PRIVATE PROPERTY OR PUBLIC FORUM?

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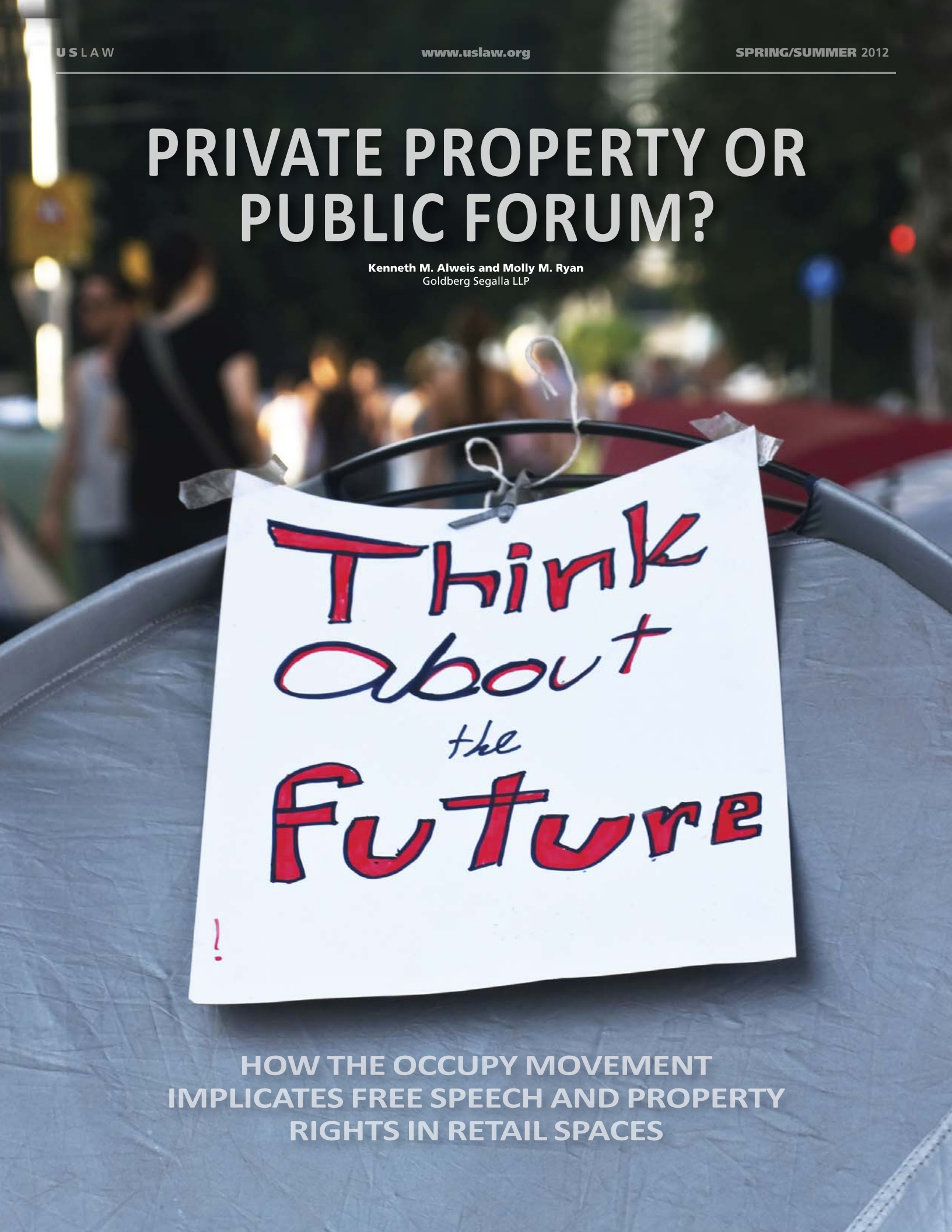

HOW THE OCCUPY MOVEMENT IMPLICATES FREE SPEECH AND PROPERTY RIGHTS IN RETAIL SPACES

As the legions of Occupy Movement members sprouted tent cities on both public and private property across the nation, the highly publicized movement raised a number of questions beyond the merit or effectiveness of its protest against perceived economic or social inequalities – principal among them the issue of when and how owners and managers can control expressive conduct on their properties. No commercial group is more affected by these issues than the shopping center industry, whose vast parking lots and increasingly public-space-like designs create an attractive forum for protesters to make their stance.

RETURNING TO THE PRUNEYARD

Shopping centers are private property. Nonetheless, more than thirty years ago, the Supreme Court held in *PruneYard Shopping Center v. Robins*[1] that despite the fact that the purpose of a shopping mall is to provide retailers with an environment that encourages consumers to purchase goods and services, the right of a property owner to regulate speech on its property is not unfettered. Rather, the constitutions of the various states are free to define how private property owners who open their property to the public may control non-commercial speech.

Since *PruneYard*, the courts of many states have interpreted the decision and the holding that a shopping center can constitute a public forum for free speech if it is open to the public in a manner similar to that of public streets and sidewalks "and that a shopping center to which the public is invited provides 'an essential and invaluable forum'" for exercising free speech rights. *United Broth. of Carpenters v. NLRB.*[2] Nonetheless, despite the fact that the *PruneYard* decision would have seemed to open the door to protests like the Occupy Movement, the majority of state courts that have been heard on the public-private issue have taken the more conservative approach and held that patrons have no inherent right to free speech at privately owned shopping centers. These state courts reason that their own state constitutions, like the federal Constitution, define rights as protecting citizens from government action only and not from restrictions placed by one private individual or entity on another. Therefore, if restrictions on speech at privately owned shopping centers cannot be defined in some way as commensurate with state action, then a constitutional right to free speech at those shopping centers is not triggered. *See, ex. SHAD Alliance v. Smith Haven Mall*; *Fiesta Mall Venture v. Mecham Recall Comm.*[3] In contrast, other states have gone so far as to hold that a privately owned shopping center is a public forum and that a privately owned shopping center must permit peaceful picketing of businesses in a mall, even though the picketing may harm the shopping center's business interests. *See, Best Friends Animal Society v. Macerich Westside Pavilion.*[4]

A less clear line arises when centers allow for access by some groups while at the same time hoping to prohibit others. For example, a center might want to allow Girl Scouts to sell cookies but not want a racist, militant group handing out literature on a common area sidewalk. Even in those states that hold that their constitutions limit the ability of owners to control public access, shopping centers may impose reasonable restrictions on the time, place, and manner of expressive activities so as to eliminate or limit disruption or threats to health and safety. *See, Green Party v. Hartz Mt. Indus.*; *Best Friends Animal Society v. Macerich Westside Pavilion.*[5] As a result, shopping centers often times restrict speakers to certain sections of the common area, set up community booths, and require written applications in advance of the activity. Owners can also prohibit altogether speech that is fundamentally incompatible with the centers' purpose, such as obscenity, pornography, and hate speech.

OCCUPY WALL STREET

In this context, shopping center owners should not be prohibited from preventing the establishment of tent cities on their properties. Recently, in *Waller v. City of New York*,[6] petitioners were participants in the Occupy Wall Street demonstrations who had set up camp in Zuccotti Park. The park is a privately owned public access plaza that was established by the City of New York by a special permit that requires the park to be open year round to the public and maintained for public use. Sometime after the encampment began, the owner published rules that included prohibitions on the erection of tents and camping. Following the publication of the rules, the "occupiers" were told by the police that they had to leave the park and remove their belongings. Petitioners sought an injunction preventing the enforcement of the newly published rules.

In denying the request for the injunction, the Court held that while it was "mindful of movants' First Amendment rights of freedom of speech and peaceable assembly…[e]ven protected speech is not equally permissible in all places and at all times." The Court found that the demonstrators' rights were not superior to those of the owner who was bound to maintain the property in a safe and lawful condition.

It should be noted that New York is in the majority in holding that shopping centers are not the equivalent of public forums. In addition, the property in question, Zuccotti Park, is non-commercial and by permit, a park required to be open to the public. Nonetheless, the reasoning behind the *Waller* decision should be applicable in all jurisdictions. Property owners have the right to impose reasonable limitations on the use of their properties.

CONCLUSION

The specter of a field of tents covering a corner of a parking lot may seem daunting to a shopping center owner or manager. There is nothing to fear. Even in those jurisdictions with constitutions that imply that shopping centers are the equivalent of public forums, owners and property managers should feel comfortable enforcing rules that prohibit camping conduct that operates outside the reasonable limitations imposed by the centers. Centers are open to the public during defined hours for the purpose of shopping. Limiting expressive speech, in terms of time and place as well as manner, is allowed.

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1 447 U.S. 74 (1980)
2 540 F.3d 957 (9th Cir.) cert. denied, 130 S.Ct. 553(2009)
3 66 N.Y.2d 496, 498 N.Y.S.2d 99 (1985); 159 Ariz. 371, 767 P.2d 719 (1988)
4 193 Cal. App. 4th 168, 122 Cal. Rptr. 3d 277 (2011)
5 164 N.J. 127, 752 A.2d 315 (2000); 193 Cal. App. 4th 168, 122 Cal. Rptr. 3d 277 (2011)
6 933 N.Y.S.2d 541 (S. Ct., NY County 2011)