conditions that our freedoms have remained intact and our Constitutions have survived for so long."²⁹ An appropriate understanding of the article, the Chief Judge concluded, would have recognized that the Mall's prohibition on free speech inhibited the spread of public information to the community. Self-government went hand in hand with that information, so the state action requirement should have been triggered as soon as the SHAD Alliance was excluded from the property. In changing times, the Mall's public functionality engendered full protection for democratic space:

Our State Constitution is an innovative document. It was intended to ensure that rights and privileges granted in the past would be preserved in the future under changing conditions. In the past, those who had ideas they wished to communicate to the public had the unquestioned right to disseminate those ideas in the open marketplace. Now that the marketplace has a roof over it, and is called a mall, we should not abridge that right.³⁰

²⁸ Wachtler, dissenting. *Ibid.*, at 511.

²⁹ *Ibid.*

³⁰ *Ibid.*, at 514.

Chief Judge Wachtler's appeals did not triumph in New York. His position on the topographical impact of shopping malls on the public sphere found a more receptive audience in New Jersey about a decade later, though. In 1994, that state's Chief Justice, Robert Wilentz, authored the opinion in *New Jersey Coalition Against the War in the Middle East, et al. v. J.M.B. Realty Corporation, et al.*³¹ In *New Jersey Coalition*, a loosely affiliated cluster of organizations, all opposed to U.S. intervention in the Persian Gulf, sought access to nine regional shopping centers and one community center, in order to hand out leaflets during Veterans Day Weekend in 1990.³² The leaflets urged mall goers to contact their congressional representatives and demand that they vote against American military action in Iraq, following its invasion of Kuwait that summer.³³ Four shopping centers permitted distribution of the handbills, but the remainder denied access to the activists. The Coalition appealed to the state's trial and appellate courts, to no avail. They sought review in the New Jersey Supreme Court under the state constitution's free speech clause, which mirrored New York's.³⁴

In deciding the case, Justice Wilentz took an altogether different tack than had Judge Titone and the *SHAD Alliance* majority. Wilentz did not puzzle over the original text of the state's charter, nor did he even quote it directly in his opinion. Instead, he insisted that the salient issue in *New Jersey Coalition* was the breadth of civic engagements inside the state's shopping centers. This expanse had turned vital at a time when social background facts within

³¹ 138 N.J. 326 (1994). Hereafter, *New Jersey Coalition*.

³² NB: Community Centers are considerably smaller in size and merchandizing scale than their regional center counterparts. While the latter range from 400,000 to 800,000 square feet and contain more than one large anchor tenant, community centers normally range from 100,000 to 350,000 square feet and may contain only one anchor property, such as a big box retailer. James DeLisle, June, 2007, "Shopping Center Classifications: Challenges and Opportunities," *White Paper*, Runstad Center for Real Estate Studies (sponsored by ICSC), University of Washington, College of Architecture & Urban Planning. See also, "ICSC Shopping Center Definitions: Basic Configurations and Types for the United States," International Council of Shopping Centers, 2004.

³³ Joni Noble, "Case Note on New Jersey Constitution," *Seton Hall Constitutional Law Journal*, 11 Seton Hall Const. L.J. 913, 927, Summer 2001.

³⁴ Article I, Paragraph 6 of the New Jersey Constitution reads in part, "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."

the state had changed after the first half of the 20th century. Like Chief Judge Wachtler in New York, Wilentz believed that the manner in which modern malls functioned in his state demanded a more spacious interpretation of what made them public. Going further, perhaps, Wilentz looked to reimagine the debate over public expression, focusing on the environmental texts produced by shopping centers—both inside their malls, and throughout New Jersey—rather than relying on the historical texts of the state’s 1844 constitutional convention.³⁵

Using measures advanced in an earlier ruling that upheld free expression on the private campus of Princeton University, Wilentz analyzed the ways in which shopping center owners had successfully transformed their malls into latter day public spaces, well beyond their commercial triumphs.³⁶ In contrast to Judge Titone in New York, he eschewed a strict interpretation of state action in excluding speech from malls. Instead, Wilentz directed his opinion to the question of whether mall spaces were civic spaces; whether the invitation to use them was sufficiently broad in scope to accommodate leafleting and other forms of expression; and whether the practical relationship between property and space therein made commerce compatible with political association. Based on these three inquiries, Wilentz signaled his intention to look at spatiality and functionality over property and title:

Although the ultimate purpose of these shopping centers is commercial, their normal use is all-embracing, almost without limit, protecting a community image, serving as their own communities, encompassing practically all aspects of a downtown business district, including expressive uses and community events. We know of no private property that more closely resembles public property. The public’s invitation to use the property...is correspondingly broad, its all-inclusive scope...is not just an invitation to shop, but to do whatever one would do downtown, including doing very little of anything.

³⁵ I am borrowing the idea of “texts” from Iveson. Among other examples, he relies on a shopping mall (in Australia) to demonstrate how publics create codes of use inside, which are monitored in turn by authorities charged with regulating publicly accessible private property. See, Kurt Iveson, *Publics and the City* (Oxford: Blackwell Publishing, 2007), pg. 215.

³⁶ *State v. Schmid*, op cit. Clearly, there are differences between a university campus and a commercial shopping center. The tie between them in New Jersey was private ownership, and their value to public discourse.

Turning specifically to the advocacy by members of the New Jersey Coalition:

As for the third factor of the standard—the relationship between the purposes of the expressional activity and the use of the property—the free speech sought to be exercised...is wholly consonant with the use of these properties. Conversely, the right sought is no more discordant with...property than is the leafleting that has been exercised for centuries within downtown business districts...³⁷

Wilentz's entire opinion was colored by the compatibilities above, along with a theme found in Justice Marshall's dissents, as well as in California a decade and a half earlier: declining practicable space in publicly owned downtowns. Topographical transformations in New Jersey required emplacement of free expression in shopping malls, as *de facto* gathering places. The Coalition joined countless stakeholders affected by the privatization of public space. Tracing the unprecedented growth of shopping centers throughout the state, Wilentz believed their owners now shared a civic responsibility with urban municipalities:

We...find the existence of a constitutional obligation to permit the leafleting plaintiff seeks at these regional and community shopping centers; we find that the balance of factors clearly predominates in favor of that obligation; its denial...is unreasonably restrictive and oppressive of free speech; were it extended to all regional and community shopping centers, it would block a channel of free speech that could reach hundreds of thousands of people, carrying societal messages that are at its very core. *The true dimensions of that denial of this constitutional obligation are apparent only when it is understood that the former channel to these people through the downtown business districts has been severely diminished, and that this channel is its practical substitute.*

In the retail boom of the 1990's, moreover, a social and legal duty existed among mall owners intent on filling the market voids they helped open:

Defendants have expended enormous efforts and funds in bringing about the success of these centers. We hope they recognize the legitimacy of the constitutional concern that in the process of creating new downtown business districts, they will have seriously diminished the value of free speech if it can be

³⁷ *New Jersey Coalition*, op cit., at 333-34.

shut off at their centers. *Their commercial success has been striking but with that success goes a constitutional responsibility.*³⁸

Wilentz's thoughts on success and civic obligation can be reconsidered later, especially when we look at how malls are currently faring in the retail market, as well as how their owners might revisit the dynamic between multi-functionality and commercial viability. For now, it is evident that he was privileging public practice over private purpose, while treating state action unlike *Titone* in New York. That choice was an outlier, as Wilentz himself confessed. By 1994, many states had already declined the invitation extended in *Pruneyard*. Yet the law was on the Coalition's side, he opined, because of the myriad functions that New Jersey shopping centers had welcomed in their malls. The court produced a litany of non-commercial activities in the decision. It even attached an appendix at the end of its opinion, which detailed dozens of public events hosted inside each center that joined the contest.³⁹

The fluidity of space in New Jersey malls, coupled with the state's affirmative free speech provisions, warranted an analysis based on public function. Narrow interpretations of state action overlooked the nature of mall space, even though it was qualitatively "all-embracing." So, too, was the invitation issued to publics by property owners, a "predominant characteristic" of the mall, "not at all changed by the fact that the primary *purpose* of the centers is profit and the primary use is commercial."⁴⁰ Single use suburban zoning essentially vanished within shopping centers, Wilentz suggested. The diversity inside belied uncomplicated rights to exclusion among owners and property managers. Equally, the open invitations they extended to outsiders required toleration for heterodox practices inside:

³⁸ *Ibid.*, at 334-35. My emphasis in each quote.

³⁹ The event types found in the appendix have been noted in other portions of this study—primarily, in the second and fourth chapters. I have therefore omitted them in this summary.

⁴⁰ *New Jersey Coalition*, *op cit.*, at 357

The almost limitless public use of defendants' property, its inclusion of numerous expressive uses, its total transformation of private property to the mirror image of a downtown business district and beyond that, a replica of the community itself, gives rise to an implied invitation of constitutional dimensions that cannot be obliterated by defendants' attempted denial of that invitation, an implied invitation that included leafleting on controversial issues. 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.⁴¹

Turning to the final thread in his argument, Wilentz held that free expression was eminently compatible with the operation of shopping centers in New Jersey. Accommodation of speech and assembly was embedded in their wholesale replacement of the quintessential public fora found in downtown business districts. In other words, malls naturally functioned like urban spaces. They also invited members of the public inside for a host of activities. Therefore, they delivered spatial intersections found on traditional public property, where discursive practices such as the Coalition's anti-war leafleting once flourished among speakers and listeners. To the extent that shopping centers presented the public functionality and diversity of streets and sidewalks, the openness and accessibility historically associated with the latter were now apropos inside the former. Clearly, Wilentz was making a different use of history than Judge Titone had in *SHAD Alliance*. Unlike Titone, Wilentz found practicable public space within shopping malls, and thus in his own state's constitution. He also disputed the alarms sounded at the prospect that speech might be given breathing space inside malls:

This is the new, the improved, the more attractive downtown business district—the new community—and no use is more closely associated with the old downtown than leafleting... In a country where free speech found its home in the downtown business district, these [shopping] centers can no more avoid speech than a playground avoid children, a library its readers, or a park its strollers.

More importantly, we find that the more than two hundred years of compatibility between free speech and the downtown business district is proof enough of its

⁴¹ *Ibid.*, at 360.

compatibility with these shopping centers. The downtown business districts at one time thrived: no one has ever contended that free speech and leafleting hurt them. The extent of their downfall has had nothing to do with free speech and leafleting. This record does not support the proposition that one dollar's worth of business will disappear because of plaintiff's leafleting even though some shoppers and non-shoppers may not like it.⁴²

Relating his defense of free speech in New Jersey malls to their natural public function, far-reaching invitation, and replacement of traditional public spaces, Wilentz now confronted the state action objections raised in *Lloyd Corp.*, *Hudgens*, and several states, including New York. The legal contest hinged not on *who* excluded expression in malls, he thought, be it government or their owners. Rather, the concern ought to be about rights of free speech, which were being excluded in new places *where* they had high value.⁴³ The theory behind *Marsh* was alive and well, albeit in New Jersey. The preferred position of speech seemed to enjoy a comeback, too, based on social background facts. Combining the characteristics above with what he dubbed “a changed society,” Wilentz concluded that the state's free speech article still protected civic engagement from the prohibitions of government and property owners alike:

In New Jersey, we have an affirmative *right* of free speech, and neither government nor private entities can unreasonably restrict it. It is the extent of the restriction, and the circumstances of the restriction that are critical, not the identity of the party restricting free speech. Were the government ever to attempt to prohibit free speech in the downtown business district, without doubt our Constitution would prohibit it, and in New Jersey when private entities do the same thing at these [shopping] centers, our Constitution prohibits that too.⁴⁴

⁴² *Ibid.*, at 361-62.

⁴³ This argument contrasts with the view that constitutional framers in the states could not have anticipated the range of new spaces that might be built after free speech provisions were ratified, but they could recognize clear differences between government actors and private actors. See, for example, William Burnett Harvey, “Private Restraint of Expressive Freedom: A Post-Pruneyard Assessment,” *Boston University Law Review*, November 1989, 69 B.U.L. Rev. 929, 966.

⁴⁴ *New Jersey Coalition*, *op cit.*, at 369. Wilentz's emphasis. I will look at the impact of topographical and social changes on the state action-public function contest in the following section.

Echoing Justice Marshall's dictum about suburbanization in *Logan Valley Plaza*, and updating it to account for more waves that followed that decision in 1968, Wilentz framed his own public function rationale in normative terms. Modern jurisprudence, he urged, should evaluate history and precedent in resolving existing contests. However, it must also take stock of changing circumstances and surfacing needs. In *Coalition*, New Jersey's shopping malls had been transformed into the state's new town centers, while replacing its old ones:

We look back and we look ahead in an effort to determine what a constitutional provision means. If speech is to mean anything in the future, it must be exercised at these [shopping] centers. Our constitutional right encompasses more than leafleting and associated speech 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.*

In light of the topographical transformations above, Wilentz believed his interpretation of New Jersey's free speech article had to respond to conditions unimagined when it was drafted during the 19th century. This theory of judicial review assumed greater import when new circumstances undermined opportunities for popular participation. Modern developments required jurists to look beyond what Ely calls the "four corners" of constitutional provisions, which have never been self-contained when they address democratic rights. And just as the First Amendment was intended to withstand changing political conditions after the Bill of Rights was ratified in 1791, the state's free speech article was framed to adjust to new forms of commerce:

We do not believe that those who adopted a constitutional provision granting a right of free speech wanted it to diminish in importance as society changed, *to be dependent on the unrelated accidents of economic transformation, or to be silenced because of a new way of doing business.*⁴⁵

⁴⁵ *Ibid.*, at 370. My emphasis. NB: I will elaborate further on Ely's theory of judicial review as it relates to shopping mall jurisprudence below. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980.), pp. 12-13.

Concluding that the rights of New Jersey citizens to use malls “to make their views known, however popular or unpopular” had grown out of the state’s altered socio-spatial landscape, Wilentz would face opposition from his bench. Justice Marie Garibaldi, who supported the federal free speech exclusions upheld in the previous chapter, voiced the fiercest criticism. Garibaldi dissented, protesting against the dangers of a limitless free speech doctrine in New Jersey shopping centers. In her view, the court’s decision had actively created legal compatibilities based on alleged functions, invitations, and annexations that theoretically protected speech in all too unexpected spaces:

[U]nder the majority’s reasoning, whether the property...was dedicated to the public for public discussion is irrelevant. All that matters is that the property was open to the public, as is a shopping mall or any other large gathering space. An example of a publicly-accessible place that will become an open forum for expression under the majority’s analysis is Great Adventure Theme Park. That result is plainly absurd.⁴⁶

Notwithstanding the fact that the nation’s largest indoor amusement park is housed in a shopping center, the Mall of America, Wilentz appeared chastened by Garibaldi’s dissent, particularly her objection to wholesale applications of his decision to New Jersey’s commercial properties. The majority also heeded her argument about the added costs of speech in malls, and her warning that retailers would invariably pass those costs onto consumers. While no direct evidence was ever offered to support these premonitions, Wilentz conceded some territory to Garibaldi and the state’s mall owners. First, he narrowed the court’s holding to the state’s regional centers, though one community shopping center was a party to *New Jersey Coalition*, a fact to which I will return in a moment. Next, he confined shielded expression to leafleting and related speech activities. Wilentz would allow no “bullhorns, megaphones, or even a soapbox”;

⁴⁶ Ibid., at 395.

no “placards, pickets, parades, and demonstrations,” only “normal speech.”⁴⁷ Finally, he followed California’s lead, by inviting New Jersey shopping center owners to regulate expressive activities through time, place, and manner rules. Going even farther than Judge Newman had in *Robins* fifteen years earlier, Wilentz added that owners throughout the state possessed “extremely broad” power to impose those rules inside their malls.⁴⁸

That last concession may have fueled hopes for a reversal of fortune as the new millennium dawned and the state’s mall owners waged another battle against expression; this time inside the smaller community center covered by *New Jersey Coalition: The Mall at Mill Creek*. The comparably modest size of that property (325,000 square feet of leasable commercial space) was a minor consideration in *Green Party of New Jersey v. Hartz Mountain Industries, Inc.*⁴⁹ The major questions in 2000 concerned the regulatory powers delegated to shopping center owners in the court’s 1994 decision. How far could owners go in asserting control over speech-protected space after *New Jersey Coalition*? Could they use the time, place, and manner rules stipulated by Chief Justice Wilentz, to defray the costs of political activity projected by Justice Garibaldi in her dissent—specifically, by passing them onto speakers who were now legally permitted to follow listeners into malls?

The case began in earnest in 1997, when a patron and “Merry Miler” of The Mall at Mill Creek, James Mohn, tried to gather 2,000 signatures for that year’s Green Party gubernatorial candidate inside the complex.⁵⁰ Mohn had successfully petitioned in the Mall a year earlier, during the 1996 Nader Presidential Campaign. Following his request to do so again, however, property managers sent him a copy of the Mall’s licensing agreement. It included three user

⁴⁷ *Ibid.*, at 375.

⁴⁸ *Ibid.*, at 377.

⁴⁹ 164 N.J. 127 (2000). Hereafter, *Green Party*.

⁵⁰ “Merry Milers” was the senior citizens group that used the Mall for their morning walks each day, as permitted by the property owners. No costs were charged for this usage.

regulations. First, any non-profit organization seeking speech access to the Mall was required to purchase a \$1,000,000 insurance policy, which compensated property owners for any disruptions or loss of business that resulted from its activities. Second, outside groups had to sign a “hold harmless” agreement as a condition for use, in cases of accidents among speakers or targeted listeners. Finally, leafleting and related speech activities were limited to one day per year, or a few days at most, between January 1 and October 31. After seeking insurance premium estimates stemming from the first regulation, Mohn joined the Green Party and challenged the licensing agreement under New Jersey’s free speech and assembly articles.⁵¹

The state’s court of finding, its Chancery Division, reviewed the agreement under the New Jersey constitution and the federal First Amendment, defining the Mall as a public forum, *de facto*, based on *New Jersey Coalition*. Using a public forum standard, it ruled that the Mall’s time, place, and manner rules were not narrowly tailored to achieve their purpose. Specifically, the insurance requirement was cost-prohibitive for “splinter political groups,” effectively pricing them out of free expression on the property. Upon review, though, the state’s Appellate Division reversed and held in favor of the property owners. It concluded that the agreement was based on a “good faith exercise of reasonable business judgment.”

The New Jersey Supreme Court reversed the appeals court decision, though it questioned the legal determinations of *both* inferior courts. Writing for a unanimous majority, Justice Daniel O’Hern held that the trial court’s classification of the Mall as a public forum was mistaken. The property was private, after all, and narrow tailoring rules strictly applied to government action on public property. Likewise, he argued, *New Jersey Coalition* gave mall owners “extremely broad” regulatory power to establish time, place, and manner rules. The

⁵¹ Article I, Paragraph 18 of the New Jersey Constitution reads, “The People have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances.”

Chancery Division’s decision that they be “narrowly tailored” was inconsistent with *Coalition*.⁵²

Still, O’Hern believed the “reasonable business judgment” standard used by the Appellate Division to be more ill suited to the situation inside The Mall at Mill Creek:

We disagree...that the business judgment rule is the proper standard... We are not so certain that what is good for mall owners is good for the country, or, in this case, good for the citizens of New Jersey who seek to exercise their free speech rights.⁵³

It is here that the publicity of private property becomes further inscribed in the state’s jurisprudence—both as a matter of constitutional analysis, and as a form of spatial remediation. O’Hern paired New Jersey’s free speech and assembly articles, describing rights afforded by them as “broader than practically all others in the nation.” He also noted that the state had long been “at the historical center of debate over speech and assembly,” in cases such as *Hague v. CIO*, which originated in Jersey City. Those decisions had offset pre-New Deal jurisprudence, which had once permitted owners “unfettered control over property.” *New Jersey Coalition* followed in the tradition of *Hague*, surpassing it, really, by redressing structural imbalances between space and property in the wake of late 20th century suburbanization. Justice Wilentz sought to return practicable space to the state, places where speakers could identify listeners in spite of significant geographical shifts. He fairly handed mall owners “extremely broad” power to regulate, but not to exclude, that space, noted O’Hern. What was needed, then, was a fair accommodation of property and expression inside The Mall at Mill Creek. That meant focusing on three objects: “the nature of the affected [speech] right, the extent to which the mall’s restriction intrudes upon it, and the mall’s need for the restriction.”⁵⁴

⁵² *Green Party*, op cit., at 146.

⁵³ *Ibid.*, at 147.

⁵⁴ *Ibid.*, at 149.

Creating a context in which to review those objects, the *Green Party* court unanimously adopted “public space” as its term of art. This was the first time the phrase was used in any of the cases traced in this chapter, not to mention the previous one. Such emplacement seemed to telegraph an expansive notion of public functionality in New Jersey, and a stronger rejection of New York’s doctrinal deconstruction of malls as “non-places.”⁵⁵ O’Hern even traced the public ancestry of modern shopping centers, all the way back to the Athenian *agora*. He added, “There is a strong correlation between a free market in goods and a free market in ideas.”⁵⁶ Noting the rich history between marketplaces and political association in America, too, O’Hern criticized The Mall at Mill Creek licensing agreement, adding, “We would have hoped that the mall owners would sense the connection between the colonial pamphleteers who secured our liberties and the pamphleteers who today seek access to the new forums of commerce.”⁵⁷

Instead, the owners tried to price out discourse from those forums. Underscoring *New Jersey Coalition*, and the state’s tradition of defending its citizens against denial of public accommodations by other citizens, O’Hern concluded that the Mall’s insurance, indemnification, and scheduling rules effectively excluded leafleting and related speech. The agreement was particularly onerous on third parties and other indigent activists, who were unable to afford the insurance premiums required under its first guideline. Similarly, the hold harmless clause was couched in terms of “slip and fall” risk scenarios, yet there was not a scintilla of evidence that speakers and petitioners were more prone to accidents than customers. The agreement did not appear to be grounded on “objective factors,” O’Hern argued—none that distinguished Green Party rank-and-file members from “skylarking teenagers, who accept the general invitation of the

⁵⁵ I am borrowing the term from Auge, a cultural anthropologist. See, Marc Auge, *Non-Places: An Introduction to Supermodernity* (New York: Verso, 2006), pp. 95-98.

⁵⁶ *Green Party*, op cit., at 150

⁵⁷ *Ibid.* NB: This assumes some form of civic commitment on the part of mall owners, a subject briefly addressed in the second chapter.

Mall and pursue expressive activities that would appear to pose a greater risk,” yet were “not asked to pay anything for that privilege.”⁵⁸ Finally, the scheduling maximums were unrealistic. Given New Jersey’s primary and general elections, one or two days annually would hardly be enough to sustain “high value” expression between speakers and listeners, particularly at pivotal times in its voting cycles.⁵⁹ A ban on electioneering and other activities would undermine the state’s democratic process, which now relied on shopping centers as much as any historical marketplace where political participation had previously proceeded.

As the 21st century dawned in New Jersey, then, the courts reimaged malls as publicly functional speech environments, notwithstanding their private ownership. As it commenced in New York, on the other hand, legally protected space declined further in malls, as did the prospect that publicly accessible property would accommodate expression or ideological dissent. Over the objections of the New York Civil Liberties Union (NYCLU) and an individual lawyer named Stephen Downs, the state’s Appellate Division ruled in 2010 that content was irrelevant where privately owned malls were concerned, though the facts of a case in an Albany suburb suggest otherwise. Just as *Green Party* reinforced *New Jersey Coalition* in *The Mall at Mill Creek*, a new contest in New York fortified the Court of Appeals’ 1985 decision in *SHAD Alliance*, when it was held that “significant state action” had to be implicated in the exclusion of free speech in order for its constitution to be invoked.

Stephen Downs v. Town of Guilderland began on March 3, 2003, when Downs and his son, Roger purchased two custom made t-shirts at the Crossgates Mall.⁶⁰ One of the shirts read

⁵⁸ Ibid. at 156.

⁵⁹ Ibid. at 158.

⁶⁰ Hereafter *Downs*. NB: The complete case title is *Stephen Downs v. The Town of Guilderland; Town of Guilderland Police Officer Adam Myers; Pyramid Management Group, Inc.; Pyramid Crossgates Co.*, State of New York Supreme Court Appellate Division, Third Judicial Department, Docket No. 507428. That title reflects the participation of the Crossgates Shopping Mall, and its developer/property manager, Pyramid.

“Peace on Earth” on the front, and “Give Peace a Chance” on the rear. The other read “No War with Iraq,” and “Let the Inspections Work” on the reverse. In Iveson’s geography of public address, the origins of the case might have preceded the purchases *made inside the mall*—as the United States prepared for invasion of Iraq in the wake of 9/11, and Downs ordered his t-shirt in anticipation of sharing its message with customers at Crossgates.⁶¹ To that end, Downs and his son removed their coats following the purchase, put their new t-shirts on over the clothing they entered with, and proceeded to walk together through the common areas of the mall.

While father and son stood in the Crossgates food court, two security guards approached them and ordered them to either remove their t-shirts or leave the premises. In briefs submitted to the court by the property owners, the security guards testified that another department store detective relayed a report to them concerning “a commotion” in the mall’s common areas, initially raised by another customer.⁶² According to Downs’ briefs, however, neither he nor his son was ever observed by security personnel engaging in any kind of disruption.⁶³

When asked to remove their t-shirts, the Downs refused. They were asked again, and they refused again. The impasse continued for some time, when Guilderland Police Officer Adam Myers entered the fray. Myers was at Crossgates on another matter, to complete some administrative duties at a police substation located on the property. After being called over by the guards and having the situation explained to him, he joined them in ordering Downs and his son to remove their t-shirts. While this was happening—perhaps in a patent instance of

⁶¹ Iveson, *op cit.*, pg. 215. NB: Iveson is not referring to Downs or the *Downs* case. Yet his notion of public address as something planned in advance of one’s spatial practice is exemplified during a discussion of excluded space in an Australian shopping mall (see Note 35). Based on recent correspondence I have had with Downs, there was clearly a premeditative component to his expression, owing to an ongoing brouhaha over anti-war activities inside Crossgates before he and his son donned their t-shirts in the mall. See also, Kohn, *op cit.*, pp. 1-2.

⁶² Brief for Appellees, pg. 5.

⁶³ Brief for Appellants, pg. 6.

“heckler’s veto,” one may argue—an unidentified passerby threatened Downs. He shouted, “I ought to kick the shit out of you motherfuckers!” according to the police officer’s deposition.

Following the threat, and some additional urgings to Downs and his son, Officer Myers phoned his superior about the standoff. He in turn contacted the Town Attorney. After receiving Myers’ relayed report, the Attorney advised that the officer was legally authorized to arrest the father and son for criminal trespass, provided that the mall agreed to press charges against them if he did so. At that point, Roger Downs removed his t-shirt. Stephen Downs refused to remove his t-shirt, however, and was promptly arrested by Officer Myers. Downs was peacefully escorted to the police substation in the mall, to be issued a desk ticket by the officer. When the former made it plain to the latter that he intended to wear his t-shirt in the mall after the desk ticket was issued, he was handcuffed and escorted to the Guilderland Town Hall, where he was charged with trespass. The charges were dropped shortly thereafter, following separate protests outside Crossgates by local residents, who objected to the arrest.

Nevertheless, Downs sued the town and the mall, jointly. He contended that his free speech rights had been violated under Article I, Section 8 of the state’s constitution. Represented by the NYCLU, he claimed the protections of that article were triggered inside Crossgates. He relied on *SHAD Alliance*, which held that shopping malls could lawfully exclude speakers, unless significant state action was involved in doing so; in other words, when government itself did the excluding. In Downs’ view, the state was implicated directly in his removal from the mall, in a few ways. First, it was Guilderland Police Officer Myers who carried out his removal, under a state trespass statute. Second, a police substation inside the mall facilitated Myers’ involvement in the incident, and served as the initial processing site for Downs’ arrest. Finally, the mall and the town had formed a “joint enterprise” to exclude and arrest Downs for refusing to

remove his “Peace on Earth/Give Peace a Chance” t-shirt.⁶⁴ This collusion, added the NYCLU, was further evidenced by close coordination between Officer Myers, the Town Attorney, and the management at Crossgates, who assented to pressing trespass charges against Downs if he was arrested, following repeated entreaties to him about his t-shirt.

While *SHAD Alliance* dealt with multiple overlaps between shopping center and state in the form of community events hosted on the grounds of Smith Haven’s Mall, Downs and the NYCLU focused on Crossgates’ direct “invocation of the apparatus of government” to exclude his expression. Not only was there coordination between the town and the property owners prior to his arrest by a law officer. That arrest was initially executed inside a municipal police facility housed on the property at no cost to the owners. Even more, the mall’s management paid the town an annual fee of \$25,000 to supplement public safety inside Crossgates.⁶⁵ In sum, there was *significant* state action in the mall and in Downs’ exclusion, they charged, in the form of government entanglement in the day-to-day operation and security of the complex. This demonstrable nexus between government power and property ownership had to trigger the constitutional protections outlined in *SHAD Alliance*.

Countering that Downs’ aim was “to manufacture a case to challenge established New York Court of Appeals precedent,” the Pyramid Management Group—with malls across the state, including Syracuse’s super-regional “Destiny USA,” above—maintained that no state action was involved in the exclusion.⁶⁶ Its argument proceeded as follows: Crossgates adopted a “behavior code” in its capacity as a private actor. Since neither the Town of Guilderland nor its police force played a role in drafting that code, state action never pertained. In addition, Officer Myers happened to be inside the mall on a discrete matter. He was not onsite to exclude Downs

⁶⁴ *Ibid.*, pg. 11.

⁶⁵ *Downs*, *op cit.*, at 4.

⁶⁶ Brief for Appellees, pg. 1.

on behalf of the management, though it was lawfully permitted to seek “assistance from the police to enforce its private property rights” under *SHAD Alliance*.⁶⁷ As in most states, such as Minnesota, Pyramid argued, the presence of police substations in malls did not legally constitute state action on shopping center property. Downs’ exclusion resulted from the enforcement of mall policy, not police policy, nor town policy. The matter was strictly a private one, therefore. Since neither Crossgates nor Pyramid were government actors, state action did not apply within the framework of New York’s free speech article in *SHAD Alliance*.⁶⁸

The Appellate Division unanimously agreed. And the brevity of its opinion rivaled its apparent lack of sympathy for Downs’ position. The appeals court reiterated Judge Titone’s argument that the nature of mall property was irrelevant to free speech, dismissing Downs’ characterization of Crossgates as a public forum that functioned as part of a larger community. The court singled out *Pruneyard* and *New Jersey Coalition* as outliers, reaffirming that “New York has interpreted its constitution regarding this issue in a manner essentially consistent with the federal courts and the majority of state courts.”⁶⁹ From there, the court essentially rehashed the state action analysis included in the appellees’ briefs, while summarily dismissing each nexus between the mall, town, and police advanced by Downs and the NYCLU.

Matching that brevity, and finding no evidence that significant state action was involved in the Downs contest, the New York Court of Appeals declined to review the case further. It concluded that no constitutional issue was raised in Guilderland. Maybe Downs had intended to disrupt good law in *SHAD Alliance*, as Pyramid charged, or perhaps he “just wanted to wear a t-shirt in the mall,” as he reported. In either case, New York’s bench, which had previously dismissed the public function of private property inside Smith Haven Mall, now doubled down in

⁶⁷ *Ibid.*, pg. 30.

⁶⁸ *Ibid.*, pg. 10.

⁶⁹ *Downs*, *op cit.*, at 5.

its denial of state action inside Crossgates Mall, too. In so doing, it persisted in its unwillingness to consider any notion of public space or forum in shopping centers. Instead, the court elected to segregate private property from spheres of political expression, association, and dissent in a post-*Pruneyard* milieu.

Reimagining property as space in an age of fluctuating fortunes: state action, the new urban way

I have been privileging the public functionality of marketplaces throughout this study, shopping centers included. I trust I will not surprise anyone when I admit that I intend to do so in the remainder. It should also come as no surprise by now that the state action doctrine has consistently proven hostile to practices of public space in privately owned malls. The *Downs* contest provides a useful snapshot of the doctrine, which has been construed in New York and most states to exclude expression from the common areas of malls.⁷⁰ Now, we have seen other instances of state action in the form of municipal easements for commercial development, as well as operational enhancements in regional shopping centers—not only in this chapter, but also the previous one. Yet *Downs* signals the deployment of the state’s police apparatus to supply a mall owner with legal force needed to regulate political expression on private property, that is, to include and exclude speech activity. The case reveals an exclusionary approach that we had not seen previously, while providing fresh evidence of how the state action doctrine delimits public space in malls. And yet a number of exceptions have been incorporated into the doctrine since the Supreme Court formulated it over a century ago.⁷¹ In light of how malls perform as

⁷⁰ While they disagree on the substance of decision-making, both Sisk and Alexander have pointed out that the state action rationale has been used by a preponderance of state courts that uphold free speech exclusions in malls.

⁷¹ The state action doctrine was inaugurated in the *Civil Rights Cases*, 109 U.S. 3 (1883), at 11, when the Supreme Court held that the 14th Amendment pertained only to government’s affirmative action against citizens. In narrowing

community hubs today, those exceptions could help recreate breathing space on commercial property, while new planning approaches look to do the same in suburbs, generally.

In *Marsh v. Alabama*, the Court outlined a key exception to the seminal interpretations of state action proffered in the wake of 14th Amendment ratification. Prior to *Marsh*, a *laissez-faire* doctrine had prevailed throughout the post-Civil War 19th century and into the first third of the 20th century, when FDR's Court-packing threat prodded judicial acquiescence towards a host of New Deal policies reconciled with the Constitution in the late 1930s, with help from his recent appointees.⁷² Within ten years of Roosevelt's realignments, the *Marsh* Court held that the public functionality of a company owned and operated town had been embedded in its recreation of the urban public properties opened to speech in *Hague v. CIO*, coupled with the open invitations made by that town to members of surrounding communities. It also reasoned that private property might function publicly in necessitous circumstances, i.e., when commercial places were vital to civic engagement and an informed citizenry. New Jersey's highest court echoed each of those rationales in its two mall rulings, as we saw above.

New York's benches declined to weigh the public function exception in malls, both in *SHAD Alliance* and *Downs*. Notwithstanding those declinations, it seems plausible that *Downs* might have triggered at least one other exception to the state action doctrine, if not two: direct intervention by the state in speech exclusion, and a nexus between government and owner in the development and operation of publicly accessible private property. These exceptions may help us reexamine the meaning of state action in Smith Haven, Guilderland, or any place where malls are integral parts of metropolitan fabrics. Interestingly, the Supreme Court formulated them

the reach of the Constitution in this way, the Court maintained, "It is State action of a particular character that is prohibited...Individual invasion of individual rights is not the subject matter of the Amendment."

⁷² I am thinking primarily about Justices Hugo Black and Felix Frankfurter, who drafted the principal opinions in favor of Grace Marsh's freedom of speech in the shopping center of Chickasaw's company-owned town.

before shopping malls landed on its docket. More significantly, each one was formulated pursuant to the Court's protection of civil rights and liberties in places of public accommodation, during transitional periods in American social history.

In *Shelley v. Kraemer*, decided just two years after *Marsh*, the Court ruled that there was significant state involvement in an otherwise private arrangement whereby white property owners in a St. Louis neighborhood collectively refrained from selling their homes to African Americans. Though the "restrictive covenant" made by private citizens did not violate the 14th Amendment in itself, held the Court, the Missouri judiciary, including its highest bench, had enforced the pact. This meant that it, too, was complicit in violating the equal protection rights of still other private citizens.⁷³ In other words, the public imprimatur given by state courts to private discrimination constituted state action in 1948. Sixty years later, the NYCLU contended that Stephen Downs' exclusion from Crossgates Mall violated his free speech guarantee under the New York constitution. While the behavior code used to exclude Downs was itself the product of a private act, it formed the basis for his arrest by a town police officer, finally, and therefore triggered the state action exception advanced in *Shelley*.

Although Pyramid and the New York courts saw the incident in Guilderland differently—each agreeing that Crossgates' owners were within their right to request police protection of their private property interests—I think it is possible to argue that significant state action was involved in Downs' free speech exclusion. In fact, the property owners were unable to enforce their own rights to ban his expressive conduct, or anyone else's, without employing the police power of Officer Myers, the Guilderland Town Attorney, or New York State's Appellate Division. As Alexander points out, "there is state action in the way in which expressive activity is silenced in malls... The owners of the shopping center are able to exclude...only because government has

⁷³ 334 U.S. 1 (1948), at 20.

granted them a legal right to do so.”⁷⁴ Staeheli and Mitchell have adapted Blomley’s analysis to argue that disciplining proprietary space always calls for some measure of municipal authority, and may indeed be rooted in that authority.⁷⁵ Ultimately, the laws that govern property and space will expand or encroach on the legitimacy of public practices within a community. In this sense, Downs’ exclusion resulted from immediate enforcement of Crossgates’ behavior code by the town police, as well as the *otherness* through which his t-shirt was framed in mall policy and Guilderland’s public safety apparatus, notwithstanding his peaceful conduct.

Critical geography does not examine the state action doctrine, per se, so I would like to reserve further discussion until the last section. At the moment, I am attempting to encourage the emplacement of civic engagement in malls, as well as sustainable exceptions to a state action doctrine that has undermined free expression inside New York’s and most others around the country. An additional area in which the Supreme Court has interrupted the formalism of its doctrine is worth mentioning, therefore. In the past, the High Court has found that state action occurs when there is an observable nexus between government development activity and the agency of private actors in places of public accommodation.

In *Burton v. Wilmington Parking Authority*, the Court reviewed a challenge to racial discrimination that arose out of the sit-ins staged during the late 1950s.⁷⁶ The owner of a coffee shop located in a public parking garage routinely denied African-Americans service. Even though the denial took place on private property, the Court focused on the fact that the

⁷⁴ Alexander, op cit., pg. 43.

⁷⁵ See Staeheli and Mitchell, op cit., pp. 138-43; Nicholas Blomley, “Property, liberty and the category,” *Geoforum*, Vol. 41, Issue 3, May 2010, pp. 353-55. NB: In this sense, it is the development of private property that structures the boundaries in which public space becomes available for individual and collective participation in open political discourses. While it goes beyond the scope of this study, the examples I have cited in previous chapters—for example, bonus plazas, business improvement districts, and park conservancies in New York City, along with common interest developments throughout the country—suggest that state sanctioned property arrangements may determine how public space is created and deployed, rather than the other way around.

⁷⁶ 365 U.S. 715 (1961).

establishment was housed inside a municipally controlled facility, which supplied the business owner with heat, water, and other public supports. Moreover, evidence in the case demonstrated that the parking authority abided by the coffee shop's racial discrimination due to its interest in maintaining a "mutual benefit" with the property owner, and its competitiveness with other garages in the Delaware city. Because a "symbiosis" of place and interest existed between the shop and municipality, the Court concluded that the property owner's discriminatory practices legally triggered the 14th Amendment's state action requirement.⁷⁷ Thus, another exception was made in the area of civil rights protection on private property.

Owing to a number of decisions handed down after *Shelley* and *Burton*, it would be an overreach to stake either of them as proof positive for protection of federal speech rights in American shopping centers, that is, as incontestable state action exceptions. In fact, the Court narrowed the influence of both those cases during the Burger and Rehnquist years. It did so in legal disputes involving the private supply of public goods, as well as government imprimatur for, and entanglement with, private decision-making.⁷⁸ "The current challenge," Barak-Erez suggests, "is how to update the state action doctrine in a way that preserves the distinction between state and private actions and is still capable of recognizing new forms of activity in the public sphere."⁷⁹ Meeting that challenge here requires reevaluating the applicability of the

⁷⁷ *Ibid.*, at 725.

⁷⁸ See, for example *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) [denying that a privately owned, publicly-regulated utility was a state actor when it terminated service to one of its customers]; *Moose Lodge No. 107 v. Ivis*, 407 U.S. 163 (1972) [denying that government issuance of a liquor license to a private membership club produced a state action claim when the club engaged in discriminatory practices]; *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) [denying that a privately owned school became a state actor when it fired a counselor for publishing her complaints about the school's administration, even though the institution was funded primarily by government tuition payments and delivered a quintessential public function].

⁷⁹ Daphne Barak-Erez, "A State Action Doctrine for an Age of Privatization," *Syracuse Law Review*, 45 *Syracuse L. Rev.*, 1994, 1169, 1188.

doctrine to malls, specifically, in light of the multiple intersections between public support and function, on the one hand, and private development on the other.⁸⁰

Since my main interest is in the public sphere to which Barak-Erez refers, I believe that a proper perspective on breathing space for free expression in malls should entail a healthy suspicion about narrow state action interpretations that overlook the public-private partnerships that build and sustain malls. A growing number of regional and super-regional shopping centers opened after the fate of speakers and listeners had been decided at the federal level support this wariness. In the 1970s, significant financial support was infused in mall developments, via government budgets and policy-making, particularly during their boom cycles in the years that followed.⁸¹ Today, in the midst of a bust, that spending continues, if for different reasons. In response to declining profits and rising vacancies inside older shopping centers, public decision makers have found themselves assisting owners through financing and land use arrangements aimed at preserving or re-leveraging mall marketability throughout the nation.⁸²

Due to significant metropolitan and regional economic dependence on hundreds of enclosed malls, many declared “too big to fail,” neither states nor municipalities are free to walk away from them. Its reputed fiscal austerity policies aside, New Jersey recently provided \$200 million in low interest loans to the landlords of an indoor commercial mall and entertainment complex, sited on state-owned land and started before the nation’s economic downturn. The “American Dream Meadowlands” (formerly, “Xanadu”) continues to receive post-recession

⁸⁰ NB: It could also conceivably mean reconsidering those intersections in the context of the debate between judicial activism and restraint, as those juridical approaches relate to shopping centers. The debate is surely an important one for students of jurisprudence. I believe it is best reserved for future inquiry, since it goes beyond the substantive scope of my conclusion.

⁸¹ William Severini Kowinski, *The Malling of America* (New York: William Morrow and Co., 1985); see also Kowinski, “The Mallennium Factors: Mallcondo Continuum, Fortress of the Future, or Where No Mall Has Gone Before,” in Dennis R Judd and Paul S. Kantor, (Eds.) *Enduring Tensions in Urban Politics* (New York: Macmillan, 1992).

⁸² David Smiley, “Addressing Redress,” in David Smiley and Mark Robbins, *Sprawl and Public Space: Redressing the Mall* (New York: Princeton Architectural Press, 2002), pg. 14.

public financing on the heels of \$1 billion in highway and infrastructure improvements. That support is made possible through the sale of state bonds, which are backed by the pension funds of almost one hundred thousand New Jersey government employees. In New York, the city of Syracuse delivered a 25-year PILOT to Pyramid Companies—the same property management corporation sued by Stephen Downs, above. Moreover, the city appropriated environmental remediation funding and directly financed access roads to help turn the regional Carousel Center into the super-regional “Destiny USA.”⁸³

The reimagining I am recommending might be buoyed by the commercial conditions now facing older malls, too. Shopping centers around the country continue to ripen for greater public intervention by policy makers and the local administrations accountable to them. As they do, a modernized interpretation of the state action doctrine could eschew the zero-sum game between property and space observed in the courts of New York, for example. It may be fair for Sisk to say that shopping centers are indistinct from other privately owned places that receive state investment, since virtually every property development is supported by public expenditures in one way or another.⁸⁴ Still, malls are unlike homes, stand-alone stores, or even big box retailers that obtain government funding and land use benefits. They are touted by developers, owners, and municipalities coming to their rescue as the environmental annexes of local and regional communities. This is particularly true in larger malls, where numerous relationships and public activities are housed inside—not to mention a growing number of government agencies.⁸⁵

⁸³ Staeheli and Mitchell, *op cit.*, pg. 77.

⁸⁴ Sisk, *op cit.*, pg. 1193.

⁸⁵ This is not a new phenomenon, either. One example of the ongoing trend of government-commerce co-location in shopping centers is found at “City Hall in the Mall,” a multifunctional initiative in Tennessee, where the Knoxville Center provides essential government services, such a department of motor vehicles, a marriage license application desk, and the post office branch that is a veritable standard in malls today. See Jennifer Niles Coffin, “The United Mall of America: Free Speech, State Constitutions, and the Growing Fortress of Private Property,” *University of Michigan Journal of Law Reform*, 33 U. Mich. J. L. 615, Summer 2000, pp. 643-44.

Shopping centers are a \$4 trillion industry in the United States. They generate over \$35 billion in local sales taxes and more than \$127 billion for state governments around the country.⁸⁶ However, revenue has been declining in malls, and it began to do so before the 2008 recession. While super-regional centers have continued to profit in most parts of the country during the last decade, the rise of online commerce, or “e-tailing,” and big box options such as Walmart have clearly hurt the nation’s 1,200 smaller formats.⁸⁷ Diminishing retail has led to a thirty-five percent vacancy rate inside these properties, nationally.⁸⁸

Perhaps more suggestive of draining lifeblood in shopping centers are the dipping averages of “time spent” in malls that once overflowed with people spending money and hours inside the climate controlled downtowns opened after World War II.⁸⁹ A recent trade publication points out that Americans now spend between 45 minutes to two hours inside malls. Those numbers are down from a three-hour average in 1990. And the primary criticism found among dissatisfied and erstwhile customers is a lack of opportunity for *discovery* inside.⁹⁰ In fact, the most commonly cited complaint in a 2008 survey conducted by the business school at Wharton was “a lack of anything new or exciting at the mall.”⁹¹

Now, I am not suggesting that the surveys above are tracking a statistical yearning for enforceable speech rights or political dissent inside malls. I would submit, however, that the missing “discovery” cited by consumers and retail observers alike radiates from cultural demand

⁸⁶ ICSC Research, “Property and Policy Research,” January 2013, published online by ICSC.

⁸⁷ See, for example, Jeff Jordan, “The Death of the American Shopping Mall,” *The Atlantic Cities*, December 26, 2012.

⁸⁸ *Ibid.*

⁸⁹ Bureau of Labor Statistics, “American Time Use Survey-2012 Results.” Published in June 2013, pg. 9. For academic accounts, see, Ellen Dunham-Jones and June Williamson, *Retrofitting Suburbia: Urban Design Solutions for Redesigning Suburbs* (Hoboken, New Jersey: John Wiley & Sons, 2011), pg. 108; June Williamson, “Protest on the Astroturf at Downtown Silver Spring, July 4, 2007,” in Christopher Niedt (ed.), *Social Justice in Diverse Suburbs: History, Politics, and Prospects* (Philadelphia: Temple University Press, 2013), pg. 56.

⁹⁰ National Retail Federation, “Shopping 2009: Mitigating the Mall Malaise.” Published January 11, 2009.

⁹¹ Knowledge @ Wharton, “The Mall Pall: Have America’s Biggest Shopping Centers Lost Their Allure?” Published December 10, 2008.

for heterogeneity within shopping centers; the kind associated with cities—where more mixed-use spaces help furnish jobs, safety, and favorable impressions that have been drawing huge numbers of Americans back during the last decade. The urbanism of Jane Jacobs was built on many of the desiderata we saw in the first chapter, including diversity, toleration, and accommodation.⁹² Today it finds its defense in the work of Richard Florida and others, who look to undo the vestiges of singularity in suburbs and exurbs by importing values of openness, community, and unexpectedness that bolster publicity *and* commercial creativity.⁹³

I also do not wish to say that mall owners are unaware of the need for multiplicity in their centers. They know that noncommercial activities give customers reasons to come, and stay, inside.⁹⁴ Legally speaking, though, the picture appears to be different. Justice Marshall's defense of publicness in his *Lloyd Corp.* dissent is worth remembering at this point. Marshall believed that the relationship between private property and public expression in malls was best conceived as a continuum.⁹⁵ That is why he welcomed the prospect that *Pruneyard* might restore the spatiality he advanced in *Logan Valley Plaza*. However, doctrinal formalism in New York and many other states has reinforced the dichotomies that transform malls into non-places decried by anthropologists and geographers, who consider topographical space a key element of democratic processes through which people associate with one another as members of publics.⁹⁶ Questions of free speech aside, the evidence above suggests that the commercial viability of malls will diminish as opportunities for publicity ebb. Over the last decade, one might argue, a

⁹² Jane Jacobs, *The Death and Life of Great American Cities* (New York: Vintage, 1961), see especially, pp. 152-55.

⁹³ Richard Florida, *The Rise of the Creative Class, Revisited* (New York: Basic Books, 2012); see also, Florida, *The Great Reset* (New York: HarperBusiness, 2011).

⁹⁴ Paco Underhill, *Call of the Mall: The Geography of Shopping* (New York: Simon and Schuster, 2004), pg. 30.

⁹⁵ *Lloyd Corporation v. Tanner*, 407 U.S. 551 (1972), at 581.

⁹⁶ Marc Auge, *Non-Places: An Introduction to Supermodernity*, op cit.; see also Iveson, *Publics and the City*, op cit., pp. 9-13, 209. NB: Jeremy Waldron's quote at the outset is worth reflecting on in this regard.

deficiency of place inside shopping centers has helped fuel big box consumption in quick stop modes, not to mention instantaneous online commerce from home.⁹⁷

An empirical correlation between commercial profitability and speech rights under any of the exceptions above proves difficult to show; no less because there are now so few places to ground test civil liberty in privately owned malls. On the other hand, there is growing evidence that innovative *third place* formats have been capitalizing on the declining fortunes of older shopping centers, while responding to community demands for mixed-use experiences excluded inside malls. The champions of the new urbanism recognize the experiential gap. They have been quick to fill it, earning the attention of consumers and merchants who wish to reach them. There is certainly no dearth of suspicion toward the new urbanism, which continues to expand along with metropolitanism and regionalism in the United States. Yet its advocates are fairly resolving a thirst for shared space and communality in the suburbs.⁹⁸ Whether one defines its motives as environmental or commercial, or both, the Congress for the New Urbanism is making a considerable impact on the way suburban topography is arranged today.

The new urbanism is doing this by retrofitting suburban marketplaces with streets and spaces once held in trust for civic engagement. Renewed legal considerations seem inevitable under those circumstances, in my judgment. Likewise, Justice Black and Marshall's migrations of legally protected public fora to shopping centers ought to guide those considerations, if and when they occur. In view of the innovative outlooks on social change expressed by both

⁹⁷ In fact, there is growing evidence to suggest that online shoppers are looking for greater community interplay within those media. "Social shopping," a new and ironic phenomenon, attempts to de-fragment online commerce by creating cyber-customer interfaces that reproduce community interaction associated with older marketplaces, including malls. Start-ups like Wanelo, Pinterest, and Svpply are catching the attention of major online firms, such as Amazon and Ebay, which now aim to engender a social mixing experience through "e-tailing." See Jenna Wortham, "Hanging Out at the E-Mall: Sites Make Shopping Social Again, and Investors Flock," *The New York Times*, August 17, 2013, pgs. B1 and B4.

⁹⁸ Wayne Batchis, "Free Speech in the Suburban and Exurban Frontier: Shopping Malls, Subdivisions, New Urbanism, and the First Amendment." *Southern California Interdisciplinary Law Journal*, Vol. 2, 301, 2012, pp. 351-53.

Justices, it seems possible that a public function exception could again pierce the Supreme Court's state action requirement, while reestablishing the preferred position of speech inside today's malls. Though *Logan Valley Plaza* was reversed by a subsequent ruling, the Court has never explicitly overturned its decision in *Marsh v. Alabama*, a fact that augurs well in this regard—and one that could become more salient in the context of the new urbanism.

The new urbanism was inaugurated roughly a generation ago by a group of planners, designers, and architects who were anxious about the effects of sprawl on America's suburban landscape, the nation's environmental health, and its long-term community capacity. In order to stem the development patterns we saw towards the end of the second chapter, reduce automobile dependency and carbon emissions, and instill a sense of place in the suburbs as 21st century metropolitanism and regionalism evolve, the movement has created its own congress and issued a strategic charter. At the heart of that charter is the emplacement of mixed-use space and traditional centers, which new urbanists rely on to temper and reverse the structural singularities on which edgeless suburbs and myriad ecological threats are reproduced. The congress addresses these threats by centering shared suburban spaces, that is, by consolidating them so their points become contiguous and walkable.⁹⁹ As one signatory to its 2013 charter notes, the new urbanism promotes elastic functions within design environments:

The ultimate flexibility comes from abandoning conventional land use designations, such as residential, commercial, institutional, and so forth, that are embedded in our current zoning codes. For towns to be truly responsive to the market, to emerging business environments, and to a healthy jobs/housing balance, buildings need to be designed to be multiuse, not single use. They should be thought of as being able to accommodate workplaces, stores, and domiciles.¹⁰⁰

⁹⁹ Christopher B. Leinberger, *The Option of Urbanism: Investing in a New American Dream* (Washington: Island Press, 2009), pp. 101-04.

¹⁰⁰ Elizabeth Moule, "Chapter Sixteen," *Charter of the New Urbanism, Second Edition* (New York: McGraw Hill Education, 2013), pg. 156.

This encouragement of mixed-use development has inspired a blueprint for one of the movement’s principal contributions to the suburbs: “lifestyle centers.” Lifestyle centers are novel commercial districts spouting up around the country; in many cases atop abandoned malls razed and replaced by these new urbanist designs. Described to me as “multiuse shopping centers” by a guest services representative at the Ridge Hill development in Westchester, the ICSC likewise defines them as upscale commercial and entertainment venues. Lifestyle centers are outdoor formats, built to recreate the optics of city streets where people shopped before the advent of enclosed malls in the late 20th century.¹⁰¹ Inasmuch as they are designed to give shoppers direct access to retail from downtown styled streets, lifestyle centers reestablish the relationship between storefronts and spaces such as sidewalks, which have historically supported all manner of civic functions. While they are privately owned, therefore, lifestyle centers model the immediacy between public space and First Amendment fora opened to free expression in *Hague v. CIO* and subsequent Supreme Court decisions.

These new shopping centers feature water fountains and children’s playgrounds, all within the same footprint as restaurants, hangouts, and other third places. Notably, and truly evocative of the Court’s opinion in *Marsh v. Alabama*, New York’s Ridge Hill and complexes like it now boast onsite housing components within their property portfolios. Condominiums are being sited right in the middle of these mixed-use commercial facilities. Of course, that means their owners deliver a full gamut of indispensable services to residents, for example, sewers and other infrastructures that once triggered a state action exception in *Marsh*.

¹⁰¹ The Ridge Hill complex was built in 2011, midway between Yonkers and White Plains, New York. It is anchored by a Whole Foods supermarket on one end, and a multiplex cinema and several national retailers on the other—all set on the street and one upper level—with five parking garages located off its main artery, “Market St.” For the ICSC definition of lifestyle centers, see DeLisle, *op cit.*, pg. 10.

From an environmental perspective, lifestyle centers help reduce VMTs (vehicle miles traveled) and meet other conservation needs urged by new urbanists.¹⁰² Yet, the porosity between private and public functions within these commercial complexes reflects recognition among those rallying to build them that the older ecologies of shopping malls are being outmoded by popular demands for place in suburbs. Though the law has been slow to catch up, developers and owners appear responsive to this emerging social background fact. The nation's largest Real Estate Investment Trusts (REITs) are now concentrating their capital on lifestyle centers, frequently demolishing malls in order to build mixed-use retail formats.¹⁰³

State action is following suit. We have seen several examples of public intervention in enclosed malls, intended to sustain private sector employment and local tax bases. In other cases, in which downturns appear irreversible, governments are intervening directly in the redevelopment of "dead malls" and transitioning them into new urban commercial properties.¹⁰⁴ Municipal involvement has been critical for mall replacement and retrofit projects in places like The Avenue, the country's first lifestyle center, near Baltimore; Downtown Park Forest, outside Chicago; Mizner Park, in Miami; and Willingboro Town Center, one of the original Levittown prototypes, on the outskirts of Newark. In addition to capital budget expenditures, suburban administrations continue to empower any number of public development corporations to refurbish distressed malls, so they do not pull local communities under financially.¹⁰⁵ The iconic mall remains politically relevant, but metropolitan and regional authorities are betting on the new

¹⁰² Williamson, *op cit.*, pg. 56.

¹⁰³ *Ibid.*, pp. 64-68.

¹⁰⁴ Kohn, *op cit.*, pg. 87.

¹⁰⁵ Dunham-Jones and Williamson, *op cit.*, pp. 119-25. The authors cite a variety of examples in which government funding has been deployed to remodel older malls throughout the United States. One of the most interesting conclusions they draw from these redevelopments is that success consistently corresponds to the enhancement of the public realm therein: "The distinguishing factor of the more successful contemporary mixed-use developments is the...quality of the public space that is established...Only by establishing a populated public realm can mixed-use developments live up to the social aspirations of a downtown." Pg. 110.

urbanism in enacting redevelopment policy. As Dunham-Jones points out, that is why so many properties are now built through public-private partnerships and tax increment financing backed by state and local governments. It is also why lifestyle center developers are earning master planning variances (also known as “smart growth” variances) to circumvent single use zoning policies carried over from post-War suburbanization.¹⁰⁶

My hope is that the law will catch up with social background facts emerging on the privately owned main streets of lifestyle centers; that it will at last complement the mixed-use designs introduced by the new urbanism, but also engender much more than the simulacra of downtown life in places such as Ridge Hill. The state action doctrine advanced by the Supreme Court, and most recently reprised in New York, belies the multilayered nexus between property development and public intervention in older shopping centers. Meanwhile, the legal exclusivity of commercial intercourse in malls is becoming outmoded by their newer iterations. In her study of malls and other privatized spaces, Kohn makes an important distinction between the diversity and functionality of commercial formats like lifestyle centers, and enclosed malls, where political association was excluded in *Lloyd Corp.* and *Hudgens*:

It seemed obvious [to the majorities in those two cases] that a mall was simply devoted to a single activity, shopping, whereas a town was defined by the physical proximity of diverse spaces and activities, housing and services, leisure and work, consumption, education, and production. A mall is a place you visit; a town is a place you live. But this has been slowly changing...New Urbanist-inspired developments...mimic the appeal of old-fashioned downtowns... They link higher density housing with office and retail space, all unified by architectural cues evoking the turn of the [20th] century.¹⁰⁷

Whether or not one agrees that free speech ought to be safeguarded in shopping malls, it is unlikely that lifestyle centers and other mixed-use commercial properties will be immune from

¹⁰⁶ Ibid. pg. 109.

¹⁰⁷ Margaret Kohn, *Brave New Neighborhoods: The Privatization of Public Space* (New York: Routledge, 2004), pp. 75-77.

jurisprudence for long. In a recent incident described by Williamson, a publicly supported mixed-use development near Washington, D.C., Downtown Silver Spring, saw civic unrest after an amateur photographer was prohibited from taking pictures with camera equipment he bought on the property. When the photographer and a number of his peers were subsequently expelled from the outdoor mall for passing out leaflets to protest the first prohibition, they organized a public demonstration on Independence Day. The property owners eventually gave way on their no-photography rule and negotiated terms for limited free speech exercises within the complex. Nevertheless, Williamson argues, the protest in Downtown Silver Spring portends more legal contests in these developments, as they multiply.¹⁰⁸

If and when newer commercial formats replace older shopping centers on the federal docket—as they continue to supplant enclosed malls throughout the nation’s suburbs—existing judicial doctrines will surely control. And unless courts revisit them, free expression will remain off limits within the first walkable, commonly accessible spaces known to many suburbanites. These doctrines, particularly state action, should be revised according to the exceptions formerly made for public functions that occur inside suburban malls and their antecedents upon the American landscape. The public function exception seems especially apropos today, given the new urbanist formats replacing malls, which convey *all* the attributes of downtown shopping districts delineated by Justice Black in his support of speech on commercial property, both in his majority and dissenting opinions.

In light of the topographical transformations above, legally reimaging free expression on publicly accessible private property will hardly loose some sort of philosophically discredited judicial activism in malls. Nor will it destabilize the meaning of the First Amendment, or over-emphasize arbitrary construction of its free speech and assembly clauses by a tribunal of judges

¹⁰⁸ Williamson, *op cit.*, pg. 68.

who enjoy life tenures and a lack of accountability, as Sisk and a couple of the jurists above have insisted.¹⁰⁹ Rather, it will signal recognition that civic engagement is not self-sustaining; that in some cases, active assertion of judicial review over the Bill of Rights enhances the democratic experience, rather than diminishing it, as Madison and the founders understood.¹¹⁰ In his spirited defense of judicial interpretation as pragmatism, Ely argues that fairness within the democratic process actually requires the interventions of an unelected judiciary. Courts alone can look past the plain text and seemingly self-contained clauses of what Justice Louis Brandeis has called our “living Constitution,” particularly when political expression and association hang in the balance. Jurists may stand aloof from the substances ascribed to the law by popularly elected legislators and other vested interests. Ely cites the rulings of the Warren Court, which did exactly that in its free speech and civil rights decision-making. Institutionally insulated and more wont to behave objectively, judges are in a unique position to articulate meanings of the nation’s charter that are “participation-oriented” and can accommodate changes in American life.¹¹¹

Moreover, courts are more capable of advancing what Ely calls “representation-reinforcing” rights for groups otherwise marginalized by the political process.¹¹² This is especially so in cases involving open discourse by minorities underserved in the body politic; equally in cases in which free expressions of heterodox ideas are at stake. Political dissent is fundamentally important to American democracy, Ely argues, no matter how discomfiting it may be to average citizens.¹¹³ Yet, minority stakeholders are unlikely to see their rights of political association protected by elected officials, who focus exclusively on satisfying majorities, *and*

¹⁰⁹ Sisk, *op cit.* pg. 1150. NB: I am referring to Judge Titone, in New York, and Justice Garibaldi, in New Jersey.

¹¹⁰ Frank M. Johnson, Jr., “The Role of the Judiciary with Respect to the Other Branches of Government,” in Walter F. Murphy and C. Herman Pritchett, *Courts, Judges, & Politics: An Introduction to the Judicial Process* (New York: Random House, 1986), pp. 54-56.

¹¹¹ Ely, *Democracy and Distrust*, *op cit.*, pg. 112; see also pg. 43.

¹¹² *Ibid.*, pp. 78-88. We might do well to recall the fate of the bill to require free speech in shopping centers in New York, which died in the State Assembly’s Committee on Governmental Operations shortly after its referral.

¹¹³ *Ibid.*, 114-16. NB: Ely borrows from Justice Harlan in this regard.

*who amass their power by doing so.*¹¹⁴ Inasmuch as those officials are able to aggrandize themselves politically by squelching oppositional expression and distorting the policy-making apparatus, an inclusive democratic process may call for judicial interpretation of a broadly worded Constitution, designed to ensure fair play for all participants by blunting majoritarian misuses of that process. In a more emphatic assertion of this minority rights theory, Dworkin contends that judicial review beckons legitimacy for substantive needs of democratic assembly in the United States, while protecting what he considers the chief values of “constitutionalism,” among them, civic engagement and participatory self-government.¹¹⁵

The geographic changes taking place in 21st century metropolitan America demand more, not less space in which to maintain and enhance civic capacity in our heterogeneous political culture. From a design perspective, the *Charter of the New Urbanism* acknowledges a need for place, and currently articulates it within some of the country’s most successful commercial real estate. Conversely, the declining fortunes of older shopping centers suggest that property models that exclude place or opportunities for discovery rival any business risk posed by free speech inside malls. Expanding practicable space on commercial property might be even reimagined as smart growth, therefore. And the First Amendment was surely framed to accommodate that growth, as well political changes that the founders knew would occur after it was written, as Ely points out. Inhabitants must produce their own civic space, ultimately, as the remaining section will suggest. Still, legal protection of civil rights to that space would serve to accommodate the social diversity that has reshaped suburbs during the last decade, especially, while helping to remake shopping centers—indoor or outdoor—into robust environmental expressions of a democratic public sphere.

¹¹⁴ Ibid., pp. 106-07.

¹¹⁵ Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard University Press, 1977).

*Rainbow suburbs and the right to the analogous city*¹¹⁶

Design patterns spurred by the new urbanism reflect growing momentum for combining commercial property with public space in suburbs. Legally protecting those spaces for the purposes of free expression and association would help rekindle relationships between commerce and civic engagement, which have historically flourished within urban environments. In Chapter Two, we saw multiple overlaps between marketplaces and public spheres. In ancient Athens, the architecture of the *agora* reflected openness and accommodation for debate within embodied spaces, where consumers performed as citizens, and vice versa. In medieval and early modern cities of Europe, a more diverse mix of social classes learned to share space in the outdoor markets of town centers, where they began to identify community interests and sometimes unexpectedly forged themselves into visible, resistant publics over the course of four centuries. Colonial and post-revolutionary Americans carried that mantle through the Civil War, while early 20th century urbanites reestablished publicity and political toleration, using metropolitan streets, squares, and markets to openly negotiate social and ideological identities.

Towards the end of each epoch, however, top-down wariness of publicly practicable space emerged. As a result, suspicious regimes rearranged the political geography of denser centers. Well before the Dark Ages, post-democratic Greek rulers and their imperial successors in Rome fragmented *agoras*, and then forums, by positioning monuments throughout their midpoints and splitting commercial intercourse from common spaces, open markets from surrounding *stoas*. Market squares in France and England were dispersed from the hearts of Paris and London to outer districts in the 18th and 19th century and eventually turned into arcades

¹¹⁶ The term “rainbow suburbs” comes from Frey, who uses it to refer to widespread shifts in the demographic characteristics of the American suburbs, following his analysis of the 2010 Census (see below). See, William H. Frey, “Rainbow Suburbs,” *Milken Institute Review*, Fourth Quarter, 2011. NB: The arguments that follow are not intended as conclusive. Rather, they are meant to signal an agenda for continued examination of the relationships between designs and practices of suburban public space, as well as the mediation of those relationships in law.

or covered under roofs. In the post-Civil War United States, rowdy street markets of antebellum cities were scattered or replaced by large and tightly regulated department stores. By the second half of the 20th century, unprecedented decentralization occurs, when suburbs materialize *en force*. This change owed not only to popular choices, but to an array of national highway and housing policies, as well as zoning decisions in municipalities throughout the country.

The last rearrangement may have been the most pronounced, as I have argued previously. Until recently, at least, its chief consequence has been single use development and a kind of anti-environmentalism, which has driven edgeless suburban sprawl, literally. While the planning community now rethinks the unforced errors of past land use in suburbs, marketplaces of goods remain fundamentally detached from the marketplace of ideas. This is due in large part to an enduring legal script that has deemed them incompatible. In view of critical geographic studies, the new urbanism, and significant demographic shifts in suburbs during the last decade, that legal script merits reconsideration, as does its impact on suburban space.¹¹⁷

Law can mediate the relationship between structural arrangements of space and embodied practices by publics who inhabit it, as Mitchell, Blomley, and others have argued.¹¹⁸ This idea is adopted from the work of Lefebvre, who wrote that citizens ought to use their civic capacity to engage in *spatial practices* and transform cities to meet organic, democratic needs.¹¹⁹ Lefebvre knew that professionals charged with managing any city were resolved to control it, though; to make its shared spaces legible in the interests of property ownership, principally.¹²⁰ Utilizing the

¹¹⁷ The last idea comes from Carpio, et al., who argue that marginalized suburbanites, in particular, Latino immigrants, are currently wrestling with laws and within their own communities to establish public space, what they call “the right to the suburb.” See Genevieve Carpio, Clara Irazabal, and Laura Pulido, “Right to the Suburb? Rethinking Lefebvre and Immigrant Activism,” *Journal of Urban Affairs*, Vol. 33, No. 2, 2011, pg. 202.

¹¹⁸ See, for example, Don Mitchell, *The Right to the City: Social Justice and the Fight for Public Space* (New York: Guilford, 2003), pg. 20; Nicholas Blomley, “Cuts, Flows, and the Geographies of Property,” *Law, Culture and the Humanities*, Vol. 7, No. 2, 2010, pp. 205-08.

¹¹⁹ Henri Lefebvre, *The Production of Space* (Oxford: Blackwell, 1991), pg. 38.

¹²⁰ *Ibid.*, pp. 56-57.

imprimatur of the state's apparatus, owners and administrators routinely combined to pulverize cities on behalf of social order and hierarchies of use, legally abstracting available spaces from the publics that live and consume them.

Spaces hybridized by the active participation of publics are always in danger of being fragmented, according to critical geographers. They may be legally excluded from opportunities for open assembly and then homogenized in ways that thwart the diversity, accommodation, and toleration of unmanaged space. Thus, there is a dialectical tension between those who use place and those who own or regulate it. It manifests historically in subtle and not so subtle annexations that transpire in the middles of cities, for example, during the periods mentioned above. The right to the city, then, is the right of inhabitants not to be marginalized by spatial exclusions; it is the right not to be removed from the centers of urban life, or relegated away from other inhabitants of those centers through architectural or administrative decision-making from the top down; it is the right to assemble freely and practice speech and civic engagement; it is, in sum, the right of political association.¹²¹ In Mitchell's update on this thesis, it is finally the law that prescribes who has the right to the city, by delineating what uses are legally acceptable, among whom, and where, specifically.¹²²

The ideas above were rarely explored in the context of suburban space, until recently. It was generally taken for granted that relationships between property and publicity in suburbs mirrored their cultural segmentations. Most seem to conclude that political geography in suburbs was an historical effect of their demography, not its cause.¹²³ However, suburban America *is* the metropolitan United States of the 21st century, according to many contemporary demographers.

¹²¹ Henri Lefebvre, "The Right to the City," in Eleonore Kofman and Elizabeth Lebas (Eds.), *Writings on Cities* (Oxford: Blackwell, 1996), pp. 151-54. NB: *The Right to the City* was originally published in 1968. See also, Lefebvre (1991), op cit., pp. 28-9.

¹²² Mitchell (2003), op cit., pg. 46.

¹²³ Carpio, et al., op cit., pg. 185.

Today's suburbs are not only comprised of homogenous bedroom communities, consisting of white middle class commuters. Suburban publics are more diverse than ever before, racially, ethnically, and economically.¹²⁴ Minority inhabitants make up 35% of the overall population in suburbs, according to the 2010 Census—a figure comparable to the averages of the nation's largest cities. In fact, several suburbs have become majority-minority since 2000.¹²⁵ “Black flight” from older cities has produced suburban population growth in both the Northern and Southern United States, while Hispanic migration and Latino immigration has accounted for almost 50% of that expansion over the last decade. Asian Americans are settling within suburbs in surging numbers, with half of those racial groups now making their homes there. In contrast to these figures, the 2010 count shows that non-Hispanic whites suburbanized by only 10% during the decade.¹²⁶

The anachronisms of melting pot cities and grey flannel suburbs are also giving way to convergences in the class dynamics of America's metropolitan landscapes. The working poor no longer live in cities alone, that is. Dunham-Jones and Williamson note that suburban municipalities now host more impoverished Americans than do the largest central cities.¹²⁷ From 2000 to 2010, the number of poor suburbanites increased by 64%, to about 17 million, while totals have begun to decrease modestly in cities.¹²⁸ The Urban Land Institute, one of the nation's preeminent planning organizations, continues to study demographic changes cited

¹²⁴ Nancy A. Denton and Joseph R. Gibbons, “Twenty-First-Century Suburban Demography: Increasing Diversity Yet Lingering Exclusions,” in Niedt, *Social Justice in Diverse Suburbs*, op cit., pp. 13-14; Underhill, op cit., pg. 30.

¹²⁵ William H. Frey, “The New Metro Minority Map: Regional Shifts in Hispanics, Asians, and Blacks from Census 2010,” *State of Metropolitan America*, The Brookings Institution, August 2011, pp. 3-11. See also, Frey, “Melting Pot Cities and Suburbs: Racial and Ethnic Change in Metro America in the 2000s,” May 2011, pg. 7.

¹²⁶ Ibid., pg. 11. NB: This last raw figure does not reflect the fact that whites still make up large majorities in the outer ring “exurbs” located farthest from city centers.

¹²⁷ Dunham-Jones and Williamson, op cit., pg. 9.

¹²⁸ Elizabeth Kneebone and Alan Berube, *Confronting Suburban Poverty in America* (Washington: The Brookings Institution, 2013), pp. 6-13. NB: Kneebone and Berube use the term “poor” to describe a family of four with an annual income of \$22,314 or less. See also, Denton and Gibbons, op cit., pg. 25; Emily Badger, “The Suburbanization of Poverty,” in *The Atlantic Cities*, May 20, 2013.

above. It has also been encouraging its clientele to recalibrate development of commercial property to align with principles of the new urbanism.¹²⁹ At the same time, social researchers and justice advocates have turned their attentions to record inequality in suburbs, as they attempt to tackle equity problems traditionally within the purview of mainstream urbanism.¹³⁰

Detailing the sweep of all these changes would go beyond the scope of this study. My point is that demographic transformations in American suburbs demand reconsideration of the legal scripts imposed on their putative physical centers—shopping centers—four decades ago. Jurisprudence should weigh public functionality within old *and* new malls in light of contemporary suburbs, so that diverse suburbanites may openly associate or negotiate identities and ideas in ways reserved to cities.¹³¹ The property catalogues inspired by the new urbanism feature optics of civic space needed by activists and growing suburban underclasses to produce a metropolitan public sphere, perhaps many of them. But materializations of those spheres remain contingent upon the “geography of law,” which currently denies a *right to the suburb*, that is, a legal, practicable center in almost every state. Such a right will become indispensable for advancing social change in the suburbs, I would argue. It already is, says Niedt:

The importance of public space as an arena where marginalized groups use their visibility to press claims for recognition, rights, and distributive justice is becoming all the more important as suburbs diversify.¹³²

The idea of a right to the city may therefore be advantageous for understanding the interchange between built environments such as shopping centers, on the one hand, and suburbanites’ political needs, on the other. It may also be useful for examining the capacity of

¹²⁹ See, for example, John McIlwain, “Suburbs 2.0: The Evolving American Suburbs,” in *Urban Land*, published by the Urban Land Institute, June 2011.

¹³⁰ Christopher Niedt, “Introduction,” in Niedt, *Social Justice in Diverse Suburbs*, op cit., pg. 4.

¹³¹ Carpio, et al., op cit., pg. 188.

¹³² Niedt, op cit., pg. 5.

the law to resolve tensions between spatial designs and practices; even more so when the legal apparatus is invoked to safeguard orthodoxies left unquestioned in the public sphere, or when those orthodoxies are reproduced by the political process without regard to fair play and popular participation. This is when the system corrupts, and when public distrust takes root, Ely argues.¹³³ In the critical geography inspired by right to the city visions, the state contours who and what practices are welcomed where. It referees policy through which space is controlled, and it may communicate hierarchies by permitting that policy to suppress diversity and heterodoxy.¹³⁴ The exclusion of Stephen Downs' t-shirt and his arrest by town police communicate such a hierarchy. As innocuous as a few landscape photographs may seem, the same could be said for the incident in the new urbanist-inspired shopping center, Downtown Silver Spring, where family photography was permitted, while photography of the property was expressly prohibited, along with open dissent against the center's code of conduct.¹³⁵

As private developments like Downtown Silver Spring continue to replace older malls, there may be another reason to harness right to the city arguments for spatialization of free speech rights in changing suburbs. With few exceptions, these newer mixed-use properties cater to more homogenous, upscale clientele. Yet, inhabitants traditionally thought of as *urban* are rapidly reshaping suburban geography.¹³⁶ It may be fair to wonder, then, if the spread of the new

¹³³ Ely, op cit., pp. 101-03.

¹³⁴ Staeheli and Mitchell, op cit., pp. 122-27; Mitchell (2003), op cit., 128-30.

¹³⁵ NB: I have tested the no-photography rule at Ridge Hill and at indoor malls in New York, and have been promptly ordered not to take pictures of property. In thinking further about the Downs' incident, it is worth noting Blomley's argument, that community expectations about appropriate activities in shared space may serve to discipline public life itself. This is particularly germane in the context of property disputes, he suggests. See Nicholas Blomley, "Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid," in *Annals of the Association of American Geographers*, Vol. 93, No. 1, 2003, pp. 122-23. The tensions between community and publicity were mentioned in a previous chapter. Kohn also explores them in the context of new urbanism and its emphasis on planning against unexpected activities. Kohn, op cit., pp. 192-93

¹³⁶ The ICSC categorizes lifestyle centers as "upscale." See DeLisle, op cit., pg. 5. The orientation of these new urbanist designs raises an interesting paradox, one described by Zukin, referring to popular public spaces in New York City: as areas of commerce and sociality grow more chic when perceived as authentically "urban," they simultaneously exclude the groups who gave them diversity and authenticity, but who can no longer afford, or are

urbanism will serve to exacerbate rights contests for expression and association in lifestyle and new town centers now appearing on suburban property maps. As I pointed out in the previous section, the new urbanism reiterates the topography of cities, and it theoretically provides access and anthropological space required by suburbanites to declare themselves amongst one another. Barring legally protected rights to openly practice association in these privately owned centers, however, there might be little opportunity to express or negotiate the social diversity that Niedt, Carpio, and others attribute to today's suburbs.

Public space may mean that we encounter difference, even strangeness, as I indicated at the outset. It may also mean that we confront them and see our own orthodoxies interrupted by the heterodoxies of others. This is why free expression has earned high value among political theorists, irrespective of chronology or ideology. More than two centuries before Habermas theorized an *ideal speech situation* and came under criticism from pluralists like Young for failing to create space for the “explicit representation of oppressed groups in discussion and decision making,” Adam Smith defended the value of place, proximity, and diversity. Smith urged that the publicness of space nurtured visibility and revelation of moral symbols, which enabled citizens to become sensitized to people unlike them.¹³⁷ I think this is an unrealized promise of shopping malls, which might otherwise function publicly in the spirit of their inventor, Victor Gruen: as modern *agoras*, market squares, or downtowns. When shared space is fragmented, as Kohn and Mitchell each point out—when it is hierarchically split between

no longer invited, to inhabit them. See Sharon Zukin, *Naked City: The Death and Life of Authentic Urban Places* (New York: Oxford University Press, 2011). I think a fair criticism of lifestyle centers and other new urbanist commercial properties is that they are modeled to look like downtowns, but their rules of use restrict the spatial practices that make downtowns valuable to the public sphere. This is an area for continued research. To reiterate, however, a central argument of this conclusion is that legal contests arising from those spatial practices—specifically, expressive activities—will be decided according to the dictates established in the previous chapter.

¹³⁷ Iris Marion Young, “Polity and Group Difference: A Critique of the Ideal of Universal Citizenship,” in Robert E. Goodin and Philip Pettit (Eds.), *Contemporary Political Theory* (Oxford: Blackwell, 1997), pg. 263. Adam Smith, *The Theory of Moral Sentiments*, Part I, Section I, Chapter IV, in Robert Heilbroner (Ed.) *The Essential Adam Smith* (New York: Norton, 1987). Originally published in 1759.

inclusion and exclusion—opportunities for interpersonal discovery of differences are compromised, and civil rights that inform processes of discovery are threatened.¹³⁸

Some new urbanists envisage a connection between social discovery, civil rights, and embodied spaces inside the boundaries of suburban lifestyle centers and other properties. “The increasingly diverse publics of suburbia,” argues Williamson, “demand [the] streets with sidewalks, squares and greens” of these novel downtowns, though they are privately owned. In this view, the new urbanism can help meet these demands architecturally.¹³⁹ Even more, she says, it is “plausible and thrillingly possible that newly built places designed...to evoke traditionally urban public spaces will provide cues for people to ‘produce’ public space, in the spirit of Henri Lefebvre, and, in some measure, to ‘take’ it by asserting and struggling for new rights and opportunities.”¹⁴⁰ Effective planning would enhance practicable space in the short run, furnishing ready-made topography for association and negotiation of political differences.

Along with Dunham-Jones, Williamson has also suggested that rallying behind “instant urbanism” or the “instant architecture” of public space could help bridge the growing diversity of suburbs to practices of publicity that never existed before.¹⁴¹ A corollary of this faith in the new urbanism is that civil rights in diverse suburbs cannot be reserved to the production of political space via activism or movements alone, since they develop too slowly.¹⁴² This is a provocative, even persuasive argument. Still, the jurisprudence I described above means that participatory space for open political discourses cannot be produced lawfully in privately owned centers in forty-five states—notwithstanding architectural semblances between those suburban centers and streets and sidewalks protected by what remains of the public forum doctrine. Practicable space

¹³⁸ Kohn, *op cit.*, pp. 194-201; Mitchell (2003), *op cit.*, pp. 147-51.

¹³⁹ Williamson, *op cit.*, pp. 68-69.

¹⁴⁰ *Ibid.*, pg. 57.

¹⁴¹ Dunham-Jones and Williamson, *op cit.*, pp. 3-9.

¹⁴² Williamson, *op cit.*, pg. 57.

inside new urbanist-inspired commercial developments would “breathe” just as poorly under legal precedents reiterated by most state benches, which exclude free speech from older shopping malls. Arguments from civic design are well intentioned. Yet the capacity of the new urbanism to animate practices of public space is likewise circumscribed by prevailing law, barring meaningful reinterpretation of the doctrines outlined in this chapter and previous ones.

This brings us back, finally, to the right to the city, which is in many ways synchronous with uninhibited participation, what Lefebvre called the *oeuvre*.¹⁴³ The function of civic engagement is the creation of *representational space*.¹⁴⁴ This is the space where struggle is waged against orthodoxy, perhaps where resistance to it is produced. The chief end of that resistance is most practical. It consists in spontaneous access to what is genuinely urban about the city: the political agency of people who use it.¹⁴⁵ There is nothing planned about it. This is why the practice of space is always embroiled in a contest with the *representation of space*, what Lefebvre, Mitchell, and others view as an object of simulacrum, an abstraction, as opposed to an embodied freedom or association. The very spatiality of that representation is exclusive, and therefore its publicity is always a matter of suspicion unless physically contested.¹⁴⁶

To reprise a theme I raised early in this study, however, the contest between practicable space, on the one hand, and exclusion, on the other, will invariably be vetted through the “geography of law.” This now seems to be the case in suburban shopping centers *and* city centers. While the law once reflected more favorably on expression and association inside the analogous city of the mall, it has generally abandoned those practices for four decades. If malls or lifestyle centers, *de facto* cores of rapidly diversifying suburbs, are to function as

¹⁴³ Lefebvre (1996), op cit., pg. 174.

¹⁴⁴ Lefebvre (1991), op cit., pg. 33.

¹⁴⁵ Mark Purcell, “Possible Worlds: Henri Lefebvre and the Right to the City,” *Journal of Urban Affairs*, June, 2013, pp. 5-9.

¹⁴⁶ Lefebvre (1991), op cit., pp. 38-39.

representational spaces in 21st century communities, then legal interpretations need to be updated. Public address must be spatialized in suburbs, so that social diversity may be visibly articulated and ideological heterodoxy revealed *en route* to Ely's notion of fair play in the democratic process. Otherwise, shopping centers will have earned their monikers as *representations of space*. Indoor or outdoor, they will continue to be criticized as non-places, which pose "the illusion of public space...without the impingement of the political," as Miles argues.¹⁴⁷ Their geographic value will remain suspect in the context of metropolitan change, when suburbs witness concerns once believed unique to the city, and new suburbanites have too few places to negotiate identity, as they have done historically in urban spaces. In lieu of new legal mediation, shopping malls and lifestyle centers will hide social and ideological difference. They will sanitize and displace processes of discovery that require community, toleration, and what I have been calling unexpectedness. In the end, malls will indeed prove to be ersatz spaces, where Habermas' *distorted speech situation* materializes, and any notion of a public sphere activated through democratic deliberation remains "illusory."¹⁴⁸

In closing, I would submit that existing jurisprudence has largely excluded public space on behalf of formalistic shopping center doctrines throughout most of the country. Prevailing legal interpretations have left malls vulnerable to widespread cultural criticism leveled against them for many years, while doing little to protect them commercially during the last decade. In light of social background facts now emerging in contemporary suburbs, I believe shopping centers—whether they are appointed with indoor or outdoor malls and common areas—ought to be treated by courts as publicly functional places, where new suburbanites are legally permitted

¹⁴⁷ Steven Miles, *Spaces for Consumption: Pleasure and Placelessness in the Post-Industrial City* (Los Angeles, CA: Sage Publications, 2010), pg. 105.

¹⁴⁸ *Ibid.*, pg. 107; see also, pp. 111-12.

to advance their claims of diverse identity and ideology in the open, as well as visibly negotiate them in *representational space*.

Given the power of law to influence the continuum between inclusivity and exclusivity, and to mediate the relationship between property and publicity, courts will continue to decide whether the privately owned topographical centers of suburbs proffer more than *representations of space*. In the unlikely event that the political process requires free speech and assembly inside malls, judicial contests over rights to regulate expression and association are sure to be triggered. Absent that judicial intervention, moreover, political processes within legislatures and policy-making bodies are almost certain to remain stacked against dissent. It is hard to imagine the “participation-oriented, representation-reinforcing” rights described by Ely finding protection *outside* the judiciary; not while property owners and developers maintain their organized efforts to preserve the status quo inside malls.¹⁴⁹ The International Council of Shopping Centers has redoubled its efforts to influence the political process through campaign contributions and other nexuses with legislators and government stakeholders, who may at once be asked to weigh in on civil rights in privately owned malls.¹⁵⁰ The irony of free speech inside shopping centers may therefore be that unelected jurists act as guarantors of support for the principles of openness and accessibility that help us indicate public space.

At present, those principles do not correspond to malls. *Pruneyard* may have signaled brighter hopes for free speech and assembly in malls when it was originally handed down over thirty years ago. Those hopes have been snuffed out in New York, and most other states for that matter. Only two states have emplaced broader constitutional protections in privately owned

¹⁴⁹ Though it is not apposite, necessarily, the ICSC’s government relations division has touted its growing efforts to create additional nexuses with the political decision-making community, for example hosting more lobbying events on behalf of the National Governors Association and the National Conference on State Legislators.

¹⁵⁰ For instance, the ICSC has recently formed its own political action committee, the ICSC-PAC, which is charged with advancing mall owners’ advocacy on multiple policy initiatives affecting shopping centers around the country.

shopping centers since California did on behalf of its diminishing public sphere. Neither public financing or tenancy inside declining malls, nor the advent of the new urbanism have yet aroused reinterpretations of the state action doctrine, the chief rationale for exclusions against speech in most states—notwithstanding Colorado’s recognition of pervasive government entanglement in the development and operation of shopping centers, or New Jersey’s analysis of how they function publicly in the lives of most suburbanites.

Given the rapidity of social changes in suburbs, and the continued resistance of state courts to require free speech and assembly in privately owned, quasi-urban centers where speakers may be able to identify listeners, and vice versa, a High Court re-invitation to First Amendment expression in shopping malls may represent the best hope for opening channels of political association recommended in this study. It may help emplace public spheres that are produced by *individual and collective participation in open political discourses*. These are the sorts of *big* constitutional responsibilities that Ely rightly assigns to the judiciary. Our “living Constitution” should afford diverse suburbanites their right to the city. It can prescribe that right as one of political agency, a la Lefebvre. It already places that right within the purview of courts, to articulate pragmatic interpretations of democratic fair play under real life conditions. As Ely argues, it is the duty of courts, specifically, the High Court, to “make sure the channels of political participation and communication are kept open.”¹⁵¹ For my purposes, Ely’s charge to courts has been read to endorse a *legally protected* right to the city, which Lefebvre regards as “real and active participation” in the spaces shared by people.¹⁵² That is how an analogous city becomes practicable or *urban*. It is how public spheres are produced through the “permanent

¹⁵¹ Ely, *op cit.*, pg. 76.

¹⁵² Lefebvre (1996), *op cit.* pg. 145.

participation of...‘interested parties,’ with their multiple, varied and even contradictory interests,” and how exchange values of shared space are balanced by use values.¹⁵³

One of the recurring themes in this study has been that privately owned shopping centers have long functioned as the suburban analogues of publicly owned downtowns. In view of the changes described above, the analogy appears more germane today, notwithstanding widespread consumer desertions and fiscal shortfalls in malls, which mirror the plight of cities once upon a time, ironically. And while a right to the city or expressive activity has never been monolithic, history suggests that urban spaces are ones where civic capacity has been built and harnessed through political association. If the use value of shopping centers—analogue cities within diversifying suburbs—is to be reunited with democratic practices *wherever* people go, then legal interpretations of public space before and after *Pruneyard* ought to be reconsidered in light of significant transformations within today’s metropolitan landscapes.

¹⁵³ The first idea is quoted from Lefebvre (1991), op cit., pg. 422; the second, on exchange value versus use value, comes from Lefebvre (1996), op cit., pp. 67-68; see also, Purcell, op cit., pp. 10-11.

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