

FREE SPEECH IN THE SUBURBAN AND EXURBAN FRONTIER: SHOPPING MALLS, SUBDIVISIONS, NEW URBANISM, AND THE FIRST AMENDMENT

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I. INTRODUCTION

“Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and . . . inflict great pain. . . . As a nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”¹ These are the words of Chief Justice Roberts in the controversial case of *Snyder v. Phelps*, in which the Court, in an 8-1 decision, agreed that even a highly offensive display outside of a private funeral is deserving of First Amendment protection from tort liability.² Justice Roberts’s language echoes the words of another Justice Roberts, who seventy-two years earlier famously articulated the primacy of streets and other quintessential public places for free expression.³ Jarring, hurtful, perplexing, and perhaps infuriating, the signs held by the members of the Westboro Baptist church—including “God Hates Fags,” “Thank God for Dead Soldiers,” and “Fags Doom Nations”—conveyed a clear message.⁴ These were messages few would willingly seek out—particularly those who recently suffered the unspeakable pain of losing a child who valiantly served in the United States military. Many listeners might have dismissed this speech as eccentric, even sadistic.

Nevertheless, while we might question the value of the ideas conveyed by the protesters, being subject to speech we do not wish to hear is a deeply rooted tradition in American life. Allowing such confrontation is vital to America’s grand experiment in pluralistic democracy. It ensures that we cannot completely encase ourselves in homogenous bubbles, that we

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1. *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011).

2. *Id.*

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

4. *Snyder*, 131 S. Ct. at 1216–17.

cannot become too comfortable, and that we cannot shield ourselves entirely from even the most noxious of views. Tension and confrontation are the release valves of democracy.

Thus, on its face, *Snyder* might be considered a win for free expression—and a victory for American democracy. On second glance, however, we might pause and observe that these picketers had little opportunity to truly engage, face-to-face, with funeral attendees. Their protest took place on a small plot of public land that was approximately one thousand feet from the funeral.⁵ The slain soldier's father, who approached the church in a vehicle, testified that he could not even read the signs held by the picketers, but could only see the very tops of the signs as he drove past.⁶ We can presume that he was grateful that his contact with these protesters was so negligible.

However, had this church been located on Rittenhouse Square in Philadelphia or in Central Park in New York City, this level of distance could not so easily have been achieved. The tension and discomfort for the father and other funeral attendees would have been significantly greater had this “confrontation” not taken place through the filter of a closed automobile window, but rather on a pedestrian-filled urban street. The expressive impact of the unwanted message would also have been much greater. In today's thoroughly suburbanized American landscape, however, such urban encounters are increasingly the exception, rather than the rule. There are fewer and fewer opportunities for face-to-face confrontation with unexpected, unsolicited, and perhaps unwelcome ideas.

This Article examines the Supreme Court's response to our changed landscape. Part II provides a brief exploration of suburban sprawl, its nature, and impact. Part III examines why the First Amendment is of such importance in public places. Next, Part IV discusses the privatization of the town and the Supreme Court's First Amendment approach to the quintessentially American setting of the contemporary shopping mall. Part V examines the Court's jurisprudence in the suburban residential context, and contemplates the impact of an increasingly privatized residential landscape. Finally, this Article closes by questioning the constitutional implications of one of the most recent trends in suburban development,

5. *Id.* at 1213.

6. *Id.*

inspired by the architectural movement New Urbanism, the so-called “lifestyle center.”⁷

II. THE NEW LANDSCAPE

One of the most frequent observations about the impact of sprawl, and suburbanization in general, is the way the new American landscape has transformed what was originally firmly part of the public realm into something essentially private.⁸ Prosaic tasks such as daily trips to the market were formerly public acts, necessitating interpersonal contact with one’s neighbors. Prior to the advent, and now dominance, of the automobile as a form of transportation, interaction with members of one’s community on the street and at local retail establishments was the norm. For the vast majority of Americans today, leaving one’s home to accomplish even the most routine tasks presents few opportunities for contact with one’s neighbors and community.⁹ While many suburbanites no doubt profess to willingly embrace their privatized lives, most suburban Americans have no choice but to get into their automobile for an extended period of isolation for almost all daily errands. Their destination will not likely be a community-bound retail establishment of old, clustered among other shops in a pedestrian-friendly “downtown” where community members regularly brush up against each other. What pedestrian interaction still exists is primarily confined to privatized public spaces such as enclosed shopping malls and outdoor lifestyle centers, which are “walkable outdoor settings with grids akin to city streets . . . offering shoppers the chance to stroll between stores.”¹⁰ In lifestyle centers, private owners

7. See, e.g., Jonathan O’Connell, *Lifestyle Plan May Not be Built to Last; Meant to Replace Malls Critics Say Town Centers Not Safe Bet for Retailers*, WASH. POST, May 31, 2010, at A10.

8. See, e.g., J. ERIC OLIVER, *DEMOCRACY IN SUBURBIA* (2001); Josh Mulligan, Note, *Finding a Forum in the Simulated City: Mega Malls, Gated Towns, and the Promise of Pruneyard*, 13 CORNELL J.L. & PUB. POL’Y 533 (2004).

9. The percentage of Americans living in the suburbs has substantially increased in recent years: as of 2000, the percentage of Americans living in the suburbs reached 50 percent, up from 38 percent in 1970. *U.S. Population Now 300 Million and Growing*, CNN.com, Oct. 17, 2006, http://articles.cnn.com/2006-10-17/us/300.million.over_1_total-population-households-census-bureau?_s=PM:US. Further, between 2009 and 2010, of people who had moved, “principal cities within metropolitan areas experienced a net loss of 2.3 million movers, while suburbs experienced a net gain of 2.5 million movers.” Press Release, Census Bureau Reports Housing is Top Reason People Moved Between 2009 and 2010 (May 23, 2011) (available at http://www.census.gov/newsroom/releases/archives/mobility_of_the_population/cb11-91.html).

10. O’Connell, *supra* note 7.

generally write their own rules for what kind of interpersonal contact may take place.¹¹ Today, even with lifestyle centers in some communities, most consumers do their shopping at big-box corporate behemoths, such as Walmart, with little connection to the locality where they reside.¹²

There are undoubtedly tangible benefits to the conveniences and efficiencies resulting from these developments. The contemporary shopping mall, in many respects, simulates a traditional urban street. At the same time it offers purported improvements upon city life—malls are safer, more comfortably homogenous, and more effectively targeted toward a single goal: consumption.¹³ There are also, of course, drawbacks to the attendant features of modern low-density, suburban America. In recent decades, New Urbanism, a movement led by architects who are critical of the prevailing suburban landscape, has offered a response to some of these disadvantages.¹⁴ This movement, now exerting greater influence on suburban design, seeks to refine suburbia by returning to a more traditional, pedestrian-friendly blueprint.¹⁵ New Urbanist lifestyle centers bring office space and residential housing back into the mix—creating ersatz “towns” that can be sanitized of unwanted elements. Regardless of how one feels about these changes to our manmade landscape, however, one accompanying characteristic should not be ignored: the striking disappearance, or at least diminution, of the public sphere. As we shall see, even New Urbanist developments, with their emphasis on recreating traditional town-like places, take what would have formerly been unequivocally public, and put it into private hands. This fundamental shift in the way Americans live has profound constitutional implications.

Prior to the mainstreaming of the “private estate” lifestyle afforded by mass suburbanization, only the elite had the privilege of privatized

11. Desert Ridge Marketplace in Phoenix, Arizona, for instance, has a strict code of conduct that includes such prohibitions as staring. Andrew Blum, *The Latest Incarnation of the Shopping Mall*, SLATE MAGAZINE (Apr. 6, 2005, 6:24 AM), http://www.slate.com/articles/arts/culturebox/2005/04/the_mall_goes_undercover.html. See also *infra* Part VI.

12. Walmart Stores Inc., for instance, had approximately 4,400 stores across the United States as of May 2011. Sandra M. Jones, *Wal-Mart Making Little Plans for Cities*, CHI. TRI., May 15, 2011, at C-1. As of 2011, Walmart was the U.S.’s “largest grocer.” *Id.*

13. Mulligan, *supra* note 8, at 538.

14. See Michael Lewyn, *New Urbanist Zoning for Dummies*, 58 ALA. L. REV. 257, 257–60 (2006).

15. *Id.*

leisure.¹⁶ Children would spend outdoor playtime in public parks, in recreation facilities, and in the streets with other children. While children, no doubt, still utilize public spaces to some extent, the ideal outdoor place to play is now the private backyard—a refuge from the daunting and uncontrolled public realm suburban parents are ritualistically trained to fear.¹⁷ Interestingly, the rise of the backyard coincided with the post-war suburban death of the generously sized front porch.¹⁸ The lack of this architectural feature, in conjunction with larger lot sizes, made frequent impromptu socializing with one’s neighbors largely a thing of the past.¹⁹ The sprawling layout of many suburban and exurban developments made routine walks fruitless, if not dangerous.²⁰ This made the sociability of sitting on one’s front porch a less desirable social experience. The introduction of air conditioning and television has made it much more likely that when a family is not playing or relaxing in their backyard, they are affixed to their television in the comfort of their climate-controlled home.²¹

As historian Kenneth Jackson explains, “[a] major casualty of America’s drive-in culture is the weakened ‘sense of community’ which prevails in most metropolitan areas. I refer to a tendency for social life to become ‘privatized,’ and to a reduced feeling of concern and responsibility among families for their neighbors.”²² Additionally, as political scientist J. Eric Oliver points out, the implications of the privatized world of sprawl and its “uncivic” architecture are not merely social, they are also inherently political.²³ Oliver looks specifically at newer Sun Belt communities in the United States, which are both more likely to be exclusively designed around the automobile and subject to the oppressive summer heat and

16. See, e.g., DOLORES HAYDEN, *BUILDING SUBURBIA: GREEN FIELDS AND URBAN GROWTH 1820-2000*, at 45–70 (2004) (examining the growth of exclusive “picturesque enclaves” of the mid-1800s).

17. See, e.g., Gill Valentine, *Children Should Be Seen And Not heard: The Production and Transgression of Adults’ Public Space*, 17 *URBAN GEOGRAPHY* 205 (1996).

18. KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 185–186* (1985).

19. *Id.* at 58 (1985).

20. JAMES HOWARD KUNSTLER, *THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA’S MAN-MADE LANDSCAPE* 115 (1993).

21. HAYDEN, *supra* note 16, at 227.

22. JACKSON, *supra* note 18, at 272.

23. See OLIVER, *supra* note 8, at 162–63.

humidity that inspires the air-conditioning withdrawal effect.²⁴ Oliver's data reveals that "residents of these communities are less psychologically and socially engaged in their communities than their counterparts in older, Sun Belt places."²⁵ According to three primary metrics of political participation, "interest in politics, feelings of political efficacy, and patterns of mobilization," Oliver found a decline in civic engagement from older to younger Sun Belt communities—where the attributes of sprawl are the most pronounced.²⁶

Furthermore, when we contrast the vibrant type of political participation that occurs in the inner city to the unremarkable politics of suburban and exurban jurisdictions, it becomes clear that dense urbanity is a generator of vital political activity. Scholars, such as sociologist Claude Fischer, have found that cities, in contrast with their suburban counterparts, tend to produce unconventional political subcultures and are "disproportionately the locale of invention" and "political dissent."²⁷ More recently, political scientist Elaine Sharp, in her study *Morality Politics in American Cities*, emphasizes the centrality of morality issues in urban governance.²⁸ The cultural anomalies and resulting political contestation prevalent in dense urban areas serve to bring issues to light that more homogeneous suburbia rarely confronts. Because of their heterogeneity, urban governments are arguably more accommodating to the eccentric proclivities and diversities of the American population.

The mixed-use, high-density nature of the urban landscape—in contrast with the privatized world of sprawl—makes unconventional subcultural patterns of behavior more visible to urban visitor and resident alike. Prior to the mainstreaming of homosexuality in America, urban areas were often the only locales where gay and lesbian Americans could express their sexual identity without fear of violent retribution.²⁹ Politically, urban areas were the first to institute laws protecting homosexuals from discrimination, and thus were at the vanguard of social and political

24. See *id.* Sun-Belt Communities, include "areas of the South and West" United States. Oliver explains that "with the advent of air-conditioning, states like Texas, Florida, North Carolina, and Arizona suddenly became more hospitable." *Id.* at 157.

25. *Id.* at 171.

26. *Id.*

27. Claude S. Fischer, *Toward a Subcultural Theory of Urbanism*, 80 AM. J. SOC. 1319, 1321 (1975).

28. ELAINE B. SHARP, *MORALITY POLITICS IN AMERICAN CITIES* (2005).

29. Robert Aldrich, *Homosexuality and the City: An Historical Overview*, 41 URBAN STUD. 1719 (2004).

progress.³⁰ Urban subcultures, which are by definition less satisfied with the political status quo, have played an important role in American history as catalysts for political change.³¹

Political rallies and protests usually take place in the center of large cities, not only because urban areas are where unconventional ideas are generated, but because urban downtowns offer visible and dramatic backdrops for political speech. Pedestrian-less sprawl does not offer a very effective platform for political speech, particularly if one seeks to have his or her message heard by as many people as possible. Throughout political history, in America and abroad, public fora have figured prominently.³² Political movements of all sorts have turned to outdoor public space in order to get their message across. The proportionate loss of civic space resulting from subdivision dominated growth and cloistered private shopping malls has thus reduced the number of viable public settings in which one's political voice can be heard. In sum, the privatized world of sprawl has inhibited many of the vital, politically-engaging attributes formerly provided by dense heterogeneous cities and small community-oriented towns.

III. WHY WE NEED THE FIRST AMENDMENT IN PUBLIC PLACES

As the public environment has become increasingly privatized, with indoor malls replacing public shopping streets and gated communities replacing publicly accessible neighborhoods, the Supreme Court has had to grapple with the challenge of ensuring free political speech in a landscape where public places are increasingly rare. The Court has had much to say about how political speech may be regulated in the new private "public square." The First Amendment was devised by the Constitution's framers under the assumption that American democracy can only function successfully through the open transmission of political ideas.³³ America's founding fathers took for granted the existence of public forums in which political ideas could be exchanged.³⁴

30. *Id.*

31. *Id.*

32. See TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 27 (2009) [hereinafter SPEECH OUT OF DOORS].

33. See ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

34. See SPEECH OUT OF DOORS, *supra* note 32, at 26.

At the same time, however, the framers had a deep respect for the private realm, especially the highly celebrated ideal of private property.³⁵ Private property is foundational to our constitutional scheme.³⁶ Thus, the distinction between the public realm and the private realm is of key importance. Constitutional jurisprudence stretching back more than a century generally limits constitutional protections to unconstitutional actions by governmental, not private, actors.³⁷ In a world in which a majority of public space is privatized, and where public fora are increasingly difficult to find, it becomes increasingly imperative that these two constitutional values be reconciled. The fear is that politics itself may conceivably be in danger of privatization—and that this is an unworkable proposition in a heterogeneous democracy. As sprawl moves what was once public to the private sphere, does or should the Court’s constitutional equation shift?

The language contained in the First Amendment addressing free expression appears straightforward enough: “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble”³⁸ Nevertheless, scholars, legal practitioners, and judges have long debated the meaning and purpose of these few words. For one, its meaning has been adapted to include actions by states following incorporation via the Fourteenth Amendment.³⁹ In itself, this required reading “Congress” as including not only those political actors occupying the United States Capitol, but state and local legislatures as well. Next, there is the question of what it means to “make no law.” What level of governmental involvement constitutes the “making of a law”? As we shall see, the so-called state action doctrine, perhaps unsatisfactorily, attempts to resolve this question. As Alexander Meiklejohn, a Professor Emeritus of Philosophy at the University of Wisconsin, explained, “the literal text of the [First] Amendment falls far short of expressing the intent and the scope of that protection.”⁴⁰ Ultimately, determining what the First Amendment means in a vast and unpredictable range of contexts requires courts to look not only to the

35. RICHARD A. EPSTEIN, SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY 2 (2008).

36. *Id.*

37. *See infra* Part IV.

38. U.S. CONST. amend. I.

39. *Gitlow v. New York*, 268 U.S. 652, 664 (1923).

40. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961).

literal construction of the amendment's words, but also to its larger purpose.

To be sure, there is no consensus as to what this purpose is. Many emphasize the value of individual expression and liberty guaranteed by the First Amendment, while others focus on its essential role of ensuring a healthy participatory democracy through open debate and discussion.⁴¹ The first view posits that the First Amendment is essentially “a shield” protecting individuals from interference by the state.⁴² This liberty theory is rooted in notions of “self-realization and self-determination,” that are separable from the common good.⁴³ In contrast, the second position, known as the democratic model, emphasizes the importance of free expression for the good of the collectivity.⁴⁴ While these theories are by no means mutually exclusive, it is the latter position that is especially relevant in questioning how the First Amendment might apply in the context of privatized urban sprawl.

The view that free expression is an essential component of democratic self-government has been articulated by philosophers, legal thinkers, and Supreme Court Justices. The value of vigorous, open communication, and confrontation of human thought—sometimes referred to as the “marketplace of ideas,” expounded by John Stuart Mill a century-and-a-half ago⁴⁵—is echoed by modern scholars and judges. Justice Brennan, in what is perhaps one of the most influential statements on the meaning of the First Amendment, proclaimed “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”⁴⁶ Professor Meiklejohn argued that inherent in the capacity of a people to govern themselves is not merely the right to cast a ballot, but also the necessary judgment and knowledge required to make effective voting decisions.⁴⁷ This includes “[p]ublic discussions of public issues, together with the

41. See Mark C. Alexander, *Attention, Shoppers: The First Amendment in the Modern Shopping Mall*, 41 ARIZ. L. REV. 1, 9–14 (1999).

42. *Id.* at 9.

43. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1977).

44. See Alexander, *supra* note 41, at 11–14.

45. See JOHN STUART MILL, ON LIBERTY (David Bromwich & George Kateb, eds., Yale Univ. Press 2003) (1859).

46. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

47. Meiklejohn, *supra* note 40, at 256–57.

spreading of information and opinion bearing on those issues.”⁴⁸ According to Meiklejohn:

‘[T]he people need free speech’ because they have decided, in adopting, maintaining and interpreting their Constitution, to govern themselves rather than be governed by others. And, in order to make that self-government a reality rather than an illusion . . . the judgment-making of the people must be self-educated in the ways of freedom. . . . [This is] the positive purpose . . . of the First Amendment⁴⁹

Under this conception, the First Amendment has an intimate and integral relationship with popular sovereignty. It demands that the government’s role be not to dictate “truth,” but to ensure that the populace has an environment conducive to informed debate and “a meaningful exchange of ideas.”⁵⁰ It is critical, however, that we not simply pay lip service to this vision. It is quite easy, and unfortunately common, to revere the notion of a marketplace of ideas, while casually disregarding the actual need for a tangible marketplace. The rise of the Internet has perhaps further diluted any sense of urgency. However, the fundamental “placelessness” of the blogosphere might, in some respects, be more of a cause for alarm than for celebration. The increasing dominance of electronic communication might give rise to the legitimate fear that the marketplace of ideas is being replaced by a series of self-selecting echo-chambers, where there is even less chance that individuals will come face-to-face with uncomfortable ideas. While the democratic theory of the First Amendment might be appealing as an abstract concept, too little thought is given to the necessity or nature of the place where the exchange of ideas takes place. As Timothy Zick, Associate Professor at St. John’s University School of Law, observes, “the exercise of expressive rights requires adequate physical space. Given its primacy, it is remarkable how little attention has been given to the concept of ‘place.’”⁵¹

There is no doubt that the type of public debate necessary for a viable self-governing democracy can occur in a range of venues. Additionally, technological advances such as the Internet and cable television have only broadened the opportunities to enter one’s opinions into the idea marketplace. However, despite providing a significant contribution to society’s ability to disseminate political ideas, these advances are no

48. *Id.* at 257.

49. *Id.* at 263.

50. Alexander, *supra* note 41, at 14.

51. Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 581 (2006) [hereinafter *Speech and Spatial Tactics*].

substitute for face-to-face confrontation. Political dissent is by definition contentious. Attempts to disrupt the political status quo cannot take place in a vacuum, nor simply among an isolated group that shares the same politically divergent views. Disrupting the status quo requires persuasion of citizens who would otherwise not hear one's message.

The rich history of political activism on public streets, sidewalks, and parks is no accident. Indeed, this Article contends that the "place" selected for speech is often one of the most strategic decisions involved in political expression. Speech is staged such that it will have the maximum effect, targeting the most critical listeners, at a time and place best suited to convey one's ideas—whether it be the disturbing images of the Ku Klux Klan marching on the streets of Skokie, Illinois, where hundreds of Holocaust survivors reside,⁵² or Martin Luther King's "I Have a Dream" speech set with the Lincoln Memorial as a majestic backdrop, speakers of all persuasions have long understood the profound impact place can have on the power of one's message. Indeed, "[m]uch of the revolutionary past ha[s] been acted out on the public streets and other public places."⁵³ A free exchange of ideas cannot merely entail thousands of cloistered ideological communities communing among themselves. For a highly pluralistic democracy built on self-determination to thrive, alternate visions of democracy must be exposed to the sunlight of public space.⁵⁴

This bedrock principle was famously articulated in 1939 by Justice Owen Roberts in a decision rejecting restrictions of free expression on the streets of Jersey City.⁵⁵ He observed that:

[Public places] have immemorially been held in trust for the use of the public . . . 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.⁵⁶

This holding confirmed the status of government not as a mere owner of public places, but as a trustee guaranteeing, if not encouraging, access to and expression in the physical spaces where civic life was expected to

52. *Klan Rally in Illinois Erupts in Violence*, CNN.COM, Dec. 16, 2000, <http://archives.cnn.com/2000/US/12/16/klan.rally.reut>.

53. *Speech and Spatial Tactics*, *supra* note 51, at 608.

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

55. *Id.* at 515.

56. *Id.* at 515.

flourish. Importantly, the “trust provided the unwilling listener no general right of privacy on the public ways.”⁵⁷

A sustainable democracy cannot coddle the sensitivities of citizens who seek to shelter themselves from the cacophony of the marketplace. Thus, although the Constitution allows states to utilize their police power to impose certain minimal “time, place and manner” restrictions to minimize any risk of violence or disorder, the essence of its mission remains clear.⁵⁸ As guardians of the public-trust, states and localities must ensure that the public sphere remains robust and accessible to all, even if the outcome is confrontation with, and discomfort among, those content with the status quo. It is a mission America’s founding fathers enshrined in the First Amendment of the United States Constitution. Unfortunately, when it comes to the privatizing impact of sprawl, the Supreme Court has, in many respects, turned its back on this objective.

IV. A TOWN TODAY, A MALL TOMORROW

One context in which the Supreme Court has seemingly lost touch with the crucial democratic implications of free expression in public places is the suburban-style shopping mall. Modern large-scale shopping centers are one of the most notable accompanying features of widespread urban sprawl. Since evolving from the small-scale shopping strips of approximately half a century ago into the large, highly complex enclosed malls of today, American malls have displaced much, if not most, of the activity that formerly took place on public streets and in public parks.⁵⁹ What began as a convenient and utilitarian mode of retailing designed to accommodate the increasing dominance of the automobile, has grown into a dominant and ubiquitous American institution central to many Americans’ lives.⁶⁰ The most recent trend, inspired by the architectural movement New Urbanism, is to turn enclosed malls inside out and add office and residential space.⁶¹ Dubbed lifestyle centers, these enhanced outdoor malls have become increasingly common in the past decade.⁶²

57. *Speech and Spatial Tactics*, *supra* note 51, at 609.

58. *Heffron v. Int’l Soc’y for Krishna Consciousness*, 452 U.S. 640, 648 (1981).

59. OLIVER GILLHAM, *THE LIMITLESS CITY: A PRIMER ON THE URBAN SPRAWL DEBATE* 39 (2002).

60. *Id.* at 36–39.

61. *See* Lewyn, *supra* note 14, at 257–260; Jonathan O’Connell, *Lifestyle Plan May Not be Built to Last; Meant to Replace Malls Critics Say Town Centers Not Safe Bet for Retailers*, WASH. POST, May 31, 2010, at A10.

62. *See, e.g.*, O’Connell, *supra* note 61.

Today, “[c]ountless Americans practically live their lives in the modern mall. They not only purchase goods, but they also lounge, eat, perhaps see a movie, work out, or more.”⁶³ Malls, in other words, are where Americans spend a large percentage of their leisure time. They frequently present the only opportunity in America’s increasingly privatized landscape to brush up against a wide array of fellow citizens. They are, in essence, the modern public realm—with, of course, one caveat: they are privately owned. “[L]ife in the mall is controlled by the mall management. So the visitors live their lives, but they are never exposed to people, activities, or ideas that are not pre-approved by the management.”⁶⁴ That is, of course, unless the democratic principles of the First Amendment are found to trump the property interests of the private mall owners.

Whether this would occur turns on a somewhat esoteric and inconsistently applied doctrine established by the Supreme Court. It is a doctrine that addresses the question of whether, and in what contexts, fundamental guarantees of the Constitution are to apply to non-state actors. Known as the “state action doctrine,” it has roots that stretch back to the founding fathers’ debates over the wisdom or necessity of the Bill of Rights.⁶⁵ However, it would take almost one hundred years, following the post-Civil War passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, for the Supreme Court to explicitly draw the indelible line between public and private still adhered to today. The *Civil Rights Cases* of 1883⁶⁶ marked the Supreme Court’s first state action decision. Since then the Court has, with certain narrow exceptions, read the Constitution’s protections of individual liberties to apply only to state, meaning governmental, action.

In the *Civil Rights Cases*, the Court struck down a federal law ensuring that all persons were “entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement.”⁶⁷ The Court declared that the Civil Rights Act of 1875 was “repugnant to the *Tenth Amendment of the Constitution*.”⁶⁸ By requiring that it be the states, many of which were overtly hostile to racial equality,

63. Alexander, *supra* note 41, at 2.

64. *Id.* at 2–3.

65. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1543 (6th ed. 2009).

66. *See Civil Rights Cases*, 109 U.S. 3 (1883).

67. *Id.* at 9.

68. *Id.* at 15.

and not the federal government that prohibit private discrimination, the *Civil Rights Cases* were arguably responsible for setting back the civil rights movement by seventy-five years. The way the Court solidified the constitutional dichotomy between the public and the private, however, is more relevant here. Accommodations offered to the general population may appear on their face to be public, but because they do not directly involve the government, the Court considered them merely private.⁶⁹ They are thus precluded from constitutional intervention. In other words, while a state may be free to regulate the behavior of private actors within its own jurisdiction, the U.S. Constitution does not apply. As the Court explained, “[t]he wrongful act of an individual, unsupported by any [State] authority is simply a private wrong.”⁷⁰

Despite the shameful history of the state action doctrine’s earliest incarnation, modern proponents of the doctrine emphasize its importance as an ostensible bulwark of individual autonomy.⁷¹ In 1982, the Supreme Court asserted that “[c]areful adherence to the ‘state action’ requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. . . . Whether this is good or bad policy, it is a fundamental fact of our political order.”⁷² From both a practical and principled viewpoint, valid considerations warn against constitutional encroachment into the private sphere. The Constitution was designed to protect the rights and autonomy of the individual; excessive constitutional interference into private decisionmaking arguably contravenes this goal. Legal scholars have contemplated “the extreme consequences that might follow,” such as that “[n]ewspapers and radio stations might be prohibited from exclusively promoting a particular point of view,” or that “[p]rivate homeowners might be precluded from choosing their guests on racial or political grounds.”⁷³ Unlimited constitutional incursion into the private realm would thus be antithetical to many of the aspirations of liberal constitutional governance.

This does not mean that the state action doctrine is not and should not be subject to appropriate exceptions. Determining the line between the public and the private sphere can be an incurably hazy endeavor. The Supreme Court itself has addressed the difficulty of this task,

69. *Id.* at 17.

70. *Id.*

71. STONE ET AL., *supra* note 65, at 1548–1549.

72. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

73. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1588 (5th ed. 2005).

acknowledging that the “cases deciding when private action might be deemed that of the state have not been a model of consistency.”⁷⁴ The challenge for the Court has been finding a coherent formula for determining precisely when and in what context it is appropriate to diverge from the state action doctrine first articulated in the *Civil Rights Cases*. The so-called “public functions” exception from the state action principle, an exception from which the court has substantially backpedaled, speaks directly to the inherently privatizing impact of urban sprawl. This doctrine, discussed below, determined that an exception to the state action requirement is justified where traditionally public places are placed in private hands; the short-lived effect was to preserve constitutional rights even where the public landscape is privatized.⁷⁵

In an attempt to understand just why the Court’s jurisprudence has devolved with regard to the public functions exception, we might look to a poignant observation made by James Howard Kunstler, one of America’s most outspoken critics of sprawl. He emphasizes that one of the most insidious aspects of mass suburbanization is the way it has incrementally erased America’s collective memory of what a genuine, pedestrian-scaled town can be.⁷⁶ Downtowns, which used to be the locus of communities, have been reduced to nostalgic tourist novelties.⁷⁷ Kunstler laments that “two generations have grown up and matured in America without experiencing what it is like to live in a human habitat of quality.”⁷⁸

The Supreme Court justices might likewise be said to have passed an analogous milestone of institutional forgetfulness. In the Court’s early constitutional jurisprudence addressing privately managed and owned public places, the Court instinctively drew parallels with the publicly managed and owned public realm.⁷⁹ The Court held fast to the belief that public places, whether publicly or privately owned, were an essential component of a constitutional democracy and thus deserving of constitutional protection.⁸⁰ Court majorities seemed to acknowledge that privately owned and controlled places—such as company-owned towns and corporate-owned malls—were taking the place of what was historically

74. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991).

75. *See infra* footnotes 20–25.

76. JAMES HOWARD KUNSTLER, *THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA’S MAN-MADE LANDSCAPE* 245 (1993).

77. *See id.*

78. *Id.*

79. *Marsh v. Alabama*, 326 U.S. 501, 506 (1946).

80. *See infra* footnotes 20–25 for a discussion of *Marsh*, 326 U.S.

public.⁸¹ Over time, however, the Court's perception began to change, like Kunstler's description of the public at large.⁸² Perhaps as a result of the ubiquitous and relentless privatization of public space that has become the modern norm, the Court lost sight of just how critical the public realm is to a vibrant republic.

A. *MARSH V. STATE OF ALABAMA*—WHEN PRIVATE COULD BE PUBLIC

One of the Supreme Court's earliest forays into the public functions exception occurred in the wake of the Second World War. Grace Marsh, a Jehovah's Witness, was arrested while distributing religious literature on a sidewalk near a post office in the town of Chickasaw, Alabama, a suburb of Mobile.⁸³ Under ordinary circumstances, there would have been no doubt that her actions were protected by the First Amendment guarantee of free speech. The Supreme Court in *Marsh* made precisely this point.⁸⁴ Nonetheless, she was charged with violating an Alabama law that made it a crime "to enter or remain on the premises of another after having been warned not to do so."⁸⁵ While on its face Chickasaw functioned like any other typical American town, Chickasaw's conventional appearance disguised a decidedly unconventional attribute. Although the town was freely accessible to the public, Chickasaw was privately owned by the Gulf Shipbuilding Corporation.⁸⁶ "In the stores the corporation had posted a notice which read as follows: 'This is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted.'"⁸⁷ The Supreme Court was thus confronted with what was then a novel legal question: All else being equal, do fundamental constitutional guarantees vanish, where they otherwise would flourish, when ownership of traditional public places is placed in private hands?⁸⁸

America is a nation of limited government. Clear constitutional boundaries are imposed even on the democratic process itself. This means that as a baseline, absent a constitutional amendment, Ms. Marsh is generally free to propagate her ideas. A hostile majority cannot subvert the

81. *Marsh*, 326 U.S. at 507.

82. *See infra* footnotes 25–39.

83. *Marsh*, 326 U.S. at 502–03.

84. *Id.* at 504.

85. *Id.* at 503–04.

86. *Id.* at 502.

87. *Id.* at 503.

88. *See id.*

fundamental liberties of even the most disfavored minority. Can this bedrock principle be avoided through use of a simple financial transaction—placing an entire town in private, rather than governmental, hands? In *Marsh*, the Court said no. The Court explained that “[o]wnership 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.”⁸⁹ Thus, even in a company town such as Chickasaw, private owners “cannot curtail the liberty of press and religion.”⁹⁰ In arriving at this conclusion, the Court compared the company town at issue with privately owned bridges, highways, and rail lines.⁹¹ Justice Black’s majority opinion explained that the town of Chickasaw, like these other privately held facilities, serves a “public function.”⁹² Where private ownership of a town, like a highway, operates primarily to benefit the public, it is not immune from constitutional protection.⁹³

With the onset of World War II, company towns similar to Chickasaw proliferated in response to the enormous production needs associated with the war.⁹⁴ The towns were filled with industrious residents working in service to their country at a time when patriotism and the values of citizenship were at their peak.⁹⁵ According to Justice Black, the citizens of Chickasaw were comparable to the residents of any other town in America.⁹⁶ As the majority explained:

These people . . . [j]ust as all other citizens . . . 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 . . . reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments⁹⁷

89. *Id.* at 506.

90. *Id.* at 508.

91. *Id.* at 506.

92. *Id.* at 507.

93. *Id.* at 506.

94. See HARDY GREEN, *THE COMPANY TOWN: THE INDUSTRIAL EDENS AND SATANIC MILLS THAT SHAPED THE AMERICAN ECONOMY* (2010).

95. See *id.*

96. *Marsh*, 326 U.S. at 510.

97. *Id.* at 508–09.

The majority declared that preserving freedom of expression was just as important to the health of civic society in a privately owned town as it was in a conventional municipality.⁹⁸

This is not to say that the Court was not mindful of the inherent constitutional conflict at issue. The Court acknowledged that property owners themselves are also entitled to certain constitutional protections. As mentioned earlier, “property” ranked high on the list of constitutional values embraced by the Constitution’s framers.⁹⁹ However, the majority made it clear that in cases where the rights of property owners are pitted against the freedoms of press and religion, a wealth of Court precedent establishes that “the latter occup[ies] a preferred position.”¹⁰⁰ The Court declared in no uncertain terms that “the right to exercise the liberties safeguarded by the First Amendment ‘lies at the foundation of free government by free men.’”¹⁰¹

In retrospect, *Marsh* was decided at a pivotal moment for America’s built environment. It was written during the very first weeks of the suburban post-war boom. It was, of course, too early for the justices or society at large to comprehend just how dominant suburbanization would become—and how profoundly privatization would penetrate American culture. “Community” was thus still a taken-for-granted and deeply engrained aspect of life in America. Justice Frankfurter, in a concurring opinion, placed primacy on this notion of “community.”¹⁰² To Justice Frankfurter it was not private ownership, but the universal “community aspects” of residing in any American town that were “decisive in adjusting the relations now before us.”¹⁰³ The tension between self-regulation by a community and the freedom of an individual “to exercise his religion and to disseminate his ideas,” is a tension “the Bill of Rights was designed to resolve.”¹⁰⁴ Implicit in the First Amendment is the conclusion that freedom would, and must, be the victor.

Justice Stanley Reed, however, in a vehement dissent that presaged the future course of the Court, rejected this view. Justice Reed protested that the majority’s decision establishes the principle “that one may remain

98. *Id.*

99. *See supra* text accompanying footnote 35.

100. *Marsh*, 326 U.S. at 510.

101. *Id.* (citing *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939)).

102. *See id.* at 510–11 (Frankfurter, J., concurring).

103. *Id.*

104. *Id.* at 511.

on private property against the will of the owner . . . so long as the only objection to his presence is that he is exercising an asserted right to spread there his religious views.”¹⁰⁵ The dissent was alarmed by the implication of extending such constitutional privileges to the private sphere and warily observed that the *Marsh* decision marked the Court’s first such extension.¹⁰⁶

In truth, the majority merely carved out a narrow exception to the state action doctrine, an exception to which only private property serving a clear public function would apply. The Court’s rationale would not seem to apply to the vast majority of privately owned land. For the Court, the free exchange of ideas was just too important to the health of America’s democracy to sacrifice it on a technicality. And in *Marsh*, for all intents and purposes, the town behaved and functioned like any other at the time. Its ownership by a private company was a technicality that had little, if any, bearing on which residents decided to settle there, which citizens chose to frequent its business district, and most importantly, how these individuals participated as members of America’s greater civic society.¹⁰⁷

Far more disturbing than the prospect of a “constitutional invasion” into all aspects of the private sphere—an indeed troubling, yet unfounded fear by those who object to a discrete public functions exception¹⁰⁸—is a world in which all public places are privatized and the opportunity for an open exchange of ideas envisioned by America’s founders is greatly diminished. In an ominous nod to the future, Justice Reed noted that the appellant distributed her pamphlets on a sidewalk a mere thirty feet from “a public highway.”¹⁰⁹ Justice Reed casually observed that she “was free to engage in such practices on the public highways, without becoming a trespasser on the company’s property.”¹¹⁰ In today’s exurban communities, the interstates and collector roads which connect one suburban subdivision to another are indeed all that is left of the public realm. It is difficult to imagine even the most determined Jehovah’s Witness standing on the narrow shoulder of such a road, arm extended with the most recent issue of

105. *Id.* at 512 (Reed, J., dissenting).

106. *Id.*

107. *Marsh*, 326 U.S. at 508–509.

108. *See, e.g.*, Justice Reed’s dissent characterizing the majority opinion as standing for the intrusive principle “that one may remain on private property against the will of the owner and contrary to the law of the state.” *Marsh*, 326 U.S. at 512.

109. *Id.* at 514 (Reed, J., dissenting).

110. *Id.* at 517.

The Watchtower magazine¹¹¹ in hand, as cars buzz past at 65 miles per hour.

B. *AMALGAMATED FOOD EMPLOYEES UNION V. LOGAN VALLEY PLAZA, INC.*—A “VERY STRANGE TOWN”

In 1966, twenty-two years after *Marsh*, the Supreme Court once again confronted the question of how the Constitution applies to privately-owned public spaces.¹¹² By 1966, it was becoming increasingly apparent that the face of public space was rapidly changing. *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*¹¹³ addressed a radical realignment of the very concept of the town itself.

In *Logan Valley*, the owners of a shopping center near Altoona, Pennsylvania, sought to exclude picketers from their property.¹¹⁴ Like the thousands of developments that have since replicated the then innovative strip mall style, the Logan Valley Plaza property included not only its brick and mortar structures, but also vast “macadam parking lots” stretching “400 to 500 feet” from the “main entrance to the shopping center.”¹¹⁵ Members of the Amalgamated Food Employees Union stood in peaceful protest outside of a new supermarket in an attempt to draw attention to the nonunion status of its employees.¹¹⁶ They positioned themselves in what was perhaps the most rational location for any group of individuals attempting to draw attention to their ideas; they stood directly in front of the building where pedestrians were sure to pass by.¹¹⁷ The only significant difference between their location and a more traditional public sidewalk was the wide expanse of parking that separated them from the main roadway, and of course, private ownership.¹¹⁸ A lower court holding ordered the union picketers to remove themselves from Logan Valley property and reposition their protest along the shoulder of the public road alongside the shopping center.¹¹⁹ However, when the Supreme Court

111. *The Watchtower* is a religious magazine produced by Jehovah’s Witnesses. *Current Topics*, Watchtower, http://www.watchtower.org/e/current_topics.htm (last visited Feb. 7, 2012).

112. *See generally* *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), *abrogated by* *Hudgens v. NLRB*, 424 U.S. 507 (1976).

113. *See generally id.*

114. *Id.* at 312.

115. *Id.* at 311.

116. *Id.* at 311–12.

117. *Id.* at 311.

118. *Id.* at 310–11.

119. *Id.* at 312.

considered the union members' contention that the First Amendment protected their right to picket "within the confines of the shopping center," it reversed the lower court.¹²⁰

According to Justice Marshall, "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."¹²¹ In the pre-sprawl era, exercise of this right would not have merited judicial scrutiny. Previous Supreme Court opinions had asserted that "streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied."¹²² The Court determined that, just like the town of Chickasaw, this strip mall was the "functional equivalent" of a downtown "business district."¹²³ Logan Valley opened itself to the public¹²⁴ and, similar to a traditional town center, it was utilized by citizens for everyday tasks.¹²⁵ The only difference was that instead of a pleasant walk down Main Street, shoppers were required to traverse an expanse of pavement to get to and from their cars.

Although the post-war boom that precipitated wide-spread suburbanization was well under way in 1968,¹²⁶ it is worth noting the degree to which the Court remained wedded to traditional notions of place. In justifying its holding, for example, the majority explained that the "shopping center premises are open to the public to the same extent as the commercial center of a *normal town*."¹²⁷ Apparently, the auto-centric suburban landscape of separated uses was not "normal" to the majority.¹²⁸ The Court was merely observing that the most common streetscape was still one in which multiple-uses blended with one another—such that residents lived on the same or nearby streets as stores, schools, places of worship, and government offices. It was a model in which pedestrians, rather than cars, were paramount; it was one in which the concept of

120. *Id.* at 313.

121. *Id.*

122. *Id.* at 315.

123. *Id.* at 318.

124. *Id.* at 319.

125. *Id.* at 318.

126. OLIVER GILLHAM, *THE LIMITLESS CITY: A PRIMER ON THE URBAN SPRAWL DEBATE* 36–41 (2002).

127. *Logan Valley*, 391 U.S. at 319 (emphasis added).

128. *Id.*

“community” entailed the ability to communicate one’s ideas through routine face-to-face interaction. To the Supreme Court in 1968, this vision was not mere nostalgia, it was a democratic norm. At the same time, the Court was not blind to the changes that were rapidly occurring.

The majority acknowledged that “economic development” was remaking the American landscape.¹²⁹ Would constitutional rights be contingent upon the continued existence of the traditional town? The Court noted that “[t]he largescale [sic] movement of this country’s population from cities to the suburbs has been accompanied by the advent of the suburban shopping center,” and that “by the end of 1966” it was estimated that shopping centers would account “for approximately 37% of the total retail sales in [the United States and Canada].”¹³⁰ Even though the Court was writing at a time when strip malls were the exception rather than the rule, the majority could see the troubling implications of permitting privatization to convert public space into a constitution-free zone.

Forcing picketers onto narrow shoulders of busy streets devoid of pedestrians, but replete with fast-moving cars, would not only have put the union members in a position that was ineffectual from a First Amendment perspective, it would have posed a threat to the picketers’ safety.¹³¹ If the privately-owned parking lots that typically surround such malls were to be treated as the equivalent of any other private property, they would allow for a free-speech buffer that would shield pedestrians from any voices that do not conform to the mall owner’s business model. Furthermore, private businesses that cater to the general public would have a perverse incentive to surround themselves with a privatized fortress of parking, even to the extent that it is unnecessary, costly, and harmful to the environment.¹³² At the same time, there would be a clear disincentive to maintaining a location in town. The Constitution would exact a competitive disadvantage on those businesses that choose a location adjacent to the “public” public realm. As the Court noted in *Logan Valley*, “[b]usiness 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

129. *Id.* at 324.

130. *Id.*

131. *Id.* at 322.

132. See, e.g., Kathleen L. Wolf, *Trees, Parking and Green Law: Legal Tools and Strategies for Sustainability—Fact Sheet 15*, U. WASH. C. FOREST RESOURCES (Mar. 2004), http://www.naturewithin.info/Roadside/Parking_Trees_FS15.pdf.

themselves from similar criticism by creating a *cordon sanitaire* of parking lots around their stores.”¹³³

Thus, at least from one perspective, it would become decidedly irrational for businesses to remain in the city where they would continue to contribute to the vitality of civic life. Perhaps business owners would even feel compelled to uproot themselves from their urban and small-town locales where they stood for many years as valued community institutions, integral to their town’s identity. Instead, acting in their own rational self-interest, they would relocate to an anonymous privatized parking lot. While it may lack the charm and character of an old-fashioned “community,” this privatized public realm would offer the business owner the benefit of complete control. Democracy, as the founding fathers knew, is messy. As retail establishments, businesses would have a powerful incentive to avoid this messiness, and as Justice Douglas described in his concurrence, utilize private property to build “a sanctuary from which some members of the public may be excluded merely because of the ideas they espouse.”¹³⁴ As we shall see, because of the Supreme Court’s eventual reversal, the prophetic concerns of the majority in *Logan Valley* would become the new status quo.¹³⁵

It would be Justice Black’s caustic dissent in *Logan Valley*, not the majority’s holding, which would foreshadow the Court’s trajectory on matters of speech and sprawl. Justice Black, unlike his brethren, was unable to make the jump from *Marsh* to *Logan Valley*. Justice Black protested that he could “find very little resemblance between the shopping center involved in this case and Chickasaw, Alabama.”¹³⁶ Justice Black was confounded by this comparison. And indeed, many modern critics of sprawl would agree wholeheartedly with Justice Black.¹³⁷ America’s modern landscape would appear to have little in common with a traditional town. As Justice Black explained, in the shopping plaza “[t]here are no homes, there is no sewage disposal plant, there is not even a post office,” and that it “sound[ed] like a very strange ‘town’” to him.¹³⁸

133. *Logan Valley*, 391 U.S. at 324–25.

134. *Id.* at 326 (Douglas, J., concurring).

135. *See infra* Part IV.C.

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

137. *See, e.g.*, ANDRES DUANY, ELIZABETH PLATER-ZYBERK & JEFF SPECK, *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* 10 (2000); KUNSTLER, *supra* note 20, at 115.

138. *Logan Valley*, 391 U.S. at 331.

Perhaps it is “strange.” Admittedly, the Logan Valley shopping center did not include all of the component parts of a traditional town—far from it. At the time however, strict segregation of one type of human activity from another through separating property use was the wave of the future. Separated use zoning laws helped ensure that this would be the case.¹³⁹ The traditional town was being pushed out of existence. Although the individual components of downtown would persist, instead of one’s home, office, pharmacy, school, and church being separated by a few yards or blocks on a city sidewalk, they were now separated by vast networks of roads largely inaccessible to pedestrians.¹⁴⁰ Suburban sprawl does not look like a traditional town, not because the pieces that made up such towns have disappeared, but because they have spread out. In the process, many elements of what formerly comprised “the community”—such as bustling commercial districts, walkable residential neighborhoods and public parks,—have encased themselves in privatized bubbles. Justice White’s *Logan Valley* dissent illustrates this reality well.¹⁴¹ In emphasizing the differences between the shopping plaza at issue and Chickasaw, he wrote that, “Logan Valley Plaza is not a town but only a collection of stores.”¹⁴² Critics of urban sprawl might respond that as a result of sprawl America no longer has communities: it has “collections of people.” The modern built landscape has deconstructed geographic community piece by piece.

To many businesses and institutions there is a benefit in isolation: the ability to cluster exclusively with desirable like-businesses. Turning the public realm into a private one offers businesses the prospect of having their cake and eating it too. They can openly invite the public as shoppers yet ensure that the focus does not diverge from consumption. They can offer up their property as the new public square—but on their terms. Thus, when attention is turned toward civic discourse—and this discourse is bound to grow contentious from time-to-time in a pluralist democracy—they can simply force the conversation to a halt. Kick out the rabble-rousers. The new public realm is about shopping, not democracy.

Businesses that choose to locate on islands fortified by seas of parking are merely acting in their own self-interest. Of course, accumulated individual benefit does not always equal the public good. America’s founding fathers understood this when they built constitutional limitations

139. See DUANY, PLATER-ZYBERK & SPECK, *supra* note 137, at 10.

140. *Id.* at 87.

141. *Logan Valley*, 391 U.S. at 338 (White, J., dissenting).

142. *Id.*

into American government.¹⁴³ The Constitution's framers were initially concerned about the oppressive potential of the national government.¹⁴⁴ Later, with the addition of the Fourteenth Amendment, the concern expanded to include abuses of state power.¹⁴⁵ The constraints imposed by the First Amendment were clearly not directed at the private sector.¹⁴⁶ But the framers could not have predicted the way sprawl would encourage private sector monopolization of the public sphere.

It is important to note the new public realm of the shopping mall is not merely the product of private choice on the part of private developers and individual businesses. Not only do these private actors have an incentive to design their space such that they can exclude distracting communicative behavior, but also they are often required to do so by law. Most municipalities require all businesses to provide a minimum allotment of parking on-site.¹⁴⁷ The dissenters in *Logan Valley*, quick to defend the liberties of private property owners at the expense of civic discourse, fail to acknowledge this fact¹⁴⁸—granted, such requirements were likely not as ubiquitous then as they are today. Although the intent of these local laws is typically innocuous—for example, they strive to reduce congestion on the streets by eliminating on-street parking—their impact is to encourage sprawl and reduce opportunities for free expression. Even businesses that would choose to contribute to the public environment by engaging with the street by positioning themselves directly adjacent to a public sidewalk rather than behind a blockade of parking, are typically prohibited from doing so by law.¹⁴⁹ Thus well-intentioned local regulations mandating the provision of parking, in conjunction with Supreme Court precedent, unfortunately ensure that a free-speech buffer will surround most public establishments.

C. REVERSING COURSE—THE END OF FREE SPEECH IN PRIVATIZED PUBLIC SETTINGS

It would take a mere four years for the Supreme Court to substantially pare back the holding in *Logan Valley* with their holding in *Lloyd Corp. v.*

143. THE FEDERALIST NO. 10 (James Madison) (Gary Wills ed., 1982) (discussing the dangers of factions).

144. STONE ET AL., *supra* note 65, at 451.

145. *Id.*

146. The First Amendment reads “Congress shall make no law...” U.S. CONST. amend. I.

147. DUANY, PLATER-ZYBERK & SPECK, *supra* note 137, at 163.

148. See *Logan Valley*, 391 U.S. at 327–40 (Black, J., Harlan, J., White, J., dissenting).

149. See, e.g., *Grace Baptist Church of Oxford v. City of Oxford*, 320 N.C. 439 (1987).

Tanner.¹⁵⁰ Then just four years after *Lloyd*, a majority of the Court ultimately found itself in complete agreement with the *Logan Valley* dissenters and explicitly overruled *Logan Valley*—extinguishing *Logan Valley*'s limited exception to the state action doctrine.¹⁵¹ Ironically, the facts of *Lloyd* revolved around a shopping center in the heart of “smart growth” territory in Portland, Oregon.¹⁵² Portland is traditionally well-known for being on the vanguard of cities enacting policies designed to combat and prevent urban sprawl.¹⁵³

At the time, the enclosed mall was a “relatively new concept in shopping center design.”¹⁵⁴ This climate-controlled world represented the next step in the evolving privatization of the public realm. In an enclosed shopping mall, the public was not inconvenienced by distractions such as weather, and rather than travelling by car to move from one shopping experience to the next, all of a shopper's needs could be fulfilled in one convenient location. As the Court explained, “in addition to the stores [within the complex], there are parking facilities, malls, private sidewalks, stairways, escalators, gardens, an auditorium, and a skating rink.”¹⁵⁵ While the mall developers went to great lengths to mimic the attributes of a traditional public place, they still provided that “the shopper is isolated from the noise, fumes, confusion and distraction which he normally finds along city streets.”¹⁵⁶ Private security guards with “police authority” wore “uniforms similar to those worn by city police,” and were “licensed to carry handguns.”¹⁵⁷ This ersatz downtown included both a sterilized recreation of city streets, and mock-municipal authority from the ground-up.

At issue was whether the owner could constitutionally exclude those engaged in a peaceful distribution of handbills protesting the draft and the war in Vietnam.¹⁵⁸ Answering this question was complicated by the fact that the mall property was not strictly limited to shopping-related activity.¹⁵⁹ It frequently expanded its mission to allow for non-retail use.¹⁶⁰

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

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

152. *Lloyd*, 407 U.S. at 553.

153. *See* ALEX MARSHALL, *HOW CITIES WORK: SUBURBS, SPRAWL, AND THE ROAD NOT TAKEN*, at xvii (2000).

154. *Lloyd*, 407 U.S. at 553.

155. *Id.*

156. *Id.* at 554.

157. *Id.*

158. *Id.* at 553–56.

159. *Id.* at 555.

160. *Id.*

It would lease space to select “civic and charitable organizations,” including the Cancer Society, the Boy Scouts, and the Girl Scouts.¹⁶¹ It even permitted organizations such as the Salvation Army and the American Legion to fund raise and solicit contributions.¹⁶² These policies, however, were all part of a larger effort to induce “customer motivation” and “goodwill” in order to “attract shoppers and prospective shoppers.”¹⁶³ Although these activities suggested that the mall opened itself up to the public as civic space, such allowances were strategic and selective. Many other organizations were denied access to the mall, and the mall’s policy explicitly banned “[p]olitical use” of its facilities.¹⁶⁴ Also prohibited, and critical to the facts in *Lloyd*, was the distribution of handbills anywhere within the shopping complex.¹⁶⁵ Leafleting “was considered likely to annoy customers, to create litter, potentially to create disorders, and generally to be incompatible with the purposes of the Center.”¹⁶⁶ The justifications are strikingly similar to those used by the municipality in the seminal case of *Schneider v. New Jersey*, where the Court unequivocally struck down a leafleting ban as unconstitutional.¹⁶⁷ In this brave new world of privatized indoor public life, however, free speech was to be allowed only on the terms set by the mall’s owners. If the speaker’s message or methods did not conform to the business objectives of the shopping center, that speaker would have to find another venue for his or her speech.

The Supreme Court agreed with the mall. It was persuaded that the facts in *Lloyd* were distinguishable from those in *Logan Valley* and *Marsh*.¹⁶⁸ Here the pamphleteers addressed American foreign policy, a topic unrelated to the operation of the shopping center, whereas in *Logan Valley*, the focus was on the non-union hiring policies of a resident retail establishment.¹⁶⁹ The majority argued that “*Marsh* was never intended to apply to this kind of situation. *Marsh* dealt with the very special situation of a company-owned town, complete with streets, alleys, sewers, stores,

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 555–56.

167. *See Schneider v. New Jersey*, 308 U.S. 147, 156 (1939). The municipal ordinance there was aimed at preventing litter and “an unsightly, untidy, and offensive condition of the sidewalks.” *Id.*

168. *Lloyd*, 407 U.S. at 562.

169. *Id.*

residences, and everything else that goes to make a town.”¹⁷⁰ The Court’s newly-minted rigidity did not allow for analogies to be drawn between expressive freedoms “exercised in the customary manner” of a “town’s sidewalks and streets,” and the ostensibly non-customary shopping complexes that were rapidly replacing this tradition.¹⁷¹ Apparently, for this new majority, constitutional rights were contingent upon custom. If custom fades, so does one’s freedom of speech. As discussed later, this “tradition” of a public downtown is being reinvigorated in the form of private lifestyle centers.¹⁷² Privatized public places are gradually incorporating an increasing number of elements traditionally found in “a town.” Unfortunately, from a constitutional perspective, this privatized return to “the traditional” is unlikely to produce a counter-reversion to *Marsh*.

To the members of the *Lloyd* majority, “alternative avenues” for speech still existed, and as long as these avenues existed, the Constitution did not permit such an incursion into a mall owner’s private property rights.¹⁷³ In the words of Justice Powell, “[r]espondents could have distributed these handbills on any public street, on any public sidewalk, in any public park, or in any public building.”¹⁷⁴ In the city of Portland, Oregon, an anomalous city where sprawl has in fact been somewhat restrained, perhaps opportunities for effective First Amendment expression on bustling public sidewalks did still exist.¹⁷⁵ In many other major cities, however, the publicly-owned public sphere has been diminished greatly, if not completely squelched, by the proliferation of sprawl.¹⁷⁶ Ironically, by deciding *Lloyd* the way it did, the Supreme Court contributed to this reality—increasing the incentives for businesses to move away from these ostensible “alternative avenues” for speech.

By the 1970s, the ills faced by many cities led planners to conclude that the only viable solution was to privatize the cities themselves. Enormous indoor malls were planned for construction in cities across the country. Detroit’s desolate downtown, for example, was to be saved by the

170. *Id.* at 562–63.

171. *Id.* at 562.

172. *See generally infra* Part VI.

173. *Lloyd*, 407 U.S. at 567.

174. *Id.* at 564.

175. ALEX MARSHALL, HOW CITIES WORK: SUBURBS, SPRAWL, AND THE ROAD NOT TAKEN 158 (2000) (“Portland is arguably the only midsized city in the country that still has major department stores and dozens of healthy streets downtown. It does not depend on a few force-fed city projects to ‘create’ a downtown”).

176. *Id.*

erection of a mega-complex called the “Renaissance Center,” a massive development that included office towers, a hotel, and a giant shopping mall, all in one enclosed fortress.¹⁷⁷ However, “[f]rom the very start it was a financial catastrophe and, as an exercise in civic design, an epic flop.”¹⁷⁸ Although it was purportedly designed to reinvigorate the public environment in downtown Detroit, the complex had minimal physical connection to city streets.¹⁷⁹ The shopping mall emphasized security.¹⁸⁰ Even children under seventeen were not invited unless accompanied by a guardian.¹⁸¹ Detroit is but one example of a city that turned to privatization of its public sphere in order to compete with the privatized amenities of the suburbs. If the Court had been willing to take a more comprehensive view of sprawl and its impact on the public sphere, it might not have been so quick to find comfort in the supposed alternative avenues of communication available to groups and individuals seeking to convey their political ideas.

Private property advocates might prefer to frame the issue as one of freedom from government intervention. Such a characterization, however, is a fundamental distortion. Without governmental assistance and acquiescence, many privatized public places could not have become a reality in the first place. In *Lloyd*, for example, not only was the mall’s private security force provided with full police power by the city, but also, with the help of a city council ordinance: “Portland vacated about eight acres of public streets for their use.”¹⁸² In addition to conditionally lending its police powers to the operators of this private mall and using its authority of eminent domain, the city willingly took on future costs that would be associated with the project: “[T]he City of Portland was aware that as Lloyd Center developed, it would be necessary for the city to build new streets and to take other steps to control the traffic flow that the Center would engender.”¹⁸³ Furthermore, an allegation that a speaker is unlawfully using a private owner’s property necessitates reliance upon state laws of

177. KUNSTLER, *supra* note 76, at 196.

178. *Id.*

179. *Id.* at 196–97.

180. *Id.* at 196–97.

181. *Id.* at 197.

182. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 575 (1972) (Marshall, J., dissenting).

183. *Id.* at 576.

trespass and state enforcement of such laws.¹⁸⁴ Thus, characterizing a mall such as the Lloyd Center as a purely private endeavor is simply inaccurate.

The troubling implications of replacing the traditional downtown with a Constitution-free zone were not lost on the dissenters. They protested that “[f]or 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.”¹⁸⁵ Civic events such as an elaborate Veterans Day parade marched throughout the mall annually; the parade included “flags, drummers, and color guard units,” as well as a speaker who delivered “an address on the meaning of Veterans Day and the valor of American soldiers.”¹⁸⁶ With regular functions such as these, the mall was clearly engaged in, at a minimum, a superficial attempt to replicate and replace downtown America. It was clear from the beginning that malls such as the Lloyd Center, with their broad range of street-life attributes, their essential ties to city government, and their civic symbolism, could be considered an integral part of the public realm.

Hudgens v. National Labor Relations Board was the final nail in the coffin on free speech in the privatized public realm.¹⁸⁷ In *Hudgens*, the court reversed *Logan Valley*.¹⁸⁸ Property rights would ultimately prove victorious over free speech.¹⁸⁹ The Court held that warehouse employees did not have a First Amendment right to enter a shopping center in order to make their strike public.¹⁹⁰ The Court did acknowledge that protection of speech on private property may in some cases be afforded by local or state law.¹⁹¹ First Amendment of the Constitution on its own, however, left these picketers without a remedy.¹⁹²

D. PRUNERYARD SHOPPING CENTER V. ROBINS

While the Supreme Court was cutting back on vital constitutional guarantees, another court was doing the very opposite. When a privately

184. In other contexts, the Court has concluded that enforcement of the state law can constitute state action for purposes of the Fourteenth Amendment. *See Shelley v. Kraemer*, 334 U.S. 1, 19–20 (1948); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

185. *Lloyd*, 407 U.S. at 580 (Marshall, J., dissenting).

186. *Id.* at 579.

187. *See Hudgens v. NLRB*, 424 U.S. 507, 519–20 (1976).

188. *Id.* at 518.

189. *See id.*

190. *Id.* at 520–21.

191. *Id.* at 513.

192. *Id.*

owned shopping mall in California forced a group of high school students to leave the complex, the California Supreme Court concluded that the students' right to free speech had been violated.¹⁹³ In *Robins v. Pruneyard*, the students had sought to "solicit support for their opposition to a United Nations resolution against 'Zionism.'"¹⁹⁴ Relying on the California Constitution, the California Supreme Court reversed two lower court rulings denying the students the right to exercise free expression in a private shopping center.¹⁹⁵

Article I, Section 2 of the California Constitution provides that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for abuse of this right," and that [a] law may not restrain or abridge liberty of speech."¹⁹⁶ The California Supreme Court reasoned that the "California Constitution broadly proclaims speech and petition rights," and that "[s]hopping centers to which the public is invited can provide an essential and invaluable forum for exercising those rights."¹⁹⁷ The court determined that in an increasingly privatized landscape, "the public interest in peaceful speech outweighs the desire of property owners for control over their property."¹⁹⁸

This decision was ultimately challenged in the United States Supreme Court, but a unanimous Court upheld the California court's decision.¹⁹⁹ Although the United States Supreme Court had turned its back on its earlier speech-protective jurisprudence, in *PruneYard Shopping Center v. Robins*²⁰⁰ it at least conceded that it would not stand in the way of states which draw upon their own constitutional tradition to do the opposite.²⁰¹ The Supreme Court had long acknowledged that a state's own constitution may protect individual liberties in a more expansive fashion than its federal

193. See *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979), *aff'd sub nom. Robins v. PruneYard*, 447 U.S. 74 (1980). Note that the California Supreme Court and the United States Supreme Court differ regarding the name of the shopping center. The United States Supreme Court refers to it as "PruneYard," while the California Supreme Court uses "Pruneyard." Given that the shopping center's website, available at <http://www.pruneyard.com>, refers to the center as "Pruneyard," this Article will use that spelling in textual references.

194. *Id.* at 342.

195. *Id.* at 347–48.

196. CAL. CONST. art. I, § 2.

197. *Robins*, 592 P.2d at 347.

198. *Id.*

199. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980).

200. *Id.*

201. *Id.* at 81.

counterpart.²⁰² The *Lloyd* and *Hudgens* line of cases did not address such a scenario.²⁰³

The Supreme Court in *PruneYard* rejected the mall owner's contention that California's requirement that the students be allowed to solicit on his property infringed on his First Amendment right not to be compelled to use one's own property for another's speech.²⁰⁴ Unlike cases in which the communication at issue is likely to be directly associated with the views of the property owner, ideas expressed by members of the public in a privately-owned shopping center are clearly separable from the mall's owners. In the same way that pedestrians walking on the sidewalks of New York City are unlikely to associate the rantings of eccentric street performers with the administration of Mayor Michael Bloomberg, shoppers grazing past literature-distributing high school students in the Pruneyard shopping complex will not likely credit the mall's owner with the ideas expressed. As the Court pointed out, if property owners remain concerned about possible misunderstandings of a relationship, they are free to expressly dispel any such illusions by simply posting signs disclaiming sponsorship of any message conveyed.²⁰⁵ Although the Court agreed that "one of the essential sticks in the bundle of property rights is the right to exclude others,"²⁰⁶ it declined to extend the Fifth Amendment Takings Clause to the facts of *PruneYard*. Where private property is held open to the public such that it essentially replaces traditionally public places, the right to exclude becomes a principle of diminishing urgency.

Ultimately, while the Supreme Court's *PruneYard* decision may be hailed as heroic by those who lament suburbanization's impact on civic life, it must be remembered that the holding merely allows a state that is so inclined to fill in constitutional gaps. No doubt, as Justice Marshall acknowledged in his *PruneYard* concurrence, it is encouraging to observe the "very healthy trend"²⁰⁷ of state high courts applying expansive interpretations of their own constitutions, particularly where they have taken on questions of such national import.

Unfortunately, the need for such intervention is a result of the Supreme Court's own constitutional devolution. The complex array of

202. *Id.*

203. *Id.*

204. *Id.* at 80–81.

205. *Id.* at 87.

206. *Id.* at 82.

207. *Id.* at 91 (Marshall, J., concurring).

issues created by mass suburbanization is arguably national in both scope and ramifications. They are issues that directly impact the values enshrined in the Constitution and are not limited by state boundaries. They are questions in which the nation should speak with one voice.

Passing responsibility to the states is not only inappropriate where the U.S. Constitution speaks directly to the issue, it virtually ensures vast geographic inconsistencies in the freedoms afforded to Americans. California was the first state after *Hudgens* to recognize a free-speech right in shopping centers.²⁰⁸ And since *PruneYard*, over twenty states have decided at least one shopping-mall case.²⁰⁹ However, most of these states—including Minnesota, Connecticut, Pennsylvania, Arizona, Wisconsin, Georgia, Hawaii, Iowa, Michigan, New York, North Carolina, Ohio, and Texas—have declined to extend state constitutional freedom of expression to speech in shopping malls.²¹⁰ California is an outlier. Although some states have followed California's lead, for the vast majority that did not, *PruneYard* means very little.

V. SPEECH IN THE NEIGHBORHOOD

Meticulously manicured lawns lining sinuous ribbons of pavement are the hallmark of sprawling residential suburbs. The ostensible visual appeal of such configuration is indeed one of the key selling points distinguishing suburban style developments from their urban brethren.²¹¹ Stimuli in an urban setting are more likely to be eclectic, chaotic, and sometimes erratic—it is visual clutter that reflects the wide diversity of uses, activities, and people that share public space in close proximity.²¹²

Suburban residential developments, on the other hand, offer a refuge from urbanity's visual cacophony. Not only is each single family home protected by a generous green buffer, providing a degree of insulation from the outside world rarely available in a traditional urban environment, homogeneity of income²¹³ and use within each subdivision protects the suburban resident from jarring encounters with the unfamiliar. Single-use land restrictions guarantee that suburban subdivisions will remain exclusively residential, while the monotony of similarly sized homes with

208. Mulligan, *supra* note 8, at 549.

209. *Id.* at 557.

210. *Id.* at 557–58.

211. *See generally* HAYDEN, *supra* note 16.

212. *See, e.g.*, JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 143–151 (1961).

213. DUANY, PLATER-ZYBERK & SPECK, *supra* note 137, at 43.

comparable amenities ensure that a narrowly homogenous economic class will occupy the neighborhood.²¹⁴ Residents of sprawl thus come to expect that their neighbors will share certain visual conventions that mark the suburban subdivision. While there is no bar on eccentric design or behavior inside one's home, the outside of a suburban home is generally expected, and often required, to remain within narrow confines of conventionality.²¹⁵ These confines include a tidy yard, a subtle color palette, and a general avoidance any aesthetic choice that might risk rocking the boat.²¹⁶

A. DOMESTIC TRANQUILITY

Imagine a peaceful and orderly protest against a film director who makes controversial documentaries that some deem to be anti-American. This protest takes place on a wide sidewalk in front of an impressive twelve-story cooperative building on Central Park West where the director resides. The street, in typical New York fashion, is bustling with activity. Is this protected speech? Most Americans (even those who are not constitutional law scholars) would likely reply "yes." Now imagine that this protest takes place not in New York City, but on a quiet residential street in a far flung exurb in front of the director's palatial home. Would the answer be the same? It would not be a stretch to predict that many Americans would be more reticent about protecting such speech. Why?

As with the extraction and privatization of retail and other formerly public activities to the enclosed mall, the normalizing of suburban residential isolation has altered Americans' expectations. Once upon a time in America, for those who were not living on a farm, urban residential living was the norm; however, this is no longer the case.²¹⁷ By virtue of urban environments' high density and mixed-uses, urban residents inevitably lack complete dominion over their surroundings. As previously discussed, these qualities have been attributed to the greater tolerance for eccentricity and diversity that is a common hallmark of city life.²¹⁸ In contrast, the self-selected geographic enclaves endemic to suburban sprawl have helped promote an expectation, if not a sense of entitlement, of excessive control over one's residential surroundings.²¹⁹ Although many

214. *See id.*

215. JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW 495 (2003).

216. *Id.* at 506–510.

217. HAYDEN, *supra* note 16, at 21.

218. *See* Fischer, *supra* note 27.

219. DUANY, PLATER-ZYBERK & SPECK, *supra* note 137, at 43–46.

sprawling residential neighborhoods are still ostensibly part of the public realm, as homogeneity became the norm, so did the impression that a neighborhood is “mine” and not “theirs.”²²⁰

From a free-speech perspective, this is problematic. Free expression by “them” must be in earshot of “us,” or else the marketplace of ideas risks breaking down. As Justice Douglas famously exclaimed:

[Free speech] protection is essential to the very existence of a democracy. The airing of ideas releases pressures which otherwise might become destructive. . . . Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.²²¹

While this famous dissent was written against a backdrop of McCarthyism, it is a critical reminder of the importance of expressive friction to a functioning democracy. The single-use zoning prevalent in suburbia risks eliminating this friction.²²² The Supreme Court, when addressing freedom of expression in the suburban residential setting, has paid due respect to these concerns in some contexts, while doing quite the opposite in others.

The suburban expectation of insulation from the outside world was on full display in the case of *Frisby v. Schultz*.²²³ Brookfield, a suburban residential municipality just outside of Milwaukee, Wisconsin, had codified the desire for conflict-free suburban living by imposing a flat ban on all residential picketing.²²⁴ The stated goal was to assure “that members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy.”²²⁵ According to the suburban lawmakers, picketing on public residential streets and sidewalks risked causing “emotional disturbance and distress to the occupants.”²²⁶ Indeed, the subject of the picketing at issue in *Frisby* involved a topic of great sensitivity.

The First Amendment, however, counsels otherwise. Sticks and stones may break bones, but the discomfort and disturbance caused by words are

220. *Id.*

221. *Dennis v. United States*, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting).

222. Political science has attested to the reduced civic vitality of suburban politics. See OLIVER GILLHAM, *THE LIMITLESS CITY: A PRIMER ON THE URBAN SPRAWL DEBATE* 76 (2002).

223. See generally *Frisby v. Schultz*, 487 U.S. 474 (1988).

224. *Id.* at 476–77.

225. *Id.* at 477 (internal quotations omitted).

226. *Id.* (internal citations omitted).

costs we simply must tolerate as members of a free society premised upon fierce and open democratic contestation. The sensitivities of America's sacred middle class, even when they are well-founded, must not be permitted to thwart this important principle.

In *Frisby*, those challenging the law were fiercely opposed to abortion, and had gathered outside a doctor's private home on numerous occasions to protest that doctor's provision of abortion services.²²⁷ The argument made by the town in favor of the anti-picketing law's constitutionality illustrates well the altered expectations that have accompanied the mass-privatization of the public sphere. The town claimed that its law was constitutional because the streets of the residential suburb "should be considered a nonpublic forum."²²⁸ In other words, the fundamental principle famously articulated by Justice Roberts in *Hague v. Committee for Industrial Organization*, that the "streets" have "immemorially been held in trust for the use of the public," should not apply to the modern residential suburb.²²⁹

Had the Court accepted this argument, it would have marked the effective death of the public-forum doctrine for most Americans. Not only would single-use zoning encourage shopping centers to do away with free speech formerly protected by virtue of private ownership, but also residential neighborhoods would have also become immune from vital First Amendment freedoms by virtue of their exclusively residential character. The Court did not take this step. Rather, it was quick to dispose of the claim that residential streets are not a traditional public forum.²³⁰

Nevertheless, the Court proceeded to uphold the constitutionality of the ordinance by articulating a strained and narrow reading of the law at issue. The Court reasoned that the law's "use of the singular form of the words 'residence' and 'dwelling' suggests that the ordinance is intended to prohibit only picketing focused on, and taking place in front of, a particular residence."²³¹ Narrowly construed, the law ostensibly allowed for "ample alternatives" to communicate one's ideas. Place, however, is not a fungible commodity. When it comes to the impact and value of free speech, the realtor's cliché "location, location, location" is apropos. As Zick has argued, "[m]essage *placement* is often inextricably intertwined with

227. *Id.* at 476.

228. *Id.* at 480.

229. *Id.* at 481 (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)) (internal quotations omitted).

230. *Id.*

231. *Id.* at 482.

message content.”²³² In the following section, we shall see how the Court applies this very principle to the unique communicative import of displaying signs on one’s own residence.²³³ The Court, however, has been inconsistent. Troublingly, in *Frisby*, the Court emphasized the importance of place, not as a means of upholding First Amendment principles, but as a justification for diluting them.²³⁴

To the Court, the home is a refuge, “the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits.”²³⁵ Such a characterization has considerable appeal. Indeed, private property rights have always been premised largely on the ability to exclude.²³⁶ Furthermore, the Court has consistently upheld the right of private residents to choose to keep unwanted speakers off of their property.²³⁷ In *Frisby*, however, there was no allegation that picketers were attempting to trespass on anyone’s private property. The Court in *Frisby*, without explicitly acknowledging it, expanded the constitutional scope of the private sphere. After *Frisby*, the right to “residential privacy” was effectively given a wider circumference—an area that may overlap with, and even trump, a traditional public forum.

Some critics—or would-be critics—of this decision might be comforted by the narrow scope of the *Frisby* holding. After all, the Court only upheld a narrow ban on the targeted picketing of a particular home.²³⁸ Upon reflection, however, we should not take solace in this fact. In framing its holding the way it did, the Court not only validated the suburban way of life—celebrating and embracing the ideal of home not as center of community, but as an instrument of justifiable exclusion—but also attached a privileged constitutional status to this suburban lifestyle. Had this doctor’s home been an urban one, in a cooperative apartment on a bustling New York City street, it is almost certain that the same narrow reading would not apply.

232. SPEECH OUT OF DOORS, *supra* note 32, at 10.

233. See *infra* Part V.B.

234. See *Frisby*, 487 U.S. at 488–89.

235. *Frisby*, 487 U.S. at 484 (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980) (internal quotations omitted)).

236. See *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 & n.11 (1979).

237. See, e.g., *Martin v. City of Struthers*, 319 U.S. 141, 141–49 (1943).

238. *Frisby*, 487 U.S. at 488.

B. SIGNS OF THE TIMES

One of the most historically contentious uses of suburban property has been the display of signs on one's residential property. In some respects more than any other visual choice, signs blatantly contravene the philosophy of understatement that so permeates suburban aesthetic culture. Whether they declare that a home is on the market, that a particular contractor is doing work inside, or that its occupants support a specific political candidate or social cause, signs unabashedly declare to all passersby: "Look at me!" Their objective is to steal attention from the peace and tranquility of sameness, all in the hope of selling goods, promoting political viewpoints, or making social statements.

Indeed, it is precisely these attention-grabbing tactics—the garish advertisements, neon-lit storefronts, and flashy political posters—that Americans supposedly fled when they migrated en masse from dense urban environs to the suburban frontier.²³⁹ Should individuals who choose to reside in suburbia not also be the masters of their chosen physical environment? Should municipalities, as with zoning ordinances and other land-use regulations, not have the ability to ban or at least restrict the types of signs that can be displayed on one's land or in one's window? What is it that makes signage different from other forms of enforced monotony?

The answer, of course, is that signs, unlike other purely aesthetic choices, communicate a clear message—and communication is protected by the First Amendment. Although the Court has yet to rule on the sanctity of free speech in the context of increasingly prevalent private gated subdivisions and those people who are governed by private homeowners associations, it has established firm limits on a municipality's ability to prohibit the posting of signs on residential property.

The story of *Linmark Associates, Inc. v. Township of Willingboro* began in 1974, in the township of Willingboro, New Jersey.²⁴⁰ The township was one of the original three "Levittowns," the catalysts that set the standard for the mass-produced suburbia that has dominated ever since.²⁴¹ Levitt & Sons developed Willingboro for middle-class residents beginning in the late 1950s.²⁴² It was located in southern New Jersey close

239. JUERGENSMEYER & ROBERTS, *supra* note 215, at 496–497.

240. *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 85 (1977).

241. JACKSON, *supra* note 22, at 237.

242. *Linmark*, 431 U.S. at 87.

to McGuire Air Force Base, as well as to offices of a number of national corporations.²⁴³

At issue in *Linmark* was a prosaic matter that would not, at first glance, appear to raise critical concerns of free expression and democratic vitality.²⁴⁴ The township of Willingboro did not attempt to squelch vital political speech by banning politically incendiary signage; the township council's 1974 ordinance, with purportedly admirable intentions, merely prohibited residents from placing "For Sale" or "Sold" signs in front of their homes.²⁴⁵ According to the municipality, the prohibition was an attempt "to stem what it perceive[d] as the flight of white homeowners from a racially integrated community."²⁴⁶ The display of numerous "For Sale" signs was allegedly causing "panic selling" among white residents who feared that the township was on its way to "becoming all black."²⁴⁷ The signage, in other words, was thought to be precipitating a white exodus that would eventually spell the end of the town's racial integration. In 1973, nonwhites made up 18.2 percent of Willingboro's population.²⁴⁸

For two key reasons, the Court held that Willingboro's prohibition of "For Sale" signs—even considering their status as commercial speech—exceeded the constitutional bounds of the First Amendment.²⁴⁹

First, the Court concluded that "alternative channels for communication" were insufficient; therefore, the restriction did not qualify as a permissible "time, place, or manner" regulation.²⁵⁰ Other options, such as newspaper advertising and listings with real estate agencies were more

243. *Id.*

244. *Id.* at 86.

245. *Id.*

246. *Id.* The Court never fully explored whether preserving racial balance was the true impetus for the ordinance. There was significant suggestion, however, that the residents were perhaps more concerned with the prospect of declining property values than with continued racial harmony. *Id.* at 90. Nevertheless, in the 1970s the notorious practice of "block busting," in which realtors sought to instigate panic-selling by white residents by creating the impression that minorities were moving in, was widely acknowledged. *See, e.g.,* W. EDWARD ORSER, *BLOCKBUSTING IN BALTIMORE: THE EDMONDSON VILLAGE STORY* (1994). Additionally, before instituting the anti-signage legislation, the Willingboro Council had consulted with "National Neighbors," a seminal organization dedicated to "promoting integrated housing," and had "obtain[ed] a favorable report from Shaker Heights, Ohio," a well known integrated neighborhood which had also prohibited the display of for-sale signs. *Linmark*, 431 U.S. at 88.

247. *Linmark*, 431 U.S. at 88.

248. *Id.* at 87.

249. *Id.* at 93–97

250. *Id.* at 93 (internal quotations omitted).

costly and provided less autonomy to the seller.²⁵¹ These alternatives also were perhaps less effective and “less likely to reach persons not deliberately seeking sales information.”²⁵² In other words, like the chosen site of a political demonstration, place matters. What can be more fundamental to the ideal of homeownership than the ability to transfer one’s property on one’s own terms—to advertise, on-site, a personal intention to sell a private residence on the open market?

Secondly, the Court found that the Willingboro ordinance constituted an unconstitutional content-based restriction on speech.²⁵³ In order for a restriction of expression to be permissible, such restriction may not turn on the specific content of the message conveyed. As the *Linmark* majority explained, “Willingboro has proscribed particular types of signs based on their content because it fears . . . that they will cause those receiving the information to act upon it.”²⁵⁴ The Court concluded that the First Amendment does not allow such a proscription.²⁵⁵

The prohibition on “For Sale” signs is thus far from trivial. While commercial in nature, such a sign is fundamentally communicative. If the principle behind the First Amendment means anything, it is that the people, not the government, determine the relative significance or insignificance, merits or demerits of speech. Indeed, Willingboro sought to prevent the posting of “For Sale” signs specifically because of the potential social messages these signs were sending.

The ability to determine what forms of expression enter the public marketplace, even over mundane subjects, is a profound power. As the majority pointed out, “[i]f dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on that locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act ‘irrationally.’”²⁵⁶ Concededly, the Supreme Court has willingly looked the other way as suburban municipalities compete with one another for economic advantage through many other methods: whether through the exclusionary zoning practices that seek to maximize the number of wealthy residents while keeping out those who would deplete the municipality’s tax

251. *Id.*

252. *Id.*

253. *Id.* at 93–94.

254. *Id.*

255. *Id.*

256. *Id.* at 96.

base,²⁵⁷ or through the vast differentials in spending on public schools.²⁵⁸ Competition through the suppression of information, however, is where the Court apparently parts company with its past decisions—at least with regard to local governments that have not been privatized.

The Supreme Court would reaffirm this posture almost two decades later in *City of Ladue v. Gilleo*.²⁵⁹ This case involved a local ordinance far more comprehensive in scope than the “For Sale” sign ban in *Linmark*. Indeed, the Court observed that in important respects, the *Linmark* case was the “mirror image” of the facts it confronted in *Gilleo*.²⁶⁰ The city of Ladue—a suburban residential community located just outside of St. Louis, Missouri—enacted a regulation prohibiting the display of any signs on residential property.²⁶¹ The law contained certain narrow exceptions, however, including “residence identification” signs, “for sale” signs, and safety hazard warning signs.²⁶² At the same time, the ordinance permitted certain signs to be posted by nonprofit organizations, churches, and commercial establishments.²⁶³

Margaret P. Gilleo, a resident and homeowner of a single-family home in Ladue, placed a sign on her front lawn with an expressly political message: “Say No to War in the Persian Gulf, Call Congress Now.”²⁶⁴ Upon being informed that such signs were not permitted in Ladue, Ms. Gilleo applied for a variance exempting her from the regulation.²⁶⁵ The Ladue city council denied this request.²⁶⁶ Following a preliminary injunction against the ordinance by a federal district court, the Ladue city council repealed the ordinance and enacted a substantially similar replacement, this time spelling out with greater specificity the purpose of the ordinance.²⁶⁷ The new regulation described at length the policy objectives behind the sign ban.²⁶⁸ According to the city, a proliferation of

257. Wayne Batchis, *Enabling Urban Sprawl: Revisiting the Supreme Court's Seminal Zoning Decision Euclid v. Ambler in the 21st Century*, 17 VA. J. SOC. POL'Y & L. 373, 394–96 (2010).

258. Wayne Batchis, *Urban Sprawl and the Constitution: Educational Inequality as an Impetus to Low Density Living*, 42 URB. LAW. 95, 102–03 (2010).

259. *City of Ladue v. Gilleo*, 512 U.S. 43 (1994).

260. *Id.* at 48.

261. *Id.* at 45.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* at 46–47.

268. *Id.* at 47.

signs “would create ugliness, visual blight and clutter, tarnish the natural beauty of the landscape as well as the residential and commercial architecture, impair property values, [and] substantially impinge upon the privacy and special ambience of the community.”²⁶⁹

Of course, in the high stakes world of suburban municipal competition, restricting free expression in service of these objectives is quite understandable. As discussed above, the Supreme Court’s submission to the cult of local governance has furthered localities’ need and ability to favorably differentiate themselves from one another in a sea of otherwise indistinguishable sprawl.²⁷⁰ Local suburban governments are, by design, oriented toward the preservation of the economic and lifestyle interests of their narrow community of residents, not the broader democratic and social implications of their actions. As J. Eric Oliver, Professor of Political Science at the University of Chicago, observes, “[i]n obtaining economic well-being from a neighboring city without sharing in the responsibility for its social and political maintenance, the disengaged suburbanite is a civic parasite of the metropolitan community.”²⁷¹ Pitted against one another, municipal politics focus primarily on the means of maintaining their position relative to other similarly situated communities— “[b]y creating little democracies of like-minded citizens, municipal specialization and segregation limit the political conflicts that typically arise.”²⁷² Not only does this “lower the incentives for civic involvement,”²⁷³ but it also likely skews the values of local governments and their constituents away from broad and vital civic principles, such as open political expression.

The Supreme Court concluded that, as applied to the residents of Ladue, the regulation prohibiting the display of signs on residential property violated residents’ constitutional right to free speech.²⁷⁴ To the majority of the Court, Ladue’s ordinance simply prohibited too much expression, including “such absolutely pivotal speech as a sign protesting an imminent governmental decision to go to war.”²⁷⁵ Displaying signs on one’s property is part of a “venerable” tradition that often plays a critical role in political campaigns.²⁷⁶ Residential signs provide a unique and

269. *Id.*

270. *See supra* text accompanying notes 256–258.

271. OLIVER, *supra* note 23, at 195–96.

272. *Id.* at 96.

273. *Id.*

274. *Gilleo*, 512 U.S. at 58–59.

275. *Id.* at 54.

276. *Id.* at 54–55.

valuable glimpse into a citizen's political mind, and therefore offer a potent contribution to the marketplace of ideas. Such signs have no satisfactory equivalent. The Court even cited the text of a practical handbook for political operatives that suggested that campaign "posters have maximum effect when they go up in the windows of homes, for this demonstrates that citizens of the district are supporting your candidate—an impact that money can't buy."²⁷⁷ The display of a sign at a private residence strikes at the heart of the "individual liberty" and autonomy justification for the First Amendment. Thus, in this instance, the Supreme Court displayed a healthy respect for the centrality and importance of the place in which a message is conveyed. Here, the place provided not only a critical forum for individual expression, but also a central component of the idea expressed. It is integral to the "special respect for individual liberty in the home [that] has long been part of our culture and our law."²⁷⁸ Additionally, "a person who puts up a sign at her residence often intends to reach *neighbors*, an audience that could not be reached nearly as well by other means."²⁷⁹

Indeed, the Supreme Court's argument for striking down the law in *Gilleo* is so compelling that one cannot help but feel profoundly let down when one realizes the likely future of these freedoms. For example, in the context of privatized communities—gated neighborhoods, subdivisions governed by homeowners associations, and other common interest developments—such arguments will likely fail. Although the Supreme Court has yet to test the principles expounded in *Linmark* and *Gilleo* in the privatized residential landscape that is rapidly becoming the norm, the Court's current precedent suggests that the state action doctrine would lead to a denial of critical First Amendment freedoms.

C. THE SECOND PHASE OF RESIDENTIAL PRIVATIZATION

The baseline assumptions about what it means to live in a residential community in America are rapidly changing. Although the burst of suburban single-use residential building that occurred following the Second World War marked a radical shift in the way America ordered its landscape,²⁸⁰ the implications of the second phase of privatization are just beginning to be acknowledged. Commentator Brian Jason Fleming described the rising dominance of common interest developments as a "quiet revolution" profoundly impacting political and social arrangements

277. *Id.* at 55 n.12.

278. *Id.* at 58.

279. *Id.* at 57.

280. See generally HAYDEN, *supra* note 16, at 128–153.

in residential communities across America.²⁸¹ Such common interest developments—which can take the form of gated communities, association-governed communities, condominiums, cooperatives, or one of many other possible designations—all share certain distinguishing attributes.

First and foremost, a governing association, rather than a government, holds title to all of the common property in the development.²⁸² Individual residents enjoy access to this property by virtue of their membership in the association.²⁸³ Second, residents of the development must become members of the association and abide by the sometimes-onerous usage restrictions that apply not only to the common property, but to their individual residences as well.²⁸⁴ Finally, residents must pay a fee, assessed on a regular basis, to pay for maintenance of common property and other services.²⁸⁵ Essentially, private governing associations take on the role once occupied by local government. They privatize public land and the public services needed to maintain it. They privatize citizenship and the laws that citizens must abide by. They also privatize taxes. Those who are not residents, nor explicit invitees, are excluded not only from private residential property, but also from the common property. Within the boundaries of a common interest development, there is complete absence of a public realm.

Such ownership schemes are by no means a new phenomenon. Even the most densely populated of American metropolises, New York City, was not immune from the allure of privately-owned “public” space accessible only to a select few.²⁸⁶ As far back as 1831, the purchase of a twenty-two-acre farm in the heart of Manhattan would come to include one of the most storied private playgrounds.²⁸⁷ Gramercy Park, accessible only to the narrow band of residents surrounding the picturesque property, quickly “became the center of a wealthy neighborhood . . . and a bastion of correct

281. Brian Jason Fleming, *Regulation of Political Signs in Private Homeowner Associations: A New Approach*, 59 VAND. L. REV. 571, 577 (2006) (citing Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, 6 WM. & MARY BILL RTS. J. 461, 465 (1998)).

282. *Id.* at 578.

283. *Id.*

284. *Id.*

285. *Id.*

286. JACKSON, *supra* note 18, at 22.

287. *Id.*

society.”²⁸⁸ Until recently, however, common interest developments were an extraordinarily rarefied and infrequent phenomenon.

In the last few decades, these developments have multiplied at an exponential rate. Their proliferation in recent years is staggering. In 2003, approximately fifty-five million Americans, or nearly one in four home-owning Americans, lived in some form of common interest development.²⁸⁹ These privately-owned communities are ubiquitous in the more recently developed Sun Belt regions of the country.²⁹⁰ For homebuyers in many of these areas—such as Orlando, Florida; Las Vegas, Nevada; and Orange County, California—there is little choice, unless their home search is to be severely constrained, but to submit to membership in a homeowners association.²⁹¹ In other words, what was once envisioned as a choice for residents with a distinct desire to live in an exclusive, privately owned community, has fast become the status quo in residential development.

One might argue that this shift is a mere reflection of consumer demand; yet even the most ardent enthusiasts for this form of property ownership must admit that there are other factors at play. Today, many local zoning regulations actually encourage, if not indirectly require, all new homes to be built as a part of a homeowners association.²⁹² Glendale, Arizona’s statutory scheme, for example, mandates that a homeowners association govern all new subdivisions that contain any common areas.²⁹³ In Glendale, the fact that all new residential developments “have at least [one] water-retention area to collect rainwater run-off,” even though this area might be the only common space in the development, effectively ensures that new housing will be privately governed.²⁹⁴ The zoning code of the City of Las Vegas, a city that perhaps best illustrates why the modifier “urban” has replaced “suburban” in the phrase “suburban sprawl,” offers a comparable scenario. First, the Las Vegas zoning code mandates that particular features be included in new subdivisions; then it commands that

288. *Id.*

289. Lisa J. Chadderdon, *No Political Speech Allowed: Common Interest Developments, Homeowners Associations, and Restrictions on Free Speech*, 21 J. LAND USE & ENVTL. L. 233, 235–36 (2006).

290. *Id.* at 236–37.

291. *Id.*

292. *Id.* at 237.

293. *Id.*

294. *Id.* (citing Bob Lewin, *Issues Homeowners Have with Common Interest Developments*, *The American Homeowners Resource Center* (1998)).

“if” certain of these very same features are present, a homeowners association must be in place to maintain them.²⁹⁵ For neighborhoods that came into existence prior to the enactment of this statutory scheme, the City, “[t]hrough its ‘Neighborhood Services Department,’” was able to “successfully urge[] more than 150 new neighborhood homeowners’ associations to form.”²⁹⁶ The incentives for localities to privatize their neighborhoods are significant. Not only do privately owned and governed communities, like their public exclusionary-zoned predecessors, have the potential to boost a municipality’s tax base, privatization means that the municipality does not have to bear the costs of traditional government services such as trash pick-up, street cleaning and lighting, as well as landscaping and maintenance of common areas.

Private homeowners associations in many respects mimic the attributes of a true government, minus the built-in democratic protections (and inefficiencies) that accompany them. Associations, for example, are created and operated in accordance with governing legal documents that spell out the rules and regulations under which the development is to function.²⁹⁷ Such documents have been likened to state constitutions, by virtue of “their foundational nature and their nearly immutable impact on the character of the community.”²⁹⁸ This legal foundation, however, can be extremely difficult to modify once a subdivision is fully established.²⁹⁹ Many changes require a supermajority of votes by all members of an association.³⁰⁰ Securing those votes can be an insurmountable challenge, particularly in the climate of apathy that typically surrounds procedural routines of a home owners association—as well as the likely existence of tenants who rent from absentee owners.³⁰¹

From a democratic standpoint, the operation of these private governments is frequently far from ideal. Association board members have been criticized as self-selecting, self-interested, inflexible, illiberal, and non-representative of the community at large.³⁰² Thus, although private homeowners associations may in some respects resemble a model of

295. *Id.*

296. *Id.* at 239.

297. Fleming, *supra* note 281, at 578.

298. *Id.* at 578.

299. *Id.* at 578–79.

300. *Id.* at 578.

301. *Id.* at 578–79.

302. *Id.* at 579–80.

democratic governance, without the checks and balances built into public constitutions there can be simply no assurance that such associations will act in accordance with important democratic principles. Admittedly, there may be many tangible advantages to governance under a homeowners association. However, replacing local governance with privatized common interest associations presents a range of concerns worthy of further investigation—particularly in an era in which homeowners associations are rapidly becoming a norm of local governance.

One such concern is the ability of association-governed communities to subvert the free exchange of ideas so essential to American democracy. It is quite common for homeowners associations to prohibit speech in the name of the community's aesthetic or other interests—expression that would otherwise be protected by the First Amendment. Can privately-owned common-interest developments simply bypass the constitutional logic reflected in the *Linmark* and *Gilleo* cases? Can such communities enact outright bans on residential signage? Although the Court's holding in *Marsh* might lead one to believe otherwise, Supreme Court precedent since *Marsh*, as well as lower court decisions interpreting the Court's jurisprudence, lead to the conclusion that such expression would likely not be constitutionally protected.

The *Marsh* decision, applying constitutional guarantees to a privately owned company town, was premised on the need to preserve fundamental rights, even where public functions are privatized. Thus, although under ordinary circumstances the state action doctrine limits the applicability of the Constitution to governmental actors, the Court concluded that fundamental constitutional rights cannot simply be contracted away by handing inherently public functions over to private entities. For example, even though they were run by private political parties, the Supreme Court famously rejected the constitutionality of racially discriminatory “white-primaries.”³⁰³

In *Smith v. Allwright*, the Court confronted the Democratic Party of Texas's rules establishing that “all white citizens of the State of Texas,” would be “eligible to membership in the Democratic party and, as such, entitled to participate in its deliberations.”³⁰⁴ The result was a blatant exclusion of non-white citizens from primary elections—essential precursors to national elections. Lower courts had rejected the applicability

303. See generally *Smith v. Allwright*, 321 U.S. 649 (1944).

304. *Id.* at 656–57.

of the Equal Protection Clause because political parties are private organizations.³⁰⁵ Of course, if this logic were to hold, circumventing fundamental rights would be remarkably simple. Discrimination in private political primaries effectively denies participation in the public general election. The public function exception to the state action doctrine allowed the Supreme Court to identify such ostensibly private action for what it was: inherently public. The Court asserted that “the opportunity for choice [of elected officials] is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election,” and that “[c]onstitutional rights would be of little value if they could be thus indirectly denied.”³⁰⁶ Homeowners associations arguably do precisely this.

As private organizations fulfilling a role otherwise occupied by the state, homeowners association communities systematically deprive their residents of their right to speech in a traditionally valuable forum—their lawn. The process by which rights have been stripped from Americans, however, has occurred in such an indirect manner that many Americans likely do not even realize what they are missing. It is a process endemic to suburbanization. The public realm, where vital political ideas were traditionally expressed, once was a coherent whole with a distinct center. A town, with its sidewalks connecting its stores, its homes, its offices, and its parks, was a part of the public sphere. By definition, however, suburban sprawl involves the strict separation of uses.³⁰⁷ The segregation of uses that today marks most new development has radically realigned previous assumptions. With sprawl, there is no center, only a residential pod here, an office park over there, a shopping mall at exit twenty-six, and those lovely landscaped gardens with the ten dollar admission fee just a bit further down the exit ramp.

To many Americans—residents and nonresidents of common interest developments alike—the notion that a private governing body of a private residential enclave would have the power to regulate a range of overt expressive behavior might seem simply to accord with common sense because privatization is the new status quo. Familiarity with truly public spaces is waning. As a result, it now seems like a commonly accepted view that private individuals, by choosing to live in a private community, voluntarily opt-in to its rules—if they do not like them, they can either

305. *Id.* at 657.

306. *Id.* at 664.

307. *See supra* Part II.

attempt to change the rules or leave, as with any other private contractual arrangement. Perhaps residents of Texas in 1944, when *Smith* was decided, shared a similar view regarding the choice of whether or not to join a private political party. People who did not like the rules could simply choose to align themselves with another party. Of course, any such choice, particularly in the one-party South of the 1940s, was a mirage. The prevalence of common interest developments has begun to make the so-called choice of domicile similarly illusory.

In 1946, the year *Marsh* was decided, the American public landscape was notably different than we find it today. It had yet to be substantially impacted by sprawl. The company town of Chickasaw, which incorporated a traditional, mixed-use downtown, did indeed look like Anytown, USA.³⁰⁸ The Supreme Court's rationale for extending the constitutional freedom of speech to the sidewalks of this privately-owned town turned largely on this resemblance.³⁰⁹ As the *Marsh* holding was narrowed by subsequent decisions, the Justices doing the trimming were sure to point to the mixed-use nature of downtown Chickasaw. The majority in the *Hudgens* case, in the process of overturning *Logan Valley*, cited Justice Black's *Logan Valley* dissent wherein Justice Black postured:

Under what circumstances can private property be treated as though it were public? The answer that *Marsh* gives is when that property has taken on all the attributes of a town, [that is], 'residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated.'³¹⁰

With the advent of sprawl, rarely does one find such a traditional mixed-use combination. Sprawl has thus had a divide-and-conquer impact on constitutional rights, leaving the *Marsh* holding behind as a vestige of a bygone era. Although it has never been abrogated like its unfortunate cousin *Logan Valley*,³¹¹ *Marsh* remains fixed in time, unlikely to have any significant applicability or relevance in today's sprawl-dominated landscape. Of course, it did not have to be this way—the authors of *Logan Valley*, unlike those who overruled it, were able to see the clear parallels

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

309. *Id.* at 502–05.

310. *Hudgens v. NLRB*, 424 U.S. 507, 516 (1976) (citing *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 332 (1968) (Black, J., dissenting)).

311. *Hudgens*, 424 U.S. 507 (abrogating *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968)).

between the old downtown and the modern shopping center.³¹² Admittedly, even the finest of Supreme Court prognosticators cannot predict its future course with certainty. The Court's trajectory, however, leaves little reason to believe that a private homeowners association's rules prohibiting expressive signs on one's lawn or in one's window would evoke the public function exception to the state action doctrine successfully relied upon in *Marsh*.

In 2002, the Eleventh Circuit confronted precisely the hypothetical addressed above: May a private residential subdivision constitutionally prohibit a resident from posting a sign in their front yard? In *Loren v. Sasser*³¹³ the Eleventh Circuit said yes.³¹⁴ Although one cannot necessarily read deeper into a denial of certiorari, it may be significant that on May 27, 2003, the Supreme Court denied a petition for writ of certiorari requesting that the Court reconsider the Eleventh Circuit's decision.³¹⁵

The circuit court decision centered on petitioner Nicole Loren, a resident and owner of a residence in a homeowners association-governed subdivision in Hernando Beach, Florida.³¹⁶ Hernando Beach South was a deed-restricted residential community,³¹⁷ and included among its restrictions was a prohibition on the display of "any 'signs or advertisements' on the property, unless specifically approved."³¹⁸ After a series of denied requests to the homeowners association—seeking to erect a chain-link fence, deck, and wheelchair ramp on her property in order to facilitate Ms. Loren's caretaking of her physically handicapped mother and severely mentally retarded and blind step-aunt—the petitioner decided to sell her home.³¹⁹ To expedite the sale of her property, Ms. Loren sought permission from the homeowners association to place a "For Sale" sign on her property.³²⁰ This request was also denied.³²¹ The appellants argued that this "refusal to waive the deed restriction prohibiting 'For Sale' signs, combined with the threat of judicial enforcement, constituted a violation of

312. See *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 318 (1968), *abrogated by* *Hudgens v. NLRB*, 424 U.S. 507 (1976).

313. *Loren v. Sasser*, 309 F.3d 1296 (11th Cir. 2002), *cert denied*, 123 S. Ct. 2219 (2003).

314. *Id.* at 1298.

315. *Loren v. Sasser*, 123 S. Ct. 2219 (2003).

316. *Loren*, 309 F.3d at 1298.

317. *Id.*

318. *Id.* at 1299.

319. *Id.* at 1298–99.

320. *Id.* at 1299.

321. *Id.*

their *First* and *Fourteenth* Amendment rights.³²² It took a mere two paragraphs for the circuit court to dismiss this allegation.³²³ Ms. Loren's claim that potential judicial enforcement of a restriction on a residential deed constitutes state action was summarily rejected.³²⁴ The circuit court did not bother to allude to the Supreme Court's rationale in the *Linmark* case,³²⁵ where the Court emphasized the imperative First Amendment significance of posting residential signs.³²⁶ Nor, in a jurisdiction likely replete with single-use developments, did the circuit court ponder the applicability of *Marsh*.³²⁷

VI. BRINGING IT BACK TOGETHER, BUT LEAVING THE CONSTITUTION BEHIND—THE LIFESTYLE CENTER

Looking to the future, how might we expect First Amendment rights to fare in the privatized world of sprawl? One recent trend is worthy of contemplation. It is a trend that has implications for the predominantly isolating character of residential and retail development in post-war America. The enclosed uber-mall popularized in the second half of the twentieth century is, according to many observers of the retail market, on its way out.³²⁸ At the peak of mall popularity a few decades ago, an average of sixty to seventy malls opened each year.³²⁹ In contrast, between 2002 and May 2005, just seven malls were built.³³⁰ Residential units are increasingly being incorporated into neo-traditional mixed-use developments inspired by New Urbanism, commonly referred to as lifestyle centers.³³¹ As of 2006, more than a year before the great recession of the late 2000s began, no traditional malls were on the drawing board.³³² Although malls face little risk of extinction in the foreseeable future—there

322. *Id.* at 1300.

323. *Id.* at 1303.

324. *Id.*

325. *See Loren*, 309 F.3d 1296 (lacking any reference to *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85 (1977)).

326. *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 92 (1977).

327. *See Loren*, 309 F.3d 1296 (lacking any reference to *Marsh v. Alabama*, 326 U.S. 501 (1946)).

328. *See, e.g., Greg Lindsay, Say Goodbye to the Mall; Second in a Series: Regional Plazas Face Extinction Thanks to Growth of Mixed-Use 'Lifestyle Centers,'* ADVERTISING AGE, Oct. 2, 2006, at 13.

329. *Id.*

330. Pia Sarkar, *The New Face of Retail; Mimicked Main Streets, Mall Makeovers Seek to Lure Shoppers*, S.F. CHRON., May 3, 2005, at D1.

331. *Id.*

332. Lindsay, *supra* note 328.

are approximately 1130 in the United States alone³³³—lifestyle centers are rapidly taking their place as the retail destination du jour. One hundred and one lifestyle centers were developed between 2002 and May, 2005.³³⁴

What is a lifestyle center? Is it simply a dressed up mall by another name? Lifestyle centers are essentially a postmodern, privatized downtown. Kierland Commons, for example, a development in affluent Scottsdale, Arizona, describes itself as an “upscale Main Street lifestyle center that artfully blends retail shopping, dining, entertainment and office space with urban residential living.”³³⁵ Unlike an enclosed mall, shopping areas are aligned on city-like streets.³³⁶ Lifestyle centers also typically include restaurants, entertainment venues, and park-like outdoor spaces for people-watching.³³⁷ Most importantly, these town centers incorporate “a mix of uses,” including housing and office space.³³⁸ Some developers of lifestyle centers are quick to jump on the anti-sprawl bandwagon.³³⁹ They sometimes paint themselves in a heroic light, arguing that their developments are “replacing sprawl with miniature cities.”³⁴⁰ Indeed, these developments are in large part a response to New Urbanism’s call to return to a traditional model of public space—in which face-to-face contact with other pedestrians, rather than pervasive traffic jams, is once again a contender for everyday life.³⁴¹ To some extent, this new generation of faux-town-squares seems to achieve this very goal. For instance, “[s]ome—like Santana Row in San Jose, Calif.—are so well-detailed, thoroughly conceived, and populated on a weekend evening that you’d swear you were in Barcelona, Florence, or even upper Broadway.”³⁴²

Lifestyle centers, however, are no mere altruistic gesture. They are reflective of the renewed market for the urban or town-like environment that was virtually driven to extinction by the proliferation of sprawl.³⁴³ Many developers attest to the wide consumer appeal of the walkable,

333. Sarkar, *supra* note 330.

334. *Id.*

335. *Planning a Visit*, KIERLAND COMMONS, <http://kierlandcommons.com/VisitorInfo/Visit> (last visited Feb. 8, 2012).

336. Blum, *supra* note 11.

337. *Id.*

338. *Id.*

339. *See, e.g.*, Lindsay, *supra* note 328.

340. *Id.*

341. *See generally* DUANY, PLATER-ZYBERK & SPECK, *supra* note 137.

342. Blum, *supra* note 11.

343. *See, e.g.*, Jamie Reno, *Scenes From a New Mall; Shoppers Can Now Find ‘Downtown’ in Suburbia*, NEWSWEEK (US), Dec. 4, 2006, at 60.

outdoor gathering spaces lifestyle centers offer.³⁴⁴ With street-side storefronts and on-street parking, they also offer convenience to the shopper who does not have the time to brave the cavernous internal common space of an enclosed mall. Retail tenants are drawn to lifestyle centers “because they are able to better showcase their storefronts and snare anchor space.”³⁴⁵ Most critically, however, as with all private development, lifestyle centers are driven first and foremost by the desire for profit. Americans are once again drawn to urbanism, even, if not especially, the ersatz variety. The success of the lifestyle center formula attests to these changing tastes—and marketing studies bear this out.³⁴⁶ One study found that consumers spend an average of eighty-four dollars an hour in lifestyle centers, in contrast with a paltry fifty-eight dollars an hour at malls.³⁴⁷

Those concerned with the more superficial aesthetic and social ramifications of suburbanization might find some solace in the growth in popularity of lifestyle centers. They are certainly responsive to many of the criticisms leveled on sprawl by new urbanist architects and other social critics. Although it is too early to tell, lifestyle centers true to the mixed-use model might mark a first step toward greater population density, reduced traffic and auto-emissions, and increased physical activity. Environmentalists and public health advocates thus might have reason to feel optimistic about such developments. Indeed, David Goldberg, a representative of Smart Growth America, opined that “lifestyle centers are an improvement over sprawling shopping centers because they tend not to overwhelm neighborhoods and can evolve into more urban developments.”³⁴⁸ Of course, the applicability of this assessment would depend upon the context in which a lifestyle center is placed—whether it is surrounded by interstate highways or contiguous with an already established town.

Many other commentators are not so sanguine. James Howard Kunstler, the consummate critic of sprawl, cynically observed that “[l]ifestyle centers are corporate attempts to mitigate the fact that we’ve turned our nation into a parking lot filled with places that are not worth

344. See, e.g., *id.*

345. Nicoletta Kotsianas, *Lifestyle Centers Could Hurt Older Malls in CMBS Deals*, REAL ESTATE FIN. & INVESTMENT, May 8, 2006, at 1, 11.

346. Thomas Hine, *Prêt-à-Cité: Can the Main Street Looks of a Lifestyle Center Produce an Instant Community?*, ARCHITECTURAL REC., Oct. 1, 2006, at 78.

347. *Id.*

348. Robert Preer, *Downtowns vs. Lifestyle Centers: Open-Air Retail Developments Raise Worries Among Traditional Merchants*, BOS. GLOBE, Dec. 9, 2006, at E26.

living in or caring about.”³⁴⁹ Architecture critic Thomas Hine lambasts as disingenuous claims that lifestyle centers offer a unique, locally-specific experience—he writes, “aside from some very superficial regional differences in iconography—Wild West in Nevada, Mediterranean in Florida, or Ye Olde in Massachusetts—lifestyle centers nationwide resemble each other just as much as malls do.”³⁵⁰ Others have pointed out the typical lack of public transportation to and from lifestyle centers, as well as the frequent need for residents to use their car for any needs that cannot be fulfilled within the artificial, pedestrian-friendly confines of the center.³⁵¹

Ambitious projects such as Atlanta’s Atlantic Station—a lifestyle center built atop a former brownfield that sits in the heart of Atlanta proper—can have the feel of a somewhat sterile and isolated urban oasis, disconnected from the sprawling fabric of the city itself.³⁵² Its position reflects the difficult challenge of “overlay[ing] smart growth onto a sprawled system.”³⁵³ Such developments might also exhibit many of the same isolating qualities critics find objectionable in purely residential suburban enclaves. Lifestyle centers do not even come close to reflecting the economic and social diversity of a real downtown. For example, the average household income of a lifestyle center consumer in 2005 was \$75,000, well above the national median at the time.³⁵⁴ Furthermore, lifestyle centers typically lack critical civic and social institutions such as churches, libraries, or schools.³⁵⁵ One might even posit that, in this sense, the faux qualities of lifestyle centers are insidiously deceptive. They create the impression of civic life and community through an elaborate stage set, yet lack the diversity and institutions that actually constitute political life in America. Although further study of this relatively recent phenomenon would be necessary to validate such conclusions, such a false sense of civic

349. Reno, *supra* note 343.

350. Hine, *supra* note 346.

351. Thaddeus Herrick, *City Lite: Fake Towns Rise, Offering Urban Life Without the Grit*, WALL ST. J., May 31, 2006, at A1.

352. Kevin Duffy, *Smart Sprawl: Urban Design Expert Sees Atlanta as a Laboratory for Change*, THE ATLANTA J.-CONST., July 29, 2007, at 2C.

353. *Id.*

354. Sarkar, *supra* note 330. The real median household income in 2005 was \$46,326. CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & CHERYL HILL LEE, U.S. CENSUS BUREAU, *Income, Poverty, and Health Insurance Coverage in the United States: 2005*, at 4.

355. *Contra* Dan Casanova & Bill Ryan, *Lifestyle Retail Centers*, LET’S TALK BUSINESS, Mar. 2004; Beth Mattson-Teig, *Uppity Sales: Are Lifestyle Centers Worth the Higher Rent?*, FRANCHISE TIMES, May 2006, at 46.

reality could perhaps exacerbate the political anomie identified by political scientist J. Eric Oliver as characterizing suburban civic life.³⁵⁶

However, perhaps the most resonant criticism of the lifestyle center as a model for the future of American development, at least from a constitutional perspective, is its inherently privatizing attributes. As writer Andrew Blum points out, “[l]ifestyle centers are privately owned space, carefully insulated from the messiness of public life.”³⁵⁷ He notes that the Desert Ridge development, for example, posts its “rigorous code of conduct” directly below its store directory.³⁵⁸ Along with prohibiting “taking photos, video or audio recording of any store, product, employee, customer or officer” and “excessive staring,” the center explicitly proscribes “non-commercial expressive activity.”³⁵⁹ Lifestyle centers present themselves as if they were like any other public space—and they do so with a degree of finesse that far exceeds their shopping mall predecessors. Their public-like streets, park-like promenades, and bustling street life might provide an inviting image to the general public, but the fine print reveals that things are not as they appear. To Blum, this is nothing less than “a bait-and-switch routine on the part of developers, one that exchanges the public realm for the commercial one.”³⁶⁰

With lifestyle centers, developers are attempting to reconstruct what sprawl has destroyed. Restrictive single-use zoning laws, massive coils of residential subdivisions with only one gated entrance, industrial business parks surrounded on all sides by impenetrable highways, and enormous enclosed shopping malls fortified by acres and acres of blacktop, have all contributed to a profoundly isolating social landscape. As Americans rediscover the benefits of human-scaled infrastructure with human-scaled connections, the market has invariably followed. In one fell swoop, lifestyle centers attempt to recreate the feel of urban landscapes that evolved over generations. To cultivate this image, lifestyle centers typically include “varied, yet carefully regulated, building profiles, materials, and signage that are intended to evoke a sense of organic growth over time.”³⁶¹ The result, however, is a cut and paste job. While new ‘town centers’ attempt to put the shattered Humpty Dumpty of sprawl back together again, many pieces are intentionally left out. In other words, lifestyle centers

356. OLIVER, *supra* note 8.

357. Blum, *supra* note 11.

358. *Id.*

359. *Id.*

360. *Id.*

361. Hine, *supra* note 346, at 78.

extract what is presumably “good” and “fun” and “vibrant” about urbanity, while forcibly excluding any elements that do not comport with the developer’s narrow vision. Truly vibrant—and democratic—urban areas do not merely incorporate a mix of uses and an animated environment for pedestrians; they offer all people, for good or ill, a presence and a voice. This is the essence of American civic life.

As private entities, lifestyle centers understandably represent the values of profit, privacy, and security—not democracy. They are created to make money, not to propagate the virtues of some democratic ideal. Nevertheless, particularly in the rapidly growing Sun Belt areas of the nation where public space is rare, lifestyle centers arguably fulfill a critical public function—they offer one of the only places where strangers regularly congregate, pass each other on the street, and observe one another, face-to-face. There is no substitute for such human contact in the public realm, particularly when it comes to conveying political ideas. Lifestyle centers, however, are unlike the single-use enclosed shopping mall or residential subdivision. In their imperfect way, they bring back together the disparate parts extracted and segregated by sprawl. What are the constitutional implications of this post-modern privatized downtown?

Reflecting on more than half a century of First Amendment jurisprudence addressing privatized places, there are essentially two primary ways we might conceptualize the likely status of lifestyle centers. Although no federal or state court has litigated the issue of free speech in the lifestyle center context, one might initially evoke *Marsh* for its public function exception to the state action doctrine.³⁶² *Marsh* was the Supreme Court’s first confrontation with a privatized town. In *Marsh*, the town was a so-called company town, owned and operated to facilitate the functioning of the Gulf Shipbuilding Corporation.³⁶³ Since that time, privatized towns have been chopped into discreet single-use pieces, and the Court came to reject the public function exception where the privatized place at issue is just a fragment of a “traditional town.”³⁶⁴ One might imagine that lifestyle centers—still in their infancy but spreading across the American landscape—offer a platform for the Court to once again bring the public function exception to life. Like the company town in *Marsh*, lifestyle centers purposefully assemble a wide array of town-like attributes in a private setting—only instead of functioning to facilitate the operations of

362. See *Marsh v. Alabama*, 326 U.S. 501 (1946).

363. *Id.* at 502.

364. See *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

one particular company, they operate at the behest of their many retailers and residents. Thus, if the restrictive codes of conduct that limit free expression in lifestyle centers were challenged, one might surmise that the Supreme Court would return to the speech-protective principals of *Marsh* and strike down such codes as contrary to the First Amendment.

However, the second, and more likely scenario is that the Supreme Court would reject the notion that lifestyle centers constitute an exception to the state action doctrine, following its trajectory of narrowing, if not freezing in time, the *Marsh* decision. The Court, although not explicitly overruling *Marsh* in *Lloyd*, seemed to strictly relegate its rationale to a bygone era.³⁶⁵ Justice Powell's majority opinion described the company town arrangement as "an economic anomaly of the past."³⁶⁶ In *Marsh*, the Court explicitly acknowledged that the case required a balancing of two constitutional rights: "rights of owners of property against" the expressive freedoms of the First Amendment.³⁶⁷ Particularly where two opposing constitutional values butt heads, the outcome of the Court's balancing will turn, to a significant extent, on the relative constitutional values and policy views of the individual justices. Indeed, the dissenters in *Lloyd*, troubled by the majority's decision to allow speech suppression in a shopping center just four years after it had upheld this right in *Logan Valley*, sharply observed "that the composition of this Court ha[d] radically changed."³⁶⁸ There is little reason to believe that the Supreme Court would be willing to extend the *Marsh* principle to any fact pattern other than that of a company town—even considering the significant parallels between a company town and a lifestyle center.

VII. CONCLUSION

The Supreme Court's protection of the First Amendment in the context of ubiquitous urban sprawl is something of a mixed bag. Its early jurisprudence seemed to comprehend the troubling constitutional implications of privatization, and as a result it carved out a narrow exception to the general rule that the Constitution only provides a shield from governmental action. Likewise, the Court seemed capable of understanding the grave implications that would follow from allowing municipalities to limit residential speech in the name of aesthetics or other

365. *Id.* at 561.

366. *Id.*

367. *Marsh*, 326 U.S. at 509.

368. *Lloyd*, 407 U.S. at 584 (Marshall, J., dissenting).

purported social ends. Furthermore, the Court was willing to allow states to extend additional protections to free speech in a privatized setting, such as an enclosed shopping mall. However, these encouraging rulings increasingly hide in the shadow of decisions that have narrowed, and in one case outright reversed, expressive protections in an increasingly privatized world. As formerly public spaces have been privatized one by one—whether it be where one shops, where one recreates, or where one lives—the Supreme Court has withdrawn further and further from its initial commitment to the principles underlying the First Amendment.