

The First Amendment Goes Shopping: Coming soon to a Mall near you

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Generally all types of expression are constitutionally protected in traditional "public forums" such as streets, sidewalks and parks, as well as plazas and government buildings that have been opened up to the public for similar speech activities. Given today's divisive political climate and the number of recent, high profile protests across the country on various socio-economic, political and environmental issues, landlords and retail tenants may wonder what is legally allowed, what their rights are should the demonstrations enter their private property, and whether they should exercise those rights.

The landmark decision involving free speech rights in private shopping centers is *Pruneyard v. Robins*, which was decided by the United States Supreme Court in 1980. There, the Supreme Court upheld the general notion that citizens have no absolute First Amendment rights to enter and remain on private property to express themselves. However, the Court also found that while the U.S. Constitution does not provide such broad protections, individual state constitutions may "grant greater freedom to individuals to use such property, so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision."

Since *Pruneyard*, a few states have interpreted their own state constitutions to provide even greater free speech protection than that offered by the federal Constitution. States that interpret their own state constitutions to permit free speech in private forums, subject to various limitations and restrictions in scope, include California (speech and petition), Colorado, Massachusetts (limited to ballot access), New Jersey (leafleting and related speech supporting or opposing causes, candidates or parties), Oregon (initiative petitions), and Washington. Most state supreme courts that have examined the issue, however, including Wisconsin, have disagreed. In *Jacobs v. Major*, the Wisconsin Supreme Court held that owners of private property (namely shopping malls) did not have to permit non-consensual use of their facilities by others for freedom of speech purposes. These limitations on speech generally extend to all areas of the private property, including parking lots and green spaces on the shopping center grounds.

Some reminders and suggestions for retail real estate owners and tenants to help prevent, prepare for and hopefully avoid potential issues with demonstrators include:

- Consider who you rent to and how that may impact future demonstrations at or near your property;
- Set clear, concise and visible rules limiting patrons' free speech and other behavior at your premises;
- Implement a consistent policy against picketing, demonstrating or similar types of activities;
- Enforce the shopping center policies in a consistent, nondiscriminatory manner;
- Post signs around the shopping center stating that the opinions of any such individuals or groups gathering on the shopping center are not shared by the shopping center owner;
- Remember that even if demonstrators are lawfully assembled on the sidewalks or streets, they do not have the right to be disruptive or block entrances to retail real estate locations and must let pedestrians pass;
- Order offensive demonstrators off the property, but be mindful that such an action could escalate the problem and the length of time the demonstrators remain at the property;
- Contact local law enforcement if demonstrators disobey the rules or are impeding shoppers; and
- Consider other legal action, such as filing for injunctions and temporary restraining orders, for prolonged and repeated violations or in anticipation of such violations in order to protect their property rights.

Because free speech protections vary from state to state, owners and tenants are advised to tailor their policies to state specific requirements.

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