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Land Use Regulation as a Framework to Create Public Space for Speech and Expression in the Evolving and Reconceptualized Shopping Mall of the Twenty-First Century

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LAND USE REGULATION AS A
FRAMEWORK TO CREATE PUBLIC
SPACE FOR SPEECH AND EXPRESSION
IN THE EVOLVING AND
RECONCEPTUALIZED SHOPPING MALL
OF THE TWENTY-FIRST CENTURY

Gerald Korngold[†]

ABSTRACT

Much has been written lately about the “death” of malls and large-scale shopping centers. The data show, however, that the great numbers of these malls and centers are not going extinct, but rather are undergoing an evolution from the fortress-type, retail-focused mall of the 1970s to a twenty-first century model better attuned to current tastes of citizens and consumers. There are indeed significant challenges, including purchasing trends, troubled brick and mortar retail, increased online sales, and living choices. But despite some shock-value headlines, the data show that the number of malls and large centers continue to increase. Moreover, owners are reconceptualizing the mall and large centers to better position them for economic challenges. New manifestations include the mall as an “experience” beyond retail, life-style centers, and mixed-use, town center types of shopping centers. Coupled with some indicators that the move to cities has reversed and the unknown future of internet commerce, it appears that while the mall must evolve and is doing so, quality properties are far from dead.

This Article traces the rise of, current challenges to, and responses for the mall and large-scale shopping centers. It argues that these entities have been a central locus for community interactions and that their twenty-first century iterations may make them even more important. Malls and large-scale shopping centers have become central points at the expense of downtown shopping districts, where true public space was available for free speech and expression necessary for democratic government. This Article shows that in drawing people away from the traditional downtowns, malls have consumed this key civic capital without compensating the municipality. In essence, this is no different than

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a developer utilizing community infrastructure such as local roads without providing compensation and creating externalities for the town to pay for. Thus, malls and large centers have an obligation to provide space for free public expression and speech in their developments.

First Amendment arguments for such space have been soundly rejected in the past. This Article suggests new approaches to establish free expression in mall spaces to address current needs and the likely increased civic centrality of some of the “new” malls and shopping centers in this century. It suggests exactions, incentive zoning, and community benefits agreements as strong alternatives, and examines the advantages and disadvantages of each to the public, government, and mall developers and owners. Some of these solutions are mandatory—imposed by government on the developer—while others are more consensual. In addition to developing the legal methods for establishing civic free space, this Article makes an additional contribution. By establishing the legal rules of the game, municipalities and developers will be able to negotiate consensual agreements that provide for public expression space but also protect the owner’s business goals; such agreements that align the parties’ interests may ultimately be the best solution.

“The regional shopping center must, besides performing its commercial function, fill the vacuum created by the absence of social, cultural, and civic crystallization points in our vast suburban areas.”¹

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INTRODUCTION

Much has been written lately about the “death” of malls and large-scale shopping centers.² The data show, however, that the great number

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2. See Ashley Lutz, *American Malls Are Dying Faster Than You Think-and It's About to Get Even Worse*, BUS. INSIDER (Aug. 31, 2016, 11:36 AM), <http://www.businessinsider.com/are-malls-really-dying-2016-8> [<https://perma.cc/QL9R-7GYP>] (noting that mall visits experienced a 50 percent decline between 2010 and 2013.); Krystina Gustafson, *Macy's Posts Disappointing Holiday Sales, Likely to Cut 10,000 Workers and Move Forward With Store Closures*, CNBC (Jan. 5, 2017, 8:35 AM), <https://www.cnbc.com/2017/01/04/here-are-68-of-the-100-stores-that-macys-will-close.html> [<https://perma.cc/4MM2-XH42>] (explaining that Macy's plans to close an additional thirty stores over the next few years due to disappointing sales).

of these malls and centers are not going extinct, but rather are undergoing an evolution from the fortress-type, retail-focused mall of the 1970s to a twenty-first century model better attuned to current tastes of citizens and consumers.³ There are indeed significant challenges, including purchasing trends, troubled brick and mortar retail, increased online sales, and living choices.

Despite some shock-value headlines, the data show that the number of malls and large centers continue to increase.⁴ Moreover, owners are reconceptualizing the mall and large shopping centers to better position them for economic challenges. New manifestations include the mall as an “experience” beyond retail, lifestyle centers, and mixed-use, town center types of shopping centers.⁵ Coupled with some indicators that the move to cities has reversed and the unknown future of internet commerce, it appears that while the mall must evolve and is doing so, quality properties are far from dead.

This article traces the rise of, current challenges to, and responses for the mall and large-scale shopping centers. It argues that these entities have been a central locus for community interactions and that their twenty-first century iterations may make them even more important. Malls and large-scale shopping centers have become central points at the expense of downtown shopping districts, where true public space was available for free speech and expression necessary for democratic government. This Article shows that in drawing people away from the traditional downtowns, malls have consumed civic capital without compensating the municipality. Thus, malls and large centers have an obligation to provide space for free public expression and speech in their developments.

Prior attempts to claim a public right for speech in malls had been based on the First Amendment and have been rejected by the U.S. Supreme Court because malls are private property.⁶ This Article suggests new approaches to establish these spaces that offer ways to deal with the increasing civic centrality of some of the malls and shopping centers of the twenty-first century but avoids the futile First Amendment route. First, a municipality can use exaction theory to obtain a right to public space; just as the consumption of civic capital like a road or sewer system requires a developer to provide compensating land or facilities to a municipality, so should the consumption of the public good of

3. See *infra* notes 107–149 and accompanying text.

4. See *infra* notes 107–149 and accompanying text.

5. See *infra* notes 107–149 and accompanying text.

6. See *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (citing *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972)); *Hudgens v. NLRB*, 424 U.S. 507, 517–21 (1976).

communal gathering require the dedication of compensating space.⁷ Second, incentive zoning could be employed to give the mall owner advantages in its building plans in return for setting aside public space in the mall.⁸ Finally, a group of citizens could negotiate a community benefits agreement with the developer to obtain the desired space in return for general support—or non-opposition—to the mall development or redevelopment.⁹ These solutions run the range from mandatory actions imposed by government to consensual arrangements agreed to by the developer, and, as will be developed below, all have advantages and disadvantages.

The Article will serve to add to the dialog by offering legal theories for the public to acquire rights to free expression in malls and large shopping centers. It will also have an additional benefit: by establishing the legal rules of the game, municipalities and developers will be able to negotiate consensual agreements that provide for public expression space but also protect the owner's business goals. Such agreements that align the parties' interests may ultimately be the best solution of what may prove to be a very long-term, shared property relationship.

Part I of this Article traces the evolution of the mall and the large shopping center, current challenges, and emerging trends and reconceptualizations of the mall to respond to economic threats, and that may make it an even more central communal location. Part II shows how free public space is essential to democratic governance, and examines the strengths and weaknesses of electronic communications in this regard. Part III demonstrates how malls and large shopping centers have been key communal gathering places. At the same time, it explains that owners of this private property control speech, expression, and behavior to a great extent—to further their strategy of maximizing the consumer experience. That Part shows that government could not impose controls in the same way on public land. Part IV critiques traditional First Amendment attempts to gain public rights of expression in malls and centers and offers three better alternatives: exactions, incentive zoning, and community benefits agreements. This Part analyzes the strengths and weaknesses of each approach, and also offers insights on the operating agreement that would need to be established that would balance the owner's need to protect its commercial operation and strategy with the public's need for free speech and expression.

7. See *infra* notes 259–98 and accompanying text.

8. See *infra* notes 299–306 and accompanying text.

9. See *infra* notes 306–25 and accompanying text.

I. THE EVOLUTION OF THE MALL AND LARGE SHOPPING CENTER

The mall and large-scale shopping center play a central role in the commercial and social life of many Americans, especially those living outside of the urban core.¹⁰ In some ways, the mall represents a natural evolution of shopping aggregations with roots extending back for thousands of years, as merchants aggregate for the convenience of shoppers to create retail synergies. But current malls and shopping centers are different from traditional shopping areas in downtowns and central business districts in an essential way: malls and shopping centers are private property. In contrast, central business districts offer public plazas, streets, and pathways; during their commercial activity, people could interact in these true public spaces and, informally or formally, openly express and exchange ideas with friends, acquaintances, and strangers.

A. Shopping Districts: From Earlier to Current Times

The agglomeration of merchants into a shopping district in a town is a longstanding phenomenon. In ancient Sumer circa 3500 B.C., merchants located at the foot of the seventy-foot-tall temple at Ur of Nannar offered a variety of goods including oils, reeds, asphalt, mats, and stones.¹¹ The Greek agora, found in cities some 2,500 years ago, offered a collection of shopping as well as social interactions.¹² In ancient Rome, with its large population and wealth of goods, merchants came together in different types of markets.¹³ There were specialty markets located in different parts of the city devoted to the sale of one type of product, such as books, precious stones, furniture, and clothing. Food merchants grouped together in “borreas,” offering a variety of edibles.¹⁴ The Jerusalem bazaar provided a covered shopping experience for over

10. As will be described in this section, the term “mall” typically refers to a closed structure and “shopping centers”—usually open air—can run the gamut in size. The focus of this article is on malls and large-scale shopping centers. Observations made about the “mall” in the article usually apply to large-scale centers as well, unless clearly delineated.

11. JOEL KOTKIN, *THE CITY: A GLOBAL HISTORY* 4–5 (Modern Library ed. 2005).

12. Paul F. Wilkinson, *The Historical Roots of Urban Open Space Planning*, 7 *LEISURE STUD.* 125, 127 (1988).

13. KOTKIN, *supra* note 11, at 32.

14. *Id.*

2,000 years, as did Istanbul's Grand Bazaar from the time of the Ottoman Empire.¹⁵

In the United States, traditional town markets developed as an agglomeration of independent merchants to offer goods for sale.¹⁶ Retailers, owning and running their own operations, located together in American downtowns because this was viewed as the place to attract customers. Additionally, modern zoning furthered commercial concentration by limiting the areas in which stores can be operated.

Although these markets and downtowns offer a concentration of retail, they are different from the "shopping center" because they emerged organically and are independently owned and operated stores on separately held parcels of land. A shopping center, in contrast, is "a group of retail and other commercial establishments that is planned, developed, owned and managed as a single property."¹⁷ Downtown stores are owned individually by the storekeeper or a landlord, and they lack the overall design and administration that the shopping center developer or owner imposes.

B. The Development of the American Shopping Center

The American shopping center has taken a foremost place in retail sales. Moreover, the size and commercial impact of many of the larger shopping centers and enclosed malls have also made these central locations within community and public life.

1. Beginnings of the Shopping Center

Country Club Plaza, constructed in Kansas City in 1923, is generally recognized as the first American shopping center.¹⁸ Only eight large shopping centers were in operation across North America at the end of World War II.¹⁹ The period of rapid growth of shopping centers began in the 1950s when it began a steep climb to current domination of U.S. retail sales. Between 1950 and 1953 the number of neighborhood

15. Kenneth T. Jackson, *All the World's a Mall: Reflections on the Social and Economic Consequences of the American Shopping Center*, 101 AM. HIST. REV. 1111, 1111 (1996).

16. *Id.* at 1119–20.

17. *Shopping Center Definitions*, INT'L COUNSEL SHOPPING CTRS. (April 2017), https://www.icsc.org/uploads/research/general/US_CENTER_CLASSIFICATION.pdf [<https://perma.cc/PF9W-VSUX>].

18. See Jackson, *supra* note 15, at 1113 (stating that although "Baltimore's Roland Park Shopping Center (1896) is often cited as the first . . . modern [shopping center]," Country Club Plaza "was more influential and was the first automobile-oriented shopping center").

19. *Id.*

and community shopping centers tripled to 300.²⁰ The first modern center surrounded by parking spaces was Northgate, built in Seattle in 1950.²¹ Victor Gruen designed the first enclosed, climate-controlled mall, Southgate Center, which was developed in 1956 in Edina, Minnesota outside of Minneapolis.²² The Rouse Company introduced the food court in the early 1970s.²³ The success of Southgate Center, the developing interstate highway system, and the availability of large tracts of suburban land led to a boom in large shopping center and mall development during the late 1950s through the 1970s.²⁴

Generally, today's U.S. shopping centers come in two general varieties: malls and open-air centers. Malls are usually enclosed and climate controlled, with a walkway running between two facing sets of stores.²⁵ Open air centers are an attached row of stores developed and are run as a single entity, unlike a traditional row of downtown or central business district stores that are independently owned and managed.²⁶ Shopping centers provide parking lots contiguous to the stores but lack the enclosed walkways of a mall.

2. Ascendancy of the Mall

The pace of the development of shopping centers in general in the post-World War II era has been tremendous. As indicated by the following data, shopping centers have been become the primary locus of American retail stores, the center of retail activity, and an important engine for the U.S. economy. The draw of large numbers of customers to the larger shopping centers and malls has made these institutions central to their communities and to public interactions.

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20. JAMES J. FARRELL, *ONE NATION UNDER GOODS: MALLS AND THE SEDUCTIONS OF AMERICAN SHOPPING* 7 (2003).
 21. Meredith L. Clausen, *Northgate Regional Shopping Center—Paradigm from the Provinces*, 43 J. SOC'Y ARCHITECTURAL HISTORIANS 144, 145, 151, 158 (1984).
 22. See M. JEFFREY HARDWICK, *MALL MAKER: VICTOR GRUEN, ARCHITECT OF AN AMERICAN DREAM* 2 (2004). See generally Fabian Faurholt Csaba & Søren Askegaard, *Malls and the Orchestration of the Shopping Experience in a Historical Perspective*, 26 ADVANCES CONSUMER RES. 34 (1999).
 23. J. JOHN PALEN, *THE URBAN WORLD* 103 (8th ed. 2008).
 24. ALEXANDER GARVIN, *THE AMERICAN CITY: WHAT WORKS, WHAT DOESN'T* 130–32 (2d ed. 2002).
 25. *U.S. Shopping-Center Classification and Typical Characteristics*, INT'L COUNSEL SHOPPING CTRS. (Jan. 2017), https://www.icsc.org/uploads/research/general/US_CENTER_CLASSIFICATION.pdf [https://perma.cc/RS6U-4DDY].
 26. *Id.*

The International Council of Shopping Centers—a trade association that, among other functions, collects data and issues reports on the industry—states that in 2016 there were 115,892 shopping centers in the United States.²⁷ These range from strip centers or “convenience centers,” containing less than 30,000 square feet, to regional malls, having between 400,000 and 800,000 square feet, and super-regional malls, with over 800,000 square feet.²⁸ As of 2016, American shopping centers offer 7.6 billion gross leasable square feet of space.²⁹ This represents 42.8 percent of all U.S. retail space.³⁰

The shopping center has become the dominant player in American shopping. In 2016, total U.S. retail sales equaled \$4.8 trillion, while shopping center sales were \$2.64 trillion, 55 percent of the U.S. total.³¹ Shopping center sales were 14.3 percent of American GDP in 2016.³²

National employment figures also indicate that centers are an important economic engine. Eighty-two percent of the 15.8 million national retail workers in 2016 were employed in shopping centers.³³ Shopping center employees represented 9 percent of U.S. non-farm employees.³⁴

The data for the total number and square footage of all shopping centers are impressive. But they also indicate the dominance of the larger centers and their increased share of the retail picture. Shopping centers containing over 125,000 square feet provide over 55 percent of the total square footage of all centers.³⁵ Included in this group are super-regional, regional, community, power, and lifestyle centers.³⁶ Importantly, these centers offer a concentrated retail experience, drawing people

27. *United States Country Fact Sheet*, INT’L COUNSEL SHOPPING CTRS., <http://quickstats.icsc.org/ViewTablesCharts.aspx?id=398> [<https://perma.cc/H85C-ULZC>] (last updated Apr. 2017).

28. *U.S. Shopping-Center Classification and Typical Characteristics*, *supra* note 25.

29. *United States Country Fact Sheet*, *supra* note 27.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *U.S. Shopping-Center Classification and Typical Characteristics*, *supra* note 25. These figures do not include strip or convenience centers, which run below 30,000 square feet and contain a small number of retail operations; neighborhood centers, comprised of between 30,000 and 125,000 square feet, typically offer convenience goods, such as supermarkets, drug stores, and personal services; outlet malls; theme malls focusing on leisure and tourist activities with some retail and service; or airport malls. *Id.*

seeking shopping, entertainment, and social interaction—activities that historically took place in the central business district.³⁷

Regional malls and super-regional malls are the largest types of shopping centers.³⁸ Regional malls and super-malls are enclosed, with the stores facing and accessible through the interior of the mall, and typically contain a heavy concentration of apparel merchants.³⁹ Their anchor stores—traditionally department stores or large fashion specialty stores—have historically been the main retail draws.⁴⁰ The super-regional malls are larger versions of the regionals, and attract shoppers from a larger geographic area. Larger malls often provide dining, entertainment, events, and a physical layout to draw customers, in addition to retail.⁴¹ These amenities may include fountains, exhibitions, festivals, free entertainment, and routes for “mall walkers” who use the enclosed and climate controlled mall walkways for their daily constitutions.⁴² While there are some differences in numbers, there are currently approximately 1,220 enclosed malls in the United States, representing an increase from 1,205 in 2012.⁴³

Community centers, which can run between 125,000 and 400,000 square feet, provide a larger number of stores than neighborhood centers but do not usually have a full service, department-style store.⁴⁴ Power centers, at 250,000 to 600,000 square feet typically offer a single

37. See GARVIN, *supra* note 24, at 116 (showing that traditional stores rely on foot traffic and are therefore more profitable in business districts).

38. *U.S. Shopping-Center Classification and Typical Characteristics*, *supra* note 25.

39. *Id.*

40. Dennis L. Greenwald, *The Reinvention of the Shopping Center*, 19 PROB. & PROP. 42, 42–44 (2005).

41. MICHAEL D. BEYARD & W. PAUL O'MARA, SHOPPING CENTER DEVELOPMENT HANDBOOK 11 (3d ed. 1999).

42. *Id.*

43. According to the International Council of Shopping Centers, super-regional malls are typically enclosed and the other types of shopping centers are open-air. *U.S. Shopping-Center Classification and Typical Characteristics*, *supra* note 25; see also OLIVER CHEN ET AL., RETAIL'S DISRUPTION YIELDS OPPORTUNITIES—STORE WARS! 50–51 (Apr. 6, 2017), https://distressions.com/wpcontent/uploads/2017/04/Retail_s_Disruption_Yields_Opportunities_-_Ahead_of_the_Curve_Series_Video__Cowen_and_Company.pdf [<https://perma.cc/9H3U-VW9W>]; Derek Thompson, *What in the World Is Causing the Retail Meltdown of 2017?*, ATLANTIC (Apr. 10, 2017), <https://www.theatlantic.com/business/archive/2017/04/retail-meltdown-of-2017/522384/> [<https://perma.cc/HB3K-H8QJ>] (“There are about 1,200 malls in America today.”).

44. *U.S. Shopping-Center Classification and Typical Characteristics*, *supra* note 25; BEYARD & O'MARA, *supra* note 41 at 11.

dominant anchor, usually a “big box” store, with a few other tenants. Lifestyle centers provide a mixed shopping and entertainment experience and will be discussed in detail below.⁴⁵

The size of some of the super-regional centers is staggering. The Mall of America (“MOA”) in Minneapolis is the largest American shopping center, currently 5.6 million gross square feet of enclosed, climate controlled space,⁴⁶ and 4.2 million of gross leasable area.⁴⁷ The mall features over 520 stores and fifty restaurants.⁴⁸ It is also a major entertainment venue, offering, among other attractions, a substantial amusement park—Nickelodeon Universe—with twenty-eight rides, an underwater aquarium, movie theaters, and public events.⁴⁹ MOA attracts forty million visitors annually.⁵⁰ It is a tourist destination for visitors seeking shopping and entertainment. Four out of ten visitors are tourists, with leading countries of international visitors including Canada, England, Japan, Germany, Denmark, Norway, and Sweden.⁵¹

MOA has been committed to a “green” agenda. It recycles more than 60 percent of its waste, some 32,000 tons annually. There is no central heating system, with body heat, residual heat from light fixtures, and solar panels providing winter heating.⁵² Ladybugs are released in the building to control pests rather than using pesticides. A New York Times article detailed efforts by MOA engineers to conserve energy and reduce waste by installing new devices and controls and retrofitting older technology.⁵³

This Article focuses on the larger scale shopping center developments in which significant numbers of people gather, attracted by

45. *U.S. Shopping-Center Classification and Typical Characteristics*, *supra* note 25; *see supra* Section I.C.1.

46. MALL OF AMERICA, PRESS INFORMATION 3 (2016), [https://www.mallofamerica.com/upload/PressKit_2016\(2\).pdf](https://www.mallofamerica.com/upload/PressKit_2016(2).pdf) [<https://perma.cc/PHD8-F3D2>] (last visited Oct. 8, 2017).

47. *United States Country Fact Sheet*, *supra* note 27.

48. MALL OF AMERICA, *supra* note 46 at 2; *Things To Do: Mall of America*, BLOOMINGTON, <https://www.bloomingtonmn.org/mallofamerica.html> [<https://perma.cc/H5N8-Y2NV>] (last visited Oct. 8, 2017).

49. MALL OF AMERICA, *supra* note 46 at 6.

50. *Id.*

51. *Id.* at 2, 8. *See generally* Jerry Gerlach & James Janke, *The Mall of America as a Tourist Attraction*, 46 FOCUS ON GEOGRAPHY 32 (2001).

52. MALL OF AMERICA, *supra* note 46 at 11.

53. Ken Belson, *Meccas of Shopping Try Hand at Being Misers of Energy*, N.Y. TIMES (Apr. 10, 2012), <http://www.nytimes.com/2012/04/11/business/energy-environment/retailers-seek-to-serve-energy-to-cut-costs.html> [<https://perma.cc/9NPD-CYPR>].

substantial offerings of retail stores, commercial establishments, entertainment venues, and common areas. Included in that scope are the enclosed regional malls and super-regional malls;⁵⁴ lifestyle centers;⁵⁵ and some of the larger open-air community shopping centers⁵⁶ and neighborhood centers.⁵⁷

Lifestyle centers and the larger neighborhood and community centers feature common areas, sidewalks, plazas, community gathering places, and similar spaces for use by the public while patronizing the various businesses and entertainment. Similarly, enclosed malls offer common areas and gathering places for community members. Importantly, however, the spaces of these centers and malls are not “public” places in the manner of government owned or other publicly controlled land. Rather, they are private property, owned, administered, and secured by private parties for profit making purposes. The issue of citizen access for free public expression and speech are essentially the same in enclosed malls and these large shopping centers.

3. Current Challenges

After decades of strong growth, the shopping center industry has faced various challenges since the 2000s. Although the number of centers has continued to grow,⁵⁸ there has been a decline in their rate of growth: from 2012 to 2016 the number of total centers increased from 114,325 to 115,892, a rate of only 1.37 percent.⁵⁹ In 2013, for example, new shopping center supply grew at its slowest pace in over forty years.⁶⁰ From 2012 to 2016 the number of regional malls only grew from

54. There are 1,220 enclosed malls in the United States as of April 2017, up from 1,196 in 2012. *U.S. Shopping-Center Classification and Typical Characteristics*, *supra* note 25; *see also* CHEN ET AL., *supra* note 43, at 50–51; Thompson, *supra* note 43.

55. There are 497 life style centers as of April 2017, up from 451 in 2012. *United States Country Fact Sheet*, *supra* note 27.

56. There are 9,779 open-air community shopping centers as of April 2017, up from 9,611 in 2012. *Id.*

57. There are 32,598 neighborhood centers as of April 2017, up from 32,148 in 2012. *Id.*

58. *See supra* notes 54–57 and accompanying text.

59. *United States Country Fact Sheet*, *supra* note 27.

60. INT’L COUNCIL SHOPPING CTRS., SHOPPING CENTERS: AMERICA’S FIRST AND FOREMOST MARKETPLACE 6 (2014), <https://www.icsc.org/research/publications/downloads/America-Marketplace.pdf> [<https://perma.cc/J6SA-Y9J2>]. The opening of City Creek Center in Salt Lake City in March 2012 marked the first new U.S. enclosed mall since Las Vegas’s Crystals at CityCenter opened in 2009. Alice Hines, *City Creek, Mormon Shopping Mall, Boasts Flame-Shooting Fountains, Biblical Splendor*, HUFFINGTON POST (Mar. 23, 2012), <http://www.huffingtonpost.com/2012/03/22/city->

585 to 599, and super-regional malls only grew from only 611 to 612.⁶¹ This follows an earlier slowdown running up to the 2008 financial crisis: between 1987 and 1996, 102 new malls opened, for an average of 10.2 new malls a year; between 1997 and 2005, forty-six new malls opened for an average of 5.1 a year, i.e., one-half the prior rate.⁶²

Additionally, the financial underpinnings of portions of the shopping center sector have weakened. Despite a generally improving economy, the delinquency rate for mortgages on retail properties increased in 2016 by 0.6 percent over 2015.⁶³ In 2016, \$3.1 billion of commercial mortgage-backed securities for mall loans were in the hands of special servicers, compared to \$2.9 billion in 2015.⁶⁴ Early 2017 saw no respite from default on mall loans.⁶⁵

Mall owners often acquired properties by borrowing on ten-year loans just before the financial crisis of 2008–2009, and these loans are soon coming due. Given struggling properties and the weakness of the industry overall, there is a concern that these loans cannot be refinanced and balloon payments made, leading to default of the mortgages now held in bundles of commercial mortgage-backed securities.⁶⁶ There are reports that mall owners facing default are choosing to simply turn over the properties to their lenders.⁶⁷

Some of this downturn can be attributed to the financial crisis of 2008 and a maturation in the supply of centers.⁶⁸ Between 1970 and 2015 the number of malls grew twice as fast as the rate of growth of

creek-mormon-mall_n_1372695.html#s806203&title=City_Creeks_retractable [https://perma.cc/NZ37-J4TC].

61. *United States Country Fact Sheet*, *supra* note 27.
62. INT'L COUNCIL SHOPPING CTRS., WHITE PAPER: THE FACTS ON REGIONAL MALLS AND WHAT THEY SAY ABOUT THE VITALITY OF THE CONCEPT 11, <http://europe.icsc.org/srch/rsrch/wp/Malls.pdf> [https://perma.cc/3YLZ-QQYM] (last visited Oct. 8, 2017).
63. Esther Fung, *Mall Owners Rush to Get Out of the Mall Business*, WALL ST. J. (Jan. 24, 2017, 10:11 PM), <https://www.wsj.com/articles/mall-owners-rush-to-get-out-of-the-mall-business-1485262801> [https://perma.cc/9Z8L-RFCX].
64. *Id.*
65. Shelly Banjo & Rani Molla, *Doomsday Looms for Zombie Malls*, BLOOMBERG GADFLY (Sept. 13, 2016, 10:46 AM), <https://www.bloomberg.com/gadfly/articles/2016-09-13/mall-cmbs-maturity-wall-to-separate-zombies-from-living> [https://perma.cc/42B2-YCBE]; Fung, *supra* note 63.
66. Banjo & Molla, *supra* note 65.
67. Fung, *supra* note 63.
68. INT'L COUNCIL SHOPPING CTRS., *supra* note 60 at 6–7.

the U.S. population.⁶⁹ The CEO of Urban Outfitters observed: “This created a bubble, and like housing, that bubble has now burst We are seeing the results: Doors shuttering and rents retreating. This trend will continue for the foreseeable future and may even accelerate.”⁷⁰

a. Threats to Business as Usual

Still there appears to be some serious threats to business as usual for centers and malls beyond oversupply and business cycles. First, some entire chains and individual stores of brick and mortar retailers have been closing at a record pace over the past year. Examples of recent closures include Sears,⁷¹ Macy’s,⁷² J.C. Penney,⁷³ the entire Bebe chain,⁷⁴ American Apparel,⁷⁵ and the entire H.H. Gregg chain.⁷⁶ Past stalwarts like Radio Shack and Borders have disappeared over recent years. These closures are likely to have significant impact on malls and larger centers. CoStar estimated in 2017 that 310 of America’s 1,300

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69. Thompson, *supra* note 43; CHEN ET AL., *supra* note 43, at 50 (stating that the number of malls grew from 306 to 1220, while the population grew from 204 million to 321 million).
70. Lindsey Rupp et al., *America’s Retailers Are Closing Stores Faster Than Ever*, BLOOMBERG (Apr. 7, 2017, 10:11 AM), <https://www.bloomberg.com/news/articles/2017-04-07/stores-are-closing-at-a-record-pace-as-amazon-chews-up-retailers> [<https://perma.cc/XY6C-8C7X>].
71. Over 800 Sears and subsidiary stores have closed since 2012. Hayley Peterson, *Sears Is Closing 72 Stores—Here’s the Full List*, BUS. INSIDER (June 6, 2017, 5:04 PM), <http://www.businessinsider.com/sears-is-closing-72-stores-heres-the-full-list-2017-6> [<https://perma.cc/5ZA9-WU53>].
72. In August 2016, Macy’s announced it would close 100 stores. Gustafson, *supra* note 2.
73. JC Penney has closed 138 stores or 14 percent of its total number of stores. David Carrig, *Sears, J.C. Penney, Kmart, Macy’s: These Retailers Are Closing Stores in 2017*, USA TODAY (July 7, 2017, 3:30 PM), <https://www.usatoday.com/story/money/2017/03/22/retailers-closing-stores-sears-kmart-jcpenney-macys-mcsports-gandermountian/99492180/> [<https://perma.cc/8GLW-92HE>].
74. Aaron Smith, *Bebe Is Closing All Its Stores, the Latest Casualty in Retail*, CNN/MONEY (Apr. 2017, 10:30 AM), <http://money.cnn.com/2017/04/21/news/companies/bebe-closing-stores/index.html> [<https://perma.cc/69B8-STEE>].
75. Hayley Peterson, *Dying Shopping Malls Are Wreaking Havoc on Suburban America*, BUS. INSIDER (Mar. 5, 2017, 7:30 AM), <http://www.businessinsider.com/dying-shopping-malls-are-wreaking-havoc-on-suburban-america-2017-2> [<https://perma.cc/PZT3-UF4E>].
76. H.H. Gregg closed all 220 of its stores due to its bankruptcy. Carrig, *supra* note 73.

malls are at risk of losing an anchor store.⁷⁷ Major chain stores serve as anchors in malls, attracting other stores and making the mall financially viable, let alone profitable.⁷⁸ Moreover, mall tenants often have co-tenancy lease provisions that allow them to convert to a reduced rent or percentage rent if an anchor closes.⁷⁹

While observers and practitioners cannot agree on a single cause for retail's troubles, they have identified various factors. First, internet sales have taken an increased share of retail purchases, though there are different figures on the exact amount of such sales. The U.S. Census Bureau put internet sales at 8.5 percent of retail sales in the first quarter of 2017 and numbers around 8 percent for the 2016 quarters.⁸⁰ Another source states that in 2016 e-commerce represented 11.7 percent of retail sales, with e-commerce representing 41.6 percent of all retail growth in 2016.⁸¹ Amazon's sales in North America have quintupled to \$80 billion between 2010 and 2016.⁸² Lower prices, price comparisons, convenience, and frustration with inadequate in-store inventory and customer service have made the internet an attractive alternative for many shoppers to purchase many types of products.⁸³ Online sales mean fewer purchases of a desired product at the mall; fewer trips to the mall means less likelihood that a consumer will make extra purchases at other stores.

77. Peterson, *supra* note 75.

78. *Id.*

79. Marie A. Moore, *Lease Co-Tenancy Provisions*, 25 PROB. & PROP. 32, 32 (2011); Diana Bell, *As Anchor Stores Close, Co-Tenancy Clauses Can Still Cause More Problems*, NAT'L REAL EST. INVESTOR (Sep. 19, 2016), <http://www.nreionline.com/retail/anchor-stores-close-co-tenancy-clauses-can-still-cause-more-problems> [<https://perma.cc/FZ5Z-2VQ6>].

80. *Quarterly Retail E-Commerce Sales, 1st Quarter 2017*, U.S. DEP'T OF COM. (May 16, 2017, 10:00 AM), <https://www2.census.gov/retail/releases/historical/ecom/17q1.pdf> [<https://perma.cc/4FPV-8M75>].

81. Stefany Zaroban, *U.S. E-Commerce Sales Grow 15.6% in 2016*, DIGITAL COM. 360 (Feb. 17, 2017), <https://www.digitalcommerce360.com/2017/02/17/us-e-commerce-sales-grow-156-2016/> [<https://perma.cc/S6LD-74TW>].

82. Thompson, *supra* note 43.

83. See Roberto Fantoni et al., *The Future of the Shopping Mall*, MCKINSEY & CO. (Nov. 2014), <http://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/the-future-of-the-shopping-mall> [<https://perma.cc/YCD3-R33K>]; Sarah Halzack, *The Surprising Thing That Got the Biggest Share of Online Shopping Dollars in 2015*, WASH. POST (Apr. 6, 2016), https://www.washingtonpost.com/news/business/wp/2016/04/06/the-surprising-thing-that-got-the-biggest-share-of-online-shopping-dollars-in-2015/?utm_term=.abbb56edc1de [<https://perma.cc/CAH7-K2VZ>].

Second, there are indications that consumer retail tastes are changing. Preferences have moved to discount retailers, such as T.J. Maxx,⁸⁴ and to lower cost, fast-fashion rather than logos.⁸⁵ Customers are less enchanted with department stores.⁸⁶ Moreover, some consumers have objected to aspects of the mall experience in general, including the artificial temperature-controlled environment and sprawling parking lots.⁸⁷

Finally, there is evidence that American consumer spending is shifting away from apparel, the component of retail that is the traditional backbone of shopping centers and malls. Spending on clothing has declined by 20 percent since 2000.⁸⁸ In contrast, travel and hotel spending has increased, and since 2005 sales at restaurants and bars have grown twice as fast as other retail spending.⁸⁹

The challenges to retailers and to malls and large shopping centers have led to dire declarations and predictions that the American mall or large shopping center is dead or dying. Both the message and the medium range from sensationalist to sober. On one hand, media headlines blare “*The Mall Is Dying*,”⁹⁰ “*The Death of the American Mall*,”⁹¹ “*Dead Malls of America: The Retail Apocalypse Deepens*,”⁹² and “*Dying Shopping Malls Are Wreaking Havoc on Suburban America*.”⁹³ Photojournalists provide graphic scenes of the “apocalypse” of closed

84. Sapna Maheshwari, *Department Stores, Once Anchors at Malls, Become Millstones*, N.Y. TIMES (Jan. 5, 2017), https://www.nytimes.com/2017/01/05/business/department-stores-macys-sears.html?_r=0 [<https://perma.cc/Y72F-R923>].

85. Thompson, *supra* note 43.

86. Maheshwari, *supra* note 84.

87. Elaine Misonzhnik, *Return of the Mall*, NAT’L REAL EST. INVESTOR (May 5, 2011), <http://www.nreionline.com/development/return-mall> [<https://perma.cc/NL4W-77J3>].

88. Thompson, *supra* note 43.

89. *Id.*

90. *The Mall Is Dying*, WEEK (Apr. 7, 2017), <http://theweek.com/speedreads/690992/mall-dying> [<https://perma.cc/9ZFU-8LMJ>].

91. David Uberti, *The Death of the American Mall*, GUARDIAN (June 19, 2014, 6:02 AM), <https://www.theguardian.com/cities/2014/jun/19/sp-death-of-the-american-shopping-mall> [<https://perma.cc/DEP6-KECU>].

92. Greg Guenther, *Dead Malls of America: The Retail Apocalypse Deepens*, DAILY RECKONING (July 11, 2017), <https://dailyreckoning.com/dead-malls-america-retail-apocalypse-deepens/> [<https://perma.cc/G867-AMYV>].

93. Peterson, *supra* note 75.

malls,⁹⁴ and a Dead Mall Series appears on YouTube.⁹⁵ On the other hand, serious reports forecast significant contraction, with Credit Suisse predicting in 2017 that between 20 to 25 percent of U.S. malls may close within five years.⁹⁶

b. Possible Mitigating Factors.

Despite various negative indicators, there are some trends that could mitigate the position of malls. First, a key factor in the downturn of some malls had been the shift back to urban living by so-called millennials and others from the suburbs—the traditional power base of malls and shopping centers.⁹⁷ Recent census data, however, provide evidence of the reversal of this trend.⁹⁸ For the fifth straight year in 2016, population growth in big cities slowed, while growth in counties surrounding them accelerated.⁹⁹ This may be due to the unaffordability of major cities, even to people earning significant salaries.¹⁰⁰

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94. See generally Kate Taylor, *These Haunting Photos of the Retail Apocalypse Reveal a New Normal in America*, BUS. INSIDER (Sept. 18, 2017, 10:50 AM), <http://www.businessinsider.com/the-american-retail-apocalypse-in-photos-2017-3/#the-mall-seems-almost-as-empty-as-the-closed-malls-10> [https://perma.cc/XNL5-S8MH].
95. See generally This is Dan Bell, *Dead Mall Series*, YOUTUBE, <https://www.youtube.com/playlist?list=PLNz4Un92pGNxQ9vNgmnCx7dwchPJGJ3IQ> (last updated Dec. 8, 2017).
96. Makeda Easter, *Up to 25% of U.S. Shopping Malls May Close in the Next Five Years, Report Says*, L.A. TIMES (June 1, 2017, 4:40 PM), <http://www.latimes.com/business/la-fi-malls-closing-20170531-story.html> [https://perma.cc/7PBB-WUD3].
97. John McDuling, *What America's Internal Migration Tells Us About the Death of the Mall, and the Brand*, QUARTZ (Apr. 15, 2014), <https://qz.com/199246/what-americas-internal-migration-tells-us-about-the-death-of-the-mall-and-the-brand/> [https://perma.cc/QV59-HWYB].
98. William H. Frey, *City Growth Dips Below Suburban Growth, Census Shows*, BROOKINGS (May 30, 2017), <https://www.brookings.edu/blog/the-avenue/2017/05/30/city-growth-dips-below-suburban-growth-census-shows/> [https://perma.cc/REB9-6VU2].
99. Jed Kolko, *2016 Population: Back to the Suburbs, Back to the Past*, JEDKOLKO.COM (Mar. 22, 2017), <http://jedkolko.com/2017/03/22/2016-population-back-to-the-suburbs-back-to-the-past/> [https://perma.cc/QWM4-4LNA]; Jed Kolko, *Americans' Shift to the Suburbs Sped Up Last Year*, FIVE THIRTYEIGHT (Mar. 23, 2017, 12:01 AM), <https://fivethirtyeight.com/features/americans-shift-to-the-suburbs-spded-up-last-year/> [https://perma.cc/V8FG-NHRF].
100. RICHARD FLORIDA, *THE NEW URBAN CRISIS* xvi-xviii, 6-7 (2017); Emily Badger, *Who's Really Moving Back into American Cities*, WASH. POST (Apr. 1, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/04/01/the-surprisingly-narrow-reality-of-americas-urban-revival/?utm_term=.d7bd82e9c613 [https://perma.cc/JTF5-JF3Y].

Second, the amount of additional growth of online sales cannot be precisely predicted,¹⁰¹ and there have been some scattered indicators that shoppers still prefer in-store retail over online shopping.¹⁰² Third, there is also a growing view that not all malls will fare the same. Class A—high-end malls—maintain high performance,¹⁰³ while lower-end Class B, C, and D malls have had poor results and face greater financial risk.¹⁰⁴ There is the related problem of overgeneralizing from anecdotes and treating all mall situations alike. As Joel Kotkin observed:

To suggest malls are dead based on failure in failed places would be like suggesting that the manifest shortcomings of Baltimore or Buffalo means urban centers are not doing well. Like cities, not all malls are alike.¹⁰⁵

Finally, the slowdown in shopping center growth and disappearance of some nonviable centers should help to address the problem of over-

101. *Quarterly Retail E-Commerce Sales, 1st Quarter 2017*, *supra* note 80. E-Commerce's percentage of total retail sales in the fourth quarter of the past five years is as follows: 8.2 percent in 2016, 7.5 percent in 2015, 6.6 percent in 2014; 6.1 percent in 2013; and 5.5 percent in 2012. *Id.* Whether this steady growth will continue is for the future to reveal.

102. Joel Kotkin reported that an A.T. Kearney study showed that shopping in stores is preferred over online-shopping by all age groups. Joel Kotkin, *Mall's Washed Up? Not Quite Yet*, DAILY BEAST (June 7, 2015, 12:01 AM), <http://www.thedailybeast.com/malls-washed-up-not-quite-yet> [<https://perma.cc/D4ER-VCPN>]. There are claims that proprietary research has shown that “customers still prefer to shop in stores 75% of the time.” CHEN ET AL., *supra* note 43, at 3. Given the proprietary nature of this data, it is not possible to assess; it does, however, seem to call for further, transparent inquiry.

103. See William Travers, *For Elite Class A Malls, It's Good to Be King*, AUCTION.COM (Jan. 21, 2016), <https://www.auction.com/blog/for-elite-class-a-malls-its-good-to-be-king/> [<https://perma.cc/ZJG9-PDJB>] (defining different classes of malls); Amanda Kolson Hurley, *Shopping Malls Aren't Actually Dying*, CITY LAB (Mar. 25, 2015), <https://www.citylab.com/design/2015/03/shopping-malls-arent-actually-dying/387925/> [<https://perma.cc/R327-UKQJ>].

104. CHEN ET AL., *supra* note 43, at 52–53; Rupp et al., *supra* note 70; Richard Halstead, *San Rafael's Northgate Mall Sold to Merlone Geier Partners*, MARIN INDEP. J. (Jan. 26, 2017), <http://www.marinij.com/article/NO/20170124/NEWS/170129889> [<https://perma.cc/4GLD-ZAUY>]; Crystal Kim, *Evercore: Mall REITs A-Okay?*, BARRON'S (Feb. 6, 2017, 3:39 PM), <http://www.barrons.com/articles/evercore-mall-reits-a-okay-1486413568> [<https://perma.cc/Z7NR-268L>]; Donna M. Airolidi, *REITs Keep It Classy—Class A, That Is*, REAL DEAL (May 17, 2017, 1:00 PM), https://therealdeal.com/issues_articles/reits-keep-it-classy-class-a-that-is/ [<https://perma.cc/Q4MQ-3369>].

105. Kotkin, *supra* note 102.

supply if basic rules of supply and demand hold.¹⁰⁶ This would benefit remaining centers.

C. The Reality: Evolution, Not Death

Despite the dire and somewhat alarmist predictions of the death of malls, it is more likely that this mature industry is undergoing an evolution towards a new model necessary to meet the needs of twenty-first century customers and investors. This is not unlike the changes faced by other sectors generally across the economy. Importantly, for this article's inquiry, many of the most promising solutions for large shopping center revival would seemingly increase the public nature of center spaces and their use as community gathering places. If these solutions are successful, this would make the issue of free expression in these locations even more pressing than it already is today.

1. Lifestyle Centers: A More Traditional Town Experience

One recent innovation that responds to changing consumer tastes is lifestyle centers. While they may be as large as regional malls, ranging between 150,000 and 500,000 square feet, they differ from malls in a number of fundamental ways.¹⁰⁷ They are typically open-air, lacking the overall enclosure of a traditional mall and enclosed pathways between the stores.¹⁰⁸ Lifestyle centers provide more of a feel of historical downtown shopping as the stores are oriented towards the street or internal open space.¹⁰⁹ Lifestyle centers have common areas, plazas, parks, entertainment areas, and walkways used by visitors.¹¹⁰ These areas are most usually private property under the center owner's control, however, and not governmentally owned public property.¹¹¹

Some lifestyle centers go beyond retail and seek to emulate a town center experience, with mixed uses of properties.¹¹² They may lease

106. See *supra* notes 69–71 and accompanying text.

107. *U.S. Shopping-Center Classification and Typical Characteristics*, *supra* note 25.

108. See generally Edward J. Sullivan, *Cudgels and Collaboration: Commercial Development Regulation and Support in the Portland, Oregon-Vancouver, Washington Metropolitan Region*, 6 VT. J. ENVTL. L. 67, 83–84 (2005) (describing one lifestyle center and related governmental approvals).

109. Judy Keen, *As Enclosed Malls Decline, 'Lifestyle Centers' Proliferate*, MINNEAPOLIS POST (Aug. 30, 2013), <https://www.minnpost.com/cityscape/2013/08/enclosed-malls-decline-lifestyle-centers-proliferate> [<https://perma.cc/NP9S-TCVP>].

110. Andrew Blum, *The Mall Goes Undercover*, SLATE (Apr. 6, 2005, 6:24 AM), <http://www.slate.com/id/2116246> [<https://perma.cc/TNH8-V9J7>].

111. *Id.*

112. *Id.*

commercial office space in addition to retail.¹¹³ Various lifestyle centers are linked to residential units, creating mixed use developments that follow the “New Urbanist” approach of providing homes, shopping, entertainment, and workplaces within close proximity to each other.¹¹⁴ There is often a conscious desire by the developer to establish a “mini-downtown” and create a community by incorporating municipal offices and services, retail, residential, recreation, and office space in the development.¹¹⁵

Lifestyle centers, therefore, may answer consumer demand for shopping outside of closed spaces, better connection to their environment, and an integrated downtown experience.¹¹⁶ Data indicate strong growth in lifestyle centers. Between 2012 and 2016, the number of lifestyle centers grew from 451 to 497, representing 10 percent growth; in the same period, the growth rate of regional and super-regional malls was only one percent.¹¹⁷

The public areas of lifestyle centers are no longer separated from the outside world by the walls of an enclosed mall. People enter these lifestyle centers from public streets.¹¹⁸ The delineation between the government’s streets and the private open areas in the lifestyle center becomes blurred. This softening of the public-private demarcation

113. Jennifer Duell Popovec, *Existing Lifestyle Centers Thrive, But Developers Prefer Mixed-Use for New Projects*, NAT’L REAL EST. INVESTOR (Dec. 11, 2014), <http://www.nreionline.com/retail/existing-lifestyle-centers-thrive-developers-prefer-mixed-use-new-projects> [<https://perma.cc/LB47-4UUX>].

114. CSA Staff, *Fueling Growth*, CHAIN STORE AGE (Mar. 3, 2008), <https://www.chainstoreage.com/article/fueling-growth-0/> [<https://perma.cc/M6V5-9FMA>]; Blum, *supra* note 110.

115. Steve McLinden, *Creating Communities*, SHOPPING CTRS. TODAY, Dec. 2016, at 74, 76 <https://www.icsc.org/sct/shopping-centers-today/december-2016> [<https://perma.cc/E9UV-F9AN>]; see Jessie Stewart & Greg Dickinson, *Enunciating Locality in the Postmodern Suburb: FlatIron Crossing and the Colorado Lifestyle*, 72 W. J. COMM. 280, 296–97 (2008) (discussing how lifestyle center was utilized to create sense of place in suburban and exurban development); Mark Gillem, *Make-Believe Main Streets: Hyperreality and the Lifestyle Center*, 20 TRADITIONAL DWELLING & SETTLEMENTS REV. 13, 15 (2009) (critiquing the lifestyle center concept).

116. See Donna Mitchell, *Lifestyle Centers Positioned to Help Landlords Weather Industry Upheavals, Expert Claims*, NAT’L REAL EST. INVESTOR (Jul. 20, 2017), http://www.nreionline.com/retail/lifestyle-centers-positioned-help-landlords-weather-industry-upheavals-expert-claims?NL=NREI-21&Issue=NREI-21_20170720_NREI-21_210&sfvc4enews=42&cl=article_3&utm_rid=CPG09000005816356&utm_campaign=10127&utm_medium=email&elq2=7967ad06b3cf45e199ffece1084c21a7 [<https://perma.cc/6A98-ADZN>] (noting that flexibility of the concept is an advantage).

117. See *United States Country Fact Sheet*, *supra* note 27.

118. See Blum, *supra* note 110.

makes the issue of the right to free expression and speech in the open areas of lifestyle centers more pressing. Thus, the growth in the numbers of lifestyle centers as a twenty-first century response to the mall would seem to increase the need to resolve the already extant issue of free expression and speech in major shopping centers.

2. Revitalizing Troubled Malls

Another way that the industry is responding to troubled malls is for the developer to reconceptualize them; the greater the economic threat, the more significant the possible response. The strategies usually run along three lines: converting the mall from a shopping-only venue into an “experience” by adding entertainment, restaurants, and other attractions; revamping the retail offerings; and, as needed, replacing vacant stores and perhaps repurposing a vacant mall.¹¹⁹

a. Creating a New Experience.

The primary repositioning strategy is for malls and major shopping centers to offer an “experience”—entertainment, interaction, hands-on activities—that is not available with online retail.¹²⁰ According to a McKinsey report, “[n]ow, when consumers visit malls, they are looking for experiences that go well beyond traditional shopping.”¹²¹ Traditional, commoditized shopping is no longer sufficient to compete with internet retail. Even enclosed malls are seeking to reinvent themselves as the new downtown with restaurants, children’s play areas, concerts, arts centers, farmers’ markets, service providers, high-end grocery stores, theaters, amusement parks, and other entertainment venues.¹²² According to the CEO of PREIT:

119. Esther Fung, *The Mall of the Future Will Have No Stores*, FOX BUS. (June 12, 2017), <http://www.foxbusiness.com/features/2017/06/12/mall-future-will-have-no-stores.html> [<https://perma.cc/9Q4U-WDMB>].

120. Stephanie Clifford, *Malls’ New Pitch: Come for the Experience*, N.Y. TIMES (July 17, 2012), http://www.nytimes.com/2012/07/18/business/malls-take-on-the-internet-by-stressing-the-experience.html?rref=collection%2Fbyline%2Fstephanie-clifford&action=click&contentCollection=undefined®ion=stream&module=stream_unit&version=search&contentPlacement=1&pgtype=collection [<https://perma.cc/3R4M-ANQB>]; Stephanie Clifford, *Luring Online Shoppers Offline*, N.Y. TIMES (July 4, 2012), <http://www.nytimes.com/2012/07/05/business/retailers-lure-online-shoppers-offline.html> [<https://perma.cc/Y7XG-8ME2>]; Youn-Kyung Kim, *Consumer Value: An Application to Mall and Internet Shopping*, 30 INT’L J. RETAIL & DISTRIBUTION MGMT. 595, 595 (2002).

121. Fantoni et al., *supra* note 83.

122. *Id.*; Peterson, *supra* note 75; Easter, *supra* note 96.

The historical view of [the] mall, one that relies heavily on apparel and accessories, really is dead and a new model is rising. Today's consumer craves a variety of offerings and is agnostic as to where they shop, they want [it] all and a personalized social experience in one place.¹²³

So-called "experiential retail" can be achieved in various ways.¹²⁴ Sometimes an addition is built on to the mall providing mostly entertainment venues.¹²⁵ Other developers have converted portions of enclosed malls into open-air facilities in the nature of lifestyle centers.¹²⁶

With the restructuring of malls as a consumer experience beyond retail, some experts have predicted that the mix of tenant space to public space will move from the current 70-30 to 60-40 or even 50-50.¹²⁷ With increased public space, today's issues of free expression and speech will likely become more acute.

b. Revamping the Retail Offerings.

In order to revitalize, some have suggested that malls should seek a curated mix of specialized, unique stores; this would prevent commoditization of their retail.¹²⁸ Malls should also attempt to replace vacating tenants whose merchandising was not attractive to customers and whose prices were not competitive.¹²⁹ Some tenants taking new space provide new formats for shopping, some of which integrate technology and on-line shopping. One example is "showrooming," where the

123. Donna Mitchell, *Mall REITs Pursue Multiple Strategies in Dealing with Tenant Troubles*, NAT'L REAL EST. INVESTOR (May 4, 2017), <http://www.nreionline.com/retail/mall-reits-pursue-multiple-strategies-dealing-tenant-troubles> [<https://perma.cc/TU44-LK44>] (quoting Joseph F. Coradino).

124. Peterson, *supra* note 75.

125. Fung, *supra* note 119 (discussing new 235,000 sq. ft. expansion of Staten Island Mall, comprised of 75 percent entertainment and food venues).

126. *Id.* (describing Forest City redevelopment of mall in Arlington, VA removing two-thirds of mall roof and building adjoining residential units).

127. Fantoni et al., *supra* note 83.

128. *Id.* at 3.

129. *See Macy's Takes Another Hit As Mall Traffic Dwindles*, N.Y. POST (May 11, 2017, 9:08 AM), <http://nypost.com/2017/05/11/macys-takes-another-hit-as-mall-traffic-dwindles/> [<https://perma.cc/E9KX-M3F7>] (describing the store's "uphill struggle to attract customers amid a slump in demand"). Tech stores are particularly attractive. *See* Andrew McIntyre, *3 Ways Malls Are Repositioning Amid Anchor Store Exits*, LAW360 (Oct. 20, 2016), <https://www.law360.com/articles/832192/3-ways-malls-are-repositioning-amid-anchor-store-exits> [<https://perma.cc/D5P8-TNQV>] (discussing how mall developers are repositioning by filling "big box-store" vacancies with tech retailers such as Apple and Microsoft).

store provides customers an opportunity to experiment with a product or to try on apparel, with orders being filled online and via delivery; these experiences cannot happen online.¹³⁰ Bonobos—at least prior to its purchase by Walmart—had announced plans to open twenty new “showrooming” stores.¹³¹ Best Buy retains brick and mortar stores because customers want to handle electronics items before buying, “learn how to use it,” and pick up online orders at stores.¹³² Another example is known as omni-channel retailing that allows customers to purchase online but pick up products at stores, as well as other integration of the internet with in-store experiences.¹³³

c. Repurposing the Mall

A developer may have to respond to a major or total vacancy of a mall’s tenantable space by repurposing the mall. Some repurposing has been discussed above in connection with re-creating the mall as an entertainment venue and reconceptualization of the retail offerings. The mall owner may face the need—or opportunity—to repurpose on other occasions.

Some mall repurposing provides an opportunity for the mall to re-invent its retail footprint. As malls are left with vacant department stores, they may use this as an opportunity to divide the space to provide more attractive retail tenants, such as “fast-fashion stores.”¹³⁴ For example, when Bloomingdale’s departed from MOA in January 2012, the mall created a plan to “divide the . . . space into [locations] for five other retailers.”¹³⁵ Les Wexner, the CEO of L Brands, has stated:

130. Internet shopping is trying to overcome the advantage of customers trying on clothing by developing digital body scanning technology for home shoppers. *See* Barney Jopson, *Clothes Shops Prepare for Body Scanning*, FIN. TIMES (Sept. 14, 2012), <https://www.ft.com/content/fb0ef6e2-fa0c-11e1-9f6a-00144feabdc0?mhq5j=e7> [<https://perma.cc/4C3E-H4KP>].

131. *Weekly Store Openings and Closures Tracker #6: Bonobos Opening 20 New Stores*, FUNG GLOBAL RETAIL & TECH, <https://www.funglobalretailtech.com/news/weekly-store-openings-closures-tracker-6-bonobos-opening-20-new-stores/> [<https://perma.cc/DJM9-9RNW>] (last visited Oct. 8, 2017).

132. Brian Sozzi, *Best Buy Slows Closures as Stores Seen Key to Digital Shopping*, STREET (Aug. 31, 2016, 12:31 PM), <https://www.thestreet.com/story/13690060/1/best-buy-slows-closures-as-stores-seen-key-to-digital-shopping.html> [<https://perma.cc/JYG3-6C6D>].

133. INT’L COUNSEL SHOPPING CTRS., *supra* note 60, at 14.

134. *See* Donna Mitchell, *Will the Department Store Sector Survive?*, NAT’L REAL EST. INVESTOR (Jan. 26, 2017), <http://www.nreionline.com/retail/will-department-store-sector-survive> [<https://perma.cc/5LPU-W6MQ>] (“The [vacant department stores] had been converted to a mix of uses, including fast-fashion stores, restaurants, grocery stores and fitness centers.”).

135. Nancy Ngo, *Bloomingdale’s at Mall of America Closing; Space to Be Divided*, TWINCITIES.COM (Jan. 3, 2012, 11:01 PM), <http://www.>

Ten or 15 years ago, if a department store left a mall, it was really a problem for the developer. Now, many of the developers are trying to buy back the space from the department stores because they're an economic detriment and they can recycle that space.¹³⁶

Depending on the overall soundness of the retail operation, the mall owner may need to repurpose the structure in ways beyond new retail and entertainment offerings. This may entail conversion of the entire building or substantial parts to new uses, such as office space,¹³⁷ a major medical facility,¹³⁸ a church,¹³⁹ or a community college.¹⁴⁰ Other times, a mall might be demolished to create a city center type of development with offices, residential, entertainment, and high-end retail.¹⁴¹

In their highly regarded book, *Retrofitting Suburbia*, Dr. Ellen Dunham-Jones and June Williamson provided case studies of poorly performing and defunct malls that have been reconceptualized, repurposed, and sometimes razed and rebuilt, adopting many New Urbanist

twincities.com/lottery/ci_19672807?source=pkg [https://perma.cc/85D2-AFC7]; see also Thomas Lee & Janet Moore, *MOA Plans Life After Bloomingtondale's*, NORTHIOWATODAY.COM (Jan. 5, 2012), <http://northiowatoday.com/2012/01/05/moa-plans-life-after-bloomingtondales/> [https://perma.cc/Q2JE-MPP8].

136. Maheshwari, *supra* note 84 (quoting Les Wexner). See generally Liam Plevin, *Mall Owners Find Silver Lining in Retailer Busts*, WALL ST. J. (Nov. 19, 2015, 2:56 PM), <https://www.wsj.com/articles/mall-owners-find-silver-lining-in-retailer-busts-1447756381> [https://perma.cc/6NWQ-SGYZ] (discussing landlords buying back leases from bankrupt tenants).
137. See *The Mall of the Future Will Have No Stores*, FOX BUS. (June 12, 2017), <http://www.foxbusiness.com/features/2017/06/12/mall-future-will-have-no-stores.html> [https://perma.cc/H94K-MSMQ] (explaining that Ford Motor engineering division moved into a vacated department store at a Michigan mall).
138. See BRIAN LANDES, *WHY MALL REUSE IS JUST BEGINNING* 8 (2017), <https://download.transwestern.com/public/Media/Mall%20Reuse%202017.pdf> [https://perma.cc/A6F8-PW76].
139. See Alana Semuels, *A New Life for Dead Malls*, ATLANTIC (Mar. 9, 2015), <https://www.theatlantic.com/business/archive/2015/03/a-new-life-for-dead-malls/387001/> [https://perma.cc/XR9U-C7B3].
140. See David Montgomery, *Deep in the Malls of Texas, a Vision of Shopping's Future*, N.Y. TIMES (June 20, 2017), https://www.nytimes.com/2017/06/20/realestate/commercial/texas-malls-future-shopping.html?_r=0 [https://perma.cc/Q84X-6N3J] (describing mall in Austin, Texas converted to Austin Community College campus).
141. See *id.* (describing plans for Dallas Midtown).

principles.¹⁴² For example, the Randhurst Mall, designed by Gruen and opened in 1962 as the first enclosed mall in the Chicago area, has largely been demolished and its interior core replaced by an open-air boulevard of stores.¹⁴³

Among the more unusual stories is the decline and repurposing of Cleveland's 150,000 square foot Galleria Mall at Erieview. The glass paneled, enclosed Galleria opened in Cleveland's central office district in 1987 with plans for more than sixty retailers and restaurants, targeting downtown workers as its customers.¹⁴⁴ The Galleria never performed well, at its peak renting only forty of its sixty-two stores. By the turn of the millennium, with the Cleveland downtown office economy declining, the Galleria had only twenty-eight stores under lease.¹⁴⁵ As of February 2012, the Galleria had only "eight retail stores, eight food-court vendors and a couple of [other] businesses,"¹⁴⁶ in a downtown with a 19.2 percent vacancy rate in Class A and B office space.¹⁴⁷ The response? A portion of the central court of the mall was converted into hydroponic, organic gardens for raising greens, herbs, and tomatoes.¹⁴⁸

One possible interpretation is that we are not witnessing an apocalyptic tale of the end of malls, but rather a hopeful narrative about the repurposing of the use of land and structures that is as old as civilization. Evolution and adaption of real estate to emerging human needs is a good thing. Economic, social, political, environmental, and

142. See generally ELLEN DUNHAM-JONES & JUNE WILLIAMSON, *RETROFITTING SUBURBIA: URBAN DESIGN SOLUTIONS FOR REDESIGNING SUBURBS* (updated ed. 2011).

143. Robert Sharoff, *Historic Illinois Mall Seeks New Life as Main St.*, N.Y. TIMES, June 8, 2011, at B6; see DUNHAM-JONES & WILLIAMSON, *supra* note 142, at xiii.

144. See Patrick Crowley, *Deal for Cleveland's Galleria at Erieview Stalls*, COM. REAL EST. DIRECT (Mar. 1, 2002), http://www.crenews.com/general_news/general/deal-for-clevelands-galleria-at-erieview-stalls.html [<https://perma.cc/BRP7-KYUN>].

145. *Id.*

146. Stephanie Clifford, *How About Gardening or Golfing at the Mall?*, N.Y. TIMES (Feb. 5, 2012), <http://www.nytimes.com/2012/02/06/business/making-over-the-mall-in-rough-economic-times.html?mcubz=3> [<https://perma.cc/U8PA-J246>].

147. Michelle Jarboe, *Downtown Cleveland Offices Snag New Expanding Tenants, in a Shift from Decades of Corporate Flight*, CLEVELAND.COM (June 1, 2012, 10:55 AM), http://www.cleveland.com/business/index.ssf/2012/05/post_100.html [<https://perma.cc/25WU-78N2>].

148. Sarah Crump, *Galleria Mall is Giant Greenhouse, Raising Organic Crops in Cleveland*, CLEVELAND.COM (Feb. 27, 2010, 4:00 AM), http://blog.cleveland.com/metro/2010/02/galleria_has_gardens_now.html [<https://perma.cc/6TP6-SLSS>]; Clifford, *supra* note 146.

aesthetic conditions inevitably change over time, thus altering human needs and expectations. In response to societal shifts, for example, large scale industrial buildings of the Northeast and upper Midwest have been divided and reconstructed to house smaller scale entrepreneurial companies, commercial buildings in lower Manhattan have become artist studios and loft apartments, structures on underutilized land have been razed across the country to build affordable housing, and the beat goes on. As the redeveloper of Randhurst Mall stated: “Our approach is to look for good real estate that has the wrong real estate product and that’s often the case with 40-year-old malls.”¹⁴⁹

Owners will adapt, and if necessary rebuild, their structures in response to market demand. Investors will no longer place capital in the malls of the 1960s and 1970s but will invest in the destination malls of the twenty-first century. The mall has changed, but those changes—the lifestyle center model, the entertainment-retail “experience” destination, and the town center model—will perhaps make the public spaces in the mall and major shopping centers a bigger draw than ever. These spaces in existing malls and major centers are already vital community focal and gathering points. As will be shown in the next sections, the law needs to provide means for freedom of expression and speech within these privately owned but seemingly public locations.

II. PUBLIC SPACE AS ESSENTIAL FOR FREE SPEECH, EXPRESSION, AND DEMOCRACY

The free exchange of ideas is a central predicate for the American democratic system of government. The citizenry has had a long history of access to non-private spaces in the central shopping district and adjacent sidewalks, parks, and plazas in which to freely express ideas. This democracy-supporting free expression and speech in public spaces in the commercial district should be understood as a public good or civic capital. As will be developed in Part III, the advent of malls and large shopping centers consumes this civic capital. Developers should, therefore, compensate the community by providing alternate public space in the mall.

A. Public Places in the American Experience

The role of urban public space in America is constantly evolving based on social, economic, and political forces. Some American cities began with conscious plans to develop public places for commerce and recreation. The Laws of the Indies, promulgated in 1573 by Spanish Emperor Phillip II, prescribed the development and placement of churches, public buildings, commercial establishments, and other uses

149. Sharoff, *supra* note 143 (quoting Brett Hutchens).

in Spanish colonies in America.¹⁵⁰ These ordinances provided for the placement of public buildings in a large plaza which would form the center of the new community.¹⁵¹ William Penn laid out a grid for Philadelphia, with public spaces for marketplaces and recreation.¹⁵²

In 1773, James Oglethorpe took city planning further when he designed a functional and aesthetically minded plan for Savannah, Georgia. He created connected neighborhoods of “picturesque squares amid grid street patterns with public spaces surrounded by private dwellings.”¹⁵³ The public squares at the heart of these wards was where many “communal activities” took place such as “gathering water,” selling goods, “celebrating holidays and victories,” and coming together “for protection in time of attack.”¹⁵⁴

Public spaces in other cities developed more organically. What began as common grazing areas often transformed into centers of commerce, social gathering, and civil society. Boston Common started as a cow pasture in the 1630s but was used for other purposes as well, such as washing, a burial ground, quarrying, a dump, and militia training.¹⁵⁵ The Common continued to evolve and because of its central location it transitioned into a center for town social and economic activity. Leading up to the Revolution, the Sons of Liberty used the Common to stage symbolic demonstrations, such as hanging lanterns from the large elm to symbolize unity, protesting against the Stamp Act in 1765, and the burning of tea after the Boston Tea Party in 1773.¹⁵⁶ In 1830, the Common’s shift from its agrarian roots was recognized when the municipality banned grazing.¹⁵⁷ The Common’s role as a venue for public expression continued over the decades, for example, serving as the venue of a civil rights demonstration by African Americans over school

150. ROBERT H. FREILICH ET AL., 21ST CENTURY LAND DEVELOPMENT CODE 1–2 (2008).

151. *Id.* at 2.

152. Shaun-Marie Newcomer, *City Planning*, in 1 ENCYCLOPEDIA OF THE NEW AMERICAN NATION: THE EMERGENCE OF THE UNITED STATES, 1754–1829 275, 275 (Paul Finkelman ed., 2006).

153. *Id.*

154. *Savannah Squares*, VISIT-HISTORIC-SAVANNAH.COM, <http://www.visit-historic-savannah.com/savannah-squares.html> [https://perma.cc/CF5J-G3MX] (last visited Oct. 1, 2017).

155. David Hackett Fischer, *Boston Common*, in AMERICAN PLACES 125, 127–28 (William E. Leuchtenberg ed., 2000).

156. *Id.* at 133.

157. *Id.* at 136.

desegregation in 1974¹⁵⁸ and a 20,000 person rally in 1981 against cuts in state support for schools and jobs program.¹⁵⁹ To the present day it continues to be a scene for social and political rallies. The Common sits in the heart of Boston's commercial, office, and urban residential district. Other cities have quasi-public spaces for free speech, such as the Green in New Haven, Connecticut.¹⁶⁰

The rise of industrialization in the late nineteenth and early twentieth centuries saw an increase in deliberate national planning and design of public open spaces and parks in urban settings.¹⁶¹ These public spaces, however, often became degraded due to overuse and pollution. The well-known reports of air pollution in Pittsburgh, for example, as well as the dumping of raw sewage in rivers and traffic congestion made public places less attractive to interact and transact.¹⁶² Additionally, the rise of suburban migration pulled population from urban public spaces. The use of cars and refrigeration in homes allowed consumers to live farther away from marketplaces and to make fewer visits without risking food spoilage.

These factors contributed significantly to urban public market places becoming virtually obsolete. Yet downtown retail shopping districts for goods continued to thrive through the World War II era. The challenges of downtown shopping districts arose with the growth of the large shopping malls outside of town centers. However, downtown living and related commercial districts are once again in favor for many. New Urbanists have stressed walkable neighborhoods, foot-accessible commercial districts, and true public parks and plazas for community gathering places.¹⁶³

158. Wayne King, *Blacks Rally at Boston Common; Protest Effort to Halt Busing*, N.Y. TIMES, Oct. 14, 1974, at 24.

159. Joan Vennoch, *20,000 Rally at State House for Teachers' Jobs*, BOS. GLOBE, Mar. 29, 1981, at 1, 30.

160. New Haven's Green has a somewhat unique status. While functioning as a quasi-public space, it has actually been held privately by a group known as The Committee of the Proprietors of Common and Undivided Lands at New Haven, from 1649 until the present. See Paul Bass, *Last-Ditch Occupy Suit Seeks Proprietors' Demise*, NEW HAVEN INDEP. (Mar. 13, 2012, 1:16 PM), http://www.newhavenindependent.org/index.php/archives/entry/the_proprietors/ [https://perma.cc/88JK-59YQ]; James Sexton, *Not a Park or Mere Pleasure Ground: A Case Study of the New Haven Green*, TOWNGREENS.COM (2001), http://www.towngreens.com/DOCUMENTS/tg_newhaven_case.pdf [https://perma.cc/7EMK-G5GS].

161. Wilkinson, *supra* note 12.

162. GARVIN, *supra* note 24, at 13.

163. See FREILICH ET AL., *supra* note 150, at 8–12.

B. The Importance of Public Spaces in Democracy

The Constitution protects citizens' rights of free speech and assembly in public spaces of downtown shopping districts and adjacent public areas, subject to discrete limitations permitted by the courts on the time, place, and manner of expression.¹⁶⁴ The Framers recognized that free, lively, and open debate of civic issues was essential to the new nation. Dean Erwin Chemerinsky writes that:

Freedom of speech is crucial in a democracy: Open discussion of candidates is essential for voters to make informed selections in elections; it is through speech that people can influence their government's choice of policies; public officials are held accountable through criticisms that can pave the way for their replacement.¹⁶⁵

Free expression enables the discovery of truth through debate in the "marketplace of ideas," is part of the development of personhood and autonomy, and can contribute to the development of tolerance in society.¹⁶⁶

Richard Dagger argues that public space is needed in which people can engage in the free expression that will create civic republicanism. "According to the republican thinkers, Aristotle among them, a good life is one that engages the citizen in public affairs. It thus requires public spaces and public places in which the citizen may live a rich, if not exclusively public, life."¹⁶⁷ Robert Fishman adds:

One central theme of political philosophy in recent years has been the importance of public space for the vitality of democracy. A democratic polity needs what the philosopher Michael Walzer has called "open-minded spaces," places where a variety of people can coexist, places where a wide variety of functions encourage unexpected activities, places whose multiple possibilities lead naturally to the communication that makes democracy possible.¹⁶⁸

The importance of public spaces for free expression has been recognized by the Supreme Court of the United States and underpins much First Amendment law. Some government property, such as private

164. See *infra* note 332 and accompanying text.

165. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 954 (4th ed. 2011).

166. *Id.* at 955–58.

167. Richard Dagger, *Stopping Sprawl for the Good of All: The Case for Civic Environmentalism*, 34 J. SOC. PHIL. 28, 40–41 (2003).

168. Robert Fishman, *Towards an Open-Minded Space*, in *SPRAWL AND PUBLIC SPACE: REDRESSING THE MALL* 9, 9 (David J. Smiley & Mark Robbins eds., 2002).

offices, hospital examining rooms, and the center lane of I-95 are not appropriate places for public gatherings and protest. But the Court regards public plazas, parks and sidewalks as prime locations for free dialogue:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.¹⁶⁹

Moreover, the court has declared that “[n]o particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora.”¹⁷⁰

The voices in our public spaces range across the political and social spectrum, part of the tapestry of American dialogue. Kevin Mattson writes that “[a]s a democratic society, we need places where citizens can congregate and associate with one another. Public space is a prerequisite for a healthy civil society.”¹⁷¹ The civic capital of democratic engagement must be grown and exchanged in public spaces. Los Angeles, for example, opened Grand Park in July 2012, wedged between City Hall and Disney Hall, to revitalize the downtown area.¹⁷² The park has a farmers market, a venue to house major concerts and more participatory performances, green space, splashing fountains for children, and other amenities. The goal is to attract office workers, patrons of the growing adjacent restaurant sector, nearby residents, tourists, and even suburbanites. Grand Park may become a generator of civic capital by attracting people. Gloria Molina, the county supervisor “who led the effort to build the park,” stated “we now have pedestrian walkways and green space in the heart of this neighborhood, and we’re busy trying to make it our own.”¹⁷³

169. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (Roberts, J., concurring).

170. *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

171. Kevin Mattson, *Antidotes to Sprawl*, in *SPRAWL AND PUBLIC SPACE: REDRESSING THE MALL* 37, 45 (David J. Smiley & Mark Robbins eds., 2002).

172. Jennifer Medina, *Los Angeles Puts a New Park at Its Heart*, N.Y. TIMES (Aug. 18, 2012), <http://www.nytimes.com/2012/08/19/us/los-angeles-envisions-grand-park-as-draw-for-downtown.html?mcubz=3> [<http://perma.cc/V2NK-BXQK>].

173. *Id.*

Others see benefit in the traditional central business district's twenty-four hour access, non-homogeneity and quirkiness of architecture and establishments, and high-low experience.¹⁷⁴ As one proponent writes, “[i]n most places . . . Americans have come to realize almost too late that without a central business district, a city has no soul.”¹⁷⁵ Main Street America, a subsidiary of the National Trust for Historic Preservation, states its credo:

We believe that everyone deserves access to a vibrant neighborhood—a place that has a thriving local economy, is rich in character, and features inviting public spaces that make residents and visitors feel that they belong. . . .

The Main Street movement grew out of a recognition that a community is only as strong as its core. In an era when many people had given up hope about the commercial and cultural viability of downtown, and when suburbs, shopping malls, and big box retailers were dominating the American landscape, this seemed like an unlikely proposition. But, over the last four decades, the Main Street movement has proven that downtowns are the heart of our communities, and that a community is only as strong as its core.¹⁷⁶

These are not merely abstract or academic concerns but reflect real world experiences and conflicts. For example, in March 2012, City Creek Center, a \$1.5 billion mixed-use development on twenty acres, opened in downtown Salt Lake City.¹⁷⁷ The development included a 700,000 square foot mall, and has been praised for its amenities,

174. See generally Kenneth T. Jackson, *Memphis, Tennessee: The Rise and Fall of Main Street*, in AMERICAN PLACES: ENCOUNTERS WITH HISTORY 169 (William E. Leuchtenberg ed., 2000).

175. *Id.* at 183.

176. *The Main Street Movement*, MAIN STREET AMERICA, <http://www.mainstreet.org/mainstreetamerica/themovement> [<https://perma.cc/WEG5-UKDB>] (last visited Oct. 7, 2017).

177. Jasen Lee, *City Creek Center Driving Economic Revival for Downtown Salt Lake City*, DESERET NEWS (Mar. 17, 2012, 1:00 PM), <https://www.deseretnews.com/article/765560416/City-Creek-Center-driving-economic-revival-for-downtown-Salt-Lake-City.html> [<https://perma.cc/35RT-6PS4>]; Dawn House & Lesley Mitchell, *Thousands Fill Utah's City Creek Center for Opening (Video)*, SALT LAKE TRIB. (Mar. 23, 2012, 7:25 AM), <http://archive.sltrib.com/article.php?id=53764067&citytype=CMSID> [<https://perma.cc/6AZY-YVP3>]; Alice Hines, *City Creek, Mormon Shopping Mall, Boasts Flame-Shooting Fountains, Biblical Splendor*, HUFFINGTON POST (Mar. 23, 2012), http://www.huffingtonpost.com/2012/03/22/city-creek-mormon-mall_n_1372695.html#s806203&title=City_Creeks_retractable [<https://perma.cc/H4V5-APJQ>].

including a re-creation of the historic City Creek and fountains; urban renewal; economic development benefits; architecture, including the first retractable roof on a mall; and LEEDs certification.¹⁷⁸ There was some controversy, though, on the public versus private nature of the development. An undated and unsigned blog post on the Utah Stories blog titled *Private Mall or Public Square?* described a presentation of revised plans for City Creek Center at an open house in the City and County building.¹⁷⁹ The blogger reported that “the main topic of debate” of the meeting was whether the development was a “private mall” or a “public square,” especially regarding streets:

All of these streets will now be privately owned by [the developer]. Usage of these intersecting streets will be limited to the hours that the [developer] dictates. . . .

Will the major part of downtown Salt Lake City streets be privately owned and controlled? If so what does this mean? Does it mean that speech [can] be limited and mall police be able to say who comes and who goes? Or will our new downtown be full of public square spirit that is found in other great cities?¹⁸⁰

III. MALLS AND LARGE-SCALE SHOPPING CENTER CENTERS AS THE NEW “PUBLIC” SPACE

As shown in the prior Part, public spaces essential to democratic government were not privately owned. Often, these spaces were the sidewalks, plazas, and parks adjoining the central business district. This Part will show that in the late twentieth century, large-scale shopping centers and malls became the new community gathering place. James J. Farrell has observed that “[m]alls are America’s public architecture, a primary form of public space, the town halls of the twentieth and twenty-first centuries.”¹⁸¹

Owners of these privately-owned properties, however, are free to control the users and uses of their property. Unlike government, they are not subject to First Amendment limitations. This Part will show how shopping center and mall owners have controlled the environment of their properties to maximize their returns. Importantly, as malls and large centers transform to provide “experiences”—such as entertainment, dining, and other attractions described in Section I.C.2.a above—

178. Lee, *supra* note 177.

179. *Private Mall or Public Square?*, UTAH STORIES (Nov. 30, 2007), http://www.utahstories.com/city_creek_2.htm [<https://perma.cc/2QV7-GRUC>].

180. *Id.*

181. FARRELL, *supra* note 20, at xiv.

in response to the financial and sector challenges of the twenty-first century, it is quite possible that owners may seek to increase their control over the customer experience at the cost of free expression and speech. Similarly, without the “protection” of walls, lifestyle centers may be more conscious of controlling visitors. Thus, it may be that the challenge to free expression and speech in malls and large shopping centers, and the need for solutions, may become greater than ever.

A. Malls as a Vital Communal Gathering Place

1. Malls as a Substitute for the Traditional Downtown Experience

From their beginning, shopping centers were consciously based on the model of the American downtown. Lizabeth Cohen observed that the goal of the original shopping center planners and developers was “to perfect the concept of downtown, not to obliterate it, even though their projects directly challenged the viability of existing commercial [downtowns].”¹⁸² Their “ideal was still the creation of centrally located public space that brought together commercial and civic activity.”¹⁸³ Victor Gruen and Larry Smith wrote that “[b]y affording opportunities for social life and recreation in a protected pedestrian environment, by incorporating civic and educational facilities, shopping centers can fill an existing void.”¹⁸⁴ Gruen believed that the mall would serve as a “crystallization point[] for suburbia’s community life.”¹⁸⁵ He “saw the mall principally as an urban ordering device that, if used rationally, could replace the messy and illogical form of the American city with harmonious and sociable urban patterns.”¹⁸⁶ Gruen advocated for the civic role of shopping centers stating that “[t]hey can provide the needed place and opportunity for participation in modern community life that the ancient Greek Agora, the Medieval Market Place and our own Town Squares provided in the past.”¹⁸⁷

Malls became a place where people come together for commercial and recreational purposes. From teenage mall-rats to senior citizen mall-walkers the mall is often the place to shop, eat, meet, relax, and

182. Lizabeth Cohen, *From Town Center to Shopping Center: The Reconfiguration of Community Marketplaces in Postwar America*, 101 AM. HIST. REV. 1050, 1055 (1996).

183. *Id.* at 1056.

184. *Id.* (quoting VICTOR GRUEN & LARRY SMITH, *SHOPPING TOWNS USA: THE PLANNING OF SHOPPING CENTERS* 23–24 (1960)).

185. GRUEN & SMITH, *supra* note 184, at 23.

186. Margaret Crawford, *Suburban Life and Public Space*, in *SPRAWL AND PUBLIC SPACE: REDRESSING THE MALL* 21, 24 (David J. Smiley & Mark Robbins eds., 2002).

187. GRUEN & SMITH, *supra* note 184, at 23–24.

enjoy. Moreover, federal and state anti-discrimination laws require that people of different racial backgrounds can interact at the mall. This is much as Gruen had predicted in 1948, when he wrote that “there is much need for actual shopping centers—market places that are also centers of community and cultural activity.”¹⁸⁸ The mall became to a great extent the place that Gruen himself forecasted as having “a community center, an auditorium, a children’s play area, a large number of public eating places and, in the courts and malls, opportunities for relaxation, exhibits and public events.”¹⁸⁹ Shopping centers have become class stratified, however, based on the variety of the stores from upscale to lower middle class, marketing campaigns to different economic strata, and inadequate public transportation access.¹⁹⁰

Malls and large shopping centers serve as commercial and social focal points, and with revamping of malls to “experiences” beyond retail they may become even more central. But there is some sleight of hand in the language: though developers, planners, and boosters may use terms such as “community,” “neighborhood,” and “civic” in connection with their properties,¹⁹¹ malls are not “public” space in the eyes of the law; rather, malls are private property. Mall owners have the power to, and typically do, control the environment of their malls, instituting codes of conduct that control leafletters, demonstrators, “loiterers,” unaccompanied youths, and other behaviors deemed unacceptable by management.¹⁹²

188. HARDWICK, *supra* note 22, at 1 (quoting Victor Gruen, *What to Look For in Shopping Centers*, CHAIN STORE AGE, July 1948, at 22, 22).

189. *Id.* at 134 (quoting a 1955 speech given by Victor Gruen).

190. Cohen, *supra* note 182, at 1079–80.

191. *See* HARDWICK, *supra* note 22, at 76–80, 85–87, 120.

192. *See, e.g.*, Brittany Green-Miner & Kimberly Houk, *City Creek Center Facing Discrimination Claims*, FOX 13 SALT LAKE CITY (Apr. 26, 2012, 5:11 PM), <http://fox13now.com/2012/04/26/city-creek-center-facing-allegations-of-discrimination/> [https://perma.cc/P9RJ-6C84]; *Mall Kicks Out Shoppers For ‘Looking Too Gay’ and Tells People to Cover Tattoos and Stop Holding Hands*, DAILY MAIL, (Apr. 12, 2012, 6:07 PM), <http://www.dailymail.co.uk/news/article-2128991/City-Creek-Center-Utah-mall-kicks-shoppers-looking-gay-holding-hands.html> [https://perma.cc/7GFZ-2N22] [hereinafter *Mall Kicks Out Shoppers For ‘Looking Too Gay’*]; *Security Information*, MALL OF AMERICA, <https://www.mallofamerica.com/guests/security> [https://perma.cc/A4X3-D3QL]; *Code of Conduct*, ALDERWOOD MALL, [hereinafter ALDERWOOD MALL] <https://www.alderwoodmall.com/en/code-of-conduct.html> [https://perma.cc/PDC3-KZK9] (last visited Oct. 6, 2017); *Code of Conduct*, SIMON PROPERTY GROUP, L.P., [hereinafter SIMON PROPERTY GROUP, L.P.] <http://www.simon.com/legal/code-of-conduct> [https://perma.cc/SK6W-HGX4] (last visited Oct. 6, 2017) (prohibiting loitering); *Code of Conduct*, CBL PROPERTIES, [hereinafter CBL PROPERTIES] <http://www.cblproperties.com/code-of-conduct> [https://perma.cc/NX6G-F4AS] (last visited Oct. 6, 2017); *Code of Conduct*, NORTH PARK CENTER, [hereinafter NORTH PARK CENTER] <http://www.northparkcenter.com/>

Mall owners often make their space available to civic organizations, but only at the owners' discretion.¹⁹³

Newer types of malls developed to better compete in the twenty-first century, blur the line between public and private space and further complicate the issue. The latter part of the twentieth century saw an increase in "festival marketplaces," where developers built malls in scenic or historic urban locations, often as part of urban redevelopment.¹⁹⁴ Perhaps the first example was James Rouse's restoration of Boston's Faneuil Hall in 1976, placing merchandising alongside existing tourist venues such as museums, which "blurred the boundaries between the mall and the urban setting."¹⁹⁵ More importantly, the border between the private space of Faneuil Hall and the truly public space of the adjacent Government Center and surrounding plazas is difficult to discern but of great legal significance.¹⁹⁶

The public-private dividing line has become a particularly vexing issue with the increase in lifestyle centers, where some of the streets and sidewalks remain formal public streets and ways but control over them is ceded to the developer. This has been a concern in Silver Spring's new development where Ellsworth Drive remained a public street but the developer claimed that it was the equivalent of an open-air mall and thus banned political activities.¹⁹⁷

A mismatch is created because of the reality of the mall as private property, on one hand, and the marketing by the owner and belief of the public that the mall is a communal civic center, on the other. The mall does not replace true public spaces and cannot serve as a locus for the formation of civic capital that derives from unfettered free expression and assembly. Shopping centers are not "public" spaces like the traditional downtown and its surrounding parks and plazas where free expression and assembly is protected by the First Amendment.

pages/northpark-northpark-center-code-of-conduct [https://perma.cc/K5TD-V8YA] (last visited Oct. 6, 2017); *infra* Section I.B.2 (discussing Mall of America).

193. See generally MALL OF AMERICA, *supra* note 46, at 17 (listing annual community events at MOA).

194. Crawford, *supra* note 186, at 26.

195. *Id.*

196. *Id.*

197. See *Private Rules, Public Space: In Silver Spring, Parsing a Blurry Line*, WASH. POST, (July 15, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/07/14/AR2007071400933_pf.html [https://perma.cc/KX7X-AT83]; Marc Fisher, *Public or Private Space? Line Blurs in Silver Spring*, WASH. POST, (June 21, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/20/AR2007062002354.html> [https://perma.cc/Z4VW-R4TU].

2. No Full Digital Substitute for Face-to-Face

Some have wondered whether physical public spaces are still necessary for the exchange of ideas in the digital and social media era.¹⁹⁸ The internet, Facebook, Google, Twitter, LinkedIn, Instagram, and other vehicles generally allow for a robust and open discussion of political, social, economic, and other ideas.¹⁹⁹ Moreover, disseminating ideas through the digital world has been democratized because there is little or sometimes no marginal cost to one accessing the internet.

John R. Parkinson writes that the political sphere has become increasingly virtual and digital and that it is no longer limited to discussions in the marketplace and coffee houses.²⁰⁰ He notes that the Arab Spring was organized on Facebook and Twitter.²⁰¹ Recently, the #deleteuber campaign on Twitter, which quickly spread after Uber lowered surge prices when taxis at JFK airport engaged in a work stoppage over President Trump's executive order banning immigration for seven largely Muslim countries, led to the deletion of 200,000 Uber accounts in a few days and much negative publicity for the company.²⁰²

Parkinson, however, finds it simplistic to conclude that the digital age has made physical spaces increasingly irrelevant for democratic participation and ideas. He argues that:

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198. See generally Jean Camp & Y.T. Chien, *The Internet as Public Space: Concepts, Issues, and Implications in Public Policy*, 30 COMPUTERS & SOC'Y, Sept. 2000, at 13.
199. Cf. *Facebook Statement of Rights and Responsibilities*, FACEBOOK, <https://www.facebook.com/terms> [<https://perma.cc/DLQ3-9BGD>] (noting that content on social media is subject to "censorship" such as no hate speech, among other limits); Marjorie Heins, *The Brave New World of Social Media Censorship*, 127 HARV. L. REV. F. 325 (2014); Marissa Lang, *Blocked and Banned by Social Media: When Is It Censorship?*, S.F. CHRON. (Aug. 30, 2016, 8:04 PM), <http://www.sfchronicle.com/business/article/Blocked-and-banned-by-social-media-When-is-it-9193998.php> [<https://perma.cc/S29Z-YNKK>]. See generally TIM WU, *THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS* (2016) (discussing that social media is subject to manipulation by advertisers).
200. JOHN R. PARKINSON, *DEMOCRACY AND PUBLIC SPACE: THE PHYSICAL SITES OF DEMOCRATIC PERFORMANCE* 1 (2012).
201. *Id.* See generally Clay Shirky, *The Political Power of Social Media: Technology, the Public Sphere, and Political Change*, 90 FOREIGN AFF. 28 (2011) (discussing social media and protests outside of the U.S.).
202. Mike Isaac, *Uber C.E.O. to Leave Trump Advisory Council After Criticism*, N.Y. TIMES (Feb. 2, 2017), <https://www.nytimes.com/2017/02/02/technology/uber-ceo-travis-kalanick-trump-advisory-council.html> [<https://perma.cc/6AXP-RUXY>]; Sammy Nickalls, *Here's How Many People Deleted Their Uber Accounts*, ESQUIRE (Feb. 2, 2017), <http://www.esquire.com/news-politics/news/a52806/deleted-uber-accounts/> [<https://perma.cc/UD43-RMKW>].

[D]emocracy depends to a surprising extent on the availability of physical, public space, even in our allegedly digital world. . . . [B]y overlooking the need for such space—or arguing against that need—we run the risk of undermining some important conditions of democracy in the modern world.²⁰³

Parkinson addresses large public spaces, such as the National Mall in Washington, D.C and global counterparts, and broad based social movements. The digital world also does not obviate the need for smaller scale public locations for citizen interactions on issues both local and universal matters. Physical interactions provide various benefits to our democratic fabric. Face-to-face meetings remove the anonymity of the internet, perhaps making speakers more responsible, accountable, and thoughtful for their words. Their willingness to self-identify with their corporeal presence may make speakers more open to listening. Group interactions, such as protests or demonstrations, provide energy to participants and observers that is missing on a computer screen. In-person interactions are more engaged and less passible. Finally, the target of the message—perhaps government, a nonprofit organization, or for-profit entity—can less easily ignore people standing in a public place, disseminating their ideas.

Parkinson's argument for the importance of gathering in public places does not answer the question of whether people in the internet age feel compelled to do so. Studies and reporting on this issue are inconclusive. One survey of over one thousand millennials indicated that 85 percent prefer face-to-face meetings at work and over half prefer in-person social interactions with family and friends over electronic communications.²⁰⁴ Some social media sites, such as online dating, are designed to result in face-to-face meetings. We have also seen recent in-person, mass demonstrations, such as over one million people joining women's marches after the inauguration of President Trump.²⁰⁵ At the same time, the power of internet communications and social media hardly needs explication; it is a dominant force in our social and

203. PARKINSON, *supra* note 200, at 2.

204. Elizabeth S. Mitchell, *Surprising Study: Millennials Prefer Human Interaction over Digital*, ADWEEK (Sep. 8, 2015), <http://www.adweek.com/digital/surprising-study-millennials-prefer-human-interaction-over-digital/> [<https://perma.cc/D4CZ-KB2T>].

205. Perry Stein et al., *Women's Marches: More than One Million Protesters Vow to Resist President Trump*, WASH. POST (Jan. 22, 2017), https://www.washingtonpost.com/local/womens-march-on-washington-a-sea-of-pink-hatted-protesters-vow-to-resist-donald-trump/2017/01/21/ae4def62-dfdf-11e6-acdf-14da832ae861_story.html?utm_term=.ec0d7837d4d7 [<https://perma.cc/K9BL-YK77>].

economic lives, enabling people to rely on electronic rather than personal interactions.²⁰⁶

In-person civic dialogue historically took place on the local level in the marketplace and in adjacent public parks and squares. It remains important in the era of large scale, shopping centers and private malls. The internet is a valuable complement to face-to-face interactions, civic and social. This is not an either-or issue. Rather, this Article focuses on ensuring physical public space for this essential democratic discussion.

B. Owner Control of the Mall Environment and Experience

The mall is private property, organized as a profit-making venture. Social interactions are means to that end. Management prohibits actions that interfere with that goal, especially in the twenty-first century climate of economic challenge. Without strong returns, the viability of the mall is threatened and investors will seek other places for their capital.

To achieve a strong bottom line, the mall is designed to take the traditional American business district and enhance it for the typical consumer. It presents an orderly, appealing, and, climate controlled experience, with a pedestrian street providing access to stores and entertainment venues. It has been asserted that malls “cater to the idealized image of a streetscape held by many middle-class Americans, a ‘street’ that is free of disorder, of vehicular traffic, of pollution, or intrusion of weather and, most importantly, of the presence of lower-class

206. There is a similar, unresolvable debate about whether social media is a positive or negative force in human interactions. See Keith N. Hampton, *Is Technology Making People Less Sociable? No: Relationships Are Being Enhanced, Not Replaced*, WALL ST. J. (May 10, 2015, 11:08 PM), <https://www.wsj.com/articles/is-technology-making-people-less-sociable-1431093491?mg=prod/accounts-wsj> [<https://perma.cc/6AH9-VYZX>] (arguing that social media enhances personal relationships); Keith N. Hampton et al., *Core Networks, Social Isolation, and New Media*, 14 INFO., COMM. & SOC’Y 130, 130 (2011) (arguing that social media increases core connections and diversity and depth of connections). But see Paul S. N. Lee et al., *Internet Communication Versus Face-to-Face Interaction in Quality of Life*, 100 SOC. INDICATORS RES. 375, 375 (2011) (arguing that social media harms personal relationships); Stephen Marche, *Is Facebook Making Us Lonely?*, ATLANTIC (May 2012), <https://www.theatlantic.com/magazine/archive/2012/05/is-facebook-making-us-lonely/308930/> [<https://perma.cc/7RE5-MKP6>] (discussing new evidence that social media is making us more lonely); Larry Rosen, *Is Technology Making People Less Sociable? Yes: Connecting Virtually Isn’t Like Real-World Bonding*, WALL ST. J. (May 10, 2015), <https://www.wsj.com/articles/is-technology-making-people-less-sociable-1431093491?mg=prod/accounts-wsj> [<https://perma.cc/85D9-TKWU>] (pointing out that connecting online is different than connecting in the real world).

individuals.”²⁰⁷ The design and amenities are to increase the positive experience for patrons, encourage them to spend money in stores and other establishments which will redound to the mall owners’ benefit through higher base rents, larger percentage rent returns, and appreciation of the asset. “The interior design of suburban malls serves to create a pleasant, safe and very controlled environment, the purpose of which is to encourage shoppers to maximize the amount of time and money spent there.”²⁰⁸ Gruen himself had to concede that “[t]he shopping center is a conscious and conscientious co-operative effort by many private commercial enterprises to achieve a specific purpose: more and better business.”²⁰⁹ Malls differ from a “traditional downtowns [whose strength] is their ability to produce surprise and excitement, of not knowing what is around the next corner.”²¹⁰

Malls often have written rules and regulations governing visitor behavior and attire that are posted at entrances, and seek to prohibit activities that may result in a feeling of insecurity for shoppers.²¹¹ Some specific behaviors may be prohibited but malls often include general language barring disturbances which require discretion by mall management and security officers to apply them. This Subsection will show general categories from sample codes of conduct of malls and large shopping centers, most of which can only be enforced by a non-governmental actor on private property.

1. Speech, Protest, Demonstrations

One category of rule goes directly to prohibiting speech and expression—the hallmarks of democratic political and social activity. Thus, “picketing, demonstrating, soliciting, protesting, or petitioning”²¹² is typically expressly barred. Such a global, prior restraint of speech and expression by government would likely not survive First Amendment challenge. At the same time, the mall owner has a

207. Kent A. Robertson, *Downtown Retail Revitalization: A Review of American Development Strategies*, 12 PLAN. PERSP. 383, 386 (1997).

208. *Id.*

209. GRUEN & SMITH, *supra* note 184, at 70.

210. PALEN, *supra* note 23, at 103.

211. *See, e.g., Security Information, supra* note 192; ALDERWOOD MALL, *supra* note 192.

212. *Security Information, supra* note 192; *see also* SIMON PROPERTY GROUP, L.P., *supra* note 192 (“no solicitation;” for California locations, “engaging in non-commercial expressive activity not sponsored by the center is prohibited”); CBL PROPERTIES, *supra* note 192 (no “assembling, demonstrating, parading, picketing, marching”); NORTH PARK CENTER, *supra* note 192 (no “public event or protest”).

legitimate desire to protect customers from offensive and disruptive speech and expression, and a different mission than government.

This conflict was illustrated in 2015 when Black Lives Matter protesters gathered in the rotunda at MOA to protest the police shooting of an unarmed, twenty-four year old, African-American man in North Minneapolis.²¹³ Some 200 police officers, with about fifty in riot gear, were present.²¹⁴ The police advised the protesters that the demonstration was unlawful and threatened arrests.²¹⁵ Most then left the mall, and proceeded to the airport which organizers said was pre-planned.²¹⁶ The police said three demonstrators were arrested for trespassing and one for disorderly conduct.²¹⁷

Though the demonstrators were expressing their views on a fundamental human rights and political issue, to the mall it was something else. As reported by one news outlet, “[t]he privately owned mall said another demonstration would mean lost sales.”²¹⁸ It was reported that the mall’s attorney “said the mall was not singling out the group. ‘You have to ask, “Would you want us to permit a demonstration by white supremacists?” Of course not. The Mall of America is consistent: no demonstrations, no matter how righteous the cause.’”²¹⁹

2. Prohibitions on Attire

Other, arguably more abstract, forms of expression are also limited. For example, “appropriate attire” is often required.²²⁰ This is an ambiguous categorization—what is “appropriate”? Presumably mall management and security determine whether garments comply; some codes of

213. Christina Capecchi, ‘Black Lives Matter’ Protesters Gather; Mall Is Shut in Response, N.Y. TIMES (Dec. 23, 2015), https://www.nytimes.com/2015/12/24/us/black-lives-matter-protesters-gather-mall-of-america-is-shut.html?_r=0 [<https://perma.cc/3TY6-VADL>]; *Hundreds of ‘Black Lives Matter’ Protesters March Out of Mall of America, Demand Justice*, NBC NEWS (Dec. 23, 2015, 7:04 PM), <http://www.nbcnews.com/news/us-news/hundreds-black-lives-matter-protesters-march-out-mall-america-demand-n485261> [<https://perma.cc/4DCV-6E3X>].

214. Capecchi, *supra* note 213.

215. *Hundreds of ‘Black Lives Matter’ Protesters March Out of Mall of America, Demand Justice*, *supra* note 213.

216. *Id.*

217. Capecchi, *supra* note 213.

218. *Hundreds of ‘Black Lives Matter’ Protesters March Out of Mall of America, Demand Justice*, *supra* note 213.

219. Capecchi, *supra* note 213.

220. See, e.g., *Security Information*, *supra* note 192; SIMON PROPERTY GROUP, L.P., *supra* note 192; NORTH PARK CENTER, *supra* note 192.

conduct expressly grant management that power.²²¹ Sometimes there is an attempt to give examples, which cover quite a range—from “[c]lothing that deliberately obscure[s] the face, such as hooded tops,” to clothing with obscene language or racial/ethnic slurs.²²²

How would such “attire” regulation fare if imposed by the government? For whatever underlying motivation, and one might speculate on repugnant ones, some legislatures actually passed laws barring the wearing of “baggy pants” or “saggy pants.”²²³ At least one court has held that such ordinances violate the First Amendment’s right to Free Expression, a position echoed by various commentators.²²⁴ To the extent that the attire contains speech, prohibiting clothes that “impinge[] on the sensitivities of others in the mall” would appear to clearly violate the First Amendment.²²⁵ Thus, while a private mall owner can enforce such a rule there are serious doubts that the government could require “appropriate attire.”

3. Broad Limits on Behavior

Some malls expressly provide for broad power over behavior: “[M]anagement reserves the right to prohibit any activity or conduct which is detrimental to or inconsistent with a first-class, family oriented

221. *Code of Conduct*, CITY CREEK CENTER, <http://www.shopcitycreekcenter.com/search/Code+of+Conduct> [<https://perma.cc/UY2N-9EV9>] (“Management’s interpretation of these Rules of Conduct is conclusive and binding.”).

222. *Security Information*, *supra* note 192; *see* CBL PROPERTIES, *supra* note 192.

223. *See* Mary Bowerman, *S.C. Town Bans Saggy Pants*, USA TODAY (July 6, 2016, 9:58 AM), <https://www.usatoday.com/story/news/nation-now/2016/07/06/sc-town-bans-saggy-pants/86743376/> [<https://perma.cc/9DDA-4KQB>]; Niko Koppel, *Are Your Jeans Sagging? Go Directly to Jail*, N.Y. TIMES (Aug. 30, 2007), <http://www.nytimes.com/2007/08/30/fashion/30baggy.html> [<https://perma.cc/L5BB-4BDX>]. *But see* Lance Griffin, *Dothan Shoots Down Saggy Pants Ordinance*, DOTHAN EAGLE (May 3, 2011), http://www.dothaneagle.com/news/dothan-shoots-down-saggy-pants-ordinance/article_577459fa-7ac0-5b4d-8579-b16a73b7ddb0.html [<https://perma.cc/4UHH-XJBC>].

224. William C. Vandivort, *I See London, I See France: The Constitutional Challenge to “Saggy” Pants Laws*, 75 BROOK. L. REV. 667, 668 (2009). *See generally* Onika K. Williams, Note, *The Suppression of a Saggin’ Expression: Exploring the “Saggy Pants” Style Within a First Amendment Context*, 85 IND. L.J. 1169 (2010).

225. CBL PROPERTIES, *supra* note 192. *See generally* *Cohen v. California*, 403 U.S. 15, 26 (1971) (overturning conviction for wearing jacket with the words “Fuck the Draft” on it).

shopping center.”²²⁶ If a city, however, attempted to enforce an ordinance like the mall’s rule that “prohibit[s] any activity or conduct which is detrimental to or inconsistent with a first-class, family oriented shopping center,” the courts would likely hold it unenforceable under the “void for vagueness” doctrine.²²⁷ The Due Process Clause requires that a statute be voided when it is so vague “that men of common intelligence must necessarily guess at its meaning and differ as to its application.”²²⁸ In addition to giving fair warning—what exactly is behavior inconsistent with a first-class, family oriented shopping center?—the courts are concerned that vague statutes can lead to arbitrary and discriminatory enforcement. For example, in one mall, some shoppers alleged that security officers requested them to leave because of tattoos or homosexual behavior, claims that the mall management strongly denied.²²⁹

4. Youth Curfews and Anti-Loitering

A number of malls have experienced incidents of youth violence, large groups of young people congregating in the evenings and weekends, and walking in large groups.²³⁰ In addition to specific security

226. CITY CREEK CENTER, *supra* note 221; *see* CBL PROPERTIES, *supra* note 192 (prohibiting patrons from “disrupting the shopping enjoyment of customers”); ALDERWOOD MALL, *supra* note 192 (barring “[a]ny activity that disrupts our pleasant, family-oriented shopping environment”).

227. *See generally* WAYNE R. LAFAVE, MODERN CRIMINAL LAW: CASES, COMMENTS AND QUESTIONS 51–63 (2017).

228. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

229. *Green-Miner & Houk*, *supra* note 192; *Mall Kicks Out Shoppers For ‘Looking Too Gay’*, *supra* note 192.

230. *See* Randy Furst, *Kids Making Trouble Had Been an Issue Before Mall Shooting*, STAR TRIBUNE, Feb. 9, 1993, at 01A, 1993 WLNR 3955579; Aron Kahn, *Saturday Night Fever*, PIONEER PRESS, July 14, 1996, at 1A; Sally Apgar, *Megamall’s Plan For Required Escorts Praised, Assailed; Sudduth Calls Policy Racist; Mall Official Says It’s About Unsupervised Kids*, STAR TRIBUNE, June 21, 1996, at 01B, 1996 WLNR 5045644; Jane Morice, *Beachwood Place Implements Weekend Adult Supervision Policy Following Post-Christmas Brawl*, CLEVELAND.COM (Jan. 3, 2017), http://www.cleveland.com/beachwood/index.ssf/2017/01/beachwood_place_implements_wee.html [https://perma.cc/V2N3-C6ED]; David Chanan & Suzanne Ziegler, *Chaos As Mob Swarms at MOA*, STAR TRIBUNE, Dec. 27, 2011, at 01A, 2011 WLNR 26667836; Mara H. Gottfried, *St. Paul Street Fights Stemmed from Mall of America Brawl Around Christmas, Police Say*, TWINCITIES.COM (Mar. 12, 2012), <http://www.twincities.com/2012/03/12/st-paul-street-fights-stemmed-from-mall-of-america-brawl-around-christmas-police-say/> [https://perma.cc/54EF-BH6G].

measures to address this situation, malls have prohibited “loitering.”²³¹ They have also adopted youth curfews or supervision policies requiring persons under a given age, usually sixteen or seventeen, to be accompanied by a parent, legal guardian, or adult over twenty-one after a set time in the early evening, usually 4:00 or 6:00 p.m., on all days or weekends only.²³²

Presumably, these youth escort and loitering rules reflect the malls’ best business strategy to reduce upset to shoppers and business interruption, though there have been some charges of racial discrimination in such efforts.²³³ Governments, however, have had a difficult time crafting enforceable ordinances against “loitering.” Cities have tried to address youth violence with anti-loitering legislation that allow police officers to force groups of gang members in public areas to disperse.²³⁴ Earlier anti-loitering statutes often failed because the prohibited conduct was defined so broadly virtually anyone could fall within the statute, creating a void for vagueness invalidity. In 1992 Chicago passed an ordinance that it hoped would survive constitutional challenge by limiting the statute to members of “criminal street gangs” and by punishing the gang members for demonstrable conduct, i.e., refusal to disperse after given a police order. But the United States Supreme Court struck down the ordinance in 1999, again on vagueness grounds.²³⁵ In 2012, a court struck down a housing authority ban on “loitering” as unconstitutionally vague under the Fourteenth Amendment.²³⁶ A governmental regulation modeled after a mall’s anti-loitering rule would likely face a similar fate.²³⁷

231. See, e.g., *Security Information*, *supra* note 192; SIMON PROPERTY GROUP, L.P., *supra* note 192; CBL PROPERTIES, *supra* note 192; NORTHPARK CENTER, *supra* note 192; ALDERWOOD MALL, *supra* note 192.

232. See, e.g., *Security Information*, *supra* note 192; NORTHPARK CENTER, *supra* note 192.

233. Apgar, *supra* note 230, at 01B.

234. See, e.g., Andrew D. Leipold, *Targeted Loitering Laws*, 3 U. PA. J. CONST. L. 474, 474 (2001); Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 SUP. CT. REV. 141, 146; Ernesto Palomo, Note, “The Sheriff Knows Who the Troublemakers Are. Just Let Him Round Them Up:” *Chicago’s New Gang Loitering Ordinance*, 2002 U. ILL. L. REV. 729, 729.

235. *City of Chicago v. Morales*, 527 U.S. 41, 57 (1999).

236. *Davis v. City of New York*, 902 F. Supp. 2d 405, 421 (S.D.N.Y. 2012).

237. See generally Dan Frosch, *Homeless Are Fighting Back Against Panhandling Bans*, N.Y. TIMES (Oct. 5, 2012), <http://www.nytimes.com/2012/10/06/us/homeless-are-fighting-back-in-court-against-panhandling-bans.html> [https://perma.cc/SGK9-KARD] (describing successful challenges of bans against non-aggressive panhandling as violating rights of free speech); Joseph Goldstein, *Loitering Rules in Projects Are Too Vague, Judge Says*,

Governmental curfews on youths also have met with mixed success. Numerous cities have enacted curfews but courts have split on upholding them.²³⁸ Typically, courts will sustain legislation only if there is a showing of a nexus between the statute and the proposed goals of reducing juvenile criminality and juvenile victims. Courts will usually require data showing increased youth criminal behavior and victims during the hours of the curfew. Courts are also troubled by the failure of a regulation to provide exceptions to liability, such as traveling during an emergency, attending a school or religious function, engaging in interstate travel, and others.²³⁹ Thus, barring a justification for a youth curfew, a city could not enact an ordinance paralleling the mall rules.

Thus, malls and large shopping centers have become major communal spaces, where people gather to shop and socialize, supplanting traditional public areas of the older downtown districts. Yet malls are not true public places, and for purportedly business reasons owners choose to limit visitor behavior and expression in ways in which government could not. This presents a challenge to democratic governance which requires free public spaces for the exchange of ideas. Moreover, malls and large shopping centers may increase their importance as meeting places as they evolve into “experience” venues to meet the demands of twenty-first century consumers. Additionally, there has been an increase in lifestyle centers and town center type developments with their outdoor pathways and plazas. There is a need to find a balance between the legitimate needs and rights of mall owners and the public good of public spaces.

N.Y. TIMES (Oct. 4, 2012), <http://www.nytimes.com/2012/10/05/nyregion/federal-judge-says-obscure-loitering-rules-are-unconstitutional.html> [https://perma.cc/UTA2-HVLP] (describing a federal trial court’s holding that rules against loitering in public housing projects were unconstitutionally vague); Malia Wollan, *Free Speech Is One Thing, Vagrants, Another*, N.Y. TIMES (Oct. 19, 2012), <http://www.nytimes.com/2012/10/20/us/berkeley-targeting-homeless-proposes-ban-on-sidewalk-sitting.html> [https://perma.cc/9TCS-XLBA] (discussing the City of Berkeley’s proposed ban on laying on commercial sidewalks).

238. See generally Carol M. Bast & K. Michael Reynolds, *A New Look at Juvenile Curfews: Are They Effective?*, 39 CRIM. L. BULL. 353, 353 (2003); Orly Jashinsky, *Liberty for All?—Juvenile Curfews: Always an Unconstitutional and Ineffective Solution*, 4 RUTGERS J. L. PUB. POL’Y 546, 553–566 (2007); Note, *Juvenile Curfews and the Major Confusion over Minor Rights*, 118 HARV. L. REV. 2400, 2401 (2005); David A. Herman, Note, *Juvenile Curfews and the Breakdown of the Tiered Approach to Equal Protection*, 82 N.Y.U. L. REV. 1857, 1857 (2007).

239. See *supra* note 238 and accompanying text.

IV. TRADITIONAL AND SUGGESTED ALTERNATIVE APPROACHES TO BROADER EXPRESSION IN THE MALL

People seeking to express political, economic, and social perspectives have been drawn to malls and large shopping centers to share their ideas with the significant numbers of shoppers and visitors. The legal and policy debate between those seeking access for a public forum at malls and mall owners traditionally has been framed as a clash of First Amendment and private property rights. Proponents of free speech have argued that large malls and shopping centers have assumed the role of state actors and thus must provide access for First Amendment expression. Mall owners have rejected the notion that their private ownership reaches the level of state action and stand on the fundamental right of owners to exclude others from their property.

This section will examine the First Amendment claim, which has been rejected under federal law. Importantly, however, it will offer three unique alternatives for providing access to malls and large-scale shopping centers for the exercise of free expression necessary to democratic self-government. First, under a theory that the building of a mall or large center consumes the public good of traditional public spaces, government can impose an exaction of a physical portion of the new structure for free expression of ideas. Exactions are imposed without the consent of the owner. Second, incentive zoning can be employed to reward mall developers, who provide true public space, with rights to build beyond those allowed by existing zoning and other land use regulations. Incentive zoning is a quasi-consensual arrangement between government and owners. Finally, owners can enter into community benefits agreements with nonprofit organizations guaranteeing true public assembly space in the center. These are technically consensual, non-governmental agreements. These three devices can be employed to provide the space for public expression in the mall of the twenty-first century.

A. Traditional Attack: The First Amendment

Under the First Amendment of the U.S. Constitution, government cannot generally bar free expression activities from government-owned properties that function as public forums.²⁴⁰ Thus, if government owned a shopping center, it would have to permit people to express political,

240. See generally David A. Thomas, *Whither the Public Forum Doctrine: Has This Creature of the Courts Outlived Its Usefulness?*, 44 REAL PROP., TR. & EST. L.J. 637 (2010); Kevin Francis O'Neill, *Privatizing Public Forums to Eliminate Dissent*, 5 FIRST AMEND. L. REV. 201 (2007); Jennifer Niles Coffin, *The United Mall of America: Free Speech, State Constitutions, and the Growing Fortress of Private Property*, 33 U. MICH. J.L. REF. 615 (2000).

social, and economic ideas, solicit adherents, and distribute related literature. In various landmark cases, plaintiffs have tried to establish that private shopping centers have taken on such attributes of public property that they too must meet the same constitutional safeguards as actual government property.

Lloyd Corp., Ltd. v. Tanner,²⁴¹ decided by the U.S. Supreme Court in 1972, is the controlling precedent on federal constitutional claims in this area. In *Lloyd Corp.*, five young persons who had been requested to leave a mall when they distributed handbills opposing the Vietnam War challenged the mall policy banning leafleting.²⁴² They claimed that the mall was open to the general public and had taken on the function of the business district.²⁴³ In their view, the mall should be treated as the functional equivalent of a public place and subjected to the same First Amendment constraints that apply to governmentally-owned property.²⁴⁴ Under that standard, the handbill ban would fall.

The Supreme Court rejected this argument. It recognized that in exceptional cases private property can be transformed to the functional equivalent of public space, such as with a “company town.”²⁴⁵ But, the Court found that there is no basis for such a finding with shopping centers.²⁴⁶ Rather, shopping center developers, like all other owners, have the fundamental right to control their properties, exclude persons, and determine activities on their land:

[T]his Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only. . . . Nor does property lose its private character merely because the public is generally invited to use it for designated purposes. Few would argue that a free-standing store, with abutting parking space for customers, assumes significant public attributes merely because the public is invited to shop there. Nor is size alone the controlling factor. The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center.²⁴⁷

241. 407 U.S. 551 (1972).

242. *Id.* at 556.

243. *Id.* at 556–57.

244. *Id.*

245. *See id.* at 557–58.

246. *Id.* at 563–64.

247. *Id.* at 568–69.

Lloyd Corp. stands as the definitive ruling under the federal Constitution, rejecting the “public” characterization of shopping centers and the application of constitutional doctrine to their owners.²⁴⁸

Although the federal Constitution provided no relief, persons seeking free expression found protection for their activities in a few jurisdictions under the provision of their *state* constitutions. In *Pruneyard Shopping Center v. Robins*,²⁴⁹ the United States Supreme Court upheld the California Supreme Court’s decision that the California state constitution protected speech and petitioning in private shopping centers.²⁵⁰ In *Pruneyard*, some high school students sought to solicit support against a United Nations resolution condemning Zionism by setting up a table in a shopping center, distributing pamphlets, and requesting passersby to sign a petition.²⁵¹ Based on a center rule banning public expression, a guard asked them to leave.²⁵² The California Supreme Court recognized that this did not violate the federal Constitution, but found that this breached California law.²⁵³ The U.S. Supreme Court in *Pruneyard* deferred to the California court’s interpretation of its own constitution. Moreover, it found that the California rule was not an improper, uncompensated taking of the mall owner’s property under the Fifth Amendment of the U.S. Constitution as the leafleting would not unreasonably impair the owner’s value or use of the center.²⁵⁴ Finally, the Court determined that the leafleting would not violate the owner’s First Amendment rights since he could disavow the message, for example, through signage.²⁵⁵

Only a few other states have found a right to free expression in private malls under their state constitutions.²⁵⁶ Some twenty others

248. See generally ANTHONY MANISCALCO, PUBLIC SPACES, MARKETPLACES, AND THE CONSTITUTION: SHOPPING MALLS AND THE FIRST AMENDMENT 121–77 (2015) (providing in-depth discussion of *Lloyd Corp.* and other related cases).

249. 447 U.S. 74 (1980).

250. *Id.* at 88.

251. *Id.* at 77.

252. *Id.*

253. *Id.* at 78.

254. *Id.* at 83.

255. *Id.* at 87–88.

256. *N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757, 784 (N.J. 1994); *Green Party of N.J. v. Hartz Mountain Indus., Inc.*, 752 A.2d 315, 332 (N.J. 2000); *Bock v. Westminster Mall Co.*, 819 P.2d 55, 56 (Colo. 1991).

have specifically refused to find that their state constitutions provide the right to expression on shopping center property.²⁵⁷

Thus, challenges to mall policies banning expression based on claiming that they are “public spaces” subject to First Amendment scrutiny will be rejected under longstanding federal law, and successful in only a few states under their particular constitutions. Moreover, it would seem unlikely that the Supreme Court, as currently constituted and with its focus on protection of property rights, would reverse directions under federal law. A better way to guarantee public expression in large centers and malls is needed, as suggested below.

B. New Approaches for Expression in Malls

1. The Exaction Model

An alternative, and more sensible, approach to the issue of access for expression in malls derives from the law and practice of exactions. Local governments typically condition the granting of zoning, subdivision, or building approvals for development or construction projects on the developer taking steps to ameliorate the project’s fallout on the community. Exactions are applied in both residential developments²⁵⁸ and commercial projects.²⁵⁹ The government will require the owner improve and dedicate a portion of the property to public use or impose an “impact fee” that authorities can use to ameliorate development-related externalities.²⁶⁰ A typical example of an exaction is where a development or building improvement will bring increased traffic on an

257. See *Cross v. State*, No. 08-03-00283-CR, 2004 WL 1535606, at *5 (Tex. Ct. App. July 8, 2004) (listing relevant cases).

258. See, e.g., *Highland-In-The-Woods, L.L.C. v. Polk Cty.*, 217 So.3d 1175, 1176 (Fla. Dist. Ct. App. 2017); *Mira Mar Dev. Corp. v. City of Coppell*, 421 S.W.3d 74, 80 (Tex. App. 2013); *B.A.M. Dev., L.L.C. v. Salt Lake Cty.*, 282 P.3d 41, 46 (Utah 2012).

259. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 379 (1994) (parking lot of commercial building); *Jones Ins. Tr. v. City of Ft. Smith*, 731 F. Supp. 912, 913 (W.D. Ark. 1990) (gas station sought to add convenience store); *City of San Marcos v. Loma San Marcos, LLC*, 184 Cal. Rptr. 3d 429, 433 (Ct. App. 2015) (impact fee for conversion of recycling facility to movie studio).

260. *Koontz v. St. Johns River Water Manag. Dist.*, 133 S.Ct. 2586, 2599 (2013) (holding that rules controlling exactions of land applied to requirements of payment of fees). But cf. John D. Echeverria, *Koontz: The Very Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1, 1 (2014) (arguing *Koontz* is the worst takings decision ever); Richard A. Epstein, *The Bundling Problem in Takings Law: Where the Exaction Process Goes Off the Rails*, 4 BRIGHAM-KANNER PROP. RTS. CONF. J. 133, 134 (2015) (considering whether it is possible to benefit society by the consistent application of the takings clause). See also J. Peter Byrne & Kathryn A. Zyla, *Climate Exactions*, 75 MD. L. REV. 758, 759 (2016) (arguing that using exactions to address climate concerns is consistent with *Koontz*).

adjacent public road.²⁶¹ The municipality will require the developer to widen the street on the developer's land to accommodate the additional cars from the development's residents or commercial users.

Exactions help to achieve efficient development for two related reasons. First, they force developers to internalize their true costs rather than projecting them on to the rest of the community who did not agree to shoulder the costs.²⁶² From a "fairness" perspective, since the developer will increase the value of its land by building houses and monetize this added value through sales of units to home buyers, the developer, rather than nonparticipating neighbors, should pay for the needed infrastructure. The developer should address the externality it creates, either absorbing the cost to fix it and so decreasing its profit or by passing the cost on to house purchasers in the sales price.

Second, and of key importance to the discussion of public spaces in malls, developers should not be allowed to consume public goods without paying for them. Thus, if a portion of the community had built a sewage treatment plant in the past financed by a special assessment on then existing homes in the area, a developer should not subsequently be able to build new houses or a commercial property and hook into that system—paid for by the other town residents—without charge.²⁶³ Such a developer would be a free rider, consuming a public good that the town through its citizens have created.²⁶⁴

Exactions theory can be used to argue that, as a condition of granting land use regulation and building approvals, government should require large shopping centers and malls to dedicate a designated portion of the structure for true public space. The exaction is based on the following argument: Traditional downtown shopping districts attract citizens for mercantile purposes. While coming together in these

261. See *Jones*, 731 F. Supp. at 913; *Dowerk v. Charter Twp. of Oxford*, 592 N.W.2d 724, 727 (Mich. Ct. App. 1999) (requiring road improvements); *Sparks v. Douglas Cty.*, 904 P.2d 738, 746 (Wash. 1995) (requiring road dedication).

262. See Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 4, 19–20 (2000).

263. A special assessment is not a general tax against all properties in the municipality but rather a charge assessed against lots in a limited area in exchange for a particular benefit received by them. Classic examples are assessments against owners abutting a street for paving or owners in an area served by a new sewer or water plant. See *Evans v. City of San Jose*, 4 Cal. Rptr. 2d 601, 607 (Ct App. 1992); *Johnson v. City of Kearney*, 763 N.W.2d 103, 106–07 (Neb. 2009).

264. Professor Ellickson—not generally a proponent of impact fees—finds them acceptable in cases when they are not substitutes for general revenue expenditures. Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 487 (1977) (stating that it is appropriate to charge a developer where the pattern has been to charge abutting owners for road improvements).

downtowns, people meet other citizens informally or gather more formally on public spaces—sidewalks, pocket parks, public squares, etc.—where they can exercise their First Amendment free expression rights. This participation in dialogue about ideas is not solely their essential civil right but also a fundamental ingredient in our democratic Republic. Discussion of political, social, economic, and civic ideas are thus a public good, necessary for our free, representative government to function and thrive. The downtown retail district and its associated public areas are the catalyst for the development of a precious public good that we might call civic or community capital.

The basis of the exaction, therefore, is not individual Constitutional rights but a community asset similar to school buildings, utility infrastructure, streets, and a managed environment. All are necessary for a high functioning community. While there are other means of communication, such as in public meetings in government facilities, internet chatrooms, private homes, such participation often requires prior planning and sometimes invitation. There is unique value in the opportunity to meet and talk spontaneously, randomly, and face-to-face in public areas and for formal demonstrations in public spaces to engage passersby who had previously been unaware of the issues.

A mall that attracts significant numbers of customers from the central business district poses a threat to the civic interactions of citizens. The mall is consuming an existing public good or civic capital—civic dialogue brought about by free expression—much like a large-scale housing development grabs up the community's pre-existing street lanes, parks, and school classrooms. Just as the housing or commercial developer can legally and constitutionally be assessed an exaction to force it to internalize the costs of its development by providing additional street lanes or parks, the mall developer can be charged with an exaction to provide space in its mall to compensate for the public good it consumes by diminishing if not destroying civic dialogue and expression. This space could be required at the time of initial mall development. In this era of major repurposing of some malls that could sap civic capital, an exaction could also be required. As will be explained below, the mall owner can protect its legitimate interests through reasonable rules regulating the time, manner, and location of this free expression space so as not to interfere with the mall's business.

a. Malls as Consumption of a Public Good.

Though mindful of the difficulty in generalization, there are some overriding conclusions that can be drawn about the effect of suburban malls and large-scale shopping centers on the downtown retail

district.²⁶⁵ While there are not many studies, some reliable data points confirm the generally held belief that suburban malls have had a deleterious effect on traditional downtown commercial districts by attracting away substantial retail businesses from the urban core. Often these studies were done in the 1950s through the 1970s, perhaps to understand whether, or to confirm that, post-World War II suburbanization and malls were harming downtown retail. The negative effect of suburban malls on central business districts may be so well established for academics, the public, and policymakers that only a few additional studies have been done in later years. The current variation on the topic is discussion of the effect of the free-standing megastore—the “big box”—such as a Walmart, on existing retail.²⁶⁶

In one of the earlier studies, Raymond E. Murphy in 1971 examined the central business districts of various cities and concluded that there is a loss of retail business from downtowns to suburban shopping centers.²⁶⁷ He noted that by that date, the central business district had tended to lose the sale of standardized goods to neighborhood or regional shopping centers. Murphy predicted that the growth of larger regional malls with anchor department stores would reduce the then extant advantage of cities for specialized and comparison shopping.

Kent Robertson demonstrated that between 1954 and 1977, the central business districts of all major American experienced an absolute decline in their level of retail activity.²⁶⁸ Based on constant dollars, there

265. Generalization about the mall's effect on downtown is difficult for a variety of reasons: economic, business, demographic, and social conditions vary substantially between communities across the United States, both before and after the arrival of the mall; the health of downtown commercial districts differ, both before and after the building of the mall; and other variables affecting the health of the community core are in play. See Pierre Filion et al., *The Successful Few: Healthy Downtowns of Small Metropolitan Regions*, 70 J. AM. PLAN. ASS'N 328, 328 (2004) (discussing a survey that demonstrated that successful small city downtowns had a number of the following factors: a large university, historical character, a powerful tourist appeal, and a state capital); Kent A. Robertson, *Can Small-City Downtowns Remain Viable?: A National Study of Development Issues and Strategies*, 65 J. AM. PLAN. ASS'N 270, 270 (1999).

266. See Alessandro Bonanno & Stephan J. Goetz, *WalMart and Local Economic Development: A Survey*, 26 ECON. DEV. Q. 285, 285 (2012); Jerry Hausman & Ephraim Leibtag, *Consumer Benefits from Increased Competition in Shopping Outlets: Measuring the Effect of Wal-Mart*, 22 J. APPLIED ECONOMETRICS 1157, 1157 (2007).

267. RAYMOND E. MURPHY, *THE CENTRAL BUSINESS DISTRICT: A STUDY IN URBAN GEOGRAPHY* 170 (1972).

268. Kent A. Robertson, *Downtown Retail Activity in Large American Cities 1954–1977*, 73 GEOGRAPHICAL REV. 314, 314 (1983).

was a 51.5 percent drop in retail sales.²⁶⁹ The largest losses came later, with the declines between 1972 and 1977 and 1967 and 1972 being twice the magnitude of the other intervals during the study period.²⁷⁰ Robertson hypothesized that “[w]ith the expansion of suburban retail activity, establishments either curtailed or closed operations in downtown locations.”²⁷¹

There is evidence that the growth of shopping centers in Northern New Jersey in the 1950s significantly damaged the downtown shopping districts of several nearby cities. In a 1960 article, Samuel Pratt and Lois Pratt focused on the reshuffling of retail customers in the 1950s from New York City and four New Jersey city centers to two new malls in New Jersey—Bergen Mall and Garden State Plaza.²⁷² The four New Jersey towns saw a 22 percent average decrease in the number of major shoppers.²⁷³ Patronage of New York City by major New Jersey shoppers fell even more, by just under one-half.²⁷⁴ Another report indicated that downtown stores from Newark opened branches in suburban malls in order to address competition from suburban centers, with the percentage of their revenue from branch stores growing from 4 percent in 1951 to 32 percent in 1959.²⁷⁵

More recent studies similarly indicate a negative impact of malls on the downtown business district. According to a 2002 study by the Suffolk County Department of Planning, the downtown business district of the Village of Patchogue, New York “was one of the first major commercial centers in Suffolk County and remained a shopping destination for many years. Patchogue Village maintained its premier commercial status until shopping malls and strip commercial development took part of the village’s market share, depleting the downtown’s viability.”²⁷⁶ Commercial vacancy rates in the central business district rose from 1978 hitting a high of 19.9 percent in 1996, the year that Bellport outlet mall opened and the nearby South Shore Mall expanded.²⁷⁷

269. *Id.* at 315.

270. *Id.*

271. *Id.* at 321.

272. Samuel Pratt & Lois Pratt, *The Impact of Some Regional Shopping Centers*, 25 J. MARKETING 44, 44 (1960).

273. *Id.* at 47.

274. *Id.* at 46.

275. Cohen, *supra* note 182, at 1067.

276. SUFFOLK CTY. DEP’T OF PLAN., VILLAGE OF PATCHOGUE DOWNTOWN BUSINESS DISTRICT STUDY 7 (2002), <http://www.suffolkcountyny.gov/Portals/0/planning/Publications/PatchogueCBDReport.pdf> [<https://perma.cc/58AC-MTGL>].

277. *Id.* at 37.

A study of Port Huron, Michigan examined the impact of the construction of an 840,000 square-foot suburban mall in 1987 by comparing the composition of the downtown business district in 1986 and 2006.²⁷⁸ The study concluded that there was a fundamental alteration of the old business district. Department stores and apparel stores largely disappeared from downtown. Specialty retail saw a decline of 46 percent.²⁷⁹ Service businesses such as car repair and photography stores, convenience stores, and entertainment venues filled these spaces.²⁸⁰ It remained to be seen whether a commercial district built on such stores can be viable.

Therefore, while data is somewhat piecemeal, there is support for the position that malls harm traditional downtown shopping districts. This can form the basis for an exaction of public space in malls and large shopping centers based on their consumption of civic capital.²⁸¹

b. The Legal Framework.

The U.S. Supreme Court has placed limitations on government's power to exact land from owners in *Nollan v. California Coastal Commission*²⁸² and *Dolan v. City of Tigard*.²⁸³ These cases set forth two major principles of exactions law: *Nollan* requires a "nexus" and *Dolan* requires a "'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal."²⁸⁴

In *Nollan*, homeowners sought governmental approval under a regulation controlling coastal building to replace an existing home on their lot.²⁸⁵ The governmental commission required, as a condition of the approval, that the owners grant the public an easement across the

278. Amie Dickinson & Murray D. Rice, *Retail Development and Downtown Change: Shopping Mall Impacts on Port Huron, Michigan*, 7 APPLIED RES. ECON. DEV. 2, 3 (2010).

279. *Id.* at 8.

280. *Id.*

281. In an analogous situation, California law required that a statutory environmental impact statement should analyze whether a proposed shopping center with a "big box" would contribute to urban decay of the nearby central business district. *Anderson First Coal. v. City of Anderson*, 30 Cal. Rptr. 3d 738, 745 (Ct. App. 2005).

282. 483 U.S. 825 (1987).

283. 512 U.S. 374 (1994); *see also* *Koontz v. St. Johns River Mgmt. Dist.*, 133 S. Ct. 2586 (2013) (extending *Nollan* and *Dolan* to impact fees). The recent case of *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017) dealt with the calculation of the amount of property taken.

284. *Koontz*, 133 S. Ct. at 2595 (2013) (quoting *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 391).

285. *Nollan*, 483 U.S. at 827–28.

portion of their beach so that the public could cross to reach a public beach some quarter-mile away.²⁸⁶ The Court held that this proposed exaction was impermissible because of “lack of nexus.”²⁸⁷ While the commission had an interest in preserving views of the water to those on the public road, there was no connection between such a concern and the proposed exaction of physical access across the property to reach a public swimming beach.²⁸⁸ Without such a nexus, an exaction would be “an out-and-out plan of extortion.”²⁸⁹

In *Dolan*, a landowner sought a permit to double the footprint of its store and to pave the parking lot.²⁹⁰ The city proposed granting the permit in exchange for the owner’s dedicating a greenway within the property’s floodplain and the owner’s establishing a fifteen-foot wide pedestrian and bike path adjacent to the greenway.²⁹¹ The total dedication was approximately ten percent of the 1.67-acre parcel.²⁹² There was an apparent nexus between the requested greenway and the city’s recently adopted master drainage plan that was designed to reduce flooding along waterways because of the increased runoff and flooding risk from the expanded building footprint and paved lot.²⁹³ Similarly, there seemed to be a link between the requested bike and pedestrian path because of planners’ efforts to encourage alternatives to automobile transportation and a concern that a larger store would encourage more car traffic.²⁹⁴

The issue for the Court, though, was whether the degree of the exaction demanded by the city in exchange for the building permit had the necessary relationship to the projected impact of the project. The Court declared:

We think a term such as “rough proportionality” best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that

286. *Id.* at 828.

287. *Id.* at 837.

288. *Id.*

289. *Id.* (quoting *J.E.D. Assocs., Inc. v. Town of Atkinson*, 432 A.2d 12, 14 (N. H. 1981)).

290. *Dolan v. Tigard*, 512 U.S. 374, 379 (1994).

291. *Id.* at 380.

292. *Id.* at 387.

293. *Id.*

294. *Id.* at 387–88.

the required dedication is related both in nature and extent to the impact of the proposed development.²⁹⁵

The Court, therefore, has indicated that government can lawfully exact an interest in land only to ameliorate a harmful externality created by the development. Government cannot use zoning, subdivision, permitting, or the approval process to extract property concessions from developers that are not related to resolving community harms generated by the project.²⁹⁶

It would appear, however, that the legal requirements for an exaction of public space in a mall or major shopping center are met. As shown above, there is strong evidence that the building of a mall harms the public spaces of the traditional central business district and thus consumes a public good without compensating government. The “essential nexus” is shown. Moreover, just as a developer cannot free ride on the town’s prior investment in a sewage treatment facility, the developer cannot freely consume other civic capital. As long as the exacted space is “roughly proportional” to the capital that was lost, the *Dolan* test should be met. The calculation will require careful balancing: given the smaller space of a mall, the public space cannot equal that of the downtown; yet it must be meaningful.

c. Postscript: Exaction Power as Prelude to Negotiated Agreement

This Article has set out an argument that exactions are a viable means to replace public space compromised by the advent of a mall or large-scale shopping center. There are advantages from the town’s perspective in using the exaction method. First, the owner does not have to consent to it. Government can impose the exaction as a matter of law, without the process of negotiation. Second, there is a broad body of law setting out the statutory, procedural, and Constitutional requirements, reducing transaction costs for the municipality. Finally, government can achieve its goal—protection of civic capital—from a free riding developer.

Embedded in these advantages, however, are some concerns. First, a nonconsensual exaction may trigger costly and divisive litigation. It might be better, even in the short run, for government to negotiate with the developer over concessions rather than imposing them under its legal power. Ultimately, the developer and the town will have to “live together,” and litigation is not a good start.

295. *Id.* at 391.

296. *See generally* WILLIAM FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* (1995); Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859 (1995).

Second, there is a question of political will. While government officials may be willing to impose an exaction to avoid a direct financial loss to the town, such as preventing the town from footing the bill for widening a road as a result of development, there may not be political will by the citizens or their representative when they are losing the more abstract and intangible interest of public expression. This is especially the case when the incoming mall promises increased property tax revenues, employment, and conveniences.²⁹⁷ The mall may have a strong bargaining position in general, and often towns provide property tax breaks and other concessions to lure a project.²⁹⁸ When the town is not facing an out-of-pocket loss of the right to expression, the developer's position at the table may be even stronger. Still, the town is not without power—its location and availability of open land could strengthen its bargaining position.

Therefore, depending on the circumstances, perhaps it is best to think of the town's exaction power as an arrow in its negotiating quiver. If both the town and the developer know that the town *could* require an exaction, they may be willing to negotiate a development agreement—including guarantees of free expression space—that adequately aligns the needs and concerns of the town, its citizens, and the developers. Such a negotiated result, in the shadow of the exaction power, may bring the optimal returns to all.

Finally, there are some difficult scenarios for exactions. For example, exaction theory fits quite well when a political unit such as a city or town imposes an exaction because the building of a mall within its borders will harm its own existing civic capital. How would it work,

297. Sometimes, the government provides subsidies for the building of malls that are part of urban revitalization projects. See Jeremy Kutner, *The Greatest Mall There Never Was: Assessing the Failed Attempt to Build the New Haven Galleria* 30 (May 1, 2012) (unpublished student legal history paper, Yale Law School), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1007&context=student_legal_history_papers [https://perma.cc/3W9Q-MPEZ] (stating government had pledged \$60 million to the New Haven mall, which was never built).

298. See James T. Madore & Stephanie Dazio, *Report: Green Acres Mall \$20 Million Tax Break Was 2nd Largest in State*, *NEWSDAY* (March 27, 2017, 7:47 PM), <http://www.newsday.com/business/report-green-acres-20-million-tax-break-was-2nd-largest-in-state-1.13322750> [https://perma.cc/5C75-5HDN]; STATE OF MINN., DEPT. OF REVENUE, *ECONOMIC DEVELOPMENT TAX ABATEMENT 1* (2015), http://www.revenue.state.mn.us/local_gov/prop_tax_admin/at_manual/12_03.pdf [https://perma.cc/B8NX-KMK8] (discussing that a political subdivision may “abate all or a portion of its current or prospective property tax on a parcel of property for economic development purposes”); DAPHNE A. KENYON ET AL., *RETHINKING PROPERTY TAX INCENTIVES FOR BUSINESS* 49 (2012), <http://www.lincolnst.edu/publications/policy-focus-reports/rethinking-property-tax-incentives-business> [https://perma.cc/5R3L-KRSR] (mentioning that if the firm did not receive the tax break, it would have “located elsewhere.”).

however, when the building of a mall within one town would destroy the central business of a neighboring town—a separate political subdivision—how could the civic capital of the injured town be recovered? Under *Nollan*, it would seem to be a leap to show a nexus between a town's exaction and harm caused in another town. Perhaps this issue could be addressed by moving the exaction action upstream to a political unit such as a county, regional, or state government that has jurisdiction over both the exacting and affected subunits. The difficulty with that approach, though, is that more political players with less direct interest would now be required to act.

Another thorny scenario might arise with a developer building a mall in an exurban area where there is no previously developed central business district—can the nexus be met when there is no existing civic capital in public discourse in a location? Perhaps the city could still be successful in its exaction effort by arguing that the construction of the mall essentially pre-empts the organic development of a downtown business district and its civic capital. Arguably, that would meet the *Nollan* requirement of a relationship between the exaction and a valid governmental purpose.

2. Incentive Zoning

“Incentive zoning” legislation permits owners to exceed usual height, bulk, or similar restrictions if they provide specified public improvements, amenities, or services.²⁹⁹ Usually a state enabling act is required to delegate power to local governments to pass incentive zoning legislation.³⁰⁰ New York's enabling act, for example, allows cities to “adjust[] . . . permissible population density, area, height, open space, use, or other provisions of a zoning ordinance”³⁰¹ in exchange for “open space, housing for persons of low or moderate income, parks, elder care, day care, or other specific physical, social, or cultural amenities, or cash in lieu thereof, of benefit to the residents of the community.”³⁰² Local

299. Jennie C. Nolon & John R. Nolon, *Zoning and Land Use Planning*, 40 REAL EST. L.J. 237, 246–47 (2011); see SAN FRANCISCO PLANNING & URB. RES. ASS'N, SECRETS OF SAN FRANCISCO: A GUIDE TO SAN FRANCISCO'S PRIVATELY OWNED PUBLIC OPEN SPACES, <https://www.spur.org/sites/default/files/migrated/anchors/popos-guide.pdf> [<https://perma.cc/A2ST-5258>]; *Privately Owned Public Space*, CITY OF SEATTLE, DEPT. OF CONSTR. & INSPECTIONS, https://www.seattle.gov/dpd/cs/groups/pan/@pan/documents/web_informational/s010581.pdf [<https://perma.cc/BSW6-HS44>] (providing a photographic listing).

300. See Patricia E. Salkin, *A Quiet Crisis in America: Meeting the Affordable Housing Needs of Invisible Low-Income Healthy Seniors*, 16 GEO. J. ON POVERTY L. & POL'Y 285, 313–14 (2009).

301. N.Y. GEN. CITY LAW § 81-d 1(a) (2010).

302. *Id.* § 81-d 1(b).

governments must enact specific zoning provisions consistent with this act.³⁰³

Under the language of the New York enabling act, it would seem quite possible for a locality to craft an incentive zoning ordinance that would reward a mall or large shopping center developer for providing true public space within the project. Increasing the buildable area or height of the center and an adjustment or permitted uses, among other changes in the zoning ordinance, could provide valuable incentives for the owner to provide public expression space under the rubric of “physical, social, or cultural amenities.” There is a consensual element in incentive zoning—the owner and the municipality choose to exchange benefits, under the statutory framework.

In New York City, incentive zoning has led to developers creating plazas and pocket parks on their land that are open for public use, known as privately owned public space (“POPS”). In exchange, the owner receives increased floor area ratio (“FAR”), i.e., the right to build higher; decreased setback requirements; or other concessions that increase the owner’s buildable space.³⁰⁴ In short, developers can build higher and denser by allowing some degree of public access.³⁰⁵

There are two fundamental differences with exactions. First, with an exaction, the government obtains title to the property; in incentive zoning, the owner retains title and the public has a right to use like a license. Second, incentive zoning is not compulsory—the owner must consent to the arrangement; access cannot be imposed unilaterally by the municipality even though there is the compensation of increased building rights. A mall owner, therefore, could simply choose to reject the proffered zoning advantage to maintain the private nature of the mall and to exclude public expression space. An exaction, however, must be complied with by the owner or else it will not be granted its right to build.

Thus, the exaction technique allows the city to protect the public to a greater extent, because of its ownership of the space. But, as discussed earlier, this fear of loss of control over business premises may scare the developer away. In contrast, while an owner cannot be compelled to accept incentive zoning and public access, the owner and

303. *See, e.g.*, N.Y.C. ZONING LAW § 74-634 (2016) (subway station improvements); *Id.* § 74-76 (1968) (public plazas).

304. JEROLD S. KAYDEN, PRIVATELY OWNED PUBLIC SPACE: THE NEW YORK CITY EXPERIENCE 22 (2000).

305. *See* Henry Grabar, *A Matchmaker for New York’s Privately Owned Public Spaces*, CITYLAB (Oct. 23, 2012), <https://www.citylab.com/design/2012/10/matchmaker-new-yorks-privately-owned-public-spaces/3646/> [<https://perma.cc/G2LV-654R>] (discussing that in exchange for “bonus floor area” the city mandated the builders to turn some of the building lots into POPS).

government might be able to negotiate an operating agreement for the space that meets both of their needs. These issues are discussed in Subsection C below.

3. Community Benefits Agreements

A “community benefits agreement” (“CBA”) might also be employed to provide for public expression space in a mall. This subsection will briefly cover one type of CBA that could be useful.

A CBA is an agreement between a new project’s developer and a coalition of community groups representing the interests of people who will be impacted by development.³⁰⁶ Neighborhood associations, faith-based groups, and environmental organizations might enter into CBAs as community representatives with developers.³⁰⁷ While CBAs are private contracts, they are often sought by developers to gain an advantage concerning governmental actions. First, developers might seek community support through a CBA to lay a foundation for, and prevent opposition to, necessary governmental zoning or other land use approval for the project; second, a developer might use a CBA to acquire and demonstrate community buy-in as part of the developer’s application for a public subsidy or financing for the project.³⁰⁸

CBAs usually require the developer to address environmental or land use concerns that will be generated by the new development. This may include mitigation of harms generated by the development, such as increased traffic, pollution, or crowding, or the creation of new physical amenities, such as parks or plazas.³⁰⁹ CBAs also often require the developer to provide benefits besides typical land use matters, usually

306. See David A. Marcello, *Community Benefit Agreements: New Vehicle for Investment in America’s Neighborhoods*, 39 URB. LAW. 657, 657–58 (2007).

307. Nicholas J. Marantz, *What Do Community Benefit Agreements Deliver?: Evidence from Los Angeles*, 81 J. AM. PLAN. ASS’N 251, 251 (2015); Laura Wolf-Powers, *Community Benefits Agreements and Local Government: A Review of Recent Evidence*, 76 J. AM. PLAN. ASS’N 1, 2 (2010) (discussing governmental unit participation in the CBA); Patricia E. Salkin & Amy Lavine, *Negotiating for Social Justice and the Promise of Community Benefits Agreements: Case Studies of Current and Developing Agreements*, 17 J. AFFORDABLE HOUSING & CMTY. DEV. L. 113, 116 (2008) (discussing CBAs being limited to non-governmental actors, since the issues of government involvement are discussed elsewhere).

308. Marcello, *supra* note 306, at 659–60.

309. Madeline Janis, *Background on Community Benefits Agreements: The Process, Projects, and the Prospects for the Future*, in ANNIE E. CASEY FOUNDATION, COMMUNITY BENEFITS AGREEMENTS: THE POWER, PRACTICE, AND PROMISE OF A RESPONSIBLE REDEVELOPMENT TOOL 10, 18 (2007); Patricia E. Salkin & Amy Lavine, *Community Benefits Agreements and Comprehensive Planning: Balancing Community Empowerment and the Policy Power*, 18 J.L. & POL’Y 157, 189–192 (2009).

in the nature of economic and community development. Thus, they may require developers to provide jobs in the construction and operational phases, financial commitment to community organizations and program, and similar assistance.³¹⁰

It is possible, therefore, that a community group could negotiate with a mall developer for a CBA that would provide space in the mall for free expression of ideas. The developer could receive, in return, community support for the overall plan. There are certain advantages with the CBA route. Most saliently, this would be a consensual transaction—unlike a mandatory exaction, the developer and the community group would voluntarily agree. In general, freely negotiated market exchanges are beneficial as they produce efficient allocation of land resources and avoid coercion.³¹¹

Moreover, a CBA would provide flexibility and avoid the technical legal and statutory requirements for an exaction or incentive zoning. CBAs are inclusive in that they allow for direct citizen engagement in development decisions that will affect their lives. Finally, an engaged group of citizens might do a better job of enforcement, especially when compared to the weak track record of government with POPS.³¹²

There are significant critiques to the use of CBAs to create public space in malls and large shopping centers, however. From the developer's perspective, the community group's offered consideration—public support—may not be valuable or precise enough to gain the developer's assent. A CBA deal may not be reached without the compulsion of an exaction or the specific benefits of incentive zoning.

Most importantly, from a policy perspective, there is a risk that a CBA will not express the will of the majority in the town. The negotiating committee is not elected or even appointed by a government official.³¹³ As demonstrated above, the building of a new mall or large-scale

310. JULIAN GROSS ET AL., COMMUNITY BENEFITS AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE 36–38 (2005); Alejandro E. Camacho, *Community Benefits Agreements: A Symptom, Not the Antidote, of Bilateral Land Use Regulation*, 78 BROOK. L. REV. 355, 363, 378 (2013).

311. See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 9 (6th ed. 2003); Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process*, 2007 UTAH L. REV. 1039, 1041, 1056 (stating that consensual agreements are usually superior to government acquisition by coercion); Gerald Korngold, *Governmental Conservation Easements: A Means to Advance Efficiency, Freedom from Coercion, Flexibility, and Democracy*, 78 BROOK. L. REV. 467, 476–82 (2013).

312. See *infra* notes 321–322 and accompanying text.

313. See Vicki Been, *Community Benefits: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5, 33 (2010); Murtaza H. Baxamusa, *Empowering Communities Through Deliberation: The Model of Community Benefits Agreements*, 27 J. PLAN. EDUC. & RES. 261, 268 (2008).

shopping center consumes community capital. It would seem appropriate that under democratic principles, elected government should negotiate compensation for this loss on behalf of all citizens and stand accountable at the ballot box for its actions.

C. Administering the Public Space

Setting aside public space in a private mall is the first step. The next issue is how the space is administered, determining rules of conduct, and who administers and enforces behaviors. The legal formalities for accomplishing these goals might differ depending on whether the public space is created by exaction, incentive zoning, or community benefits agreement. But all of these vehicles need to address the same or similar issues about balancing public rights and owner control of the center.

1. Exactions

If the exaction model is used to create space for free public expression in a mall, it seems most sensible for all parties that the government exacts an easement rather than a fee interest in the property. When an owner conveys land in fee simple to government as part of an exaction process³¹⁴—for example, as a road or a park—the owner no longer retains rights in it. The property will now be administered by the government. This does not seem to be an ideal arrangement for public space in a mall. Even if it is a designated area, it would be difficult for the city to access it to maintain and control it; the owner of the mall would be concerned with loss of control, and its lenders may be disturbed over an unaffiliated fee interest within the footprint of the mall in which they hold a security interest. Moreover, carving out a fee portion inside a mall or shopping center would present a high degree of complications and transaction costs in the structuring of such a bespoke legal arrangement.³¹⁵

Thus, the better exaction solution may be for the mall owner to transfer a less-than-fee right, such as an easement, to the government as part of an exaction. The exaction of the right to use space in a private mall for public dialogue would give the city a less-than-fee right in the mall property. Indeed, the California Coastal Commission sought an

314. See *Highland-In-The-Woods, L.L.C. v. Polk Cty.*, 217 So. 3d 1175, 1176 (Fla. App. 2017) (building and dedicating a water system); *City of Dallas v. Chicory Ct. Simpson Stuart L.P.*, 271 S.W.3d 412, 415 (Tex. App. 2008) (building and dedicating a storm sewer); *B.A.M. Dev., L.L.C. v. Salt Lake Cty.*, 282 P.3d 41, 43 (Utah 2012) (building and dedicating a street).

315. There are no off-the-shelf vehicles, and the commercial condominium does not seem to fit for a small piece tucked in a mall. See generally Amy K. Hansen & Gregory A. Goodman, *Commercial Condominium Conversion*, 24 PRAC. REAL EST. LAW. 9, 14 (2008).

easement over the Nollans' property.³¹⁶ Importantly, an easement most likely would be limited to specific parts of the mall or shopping center, permitting protest but allowing the owner to limit interference with business in the mall.

When an easement is conveyed, the land owner retains the power to use and control the property provided it makes no undue interference with the transferred right.³¹⁷ Thus, the mall owner keeps ownership and control of the space, subject to the government's right. The deed of easement or easement agreement developed during the exaction process should ideally describe the respective rights and obligations of the public and mall owner in the public expression area within the mall. If the deed or agreement fails to do so, courts will fill the gaps based on principles of easement law.³¹⁸

If the exaction technique is used to provide public space in malls and large shopping centers, presumably the terms of the deed of easement or easement agreement and related agreements would be a matter of public discussion and debate by government officials before approval. In this way, the public can hold their government officials accountable to ensure that there is adequate public access. Moreover, if officials fail to enforce terms of an executed document related to public access, members of the public might be able to force the issue by bringing a mandamus action.³¹⁹

2. Incentive Zoning

Incentive zoning has presented two major concerns related to its application to create public expression space in malls and shopping centers. First, some cities have not been successful in keeping a record of the public amenities created by developers in exchange for zoning

316. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 827–28 (1987); *see also* *Bowman v. Cal. Coastal Comm'n*, 179 Cal. Rptr. 3d 299, 301 (2014) (coastal easement); *Powell v. Cty. of Humboldt*, 166 Cal. Rptr. 3d 747, 758 (2014) (airspace easement); *Brown v. City of Medford*, 283 P.3d 367, 368 (Or. 2012) (street easement).

317. *See* GERALD KORNGOLD, *PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, REAL COVENANTS AND EQUITABLE SERVITUDES* 157–76 (3d ed. 2016).

318. *Id.*

319. *See, e.g.,* *Marathon Oil Co. v. Lujan*, 937 F.2d 498, 499 (10th Cir. 1991); *City of Tarpon Springs v. Planes*, 30 So. 3d 693, 695 (Fla. App. 2010) (explaining that mandamus is only available, though, for mandatory or statutorily compelled actions by officials; it is not available if the official has discretion); *Giffort Pinchot All., SDS v. Butruille*, 742 F. Supp. 1077, 1083 (D. Or. 1990) (“[M]andamus may not be used to direct acts within an agency’s discretion.”); *Milek v. Town of Hempstead*, 742 N.Y.S.2d 113, 113 (App. Div. 2002).

benefits.³²⁰ The New York City department responsible for enforcement of POPS since their authorization in 1961 only began compiling a database of these properties in 2016.³²¹ As a result, the public is unaware of accessible areas and governmental enforcement is hindered. Moreover, municipalities often fail to enforce violations of developer agreements to provide amenities. A recent audit in New York City found that over one-half of POPS were out of compliance with governing rules,³²² about the same percentage as the late 1990s.³²³ The public has granted the owner the zoning break but has not received the public benefit.

Second, design and operating rules for POPS under incentive zoning—such as hours, behavior, etc.—may be unclear, with much latitude given to owners.³²⁴ In response, New York City upgraded design and programmatic standards in 2007 and 2009.³²⁵ There are requirements for prescribed hours,³²⁶ owners are responsible for maintenance and sanitation, and the practice has generally been to follow the city's code of conduct for parks.³²⁷

One would imagine that there would be fewer problems if incentive zoning were employed to create public expression space in a mall as compared to general POPS. Presumably, active and engaged members of the public would know that there is public space for free expression available at the mall or shopping center. Moreover, if the mall were to deny access or violate the agreed to rules for the public space, members

320. One of the major accomplishments of Professor Kayden's book is to create an inventory of these spaces. *See* KAYDEN, *supra* note 304, at 61–71.

321. SCOTT M. STRINGER, AUDITS AND SPECIAL REPORTS 22–23 (2017), https://comptroller.nyc.gov/wp-content/uploads/documents/SR16_102A.pdf [<https://perma.cc/PR7J-MTPT>] (raising questions as to the accuracy of the database supposedly being completed in 2016).

322. Eli Rosenberg, 'Members Only' Public Space in Manhattan? Join the Club, N.Y. TIMES, (Apr. 19, 2017), https://www.nytimes.com/2017/04/19/nyregion/public-space-trump-tower.html?_r=0 [<https://perma.cc/XQC9-LVMT>].

323. *See* KAYDEN, *supra* note 304, at 2.

324. *Id.* at 301–02 (describing the poor quality of the earlier years of the New York City privately owned public spaces program—begun in 1961—due to weak design standards and enforcement).

325. N.Y.C. ZONING RESOLUTION art. III, ch. 7, § 70 (2017).

326. *Privately Owned Public Space*, N.Y.C. DEPT. CITY PLANNING, <https://www1.nyc.gov/site/planning/plans/pops/pops-plaza-standards.page> [<https://perma.cc/L8MC-TNCH>].

327. *See* KAYDEN, *supra* note 304, at 38; New York City Department of Parks and Recreation §§ 1-04, -05 (2017) (outlining prohibited and regulated uses in city-owned parks).

of the public would likely bring this to the attention of government officials.

3. Community Benefits Agreements

The operation phase of community benefits agreements presents some special challenges in the context of an agreement with a mall to provide public space for free expression. The concern about the representative nature of the community signatory discussed above in connection with negotiation, applies to the operation phase as well. The community representative may exercise discretion to compromise in enforcement or adjust terms, in ways that may favor one group of citizens seeking expression over another. Government actors making such decisions are accountable by the ballot box or perhaps in actions for violations of civil rights. These controls are not available against private citizens on the community group.³²⁸

Moreover, it is unclear whether an unelected, unaccountable group of community “representatives” will have the financial resources and incentives to monitor and enforce the agreement. Without such steps, the paper right to public expression may become meaningless.

Thus, the benefits of private action to achieve public space may be ephemeral.

4. General Principles of All Operating Agreements

When the mall owner and the government negotiate the operational rules of the space devoted to public expression,³²⁹ or when a court must determine this understanding, they must balance competing interests. The mall owner has a legitimate interest in not only having the dedicated space preserved in good condition but also in preventing activities in that area from spilling over and harming the shopping and “experience” environment it seeks to create in the rest of the mall. Mall and shopping center owners are used to living under a pure private property regime, where they have simply barred political or social expression and any other behaviors unless they specifically have approved of the ideas, group, or activities.

In contrast, the government seeks the public space to encourage open discourse necessary to build civic capital. It operates under the limitations and spirit of the First Amendment which protects the free, peaceful exchange of ideas without assessing the merits or value of the message.³³⁰ Moreover, the Supreme Court has frequently stated that

328. Codes of ethics for community group members are aspirational not binding. *See generally* Marcello, *supra* note 306, at 664.

329. For simplicity, this Article includes community groups negotiating CBAs within the “government” rubric in this Subsection.

330. *See* CHEMERINSKY, *supra* note 165, at 960–70.

government cannot regulate speech because of its content. Thus, it has declared that “the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”³³¹ As a general matter, therefore, the government, unlike private property owners, cannot discriminate among speech and expression based on the message alone.

Mall owners and municipalities in negotiating operating agreements, or courts filling in gaps, might balance these competing values, policies, and legal constraints as follows: the mall owner would make the “free expression space” available to groups and individuals for expression regardless of content, but the mall would have the right to control the time, place and manner of the expression. Thus, the public space could be separated from shopping activities; the number of “expressers” using the space at any given time could be limited by a first-come-first-served basis, rather than by content, to prevent overcrowding, with advance sign-ups available for groups; noise levels could be strictly limited; owners could continue to bar people from engaging in public expression in the rest of the mall; interference with shoppers would be strictly prohibited; etc. This arrangement would mirror the rules governing public use of government property for speech, where content cannot generally be controlled but reasonable time, place, and manner restrictions are permitted.³³²

From the public’s perspective, an arrangement along these lines will go a long way toward creating public expression space in malls and large shopping centers that is analogous to rights on government and true public property. It will replace the civic gathering points harmed or destroyed by traditional malls and by the malls of the twenty-first century that are designed to draw even more citizens to share an “experience” far greater than just shopping. On the other side, if the terms of the public space are negotiated as described, the mall owner may be able to limit potential fallout on customers from the public space. The free expression space may even turn out to be a “win” for the mall owner if it draws more people to the mall. While not fitting the traditional mold of mall and large center development, as detailed above, malls are currently pushing beyond the traditional concept of malls to imitate downtowns, create lifestyle open-air experiences, and offer “experiences” as they seek to enhance malls profitability and survival in a challenging business environment. Public expression space may have its benefits if used wisely by mall owners.³³³

331. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (internal citations omitted).

332. CHEMERINSKY, *supra* note 165, at 1171–74.

333. There have been reports of deals between municipalities and shopping centers owners bearing some of the hallmarks that this article has been

CONCLUSION

Malls and large shopping centers in the twenty-first century are not dead, reports to the contrary notwithstanding. Rather, we seem to be experiencing an evolution of the concept of the mall to meet economic challenges and changes in consumer preferences. Since their advent, malls and large centers have occupied a central place in suburban communal life. New strategies for their regeneration—the mall as an “experience,” lifestyle centers, town centers, among others—might make the mall and large center even more important in some communities.

The mall of today and the future has supplanted the traditional business district, consuming vital civic capital of free speech and expression that took place in those public spaces. As developers build new malls and re-imagine older ones, society can and should require a dedicated place for free expression and speech within these places. This Article has offered innovative legal directions to impose this result. Perhaps more importantly, it has suggested how towns and developers can negotiate in the context of the law to reach a binding agreement that aligns their interests and guarantees the public free expression space while protecting the owner's business interests.

suggesting for exactions of public expression space. In Hilton Head, South Carolina, a mall owner and the town reached an agreement to permit the owner to install a stadium-seating movie theater in return for setting aside space dedicated to a community organization selected by the town. Tim Donnelly, *Art League Wins Public Space in the Mall at Shelter Cove*, HILTON HEAD MONTHLY (Nov. 29, 2009), <http://www.hiltonheadmonthly.com/news/hilton-head/1972-art-league-wins-public-space-in-the-mall-at-shelter-cove> [<https://perma.cc/RQ6U-VFKH>]. The new theater was essential for the mall's survival as it had been losing stores and shoppers over recent years. The town designated the Art League of Hilton Head Island as the tenant of the set aside space, receiving a 4,500 square-foot space, formerly occupied by a Foot Locker store, for rent of \$1 a year for up to twenty years. The Art League's planned to teach classes and hold exhibitions in the space. *Id.*