Balancing Speech and Property Rights

What can retail owners expect as the fundamental elements of our economy and democracy continue to clash?

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The economic growth and innovation achieved by the United States in the twentieth century including the introduction of the modern automobile; the construction of the interstate highway system; the growth of suburbs and the resulting suburban sprawl impacted American life and forced the law of the land to adapt as well. Sprawl destroyed the sidewalks, mixed used developments and public spaces that are only now coming back into vogue in the planning community. Increasingly, public spaces were privately owned. Attempting to reflect this dynamic change in ownership patterns and social intercourse, the law initially responded by protecting First Amendment speech rights on privately owned property accessible to the public, including privately owned shopping centers. Effectively, strip malls were treated as if they were twentieth century agoras. Toward the later half of the century courts began to recognize the rights of property owners, namely shopping center and mall owners, to restrict speech on their property if they desired. California is a notable exception to this trend.

Private ownership of land and the attendant enjoyment thereof is a structural element of our modern capitalist economy; without it commerce would seize. Similarly, the "freedom of speech" enshrined in the First Amendment to the United States Constitution, as well as in various forms in the Constitutions of our states, is a structural element of our democracy; without it representative democracy would fail. On December 24, 2007, the Supreme Court of California issued a ruling in *Fashion Valley Mall, LLC v. National Labor Relations Board* (69 Cal.Rptr.3d 288) which elevates the right of speech at the potential expense of private property rights, placing the burden on the property owner to ensure that speech rights are not hindered, even by private property rights. The court effectively held that the owner of a mall must permit speech to take place on its premises even if that speech seeks to subvert the intended purpose of the mall. *Id*. at 297.

The legal friction between speech and property dates to the 1946 United States Supreme Court decision of *Marsh v. Alabama* (326 U.S. 501). *Marsh* supports the proposition that the United States Constitution can apply on privately owned land. *Id*. at 502. In *Marsh* the Court found that a company town, "having all the characteristics of any other American town", was required to permit distribution of literature on a company owned sidewalk. *Id.* at 502-503. The Court reasoned that as private property is opened to the public and the public character of the property increases, the constitutional rights of entrants "circumscribe" the owner's property rights. *Id.* at 506.

In 1964, the California Supreme Court expanded the concept of the *Marsh* holding, deciding that a shopping center could not prohibit the picketing of a tenant. *Schwartz-Torrance Investment Corp. v. Bakery & Confectionary Workers' Union* (61 Cal.2d 766).

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This had the effect of treating a shopping center in the same manner the Court treated a company town. The California Court reasoned that the public nature of the center rendered the owner's interest merely "theoretical". *Id.* at 771. In ensuing years, the California Supreme Court issued opinions generally consistent with or expanding upon this approach. The United States Supreme Court also saw fit to continue the trend with its *Food Employees v. Logan Plaza* (391 U.S. 308) decision in 1968. *Logan* allowed the peaceful picketing of a shopping center by nonunion workers, reasoning that a shopping center is the "functional equivalent" of a business district. *Id.* at 318.

The California Supreme Court, in *Diamond v. Bland*, 3 Cal.3d 653 (1970) again saw fit to expand the concept of the then most recent U.S. Supreme Court decision, this time finding that a shopping center could not prohibit free speech activity even if it was unrelated to the business of the center. *Id*. at 663. Within two years the U.S. Supreme Court put the brakes on this trend in *Lloyd Corp. v. Tanner.* 407 U.S. 551 (1972). The Court refused to recognize a First Amendment right to speech in a shopping center when such speech was unrelated to the business of the center. Consequently, in its 1974 reconsideration of *Diamond v. Bland*, the California Supreme Court held that a privately owned shopping center could prohibit speech that was unrelated to the business of the center. 11 Cal.3d 331,332. California, it seemed, was finally willing to embrace the rights of a landowner at the expense of a First Amendment speech right.

The U.S. Supreme Court continued to recognize that there were some limits on speech rights, when juxtaposed with commercial property rights, in its decision in *Hudgens v. NLRB*, 424 U.S. 507 (1976). In *Hudgens* the Court held that that the First Amendment did not guarantee the right to free speech in a shopping mall, overruling its 1968 decision in *Logan.*

The California Court was at a crossroads. It had heeded the Court's 1972 decision in *Lloyd* by not recognizing a right to speech that is unrelated to the business of the shopping center. Would the California Court also backtrack and refuse as protected speech that speech that did not relate to the business of the shopping center? No.

In fact, shaking off its momentary embrace of the status quo in Federal law, (and following a change in the composition of its court), California repudiated its reconsideration of *Diamond* in its decision in *Robins v. Pruneyard Shopping Center* (23 Cal.3d 899)(1979). In Pruneyard, the California Court held that the right to free speech contained in its constitution is broader than the free speech right granted by the First Amendment of the United States Constitution. As such, the court determined that a shopping mall is a public forum in which persons may exercise their right to free speech under the California constitution. *Id.* at 910. California was now squarely back on its previous track, elevating the right to speech on private property and minimizing the right of landowners to control their commercial property.

The subject matter of *Fashion Valley* involved, from a commercial landlord's perspective, a direct assault on the primary purpose of a commercial environment. A union engaged in a labor dispute with the San Diego Union-Tribune (the "Tribune")

sought to initiate a boycott of the Robinsons-May department store, a tenant at the mall and an advertiser in the Tribune. To this end, the union distributed leaflets to customers entering the store, advising customers of their grievances and urging them to boycott. The mall had the union members ejected, as the members did not obtain a permit to demonstrate. *Fashion Valley* at 290. In order to obtain a permit, the members would have to agree to abide by certain rules, including a rule which prohibits boycotts. *Id.* at 291. The issue of the validity of the mall rule prohibiting boycotts eventually came before the California Supreme Court.

The California Court reaffirmed its stance that the California Constitution protects the right of free speech in a shopping mall even though the Federal Constitution does not. *Id.* at 296. The court has held that the right to speech must be "reasonably exercised" and may be subject to "time, place, and manner rules". *Robins* at 910. In *Fashion Valley,* the court inquired as to whether the mall policy was a content neutral regulation of time, place or manner or a content based regulation. It found that a blanket prohibition of boycotts was content based and thus subject to strict scrutiny, as it barred speech based on the message contained within the speech. *Fashion Valley* at 299. Had it found the mall policy to be a content neutral regulation of time, place or manner, the court indicated it would have subjected the mall policy to intermediate scrutiny to ensure that it is "(i) narrowly tailored, (ii) serves a significant government interest, and (iii) leaves open ample alternative avenues of communication". *Id.*

The California Court applied the strict scrutiny test used in interpreting the Federal Constitution which requires that a regulation limiting speech must be "necessary to serve a compelling state interest, and narrowly drawn to achieve that end". *Id* at 302. The California Court explicitly found that the Mall's commercial purpose – that of maximizing profits, is "not compelling compared to the union member's right of free expression" *Id.* In California, the right of speech consistently trumps that of private property ownership.

The dissent illustrates that this position is a minority position within the United States. Both the Federal government and state governments have dramatically scaled back the broad powers of speech once granted to individuals in privately owned shopping complexes.

California shopping center owners and tenants are now in a precarious position. It appears as if they must permit speech which could be damaging to their commercial interests. Landlords and tenants have lost a degree of security in the sanctity of their commercial operations. The exposure to liability is real for both parties. Landlords with percentage rent leases are exposed to a potential decline in rentals if a boycott is advocated against a tenant for labor related or political reasons. Query whether tenant has a duty to landlord to mitigate damages from a decreased rental stream in the event of a boycott or other protest of tenant's operations. Conversely, could a tenant have a claim against a landlord for a demonstration aimed at the landlord or other tenants that hinders its business? Property owners may find it advantageous to require a tenant to guarantee a certain level of percentage rent in the event of a boycott, whether based upon previous

retail sales or another agreed upon metric. Tenants would be well served to request an abatement of rent if operations are interfered with.

Landlords in California will also struggle to determine what constitutes a content neutral time, place or manner restriction. The court does not delve into a great deal of detail enumerating what may be an appropriate time, place or manner restriction. Query whether the content of the speech at issue really is relevant in crafting a restriction that is a "content neutral" time place or manner restriction. Might one set of restrictions be appropriate for those with general political messages while another regime is better suited for those whose speech is targeted against a particular business? Individuals who wish to target a certain store have a greater interest in being stationed in close proximity to the store, while there may be a wholly suitable alterative location for those with general messages. However, if landlords attempt to craft regulations which attempt to establish time, place and manner restrictions for different types of speech, those regulations must then withstand strict scrutiny. The landlord thus has few options to consider when developing content neutral time, place or manner restrictions.

This ruling creates an ambiguity as to just what type of activity property owners are required to permit on their premises, and in what manner that activity may be conducted. Tenants may request more safeguards than landlords are able to enforce under California law. The landlord who is able to craft appropriate regulations which protect both speech and commerce, may have a commercial advantage in seeking tenants concerned about the integrity of their operations.