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In *Hudgens v. NLRB*,[1] the Supreme Court rejected the claimed constitutional right of individuals and organizations to use a privately owned shopping center, against the wishes of the owner, as a forum for the exercise of first amendment rights. The decision explicitly overruled *Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*,[2] and affirmed a new focus for free speech adjudication in the Supreme Court.

Logan Valley, decided in 1968, held that first amendment protections for freedom of speech extended to activity on private property that was open to the public[3] and was the functional equivalent of a central business district.[4] *Lloyd Corp. v. Tanner*,[5] decided only four years later, so limited the *Logan Valley* holding[6] that *Hudgens* is little more than a tombstone on a rule four years dead. Since the progression from *Logan Valley* to *Hudgens* took but eight years, it might seem appropriate to relegate the entire area to a footnote in the history of constitutional law. But the decision does more than mark the extinction of a short-lived doctrine. More than any recent decision, *Hudgens*, read in conjunction with its predecessors, provides the framework for an assessment of the state action requirement in free speech cases.

This Article will suggest that *Hudgens* represents the Supreme Court's final rejection of the theory that the first amendment requires the government to override the interests of private property owners in order to facilitate public presentation of diverse ideas and information. The Court's insistence that the first amendment prohibits only government interference with speech reaffirms the traditional concept of the free speech guara-

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1. 424 U.S. 507 (1976).
2. 391 U.S. 308 (1968).
3. *Id.* at 319-20.
4. *Id.* at 318.
5. 407 U.S. 551 (1972).
6. *See* text accompanying notes 29-34 *infra*.

ntee and ties together several of the major speech cases of the last five years.

I. BACKGROUND TO *HUDGENS*: FROM *MARSH v. ALABAMA* TO *LLOYD v. TANNER*

The starting point for discussion is *Marsh v. Alabama*,[7] since all of the later decisions turn on interpretation of Justice Black's opinion in that case. The setting for *Marsh* was the "company town" of Chickasaw, Alabama, a suburb of Mobile owned entirely by the Gulf Shipbuilding Corporation. The town had "all the characteristics of any other American town,"[8]—buildings, streets, stores, sewers, sidewalks, and the like—but title to everything was in the corporation.[9] Even the town policeman, who had the same law enforcement powers as municipal police in other Alabama communities, was paid by the corporation.[10] Enter Mrs. Marsh, a Jehovah's Witness who distributed literature on the sidewalks of Chickasaw without obtaining the required permit. Asked to leave, she persisted in her activities and was arrested and convicted of criminal trespass.

On appeal to the Supreme Court, Mrs. Marsh contended that the actions of the corporation and the state abridged her rights to freedom of speech and religion guaranteed by the first and fourteenth amendments. Had the sidewalk in question been municipally owned, the prohibition on distribution of religious literature without a permit would clearly have been unconstitutional;[11] hence the question was whether the private ownership of the town placed the actions of Gulf outside the realm of

7. 326 U.S. 501 (1946).

8. *Id.* at 502.

9. "In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation." *Id.* at 503.

10. *Id.* at 502.

11. At the time of the decision in *Marsh*, "liberty" under the due process clause of the fourteenth amendment was deemed to embrace the right of free speech. Stromberg v. California, 283 U.S. 359, 368 (1931); Gitlow v. New York, 268 U.S. 652, 666 (1925). In *Marsh*, the court relied specifically on such cases as Martin v. City of Struthers, 319 U.S. 141 (1943); Schneider v. State, 308 U.S. 147 (1939); and Lovell v. Griffin, 303 U.S. 444 (1938), in which state prohibitions on distributions of literature were overturned. The Court today retains its attitude of strict scrutiny of any governmental regulation of public solicitation. *See* Hynes v. Mayor of Oradell, 425 U.S. 610 (1976).

the fourteenth amendment and compelled a different result.[12] In holding that first amendment principles applied to Chickasaw as to any other municipality, the Court reasoned that since private landowners could not join together, establish a municipal government, and restrict the speech of Mrs. Marsh, it would be anomalous to sanction identical restrictions simply because the town property had a single owner.[13] Dismissing the contention that Gulf's interests were analogous to those of a homeowner in controlling the behavior of guests, the Court stated: "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[14] Although in a balancing of property rights against first amendment rights the latter would have a "preferred position,"[15] the Court had to locate some state involvement in order to bring the constitutional provisions into play.

Justice Black's opinion suggests that the Court relied on two elements to establish the necessary tie with the state. The first was delegation of state power. Noting that private companies regulated by the state could not operate so as to burden interstate commerce, the Court drew an analogy to private burdens on speech.

> We do not think it makes any significant constitutional difference as to the relationship between the rights of the owner and those of the public that here the State, instead of permitting the corporation to operate a highway, permitted it to use its property as a town, operate a 'business block' in the town and a street and sidewalk on that business block.[16]

Put differently, the Court identified the requisite state action as the state's permitting a corporation to govern a community of citizens so as to restrict fundamental liberties.[17]

The Court implicitly suggested a second source of state involvement by pointing out the state's crucial role in the alleged deprivation of rights: the private trespass action against

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12. The restrictions of the fourteenth amendment apply only to states. Civil Rights Cases, 109 U.S. 3 (1883); Virginia v. Rives, 100 U.S. 313, 318 (1879).

13. 326 U.S. at 505.

14. *Id.* at 506. That the property had not been "dedicated" to the public as a matter of state property law was not deemed controlling. *Id.* at 505 n.2.

15. *Id.* at 509.

16. *Id.* at 507.

17. *Id.* at 509.

Mrs. Marsh was enforced through the state criminal trespass statute.[18] It is unclear from the opinion, however, whether the fourteenth amendment came into play only because of the state trespass action or whether Chickasaw's "public function" status was sufficient basis for the finding that Gulf's actions abridged Mrs. Marsh's constitutional rights.[19]

Under either theory, the Court's application of the fourteenth amendment directly to a private entity appeared to signal a major expansion of the state action doctrine,[20] but for some time the effect of *Marsh* was minimal. Lower courts were generally disinclined to extend its rationale beyond the facts of the case.[21] The advent of the shopping center, however, gave the *Marsh* holding new significance. Because a shopping mall serves many of the functions of a central business district, lower

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18. The managers appointed by the corporation cannot curtail the liberty of the press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute literature clearly violates the First and Fourteenth Amendments to the Constitution.

Id. at 508. Whether state enforcement of the discriminatory choices of private parties is alone a sufficient source of state action in first amendment cases is questionable. *See* notes 46-72 *infra* and accompanying text.

19. *See* notes 53-55 *infra* and accompanying text.

20. Before *Marsh*, the most expansive decision on state action was Smith v. Allwright, 321 U.S. 649 (1944), one of the "white primary" cases. There the Court, relying on the fifteenth amendment, held that where Texas statutes made the outcome of a party-conducted primary the determinate of the nominees in the general election, the racially exclusive membership policies of the Texas Democratic Party were state action. At the time of the decision in *Marsh*, Shelley v. Kraemer, 334 U.S. 1 (1948), and Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), still lay ahead.

21. *See, e.g.*, People v. Goduto, 21 Ill. 2d 605, 174 N.E.2d 385, *cert. denied*, 368 U.S. 927 (1961) (parking lot); Watchtower Bible & Tract Soc'y, Inc. v. Metropolitan Life Ins. Co., 297 N.Y. 339, 79 N.E.2d 433, *cert. denied*, 335 U.S. 886 (1948) (no right to distribute religious literature in hallway of apartments within privately owned urban residential community); Good v. Dow Chem. Co., 247 S.W.2d 608 (Tex. Civ. App.), *appeal dismissed*, 344 U.S. 805 (1952) (private park); Hall v. Virginia, 188 Va. 72, 49 S.E.2d 369, *appeal dismissed*, 335 U.S. 875 (1948) (apartment building); *cf.* Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950) (fourteenth amendment does not prohibit racial discrimination in privately owned urban residential community). *But see* Farmer v. Moses, 232 F. Supp. 154 (S.D.N.Y. 1964) (court relied, in part, on *Marsh* to allow NAACP picketing at New York World's Fair); People v. Barisi, 193 Misc. 934, 86 N.Y.S.2d 277 (Magis. Ct. 1948) (court relied on *Marsh* to allow labor picketing at Pennsylvania Railroad Station).

courts were asked to decide whether, without the acquiesence of the owner, there was a right to picket, handbill, or speak, at privately owned shopping centers.[22]

In 1968, the issue came before the Supreme Court in *Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*[23] The case involved a shopping mall in Pennsylvania occupied by two stores at the time of the incidents that gave rise to the case, but planned, and thereafter developed, as a full-scale shopping center. One of the original stores was Weiss Markets, an employer of non-union workers, whose parcel pickup area and parking lot were picketed by the local foodhandlers union. Weiss and Logan Valley Plaza obtained an order enjoining the picketing as a trespass. In an opinion written by Justice Marshall, the Court vacated the injunction and upheld the right to picket on private property. Citing cases that would permit such picketing on municipal property,[24] the Court looked to the nature of the area where the picketing occurred, rather than to its ownership.[25]

The key to the Court's decision was its conclusion that "[t]he shopping center here is clearly the functional equivalent of the business district of Chickasaw involved in *Marsh*."[26] The reasoning in the *Logan Valley* majority opinion tracked that of the earlier case.

> [T]he State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the

22. *See generally* Comment, *The Unions, Free Speech, and the Shopping Center*, 37 So. CAL. L. REV. 573 (1964); 49 VA. L. REV. 1571 (1963). Representative cases include Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers' Union, 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233, *cert. denied*, 380 U.S. 906 (1964); State v. Williams, 37 Lab. Cas. (CCH) ¶ 65,708 (Balt. Crim. Ct. 1959) (noted at 73 HARV. L. REV. 1216 (1960)); Amalgamated Clothing Workers v. Wonderland Shopping Center, Inc., 370 Mich. 547, 112 N.W.2d 785 (1963); and Moreland Corp. v. Retail Store Employees Union Local 444, 16 Wis. 2d 499, 114 N.W.2d 876 (1962).

23. 391 U.S. 308 (1968).

24. *Id.* at 313. The court relied on Teamsters Local 795 v. Newel, 356 U.S. 341 (1958); Bakery Drivers Local 802 v. Wohl, 315 U.S. 769 (1942); AFL v. Swing, 312 U.S. 321 (1941); and Thornhill v. Alabama, 310 U.S. 88 (1940).

25. "[S]treets, sidewalks, parks and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purposes of exercising such rights cannot constitutionally be denied broadly and absolutely." 326 U.S. at 315.

26. *Id.* at 318. Justice Black, the author of the opinion in *Marsh*, dissented from this characterization, pointing out differences between shopping centers and company towns, and emphasizing the constitutional importance of the concept of private property. *Id.* at 327-32.

> premises in a manner and for a purpose generally consonant with the use to which the property is actually put.[27]

As in *Marsh*, the Court did not indicate whether both delegation of authority over property and enforcement through a trespass action were necessary to a finding of state action, or what weight each element had in the ultimate determination. Instead, the Court assumed *Marsh* had settled the state action issue and thus found the functional similarities in public use of the premises dispositive.

Because the picketers were protesting employment practices of a store within the shopping center, their speech was related to the shopping center's business. The Court expressly reserved the question whether the *Logan Valley* holding would also extend to speech unrelated to the uses of the property.[28] That issue came before the Court in 1972 in *Lloyd Corp. v. Tanner*.[29] Lloyd Center was a shopping center in Portland, Oregon, consisting of sixty stores in an enclosed mall. Licensed armed security guards, employed by Lloyd, enforced a general prohibition against distribution of handbills on shopping center property.[30] Anti-Vietnam war leafletters, who were forced to leave the mall on threat of arrest for trespass, brought an action for declaratory and injunctive relief to restrain the enforcement of Lloyd Center's policy against handbilling. In an opinion by Justice Powell, the Supreme Court upheld the prohibition on handbilling as applied to the facts of the case. Relying in part on Justice Black's dissent in *Logan Valley*,[31] the Court distinguished *Lloyd* from *Logan Valley*, stating that in the latter the picketing was directly related to the purpose of the property and there was no other reasonable way to convey the particular message to the intended audience.[32] Since neither factor was present in *Lloyd*,[33]

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27. *Id.* at 319.

28. *Id.* at 320 n.9. Justice White, in dissent, contended that the Court's reliance on analogies to *Marsh* would compel extending constitutional protections to picketing on any issue, since, of course, the content of the speech in *Marsh* was wholly unrelated to the location. *Id.* at 339.

29. 407 U.S. 551 (1972). *See generally The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 122 (1972); Note, *Lloyd Corp. v. Tanner: The Demise of Logan Valley and the Disguise of Marsh*, 61 GEO. L.J. 1187 (1973).

30. The distribution of handbills or pamphlets is, of course, clearly within the scope of the first amendment. Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971).

31. 391 U.S. 308, 327 (1968).

32. 407 U.S. at 562-63. The Court brushed aside the statement in *Logan Valley* that the mall was "the functional equivalent of the business district of Chickasaw, Alabama," as "unnecessary to the decision."

the rights of nonowners to use the property were to be determined in accord with the property owner's wishes—the public was invited to be on the premises for business purposes only, not to use the center for any and all purposes.[34]

II. *HUDGENS v. NLRB:* THE END OF A SHORT ERA

In light of *Lloyd*, a re-evaluation of the *Logan Valley* doctrine was inevitable, and *Hudgens v. NLRB*,[35] decided in

Id. at 562. In dissent, Justice Marshall argued that Lloyd Center was even more public than Logan Valley Plaza; it had more stores, a wider range of services, more roads, and its own security officers. *Id.* at 575. This dissent, joined by Justices Douglas, Brennan, and Stewart, would have applied the *Logan Valley* rationale to any speech in a public meeting area such as a shopping center, regardless of the content of the speech. *Id.* at 584. They found the distinction between *Lloyd* and *Logan Valley* untenable because speech cannot be regulated on the basis of content. *Id.* at 583.

33. *Id.* at 564-67.

34. *Id.* at 565. On this point, Justice Powell relied on Justice White's dissent in *Logan Valley*, 391 U.S. at 338. The repeated reliance in the *Lloyd* opinion on the dissenting opinions in *Logan Valley* clearly signalled the Court's dissatisfaction with *Logan Valley* and thus presaged its outright rejection in *Hudgens*.

In order to underscore the significance of the property rights involved, Justice Powell noted the constitutional basis of the concept of private property, relying both on the due process and "taking" clauses of the fifth amendment. If a taking without just compensation were involved, however, *legislation* allowing public use of private property for speech purposes would be as suspect, if not more so, as a constitutional right to use property for the same purposes. Taken to its logical conclusion, then, the civil rights acts, which similarly limit the allowable uses of private property and mandate the admission of otherwise unwanted persons, *see, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), would require a grant of compensation to the property owner, clearly a position the Court did not intend to take.

On the same day that the Court decided *Lloyd*, however, it also handed down its decision in Central Hardware Co. v. NLRB, 407 U.S. 539 (1972). *Central Hardware* involved labor picketing in the parking lot of a store that was free standing, that is, not part of any shopping center or group of buildings. Again reaffirming that the Constitution does not restrict private action, the Court found the mere fact that the lot was "open to the public" did not create a constitutional right to engage in speech-related activity. Since no arguably central area was present here, as in *Logan Valley*, the Court dismissed the constitutional contentions and remanded for consideration solely in light of labor law principles. This remand indicates that Justice Powell's dicta in *Lloyd* about "just compensation" was not intended to be taken at face value, since such a theory would bear heavily on the NLRB's power to declare the prohibition on picketing an unfair labor practice.

It is interesting to note that at least two state courts interpreted *Lloyd*'s emphasis on property rights as precluding the states from giving greater rights to speak on private property than those given by the Supreme Court. Thus, in Diamond v. Bland, 11 Cal. 3d 331, 521 P.2d 460,

1976, provided the opportunity. Hudgens was the owner of the North DeKalb Shopping Center, an enclosed mall of sixty retail stores in suburban Atlanta. One of the sixty stores was leased and occupied by the Butler Shoe Company, which also owned a warehouse in another part of town. As a result of a labor dispute, the warehouse employees struck Butler and picketed all the Butler retail stores, including the one in the North DeKalb Shopping Center. The picketing took place within the enclosed mall, and the manager of the shopping center threatened the picketers with arrest if they did not leave. The union thereupon filed an unfair labor practice charge against Hudgens which the NLRB upheld, basing its decision on the Supreme Court's holding in *Logan Valley*.[36] The Fifth Circuit affirmed the Board's decision, and the Supreme Court granted certiorari to determine whether access to private property for the purpose of labor picketing was a matter of constitutional law, federal labor law, both, or neither.

After reviewing *Marsh*, *Logan Valley*, and *Lloyd*, the majority, in a remarkable piece of jurisprudential gymnastics, held that despite the painstaking efforts in *Lloyd* to distinguish *Logan Valley* on its facts, the reasoning in the two cases was so inherently incompatible that *Lloyd* could only be read as overruling the earlier case.[37] The essence of the majority opinion in *Hudgens* was that the protection *Logan Valley* gave "related"

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113 Cal. Rptr. 468, *cert. denied*, 419 U.S. 885 (1974), the California supreme court held that to allow unrelated speech (collecting signatures on an anti-pollution initiative petition) in a shopping center, even if based on state law, would unconstitutionally abridge the property rights of the shopping center owner as established in *Lloyd*. A similar result was reached in regard to the activities of the International Society of Krishna Consciousness in Lenrich Assocs. v. Heyda, 264 Ore. 122, 504 P.2d 112 (1972) (noted at 86 HARV. L. REV. 1592 (1973)).

35. 424 U.S. 507 (1976), *vacating and remanding* 501 F.2d 161 (5th Cir. 1974).

36. The Board held that refusal to allow the picketing contravened the holding in *Logan Valley* and constituted an unfair labor practice under section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158 (a)(1) (1970). Hudgens v. Local 315, Retail, Wholesale & Dep't Store Union, 192 N.L.R.B. 671 (1971), and 205 N.L.R.B. 628 (1973).

37. But the fact is that the reasoning of the Court's opinion in *Lloyd* cannot be squared with the reasoning of the Court's opinion in *Logan Valley*.

. . . .

Our institutional duty is to follow until changed the law as it now is, not as some members of the Court might wish it to be. And in the performance of that duty we make clear now, if it was not clear before, that the rationale of *Logan Valley* did not survive the Court's opinion in the *Lloyd* case.

424 U.S. at 518.

speech could not be reconciled with the lack of protection for "unrelated" speech in *Lloyd*. "If a large self-contained shopping center *is* the functional equivalent of a municipality, as *Logan Valley* held, then the First and Fourteenth Amendments would not permit control of speech within such a center to depend upon the speech's content."[38]

While I will argue that the Court's result in *Hudgens* is doctrinally correct, the Court's reasoning is nonetheless disconcerting. *Lloyd*, because it distinguished *Logan Valley*,[39] did not specifically overrule that case and therefore did not discuss its shortcomings. Because in *Hudgens* the Court claimed that *Lloyd* had already overruled *Logan Valley*, it was again unnecessary to explicate the weakness of that case. Thus, somewhere between *Lloyd* and *Hudgens*, *Logan Valley* disappears without a trace. The Court explained only why *Logan Valley* and *Lloyd* cannot co-exist; it failed to analyze why *Lloyd* survives and *Logan Valley* is relegated to history.[40] The untena-

38. *Id.* at 520. This problem had been recognized by Justice White in his dissent in *Logan Valley*. 391 U.S. at 339.

39. 407 U.S. at 560-61.

40. The concurring and dissenting opinions in *Hudgens* reflect some of the problems in the way the majority ended the rule of *Logan Valley*. Justice Powell, in a short concurring opinion joined by the Chief Justice, acknowledged the futility of his attempt in *Lloyd* to distinguish that case from *Logan Valley*. "Upon more mature thought, I have concluded that we would have been wiser in *Lloyd Corp.* to have confronted this disharmony rather than draw distinctions based upon rather attenuated factual differences." 424 U.S. at 524.

Justice White, on the other hand, in his concurring opinion, would have avoided overruling *Logan Valley* by maintaining the distinction between related and unrelated speech and distinguishing *Hudgens* on the ground that the picketing there did not relate to the store that was picketed. *Id.* at 525. In light of his dissent in *Logan Valley*, this failure to join in the majority opinion evidenced some displeasure with the majority's treatment of *Logan Valley*.

Finally, Justice Marshall, in a dissent joined by Justice Brennan, argued that the Court need not have reached the constitutional question. The NLRB, he contended, did not base its decision on the constitutional rule in *Logan Valley*, but rather incorporated the *Logan Valley* principles into its interpretation of the statute. Therefore, he would have affirmed the decision on statutory grounds, as a valid exercise of NLRB power, without addressing the constitutional issue. In addition, however, he objected both to the majority's reasoning and to the result on the constitutional question. Basing his analysis on the theme of effective channels for the communication of ideas, he argued that just as the company in *Marsh* owned the various forums for communication, so the shopping center owner monopolized these same channels of communication and thus became obligated to make them available for the public good. *Id.* at 525-34.

ble distinction between related and unrelated speech that the Court criticized[41] could just as easily have been avoided by affirming *Logan Valley* and reversing *Lloyd*, thereby affirming a constitutional right, regardless of the content of the speech, to picket or handbill at shopping centers and other places that are "functionally equivalent" to the central business district in *Marsh*.[42]

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41. This emphasis on avoiding differing results depending upon the content of the speech in question is one of the major themes of the Burger Court's free speech decisions. *See generally* Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975). Thus, in Erznoznik v. Jacksonville, 422 U.S. 205 (1975), the Court rejected restrictions on drive-in theaters based on the content of the films shown, where it was not alleged that the films were legally obscene. And in Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972), the Court invalidated an ordinance that prohibited picketing at public high schools, but exempted labor picketing, finding this classification by the content of the speech an equal protection violation. *See also* Grayned v. City of Rockford, 408 U.S. 104 (1972).

The majority in *Hudgens* relied extensively on *Erznoznik* and *Mosley*. Justice Marshall, dissenting, was not troubled by differences based on the content of the speech when the basic question was the very applicability of the first amendment, because the "degree to which the private entity monopolizes the effective channels of communication may depend upon what subject is involved." 424 U.S. at 541-42. His view is based upon a primary concern with the availability of means for communicating various ideas and thus is less concerned with the existence of state action as the starting point for first amendment analysis.

The equality principle was weakened somewhat in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), where the Court, in an opinion by Justice Stevens, upheld a Detroit zoning ordinance that placed special zoning restrictions on "adult" bookstores and "adult" motion picture theaters. Although much of the majority opinion is devoted to statements that the equality principle is not absolute, the decision seems to turn on the Court's view that non-obscene sexually oriented speech is less entitled to protection than other more "pure" forms of speech.

42. The case was remanded, however, for consideration of whether, in light of governing statutory principles of labor law, the refusal to allow the picketing was nonetheless an unfair labor practice. The question remaining was whether there was a statutory right to picket on the shopping center's property. Since *Lloyd* had referred to the constitutional basis of the concept of private property, *see* note 34 *supra*, there remained the possibility, albeit remote, that legislation requiring access to private property without compensation to the owner would be deemed unconstitutional. But the Court in *Hudgens* made clear that "statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others." 424 U.S. at 513. Therefore, the Court remanded the matter for a new determination by the NLRB based solely on the appropriate balance between section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1970), which authorizes "concerted activities for the purpose of collective bargaining," and the rights of private property. This

Tracing the treatment of the state action requirement through the four cases is one key to the unelucidated premises of *Hudgens*. Although the *Marsh* and *Logan Valley* discussions of public function implicitly acknowledge that private persons managing private property are not restricted by the first and fourteenth amendments, in neither decision does the Court expressly mention the state action requirement. In both *Lloyd* and *Hudgens*, the Court prefaces its analysis of first amendment rights with the admonition that the Constitution protects only against infringement by the government,[43] but does not discuss the principle in any detail. A clear exposition of the theories by which private property may be so entwined with the state as to impose on the owner of the property the limitation of the first amendment will demonstrate the consistency between *Marsh* and *Hudgens*, and accordingly, the error of the reasoning of *Logan Valley*.

III. STATE ACTION: THE UNDERLYING THEME

While the first amendment traditionally has been viewed as a negative command against government interference with speech,[44] it has also been argued that it is a positive directive requiring the government to facilitate the flow of ideas and information.[45] The touchstone of the negative theory of the first amendment is the state action requirement which, by establishing limits on the reach of constitutional prohibitions, leaves private persons free to "discriminate" against the speech and speech-related activities of others in ways that are forbidden to the government. Underlying the *Hudgens* emphasis on state ac-

basic balancing test, weighing the statutory right to picket (or the right of non-employee organizers to speak or distribute literature) against the rights of private property, derives from NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956), and was reaffirmed by the Court in Central Hardware Co. v. NLRB, 407 U.S. 539 (1972). Thus, while in some circumstances the statutory right to picket or to organize might unconstitutionally infringe upon private property rights, the Court made clear that in general the entire area is one of labor law, not constitutional law, and therefore primary responsibility for the balancing of these interests must rest with the NLRB. *See generally* Zimny, *Access of Union Organizers to "Private" Property*, 25 LAB. L.J. 618 (1974); Comment, *Expanding the Right of Nonemployee Union Organizers to Solicit on Company Property: Industrial Parks and Retail Stores*, 21 BUFFALO L. REV. 451 (1972).

43. Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972); Hudgens v. NLRB, 424 U.S. 507, 513 (1976).

44. Erznoznik v. Jacksonville, 422 U.S. 205 (1975); CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1972).

45. *See* notes 96-103 *infra* and accompanying text.

tion as the necessary first step of analysis in a first amendment case are three important principles concerning free speech and private property. First, state enforcement of private choice does not constitute state action in a first amendment case. Second, private property can be characterized as serving a "public function" and thus within the first and fourteenth amendments only where the property owner has the power to control the flow of information into a community. Third, private property owners are not required to subordinate economic interests or personal preferences to the goal of providing non-owners access to forums for communication.

A. State Enforcement As State Action

Two years after *Marsh*, in *Shelley v. Kraemer*,[46] the Supreme Court held that state court enforcement of a private racially discriminatory choice, there a covenant restricting the sale of neighborhood property to Caucasians, constituted state action for fourteenth amendment purposes. Because this theory of state action seemed to create the potential for encroachments on individual choices regarding privacy, association, or property use,[47] *Shelley* has been seriously criticized, both by those who felt the decision was simply wrong[48] and by those who suggested

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46. 334 U.S. 1 (1948).

47. Perhaps anticipating this objection, the Court in *Shelley* noted that

> the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the amendment have not been violated.

Id. at 13. "Voluntary adherence" is an empty concept, however. If in *Shelley* the neighboring landowners had erected a wall around the property so that the purchasers could not enter, and the purchasers had brought suit to be allowed entrance to their own property, the Court presumably would have held that recognition of the covenant as a defense came within the *Shelley* rule. *Cf.* Clifton v. Puente, 218 S.W.2d 272 (Tex. Civ. App. 1948) (court's denial of judgment for purchasers in action for title and possession on basis of racially restrictive covenant constitutes state action). *But cf.* Rice v. Sioux City Memorial Park Cemetery, 245 Iowa 147, 60 N.W.2d 110 (1953), *aff'd by an equally divided Court*, 348 U.S. 880 (1954), *vacated and cert. dismissed as improvidently granted*, 349 U.S. 70 (1955) (recognition by court of racially restrictive covenant as defense in damage action is not unconstitutional state action). Since the purpose of the covenant is to create legal rights and duties, the inherent validity of the covenant is meaningless without legal recognition of the "right."

48. *See, e.g.*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 29-31 (1959); *cf.* Kurland, *The Supreme Court,*

more principled[49] routes to the same result.[50] The Court, for its part, has been wary of extending *Shelley* beyond its facts.[51]

1963 Term—Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government," 78 HARV. L. REV. 143, 148 (1964) (describing *Shelley* as "constitutional law's *Finnegan's Wake*").

49. Cases like *Shelley*, of course, become unprincipled only in retrospect. The Court did not deliver a truly unprincipled opinion of the variety: "We like Shelley; we don't like Kraemer; therefore, Shelley wins." *Shelley* became an unprincipled decision because its underlying principle could not be, and in fact was not, extended to other situations, such as wills, trusts, and sit-ins, seemingly encompassed by the principle stated by the Court. *See* note 51 *infra*.

50. *See, e.g.*, Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967) (application of the equal protection clause to racial discrimination implies an affirmative obligation on the part of the state not necessarily present in other areas); Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962) (emphasis should not be on state action aspects of *Shelley* but on balancing the right to equality against countervailing rights of liberty and privacy); Horowitz, *The Misleading Search for "State Action" under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957) (assume state action in judicial enforcement but then balance rights of the parties); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960) (*Shelley* should have been decided on the basis of the state's delegation to private parties of the zoning power, an inherently governmental function); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959) (the real distinguishing feature of *Shelley* is that the state was not assisting A's right to discriminate, but rather was assisting A to require that B, C, and D discriminate); Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966) (the words "equal protection of the laws" imply an affirmative obligation on the part of the state); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961) (assume state action in judicial enforcement but then balance rights of various interested parties); Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963) (similar).

The reasoning of the *Shelley* court did have a few defenders, *e.g.*, Carl, *Reflections on the "Sit-Ins"*, 46 CORNELL L.Q. 444 (1961); Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases*, 16 U. CHI. L. REV. 203 (1949).

51. Evans v. Abney, 396 U.S. 435 (1970), in which the Court refused to strike a racially restrictive provision in the will of Senator Bacon so as to allow a park to be continued as a public park, seemed to foreclose the possibility that *Shelley* would require review of such enforcement as state action. *But cf.* Pennsylvania v. Brown, 392 F.2d 120 (3d Cir.), *cert. denied*, 391 U.S. 921 (1968) (court substitution of individual for municipal trustees in order to carry out racial exclusion was unconstitutional state action). *See also* Gordon v. Gordon, 332 Mass. 197, 124 N.E.2d 228, *cert. denied*, 349 U.S. 947 (1955). *See generally* Adams, *Racial and Religious Discrimination in Charitable Trusts: A Current Analysis of Constitutional and Trust Law Solutions*, 25 CLEV. ST. L. REV. 1 (1976); Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of*

In *Marsh*, Justice Black noted that "a state statute . . . which enforces such action [of excluding the Jehovah's Witnesses] by criminally punishing those who attempt to distribute literature clearly violates the First and Fourteenth Amendments to the Constitution."[52] Criminal trespass laws are not per se unconstitutional. Had Mrs. Marsh been excluded on the ground that she drove recklessly through the central business district, or was managing an illegal gambling establishment, and the exclusion had been enforced by the state criminal trespass laws, no constitutional issue would have been presented. Since Mrs. Marsh was excluded solely at the behest of the private owner, and no state official or agency was involved in the decision, the issue was whether state action, in the fourteenth amendment sense, arises when the state enforces a private choice which, *if made by the state*, would violate the first amendment. Thus, the opinion appeared to suggest a rule similar to that in *Shelley*—that one source of state action was the use of a state statute and state courts to prosecute trespassers such as Mrs. Marsh.

Stephen Girard, 66 YALE L.J. 979 (1957); Shanks, *"State Action" and the Girard Estate Case*, 105 U. PA. L. REV. 213 (1956).

Similarly, the Court's refusal to face the enforcement-as-state-action issue in the sit-in cases reflects disenchantment with the possibilities *Shelley* opened up. *See* Bell v. Maryland, 378 U.S. 226 (1964); Peterson v. City of Greenville, 373 U.S. 244 (1963); Lombard v. Louisiana, 373 U.S. 267 (1963). *See generally* Carl, *supra* note 50; Haber, *Notes on the Limits of Shelley v. Kraemer*, 18 RUTGERS L. REV. 811 (1964); Lewis, *The Sit-In Cases: Great Expectations*, 1963 SUP. CT. REV. 101; Schwelb, *The Sit-In Demonstration: Criminal Trespass or Constitutional Right?*, 36 N.Y.U.L. REV. 779 (1961).

The most recent attempt to revitalize the *Shelley* rationale has been in the procedural due process area. As a result of recent cases such as Fuentes v. Shevin, 407 U.S. 67 (1972), and Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), holding unconstitutional various state procedures for pre-judgment attachment and garnishment, it has been suggested that Article 9-503 of the Uniform Commercial Code, or similar state statutes, are unconstitutional because they permit self-help repossession without notice or hearing to the debtor. This theory has, for the most part, met with little acceptance by the courts. *See, e.g.*, Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974). *See generally* Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 46 S. CAL. L. REV. 1003, 47 S. CAL. L. REV. 1 (1973); Dunham, *Due Process and Commercial Law*, 1972 SUP. CT. REV. 135; Spak, *The Constitutionality of Repossession by Secured Creditors Under Article 9-503 of the Uniform Commercial Code*, 10 HOUS. L. REV. 855 (1973); Yudof, *Reflections on Private Repossession, Public Policy and the Constitution*, 122 U. PA. L. REV. 954 (1974).

52. 326 U.S. at 508.

A few commentators read *Marsh* as lending itself to that interpretation.[53] Most, however, concluded that *Marsh* was grounded on the principle that private entities exercising government-like powers came within the purview of the fourteenth amendment.[54] In *Shelley* itself, the Court made only oblique reference to *Marsh* in the state action discussion.[55] The decision in *Logan Valley*, however, with its mirror-image revival of the *Marsh* rationale, once again raised the possibility that by analogy to *Shelley*, state enforcement of a private choice restricting the speech of others would require review of that choice under constitutional standards.[56]

The issue of state enforcement did not arise in *Hudgens* since the appellees had not been arrested or charged.[57] The

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53. *See* Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion of Economic Power*, 100 U. PA. L. REV. 933 (1952); 44 MICH. L. REV. 848 (1948) [hereinafter cited as Comment].

54. *See, e.g.*, Van Alstyne & Karst, *supra* note 50, at 45; Lewis, *supra* note 50, at 1116; Note, *Applicability of the Fourteenth Amendment to Private Organizations*, 61 HARV. L. REV. 344 (1948); Comment, *supra* note 53.

> 55. Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the state which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. Cf. *Marsh v. Alabama*, 326 U.S. 501 (1946).

Shelley v. Kraemer, 334 U.S. 1, 22 (1948).

> 56. It has been suggested that whenever a state court is presented with a choice one resolution of which would serve to prevent racial discrimination, the fourteenth amendment subjects to review as state action the choice of the other resolution. If, analogously, the individual's right to be free of unconstitutional infringement of first amendment expression runs against any state choice not to vindicate the free exercise of that expression, then *Logan Valley* may bar a state court from aiding private action that threatened to infringe free speech as effectively as did the injunction issued by the state in this case.

The Supreme Court, 1967 Term, 82 HARV. L. REV. 63, 133 (1968). *See also* Johnson & Westen, *A Twentieth-Century Soapbox: The Right to Purchase Radio and Television Time*, 57 VA. L. REV. 574, 596-97 (1971); Comment, *Constitutional Law: Shopping Center Not Open to First Amendment Activity Unrelated to Use*, 57 MINN. L. REV. 603, 605 (1973).

57. In *Hudgens*, the picketers left the mall after being threatened with arrest. No charges were actually brought. Hudgens v. NLRB, 424 U.S. 507, 509 (1976). *But see* Johnson & Westen *supra* note 56, at 597 (arguing that result would have been the same in *Logan Valley* even

Court's firm stand in favor of the rights of property owners to determine to what extent and for what purposes their holdings are open to the public[58] would, however, be inconsistent with application of a *Shelley*-type state action rule. The worth to an individual of the right to make any choice about the use of property or to take any action depends on the power of the state to ensure the effectiveness of that action. Thus, if enforcement of a private choice neither required nor encouraged by the state makes the substance of the choice reviewable as state action, the line between private action and state action disappears entirely, and private decisionmaking is circumscribed by the same constitutional limitations imposed on public decisionmaking.[59]

Even assuming that with regard to racial discrimination the dangers of treating state enforcement as state action are outweighed by necessity,[60] matters concerning freedom of speech bring different values into play. Private choices based on the content of speech are not, unlike racially discriminatory choices,[61] viewed by society as inherently evil. Rather, individ-

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if private guards had removed the picketers and they had subsequently sued the owners of the shopping center).

58. *See* note 34 *supra* and accompanying text.

59. Advocates of the *Shelley* rule and an expansive doctrine of state action in race discrimination cases contend that the "private" decisionmaking affected would be only that which had some impact on public life. Thus, refusal to serve black patrons in a restaurant would be "state action" subject to the fourteenth amendment—choice of dinner guests would not be. *See*, Black, *supra* note 50, at 100-03; Henkin, *supra* note 50, at 487-96.

60. Although the fourteenth amendment does not expressly prohibit private racial discrimination, it has been argued that the ultimate goal of the amendment must be to eliminate all racial discrimination, whether by the government or by private citizens. *See* Black, *supra* note 50. Probably for this reason, courts have consistently been more likely to find state action, and thus violations of the fourteenth amendment, in cases involving racial discrimination than in cases where race is not an issue.

> The doctrine of state action developed primarily in the area of racial discrimination. . . . The concepts developed in this area, explicitly supported by constitutional and legislative mandates, were necessarily broadly drawn in order to implement Congressional intent in circumstances of positive and frequent state obfuscation and delay. The potentially explosive impact of the application of state action concepts designed to ferret out racially discriminatory policies in areas unaffected by racial considerations has led courts to define more precisely the applicability of the state action doctrine.

Greco v. Orange Mem. Hosp. Corp., 513 F.2d 873, 879 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975) (citations omitted).

61. *See* Runyon v. McCrary, 427 U.S. 160 (1976); Norwood v. Harrison, 413 U.S. 455, 469 (1973). Rawls argues that because the desire

ual decisions about speech—preferring some ideas and information to others, placing one's property at the service of some ideologies and not others—are central to the concept of a marketplace of ideas. Ideas fail or succeed according to their ability to win support in free public debate.[62] A private person participates in that debate when he contributes the use of his property to the proponents of certain ideas; that is an act of advocacy as surely as if he were disseminating the ideas himself.

If private persons were held to the same rigid standards the state must observe in limiting speech, an owner could impose restrictions only as to the "time, place, and manner"[63] of the activity and could not discriminate according to the substance of the ideas.[64] Whether the owner's decisions in this respect were reasonable would be determined by balancing the interests of the would-be speaker against those of the property owner.[65] Where the property was open to the public, the speaker would prevail unless his activity interfered with the use to which the property was put.[66] A court, not the owner, would determine whether

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to discriminate is not a "right," it is entitled to no value in the ordering of society. J. RAWLS, A THEORY OF JUSTICE 30-31 (1971).

62. Free speech has occupied an exalted position because of the high service it has given our society. Its protection is essential to the very existence of a democracy. The airing of ideas releases pressures which otherwise might become destructive. When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.

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

63. *See, e.g.*, Adderly v. Florida, 385 U.S. 39 (1966); Cox v. Louisiana, 379 U.S. 536 (1965).

64. *See* Erznoznik v. Jacksonville, 422 U.S. 205 (1975).

65. Such a balancing test is applied where a statute or ordinance restricts the right of speech. *See, e.g.*, Konigsberg v. State Bar, 366 U.S. 36 (1961); Schneider v. State, 308 U.S. 147 (1939). Whether the test is an appropriate mode of first amendment analysis has been disputed, *see generally* Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962), but for purposes of this Article, the merits of balancing per se are not relevant. *Marsh* is often cited as a balancing case, *see* Edwards v. Habib, 397 F.2d 687, 695-96 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969); Johnson & Weston, *supra* note 56, at 596-97. In *Marsh* the Court applied the same balancing test to the corporation's acts as it would to a municipality, for the Court had already determined that Gulf should be treated like any other city government.

66. *See* Comment, *supra* note 56, at 608 n.26 (describing a series of California cases in which such a test was applied to activity on private property).

there was such interference. In short, an owner subject to the limits of the first amendment could not, on the basis of content alone, deny the use of his property to proponents of ideas the propagation of which he found personally repugnant or commercially disadvantageous.

The first amendment, however, was not intended to force such neutrality on private persons. Indeed, the ideals of free public debate and a marketplace of ideas presume that there will be partisanship and preference for some ideas over others. The first amendment works only to prohibit the *government* from suppressing speech because of its content.[67] When a state court enforces a property owner's decision to bar some speech-related activity it does not determine that in the eyes of the *state* the excluded ideas have less merit than those which the property owner allows.[68] Rather, without directing or encouraging any particular choice,[69] the court preserves the owner's ability to make—and act on—his own decision about the merits of competing ideas. Since the first amendment does not assure that

67. CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973); Public Utils. Comm'n v. Pollack, 343 U.S. 451 (1952).

68. Judge Coffin of the First Circuit has suggested a definition of "neutrality" which allows a principled distinction between the application of the *Shelley* rule in racial cases and in speech cases. A state court is neutral, he reasons, unless it must be made privy to a discriminatory purpose in order to determine the validity of a claim. Lavoie v. Bigwood, 457 F.2d 7, 11 (1st Cir. 1972). Thus, in *Shelley*, in order to rule that the covenant had been breached, the pleadings had to assert the race of the buyers. In contrast, in a case such as *Hudgens*, the land owner's motive for bringing a trespass action is irrelevant and need never be brought before the court. Judge Coffin acknowledged that "[w]hile not exactly satisfactory, this approach at least recognizes conscious state involvement without insisting upon an unattainable purity." *Id.* at 12.

69. In CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1972), the Court held that FCC licensing was not sufficient to make the network policy of refusing political advertising state action in violation of the first amendment. The FCC did not foster the policy in question, but merely failed to require networks to accept such ads. Similarly, in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), the Court ruled that issuance of a liquor license by the Pennsylvania Liquor Authority was not state encouragement that would render the private club's racially discriminatory membership policies state action under the fourteenth amendment. The only relief granted to the *Moose Lodge* plaintiffs was an injunction against enforcement of a Liquor Control Board regulation which required that "[e]very club licensee shall adhere to all of the provisions of its Constitution and By-Laws." In enforcing the rule, the state agency would require the club to choose members on the basis of race. Thus the Court stated, "*Shelley v. Kraemer* . . . makes it clear that the application of state sanctions to enforce such a rule would violate the Fourteenth Amendment." *Id.* at 179.

everyone has a right to speak whenever or wherever he chooses,[70] or to force others to listen to his ideas[71] or contribute use of property to their support,[72] the courts in upholding the private right to select among sources of information and ideas do no more than enforce the ground rules of public debate and protect an element of first amendment freedom as important as the right to speak.

B. PUBLIC FUNCTION

All individual acts are done with the permission of the state in the sense that the state permits that which it does not prohibit.[73] Corporations, since they are creatures of the state,[74] act with the state's positive encouragement as well. While a doctrine that finds state action in all corporate decisions must be rejected in order to preserve the distinction between public and private action,[75] there are activities which, when performed by private entities, appear to involve a more specific state delegation of power than do the normal activities of the private sector. There is a strand[76] of state action analysis which recognizes that the state's delegation of governmental functions to private

70. *See* Adderly v. Florida, 385 U.S. 39, 47-48 (1966).

71. *See* Lehman v. Shaker Heights, 418 U.S. 298 (1974); Kovacs v. Cooper, 336 U.S. 77, 88-89 (1949).

72. *See* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974). In *Lloyd*, Justice Marshall noted in dissent that the shopping center had allowed the American Legion, a group that presumably had a political view opposed to the anti-war demonstrators who sought access, to use the facilities. 407 U.S. at 579 n.3. It is surely reasonable to characterize the decision of the shopping center owner to furnish a forum for the American Legion and bar the anti-war leafletters as a form of advocacy or expression, an act which ought to be protected by the first amendment.

73. "But the state can be said to authorize all conduct that it does not prohibit, and in this sense the state is 'involved' in all private conduct that it does not condemn." Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 55. *See also* Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935).

74. *See* Berle, *Constitutional Limitations on Corporate Activities—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952); Friedmann, *Corporate Power, Government by Private Groups, and the Law*, 57 COLUM. L. REV. 155 (1957).

75. *See* text accompanying note 59 *supra*.

76. In light of the various theories of state action put forth in the cases, it is impossible to say that there is any one theory which predominates, or that there is some "standard" state action doctrine. The public function doctrine discussed here, however, is rarely combined with any of the other theories.

parties may constitute state action even where the state is not actively involved in the private party's challenged act. The origin of the theory is commonly attributed to *Marsh*, where Justice Black suggested that the necessary connection with the state could be found in the similarities between the company town of Chickasaw, Alabama, and any other conventionally organized municipality and in the state's permitting a corporation "to govern a community of citizens."[77] Cases following *Marsh* present the public function theory more clearly. Thus, in *Evans v. Newton*,[78] the Court, in an opinion by Justice Douglas, stated that certain activities, such as controlling public parks, elections, and transit systems, may be so inherently governmental that even in private hands they are the activities of the state.[79]

Like other theories of state action, however, the "governmental function" theory may prove too much, since there are many private activities that might be characterized as public or government-like.[80] The task at first is to identify the functions that can support a finding of state action.[81] Clearly, any test based on the "importance" or "fundamental" nature of an activity is incapable of application as well as analytically unsound, since there is no basis in logic or in history to attribute to the state all important or fundamental societal functions.[82] It

77. 326 U.S. at 509. The Court seems to be implicitly adopting a view, most often associated with Jeremy Bentham, that property exists solely because the government protects it, and without governmental protection there is no property. J. BENTHAM, THEORY OF LEGISLATION, PRINCIPLES OF THE CIVIL CODE 111-13 (7th Hildreth ed. 1891). By this theory, use of property can be deemed governmental action, since the right to use the property derives from permission. In contrast, if property exists by some right of natural law, the use of property is not a matter of the state's grace, and the state is less involved in any particular use of private property. *See* J. LOCKE, TREATISE ON CIVIL GOVERNMENT ch. V, at 18-34 (Sherman ed. 1937). *See generally* B. ACKERMAN, ECONOMIC FOUNDATIONS OF PROPERTY LAW (1975).

78. 382 U.S. 296 (1966).

79. *Id.* at 302.

80. Schools, corporations, labor unions, and trade associations are examples. *See* Wellington, *The Constitution, the Labor Union, and "Governmental Action,"* 70 YALE L.J. 345 (1961).

81. The inquiry is similar to distinguishing between the government and proprietary functions of the state in tort law. *See* Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375 (1958). For a tort law analysis of *Marsh, Logan Valley, Lloyd*, and *Hudgens*, see Schwartz, *A Landholder's Right to Possession of Property Versus a Citizen's Right of Free Speech: Tort Law as a Resource for Conflict Resolution*, 45 U. CIN. L. REV. 1 (1976).

82. In Jackson v. Metropolitan Edison, 419 U.S. 345 (1974), a procedural due process case based on a termination of electric services with-

would be absurd, for example, to label all activities of physicians or attorneys state action because their services are important to their communities.[83] Similarly, while education is of fundamental importance,[84] the actions of private schools are not necessarily state action.[85] A privately owned utility, regulated and licensed by the state as a monopoly, does not exercise powers "traditionally associated with sovereignty."[86] Perhaps the best rule would be to characterize as public functions those powers which are *inherently* governmental. When a private entity exercises powers that are traditionally performed only by the state, it is reasonable to apply constitutional standards to that entity's acts.[87] Viewed in this light, the rule in *Marsh* survives *Hudgens*. Operating an entire town can, without undue difficulty, be described as an inherently governmental function; Gulf wielded many of the powers of a sovereign over the lives of its citizens. Imposing constitutional restrictions on the company's conduct served the first amendment goal of protecting citizens from potential abuses of governmental power.

It is easy to see how the Court got off the right track in *Logan Valley*. Justice Marshall drew the analogy to *Marsh* on the theory that since the shopping center was the functional equivalent of the business block in Chickasaw, ownership of

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out a notice or hearing, the petitioner argued that the "essential" nature of the utility service provided by Metropolitan Edison made its activities state action. *Id.* at 352. The Court declined to expand the doctrine into "a broad principle that all businesses 'affected with a public interest' are state actors in all their actions." *Id.* at 353. *Cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

83. Jackson v. Metropolitan Edison, 419 U.S. 345, 354 (1974).

84. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

85. The Court impliedly rejected this argument in Evans v. Newton, 382 U.S. 296, 300 (1966). Private schools are, however, within the scope of 42 U.S.C. § 1981 (1970), enacted under the authority of the thirteenth amendment, and may not, if they seek their students from among the general public, forbid admission to black students on racial grounds. Runyon v. McCrary, 427 U.S. 160 (1976).

86. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974).

87. "[W]hen a state permits this kind of private activity it must couple the permission with certain restrictions. If these are not supplied, the Court will supply them under the fourteenth amendment." Lewis, *supra* note 50, at 1097. In Terry v. Adams, 345 U.S. 461 (1953), for example, the Court found that the all-white Jaybird primary was, with the acquiescence of the state, operating to deny black citizens the right to vote. Analogies chosen from *Terry*, however, must take account of the fact that it was a decision based on the *fifteenth* amendment, which may require greater affirmative duties from the states than does the fourteenth. *See* Lewis, *supra* note 50, at 1093-96. *But see* Note, *supra* note 54, at 344.

roads, sewers, and surrounding areas was irrelevant.[88] On the contrary, Gulf's ownership of the roads and sewers was centrally important, for its totality of ownership was clear evidence of its totality of government-like power. As a consequence of that power, Gulf could control the flow of information to Chickasaw's citizens. The modern shopping center, although it may be a public meeting place, does not fulfill an inherently or even traditionally governmental role; its owners cannot be said to exercise powers equivalent to those of the state.[89] More important, since the owner of the shopping center does not govern an entire community, he cannot, like Gulf, cut off citizen access to information. The analogy between *Logan Valley* and *Marsh* fails precisely at this point, because the *Logan Valley* property owner could not limit the kinds of information and ideas that entered the community at large.[90]

Logan Valley would be correct only if one of the following were true: (1) state action is unnecessary in first amendment adjudication; (2) providing a central meeting place is an inherently governmental function; (3) a shopping center owner is able to deny customers the right to hear views of which he disapproves. The first proposition is clearly untenable.[91] The

88. 391 U.S. at 318-19.

89. This is the distinction between the company town and the residential private government. *See generally* Reichmann, *Residential Private Governments: An Institutional Survey*, 43 U. CHI. L. REV. 253 (1976).

90. The migrant labor camps may prove to be the true test of the continuing validity of the *Marsh* "company town" holding. *See* Illinois Migrant Council v. Campbell Soup Co., 519 F.2d 391 (7th Cir. 1975); Peterson v. Talisman Sugar Corp., 478 F.2d 73 (5th Cir. 1973); Associacion de Trabajadores Agricolas de Puerto Rico v. Green Giant Co., 376 F. Supp. 357 (D. Del. 1974), *aff'd*, 518 F.2d 130 (3d Cir. 1975); Velez v. Amenta, 370 F. Supp. 1250 (D. Conn. 1974); Franceschina v. Morgan, 346 F. Supp. 833 (S.D. Ind. 1972); Folgueres v. Hassle, 331 F. Supp. 615 (W.D. Mich. 1971); Agricultural Labor Rel. Bd. v. Superior Court, 16 Cal. 3d 430, 546 P.2d 713, 128 Cal. Rptr. 209 (1976); United Farm Workers v. Superior Court, 14 Cal. 3d 902, 537 P.2d 1237, 122 Cal. Rptr. 877 (1975); State v. Fox, 82 Wash. 2d 289, 510 P.2d 230, *cert. denied*, 414 U.S. 1130 (1973). *See generally* Note, *First Amendment and the Problem of Access to Migrant Labor Camps After Lloyd Corporation v. Tanner*, 61 CORNELL L. REV. 560 (1976); Note, *Access to Farms as Mandated by the United States Constitution and By Action of the California Board of Agricultural Labor Relations*, 8 SW. U.L. REV. 165 (1976); Comment, *Toward a Constitutional Right of Access to Migrant Labor Camps*, 29 RUTGERS L. REV. 972 (1976); Comment, *The Bill of Rights, State Action, and Private Migrant Labor Camps*, 1976 UTAH L. REV. 214.

91. The Court's treatment of *Marsh* in the *Hudgens* opinion is somewhat curious on this point.

> It is, of course, a commonplace that the constitutional guar-

second, opening the door for any school, library, or parking lot to be deemed a public function, is too broad.[92] The third is clearly against the common sense of our experiences. The owner of a mall is unlikely to control community newspapers, or radio and television stations, or the speakers in public parks and streets. Only to the extent that a state acquiesces in a private party's control over *all* forums for speech, as in *Marsh*, will the owner's ability to control the speakers and the content of speech on his property be subject to first amendment restrictions.

In so constricting the meaning of public function for speech cases, *Hudgens*[93] contradicts the contention that an owner who opens property to the public for commercial purposes has voluntarily relinquished any claim to privacy or exclusivity of use.[94] In *Lloyd*, the Court clearly stated its view that the interests of property owners need not be abrogated in order to serve the interests of would-be communicants.

> 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 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. . . .

> antee of free speech is a guarantee only against abridgment by government, federal or state. . . . Thus, while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself.
>
> This elementary proposition is little more than a truism. But even truisms are not always unexceptionably true, and an exception to this one was recognized almost 30 years ago in the case *Marsh v. Alabama*, . . .

Hudgens v. NLRB, 424 U.S. 507, 513 (1976) (citations omitted). If the Court is hinting that there was no basis for a state action finding in *Marsh*, it would also have to disavow other "public function" cases such as Evans v. Newton, 382 U.S. 296 (1966) and Terry v. Adams, 345 U.S. 461 (1953). It seems more likely, therefore, that *Marsh* was exceptional as the rare case in which a private corporation was sufficiently like a government to be subject to constitutional restrictions.

92. *See* Evans v. Newton, 382 U.S. 296, 319-22 (1966) (Harlan, J., dissenting).

93. It is more accurate to say that *Lloyd* and *Hudgens* taken together indicate the parameters of the property owner's control. *Hudgens* merely declared that since *Lloyd* and *Logan Valley* were incompatible, the latter case was overruled. *See* notes 37-38 *supra* and accompanying text. In *Lloyd*, the Court more clearly indicates its views about private property and free speech. *See* note 94 *infra* and accompanying text.

94. For an expression of that view, see Johnson & Weston, *supra* note 56, at 610-11.

> [T]he Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The Framers of the Constitution certainly did not think these fundamental rights of a free society are incompatible with each other. There may be situations where accommodations between them, and the drawing of lines to assure due protection of both, are not easy. But on the facts presented in this case, the answer is clear.[95]

C. Access to Channels of Communication

The *Hudgens* Court's implicit rejection of a *Shelley*-type state action rule[96] and its severely limited definition of public function[97] are significant in their relation to the recent first amendment controversy over government-enforced access to channels of communication. Proponents of the access theory, most notably Professor Barron,[98] argue that because the right to speak is an empty formalism without the concomitant right to make one's voice heard, the first amendment must be read as protecting the right to use effective means of communication.[99] The underlying premise of the theory is that concentration of media control in a few hands[100] prevents presentation of diverse viewpoints and inhibits the informed public debate that the first amendment is intended to foster.[101]

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95. Lloyd Corp. v. Tanner, 407 U.S. 551, 569-70 (1972).

96. *See* notes 58-72 *supra* and accompanying text.

97. *See* notes 88-95 *supra* and accompanying text.

98. Barron, *Access—The Only Choice for the Media?*, 48 Texas L. Rev. 766 (1970); Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 Geo. Wash. L. Rev. 487 (1969); Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641 (1967). *Cf.* Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C.L. Rev. 1 (1973).

99. *See, e.g.*, Johnson & Westen, *supra* note 56. For a thorough listing of literature on the subject, see Lange, *supra* note 98, at 2 n.5, 5 n.21.

100. There has been much commentary about concentration in the communications industry and about the effect of that concentration on the flow of ideas and information. *E.g.*, Daniel *Right of Access to Mass Media—Government Obligation to Enforce First Amendment?*, 48 Texas L. Rev. 783 (1970); Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 Harv. L. Rev. 768 (1972); Loevinger, *Free Speech, Fairness and Fiduciary Duty in Broadcasting*, 34 L. & Contemp. Prob. 278 (1969); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 Minn. L. Rev. 67 (1967); *Media and the First Amendment in a Free Society*, 60 Geo. L.J. 867 (1972); Note, *Conflict Within the First Amendment: A Right of Access to Newspapers*, 48 N.Y.U.L. Rev. 1200 (1973); Note, *Free Speech and the Mass Media*, 57 Va. L. Rev. 636 (1971).

101. *See* Barron, *Access to the Press*, *supra* note 98.

According to this affirmative view of the first amendment, when a newspaper sells advertising space or a broadcast network sells air time to some groups and not others, it infringes the first amendment rights of those excluded. Advocates of access relied heavily on *Marsh* and *Logan Valley* for theories of state action that would translate the actions of private media-controlling persons into governmental action subject to the restrictions of the free speech guarantee. Thus, the public function doctrine was used to argue that newspapers enjoying a monopoly position in an area of vital public concern were engaged in state action and thus were barred from making content a criterion for rejection of advertising.[102] Similarly, the FCC's role in licensing and regulating broadcasting and judging disputes between broadcasters and access seekers was analogized to the enforcement role of state courts in *Marsh* and *Logan Valley*.[103] The arguments had varied success in lower courts.[104]

Twice before *Hudgens* however, the Supreme Court considered and rejected a right of access to print and broadcast media. In *CBS v. Democratic National Committee*,[105] the Court held that the refusal of the network, an FCC licensee that accepted paid commercial advertising, to run a paid political advertisement did not violate first amendment rights. In *Miami Herald v. Tornillo*,[106] the Court declared unconstitutional a state right-to-reply statute that required newspapers to give space to political candidates whom it had criticized personally. *Hudgens*, denying the right of access to a public forum and repudiating *Logan*

102. *See, e.g.*, Chicago Joint Bd. Amal. Cloth. Workers v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); Resident Participation of Denver, Inc. v. Love, 322 F. Supp. 1100 (D. Colo. 1971). *See also* Lange, *supra* note 98, at 25-26.

103. *See* Business Exec. Move for Vietnam Peace v. FCC, 450 F.2d 642 (1971), *rev'd sub nom.* CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973); Johnson & Westen, *supra* note 56, at 597.

104. In Business Exec. Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971), *rev'd sub nom.* CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973), the court of appeals held that the relationship between the FCC and the networks was sufficient to find that the networks' actions were to be reviewed under constitutional standards. In Resident Participation of Denver, Inc. v. Love, 322 F. Supp. 1100 (D. Colo. 1971), and Chicago Joint Bd. Amal. Cloth. Workers v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971), the courts found the analogies to *Marsh* and *Logan Valley* untenable, holding that newspapers are not open to the public and furthermore that control of a method of reaching an audience did not transmute a private corporation into a government entity.

105. 412 U.S. 94 (1973).

106. 418 U.S. 241 (1974).

Valley, represents the last step in the rejection of the affirmative view of the first amendment. In one sense, *Hudgens* is a more sweeping denial of access than either the television or newspaper cases. In *CBS*, the Court concluded that because the network, under the "fairness doctrine,"[107] already had an obligation to present all sides of controversial issues, there was no infringement of the Committee's freedom of speech in the FCC's failure to order networks to accept paid political ads in addition to their own coverage. In *Miami Herald*, the Court viewed the reply statute as a vehicle for the state's telling a newspaper what to print, thus infringing the rights of the independent press explicitly protected by the first amendment.[108]

In contrast to these preferred rights under the first amendment, in *Hudgens*, only the less-preferred right of property[109] weighed against the picketers' right of free speech. Moreover, members of the Court have noted on other occasions that for an ordinary citizen without financial backing the handbill, pamphlet, or street corner speech are the only available means of reaching an audience.[110] Although public parks, sidewalks, and streets are still open to the exercise of first amendment rights, in many parts of the country the shopping mall is the real center of the community.[111] *Hudgens*, therefore, takes away, except at

107. *See* Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969).

108. There has been considerable debate among commentators as to whether the separately specified freedom of the press in the first amendment calls for different approaches in matters touching freedom of the press than in matters concerning other forms of speech. *Compare* Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975) *and* Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631 (1975) *with* Lange, *The Speech and Press Clauses*, 23 U.C.L.A.L. REV. 77 (1975). This distinction, however, whether or not accepted, is not central to the analysis in this Article, except to the extent that it may provide an independent basis for some of the recent cases rejecting the concept of a right of access to means of communication.

109. *See* Marsh v. Alabama, 326 U.S. 501 (1946). In the court's analysis of *Hudgens*, only property rights of the owner were at issue. A fuller analysis, however, would have recognized that the owner's rights involved more than just physical power, and that the allocation of use of property by the owner could have been an exercise of speech-related interests. *See* text accompanying notes 60-72 *supra*.

110. *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 570 (1972) (Marshall, J., dissenting); Kovacs v. Cooper, 336 U.S. 77, 102 (1949) (Black, J., dissenting).

111. In *Logan Valley*, for example, the majority cited statistics indicating that the population shift from cities to suburbs has been accompanied by growth in the number of shopping centers and their proportion of retail sales. 391 U.S. at 324 (1968).

the grace of the mall owner, the forum through which a less affluent speaker could reach the largest audience. From the speaker's point of view, *Hudgens* undermines freedom of speech and the ideal of a marketplace of ideas, since, quite literally, no ideas or information not approved by the property owner are allowed to enter the marketplace. Nevertheless, from the point of view of the property owner—and the community—such restrictions are necessary to preserve the vitality of the free speech guarantee.

The ideal of the first amendment is that prohibiting governmental suppression of speech will result in vigorous public debate and an informed citizenry weighing the merits of competing viewpoints. The Constitution does not, however, mandate that everyone participate in this process,[112] nor does it require private property owners to subordinate personal or economic interests to the service of the ideal.[113] Moreover, the first amendment as we know it could not permit government-directed right of access, whether to television, newspapers, or physical locations for speech and speech-related activity. As the Court noted in *CBS*, enforcement of such a right with regard to broadcasting or newspapers would require government involvement in day-to-day editorial and managerial decisions.[114] If the goal of access is presentation of diverse and contradictory views, the government, through courts or agencies, would have to ensure that the presentation of ideas and information was "balanced" fairly.[115] The

112. One justification for free speech, is, of course, the benefit which the public at large derives from hearing a diversity of viewpoints and ideas. But if the sole or even the paramount aim of the first amendment is merely to ensure that the public is able to hear a Babel of voices, the first amendment is not the great libertarian principle it has been thought to be. Freedom of speech is a justifiable aim in itself insofar as it helps to create the individual freedom and security essential to a free society. It need not be buttressed by any apologies that it will assure the dissemination of a diversity of viewpoints, that it will ensure a free marketplace for ideas, or that it is a surer means of advancing truth.

Robinson, *supra* note 100, at 159-60.

113. *See* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 256 (1974).

114. CBS v. Democratic Nat'l Comm., 412 U.S. 94, 127 (1972).

115. *See* Lange, *supra* note 98, at 75. Professor Lange also argues that an attempt to achieve "balanced" presentation of views would inevitably conflict with the principle that the most appealing ideas prevail in the marketplace and thereby "suppress" those less appealing.

Johnson and Westen propose a kind of "common carrier" access—first-come-first-served. Johnson & Westen, *supra* note 56, at 627-29. Such an approach may provide for more voices, although not necessarily for diverse voices. Moreover, if such a policy created high demand for

Court rejected the access theory because the hoped-for gains could not outweigh the damage to first amendment values that such government interference would bring.[116]

Administration of a right of access to private property such as a shopping center, designed as a marketplace for goods and services, not ideas, would create similar difficulties. How could a court, for example, determine if a fair sampling of community opinion were offered within the limits of available time and space? More important, how could a court make such a determination without considering the content of speech, an inquiry heretofore forbidden by the first amendment?[117] Alternatively, if the property owners were required to allow balanced use of the forum if any use were allowed, the result would probably be closing the facilities to all groups and a loss to the community. Every reasonably imaginable consequence indicates that the sacrifice of owners' speech and property rights would mean little enhancement of the rights of nonowners, and little benefit to the community. In expressly overruling *Logan Valley*, *Hudgens* removed the last theoretical support for an access theory and affirmed the Court's view that the continued vitality of the free speech guarantee requires a strict reading of state action in first amendment cases to preserve a wide sphere of private choice.

IV. CONCLUSION

Hudgens is a regrettable decision both because of the Court's reasoning and its failure to explicate the full extent of the state action requirement in cases determining rights of free speech. A fuller exploration of the principles involved in the decision of a private person to choose among various sources of ideas and information or to exclude speech-related activity from private property entirely demonstrates that the right to choose, although not absolute,[118] is best served in constitutional adjudication by a strict reading of the state action requirement of the fourteenth amendment and by rejection of the notion that undermining the speech and property rights of private persons serves the community interest in free speech and exchange of ideas.

access, the price of time could be bid up until only affluent groups could purchase it. *See* Lange, *supra* note 98, at 76.

116. 412 U.S. at 127; *id.* at 161 (Douglas, J., concurring). *See also* Jaffe, *supra* note 100, at 782-87.

117. *See* Erznoznik v. Jacksonville, 422 U.S. 205 (1975); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972).

118. As illustrated by the Court's deference to the NLRB for decision on nonconstitutional grounds. Hudgens v. NLRB, 424 U.S. 507 (1976).