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Constitutional Law–Freedom of Speech: Property Rights Triumphant in the Shopping Center

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CASE COMMENTS

CONSTITUTIONAL LAW — FREEDOM OF SPEECH: PROPERTY RIGHTS TRIUMPHANT IN THE SHOPPING CENTER*

Hudgens v. NLRB, 96 S. Ct. 1029 (1976)

Striking union members picketed the front of their employer's leased store located within the enclosed mall of a suburban shopping center.[1] The picketers departed after being threatened with arrest for criminal trespass by the manager of the shopping center. Subsequently, the union filed an unfair labor practice charge with the National Labor Relations Board (NLRB).[2] Finding that the union had no other reasonable access to its target audience, the Board entered a cease and desist order against further interference with the picketing.[3] Affirming the NLRB ruling, the Fifth Circuit Court of Appeals applied a first amendment standard to determine that the striking employees had a right under section seven of the National Labor Relations Act to conduct picketing in the shopping center.[4] On

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EDITOR'S NOTE: This case comment was awarded the *George W. Milam Award* as the outstanding case comment submitted by a Junior Candidate in the spring 1976 quarter.

1. The union members were employees of the Butler Shoe Co. chain whose retail outlet was located in the mall. The picketers were employed at a warehouse not situated in the mall. The employees of Butler's store in the shopping center were non-union. Hudgens v. NLRB, 501 F.2d 161, 163 (5th Cir. 1973).

2. This charge was filed against the shopping center owner. While the owner of the mall was not the employer of the picketers involved in the case, Justice Stewart noted that he was clearly a statutory employer within the meaning of §§2(6) and (7) of the National Labor Relations Act (NLRA), 29 U.S.C. §§152(6)-(7) (1970). 96 S. Ct. 1029, 1032 n.3 (1976). The union charged that the threat of arrest violated §8(a)(1) of the NLRA, 29 U.S.C. §158(a)(1) (1970), which provides that interference by an employer with the exercise of employee rights guaranteed by §7 of the NLRA, 29 U.S.C. §157 (1970), is an unfair labor practice. 96 S. Ct. at 1032. Section 7, 29 U.S.C. §157 (1970) provides in part: "Employees shall have the right to self-organization, to form, join, or assist labor unions, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining. . . ."

3. Hudgens v. Local 315, AFL-CIO, 205 N.L.R.B. 628 (1973). The right of the union to picket in the shopping mall was upheld as protected activity under §7 of the NLRA as judged by the criteria of NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956) (see note 23 *infra*). This was the second NLRB ruling on the case. On the first hearing, the NLRB held that the union had a first amendment right to picket at its chosen location, relying on Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968). Hudgens v. Local 315, AFL-CIO, 192 N.L.R.B. 671 (1971). While a petition for review was pending with the Fifth Circuit Court of Appeals, the Supreme Court decided Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) and Central Hardware Co. v. NLRB, 407 U.S. 539 (1972). The case was remanded to the NLRB for reconsideration in light of these decisions. Hudgens v. NLRB, 501 F.2d 161, 163 (5th Cir. 1974).

4. Hudgens v. NLRB, 501 F.2d 161 (5th Cir. 1974). The court determined that the private property rights of the shopping center owner should be required to yield to the §7 rights of the picketers since the object of the protest related to the use of the shopping center and since there existed no reasonably effective alternate means of communication to reach the union's desired audience. *Id.* at 169. The Court of Appeals recognized

certiorari the United States Supreme Court vacated this decision and HELD, the first amendment guarantee of free expression has no application when union picketers seek to enter a privately owned shopping center to advertise a strike.[5]

There are two extremes along the spectrum for classifying a particular location as an appropriate forum for the exercise of first amendment rights. The exercise of free expression may be completely restricted by the owner of private property used exclusively for private purposes.[6] On the other hand, citizens generally have free access to public property for use as a first amendment forum[7] subject only to reasonable regulation in the interest of the public health, safety, and welfare.[8] The desirability of maintaining the sharp

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that §7 rights are not necessarily coextensive with first amendment rights. The test used to decide the case, however, was derived from Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), in which the Supreme Court had dealt solely with the scope of first amendment rights in shopping centers. Reliance on this case was justified on the ground that *Lloyd* best isolated the relevant factors for determining when private property rights of a shopping center owner are subordinate to §7 rights. *Id.* at 167.

5. 96 S. Ct. 1029 (1976). The Court determined that union picketing rights on private property depend exclusively on rights granted under the NLRA. *Id.* at 1037.

6. *See, e.g.*, Breard v. Alexandria, 341 U.S. 622 (1951) (upholding the enforcement of trespass laws to bar uninvited solicitors from private residences); Hall v. Commonwealth, 335 U.S. 875 (1948) (private owner of an apartment house may exclude handbillers).

7. The courts have not clearly delineated the precise extent of a citizen's access to public property for the exercise of first amendment rights. But it does appear that access is greatest when the public property sought to be used is a traditional public forum such as streets, sidewalks, and parks. In such places, speech interests must be accommodated even at the cost of some interference with other uses of the public property. Thus, a complete ban on expressive activities in a traditional public forum is constitutionally impermissible. *See, e.g.*, Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (upholding the right to conduct handbilling on sidewalks); Schneider v. New Jersey, 308 U.S. 147 (1939) (pamphletting must be allowed on a city street even if alternate sites are available). Courts adhering to this view have found implicit in the first amendment a guarantee of minimum access to these forums for free expression. *Id.*

Access to property not classified as a traditional public forum, however, is more restricted. No accommodation for speech purposes need be made where there is interference with other uses of the public property. *See, e.g.*, Adderley v. Florida, 385 U.S. 89 (1966) (grounds of a jail not generally open to the public for free expression). Despite the limited access to these areas, any prohibition based on regulation of the contents of the message sought to be conveyed violates the equal protection clause. *See* Police Dep't v. Mosley, 408 U.S. 92 (1972) (invalidating a municipal ordinance that allowed labor picketing on public school grounds but banned all other expressive activities). Therefore, the first amendment guarantees only a right of equal access to public property not traditionally associated with the exercise of free speech.

The "equal access" and "minimum access" doctrines described above are treated extensively in Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 STAN. L. REV. 117 (1975).

8. *See, e.g.*, Cox v. Louisiana (I), 379 U.S. 536 (1965) (traffic regulation was a sufficiently important interest to justify curtailment of expressive activities); Cox v. Louisiana (II), 379 U.S. 559 (1965) (overriding public interest in preventing interference with the functioning of a courthouse); Feiner v. New York, 340 U.S. 315 (1951) (primacy of the public interest in enjoining the use of fighting words); Kovacs v. Cooper, 336 U.S. 77 (1949) (noise regulation not violative of first amendment rights); Cantwell v. Connecticut, 310 U.S. 296 (1940) (state may reasonably regulate time, place, and conduct of soliciting and

distinction between public and private property for first amendment purposes has been the subject of much constitutional debate as the suburban shopping center has displaced the city center as the focus of community economic and social activity.[9] This development has caused the ownership of the community business district, long associated with the exercise of first amendment rights,[10] to pass increasingly from public to private hands.[11] Consequently, there has been concern that first amendment guarantees could be seriously jeopardized by a lack of effective forums for free expression in the suburbs.[12]

The United States Supreme Court, in *Marsh v. Alabama*,[13] first recognized that private property may be treated as public for first amendment purposes under certain circumstances. In *Marsh* a woman arrested while distributing religious literature in the business district of a company town challenged the constitutionality of her conviction under a state criminal trespass statute.[14] The Supreme Court rejected at the outset the argument that private ownership of property could solely justify the curtailment of first amendment rights in a company town.[15] Instead, the majority based its opinion on the precept that first amendment guarantees occupy a preferred position in the hierarchy of constitutionally protected rights.[16]

In concluding that the facts of the case required private property rights to yield to first amendment guarantees, the Court considered the characteristics and use of the property and the significant public interest in having the channels of communication remain open. The *Marsh* Court first found the

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meetings on public roads). *See generally* Kalven, *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1.

9. *See generally* Forkosch, *Picketing in Shopping Centers*, 26 WASH. & LEE L. REV. 250 (1969); Comment, *Free Speech on Private Property*, 19 CLEV. ST. L. REV. 372 (1970).

10. "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." Hague v. CIO, 307 U.S. 496, 515 (1939).

11. One estimate placed the number of shopping centers in the United States at 13,000, accounting for 40% of retail sales not including automobiles and building materials. 74 CHAIN STORE AGE, Feb. 1971, at 26.

12. "As governments rely on private enterprise, public property decreases in favor of privately owned property. It becomes harder and harder for citizens to find means to communicate with other citizens. Only the wealthy may find effective communication possible. . . . When there are no effective means of communication, free speech is a mere shibboleth." Lloyd Corp. v. Tanner, 407 U.S. 551, 586 (1972) (Marshall, J., dissenting). *See also* Henely, *Property Rights and First Amendment Rights: Balance and Conflict*, 62 A.B.A.J. 77 (1976).

13. 326 U.S. 501 (1946). *See generally* Comment, *Constitutional Law — Freedom of Speech and Religion — What Constitutes State Action*, 44 MICH. L. REV. 848 (1946); Comment, *Freedom of Speech in a Company-Owned Town*, 1 WYO. L.J. 142 (1947).

14. 326 U.S. at 503-04.

15. *Id.* at 506. "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." *Id.*

16. *Id.* at 509.

company town indistinguishable from any other municipality but for the fact that title was vested in private hands.[17] Secondly, the public had virtually unlimited access to the property since the owner had utilized part of his holding as a commercial center.[18] Finally, the Court noted the consequences of the changing social and economic conditions that had fostered the growth of privately owned municipalities in the South.[19] On a local scale, this evolution had transformed the traditional publicly owned forums for free expression into private property. To allow the private owner of a municipality complete control over access to his property would be to render unattainable the first amendment goal of maintaining a fully informed citizenry.[20] In applying this threefold test, the *Marsh* Court did not characterize the presence of any one factor as determinative. On the contrary, the decision established a process for carefully weighing competing interests to arrive at the proper accommodation between conflicting constitutional rights.[21]

During the two ensuing decades, *Marsh* was the touchstone for efforts by the courts to establish what was perceived as a necessary balance between competing first amendment and private property rights in the shopping center.[22] These early decisions reflected a readiness on the part of the courts to equate, for first amendment purposes, the business district of the *Marsh* company town to the suburban shopping center.[23] In 1968 the Supreme Court affirmed the trend toward protecting first amendment rights by extending the

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17. *Id.* at 507-08. This aspect of the *Marsh* decision gave rise to the doctrine of functional equivalence. Under this doctrine, private property that assumes the characteristics of public property to a sufficient degree is considered an appropriate first amendment forum. For a discussion of the importance of this view in later cases dealing with the scope of first amendment rights on private property, see Henely, *supra* note 12, at 79.

18. Marsh v. Alabama, 326 U.S. 501, 503 (1946).

19. *Id.* at 508 n.5.

20. *Id.* at 508. Justice Reed dissented on the ground that the appellant could have distributed her literature on a public highway a few yards from the spot where she was arrested. *Id.* at 514. The majority did not address Justice Reed's view.

21. *Id.* at 509.

22. For a critical evaluation of the validity of extending the *Marsh* rationale to other types of commercial establishments, see Comment, *Picketing of the Modern Marketplace: The Rights of Ownership and Free Speech*, 48 B.U. L. REV. 669 (1968).

23. *See, e.g.*, Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Local 31, 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964), *cert. denied*, 380 U.S. 906 (1965) (permitting labor picketing against store in shopping center on first amendment grounds); State v. Williams, 44 L.R.R.M. 2357 (Balt. City Crim. Ct. 1959) (first amendment protects picketing of drugstore in shopping center); Clothing Workers, AFL-CIO v. Wonderland Shopping Center, Inc., 370 Mich. 547, 122 N.W.2d 785 (1963) (the shopping center's openness to the public makes it an appropriate first amendment forum); Moreland Corp. v. Retail Store Employees Local 444, 16 Wis. 2d 499, 114 N.W.2d 876 (1962) (property rights must yield to labor picketing rights when a shopping center is physically indistinguishable from public property) (dictum). *Contra*, South Discount Foods, Inc. v. Retail Clerks Local 1552, 14 Ohio Misc. 188, 235 N.E.2d 143 (1968) (the mere resemblance of private property to a municipality does not ipso facto convert it to public use).

These early state court decisions have been criticized for placing too much reliance on the physical characteristics of shopping centers and for disregarding the shopping center owner's competing property interests. *See* Note, Amalgamated Food Employees Local 590 v.

rationale of *Marsh* beyond the context of the company town in *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*[24] This case posed the question of whether a state court could lawfully enjoin union organizational picketing conducted in the confines of a privately owned shopping center.[25] Viewing the primacy of naked title as the sole issue,[26] the *Logan Valley* Court ruled that since the shopping center was the functional equivalent of a company town, it must be treated in substantially the same manner for first amendment purposes.[27] The Court looked not only to the physical similarities between the shopping center and a town[28] but also to the fact that the premises were open to the public to the same extent as those of a typical municipal business district.[29] In drawing this analogy, the Supreme Court took note of the social

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Logan Valley Plaza, Inc.: *The Right to Picket on a Privately Owned Shopping Center,* 73 DICK. L. REV. 519, 525 (1969).

At least one state court attempted to solve the problem of picketing on private property solely through the principles of property law. *See* Nahas v. Local 905, Retail Clerks Int'l Ass'n, 144 Cal. App. 2d 808, 301 P.2d 932 (Dist. Ct. App. 1956) (lessee of store in shopping center could not maintain trespass action against labor picketers since he did not have exclusive possession of area where picketing was conducted). This decision was criticized on the ground that the success of a trespass action was made dependent on the party bringing suit, the tenant of a leased store, or a shopping center owner. *See* Note, *Shopping Centers and Labor Relations Law,* 10 STAN. L. REV. 694, 697 (1958).

Although many of these cases dealt with labor picketing or organizing activity in shopping centers, the pre-*Logan Valley* period was also marked by recognition of labor organizational rights on private property on purely statutory grounds under the NLRA. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), a decision that predated *Marsh,* had established the right of employees to conduct union organizational activity on the property of their employer during nonworking hours. NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956), recognized a similar right in non-employee union organizers when it could be established that there existed no adequate alternative to entering the employer's property to communicate with employees. But since an industrial plant is not open to the public to the same extent as a business district, these decisions are distinguishable from the cases that evolved from *Marsh* granting labor activities the protection of the first amendment in shopping centers. *See generally* Gould, *Union Organizational Rights and the Concept of* Quasi-Public *Property,* 49 MINN. L. REV. 505 (1965); Samoff, *Picketing and the First Amendment:* Full Circle *and* Formal Surrender, 9 LAB. L.J. 889 (1958).

24. 391 U.S. 308 (1968). *See also* Comment, *The Shopping Center: Quasi Public Forum for Suburbia,* 6 U. SAN FRANCISCO L. REV. 103 (1971); Note, *Constitutional Law — Free Speech on Premises of Privately Owned Shopping Center,* 1973 *Wis. L. Rev.* 612; 53 MINN. L. REV. 873 (1969).

25. 391 U.S. at 308.

26. *Id.* at 324.

27. *Id.* at 319.

28. The majority attached no significance to the fact that the shopping center did not include a residential district as did the *Marsh* company town. Instead, attention was focused on the similarity of the business district of a municipality to a shopping center. *Id.* Justice Black, author of the majority opinion in *Marsh,* dissented on the ground that private property should be treated as public for first amendment purposes only when it assumes all the characteristics of a town, including a residential district. *Id.* at 332. Compare this view with his earlier statement regarding the free access to the business district of the company town in *Marsh.* See note 15 *supra.*

29. 391 U.S. at 321. Justice White's dissenting opinion expressed concern over the practical difficulties in implementing the test described by the majority. Since most businesses open their parking lots and sidewalks to the public, it would be impossible to draw a line

evolution that had spawned large numbers of privately owned business districts and decreased the availability of traditional first amendment forums in suburban areas.[30]

The *Logan Valley* majority did not restrict its examination of the equities of the case to the triad of factors considered by the *Marsh* Court. Rather, the Supreme Court broadened the *Marsh* test to include consideration of whether an alternative forum on public property would enable the picketers to reach their desired audience effectively.[31] The public forums reasonably available to the labor union were determined to be inadequate to meet the objectives of the picketing.[32] While the right of the union to conduct picketing under these circumstances was upheld, the Court limited the decision to its specific facts. Under the *Logan Valley* rationale, property rights of the shopping center owner became subordinate to first amendment rights only if the message sought to be conveyed related to the manner in which private property was being used.[33] Although *Logan Valley* appeared to restrict severely the rationale of *Marsh*, the decision could nevertheless be justified on the basis that a case by case approach was best suited for determining the complete scope of first amendment rights in the shopping center.[34]

Courts in several states extended *Logan Valley* beyond its expressed limitation. These courts held that the first amendment protected expressive activities in shopping centers even when the message sought to be conveyed was unrelated to business operations.[35] They concluded that the availability of a shopping center to the public[36] and its role as the modern suburban counter-

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between shopping centers and other retail establishments. *Id.* at 339. He also concluded that the rationale of the majority opinion would require a shopping center to permit communicative activity on its premises without regard to whether the activity was related to the operation of a particular business establishment in the center. *Id.* at 339. Justice Harlan in a separate dissenting opinion contended that the failure to decide the case on purely statutory grounds under the NLRA would have an intolerably disruptive effect on the mechanism established by Congress to resolve labor disputes. *Id.* at 336.

30. *Id.* at 324. See note 11 *supra.*

31. 391 U.S. at 322.

32. The Court determined that the shoulders of the road surrounding the shopping center were so distant from the target store that customers could not read the picketers' signs. *Id.* at 322. Requiring the union to distribute handbills on nearby public highways would place the picketers in danger of being struck by passing cars. *Id.* The concern was also expressed that picketing conducted around the perimeter of the shopping center might be considered an illegal secondary boycott. *Id.* at 323 n.12. On the other hand, Justice Black concluded that the picketing constituted an unwarranted interference with the use and enjoyment of private property since it took place in a loading zone. *Id.* at 328. The majority opinion failed to discuss the weight of the shopping center owner's competing property interests in this regard.

33. *Id.* at 320.

34. *See* Comment, *From Logan Valley Plaza to Hyde Park and Back: Shopping Centers and Free Speech*, 26 Sw. L.J. 569, 578 (1972).

35. *See, e.g.*, Diamond v. Bland, 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970), *cert. denied*, 402 U.S. 988 (1971) (shopping center owner could not bar solicitation of signatures on political petition unrelated to shopping center operations); State v. Miller, 280 Minn. 566, 159 N.W.2d 895 (1968) (shopping center owner could not prohibit distribution of political campaign pamphlets unrelated to shopping center operations).

36. *In re* Cox, 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970) (the shopping

part of the town center[37] dictated that a balance be struck in favor of first amendment rights over mere assertion of title.

The Supreme Court rejected the state courts' extension of *Logan Valley* in *Lloyd Corp. v. Tanner*.[38] In *Lloyd* shopping center owners sought to overturn a permanent injunction[39] barring interference with the conduct of anti-war handbilling on the premises of a large, multilevel shopping center.[40] Dissolving the injunction, the Court dismissed as dictum language in *Logan Valley* that referred to a shopping center as the functional equivalent of the *Marsh* company town.[41] The majority, however, stopped short of ruling that *Logan Valley* had been incorrectly decided by finding that all of the criteria of the *Logan Valley* test had not been satisfied by the anti-war protesters. Since the subject matter of the handbilling was not related to the operation of the shopping center[42] and adequate forums on public property were available for reaching the target audience,[43] an intrusion on private property

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center, a business establishment generally open to the public, could not arbitrarily exclude a potential customer because of his unconventional hair or dress).

37. Sutherland v. Southcenter Shopping Center, Inc., 3 Wash. App. 833, 478 P.2d 792 (1970) (since a shopping center functions as a business district in the most complete sense of the word, the first amendment protects the circulation of a petition on its premises even though it is unrelated to the retail function of a particular store).

38. 407 U.S. 551 (1972). *See generally* Lewis, *Free Speech and Property Rights Re-Equated: The Supreme Court Ascends From* Logan Valley, 24 LAB. L.J. 195 (1973); 57 MINN. L. REV. 603 (1973); 1973 WASH. U. L.Q. 427.

39. The Ninth Circuit Court of Appeals had affirmed the injunction. Tanner v. Lloyd Corp., 446 F.2d 545 (9th Cir. 1971).

40. Lloyd Center covered 50 acres of land and contained more than 60 businesses and professional offices plus an auditorium and skating rink. Lloyd Corp. v. Tanner, 407 U.S. 551, 571 (1972) (Marshall, J., dissenting). Justice Marshall noted that Lloyd Center differed from Logan Valley Plaza since it was larger than Logan Valley Plaza, offered a more diverse range of professional and nonprofessional services, and was more intertwined with public streets. *Id.* at 575. *See* Note, Lloyd Corp. v. Tanner*: The Demise of* Logan Valley *and the Disguise of* Marsh, 61 GEO. L.J. 1187, 1192-96 (1973), for a detailed description of the role and importance of Lloyd Center in the Portland, Oregon, area.

41. Lloyd Corp. v. Tanner, 407 U.S. 551, 562 (1972). The majority quoted extensively not only from Justice Black's dissent in *Logan Valley* but also from Justice White's dissenting opinion in the same case. "In no sense of the word are any parts of the shopping center dedicated to the public for general purposes. . . . The public is invited to the premises but only in order to do business with those who maintain establishments there." *Id.* at 565.

In his dissenting opinion, Justice Marshall concluded that the majority had failed to grasp the essence of the *Logan Valley* decision — that as private property expands to the point of becoming the actual business district of a community, "the rights of the owners to proscribe speech on the part of those invited to use the property diminish." *Id.* at 581 n.5. Justice Marshall's statement was in contradistinction to the majority view that "[t]he 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." *Id.* at 569.

42. Justice Marshall saw no reason to so limit the content of public expression in the functional equivalent of a municipal business district. *Id.* at 580.

43. *Id.* at 567. There were 66 linear blocks of publicly owned sidewalks and a public park inside Lloyd Center. All parties agreed that handbilling could be conducted in these areas. The case concerned only the privately owned areas of the Center. Petition for a

under the protection of the first amendment could not be sanctioned. In determining that the owner of the shopping center used his property nondiscriminatorily for private purposes only, the *Lloyd* Court concluded that the opening of the mall for use by selected political, charitable, and promotional groups was constitutionally insignificant.[44]

While the majority in *Lloyd* did not explicitly overrule *Logan Valley*, it seemed incongruous that the two decisions could stand together. Lloyd Center duplicated the role and functions of a municipality to a much greater degree than did Logan Valley Plaza, yet only the latter had been adjudged an appropriate first amendment forum.[45] In *Logan Valley* labor picketing had been conducted in a loading zone, and it seemed likely that the union activity had interfered with the normal use of this property.[46] The shopping center owner in *Lloyd*, however, used his premises for a wide variety of

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Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 5, Tanner v. Lloyd Corp., 466 F.2d 545 (9th Cir. 1971).

44. Lloyd Center had made its premises available for the conduct of Veterans' Day Ceremonies and school football rallies. During a National Guard weapons display, the center had been dubbed "Camp Lloyd." The Boy Scouts had been allowed to erect a camp and sleep inside the mall. Presidential candidates but not gubernatorial candidates had been permitted to give speeches in the center. The Salvation Army, Volunteers of America, and the American Legion had solicited funds in the privately owned sections of Lloyd Center. Hadassah, a Zionist women's organization, and the March of Dimes had been denied this permission. See Lloyd Corp. v. Tanner, 407 U.S. 551, 578 (1972), and Note, *supra* note 40, at 1192-93. The majority concluded that such a selection by the shopping center management served the legitimate end of bringing shoppers into the center and of generating good will rather than serving to open the premises to all expressive activity. Lloyd Corp. v. Tanner, 407 U.S. 551, 565 (1972). Compare this view with the comment of the Second Circuit Court of Appeals regarding a similar situation. "The admission of charity solicitors, glee clubs, and automobile exhibitions without untoward incident evidences the ease with which the Terminal accommodates different forms of communication. To deny access to political communication seems to be an anomalous inversion of our fundamental values." Wolin v. Port of New York Authority, 392 F.2d 83, 90 (2d Cir. 1968), *cert. denied*, 393 U.S. 940 (1968).

45. The *Lloyd* decision contained extensive criticism of the *Logan Valley* extension of the doctrine of functional equivalence to the shopping center. See note 41 *supra*. Justice Marshall concluded that the *Lloyd* majority was concerned less with limiting the *Logan Valley* rationale to use-related speech than with discarding the entire concept of accommodating first amendment rights on private property. Lloyd Corp. v. Tanner, 407 U.S. 551, 577 (1972). *See also* Comment, *First Amendment Rights vs. Private Property Rights—The Death of the Functional Equivalent*, 27 MIAMI L. REV. 219 (1972). Justice Marshall felt that since there was no valid distinction between the Lloyd Center and Logan Valley Plaza, the only legitimate way to deny first amendment protection to the anti-war handbilling in Lloyd was to overrule *Logan Valley*. Lloyd Corp. v. Tanner, 407 U.S. 551, 584 (1972). However, in Central Hardware Co. v. NLRB, 407 U.S. 539 (1972), a case decided on the same day as *Lloyd*, the Court seemed to reconfirm the viability of functional equivalency. The *Central Hardware* Court determined that the first amendment did not protect union organizational activity conducted in the parking lot of an individual store. *Id.* at 547. Justice Powell, author of the *Lloyd* decision, stated that the owner of private property was subject to the commands of the first amendment only when his property assumed "to some significant degree the functional attributes of public property devoted to public use." *Id.*

46. See note 32 *supra*.

expressive purposes potentially more distractive to his customers than the distribution of handbills, which the Court had ruled constitutionally impermissible.[47] Paradoxically, picketing intended to impair the full enjoyment of private property by causing economic harm to a target business had been accorded first amendment protection, but neutral and nondisruptive free speech had not been similarly treated.[48]

Moreover, the legitimacy of maintaining the salient feature distinguishing the cases — the relevance of the subject matter of expression to the use of the shopping center — was called into question by *Police Dep't v. Mosley*.[49] The Court in *Mosley* determined that a municipal ordinance that permitted labor picketing on public school grounds but prohibited all other expressive activities violated the equal protection clause of the fourteenth amendment.[50] Since municipal governments could not regulate the subject matter of peaceful protest on public property, it followed that a similar prohibition should also apply to the owner of quasi-public property who stands "in the shoes of the state."[51]

The instant case resolved these contradictions by rejecting the concept that a shopping center should be treated as public property for first amendment purposes. The Court based its opinion on the proposition that the first amendment right of free speech is a guarantee only against abridgment by state or federal government.[52] Describing *Marsh* as a limited exception to this rule, the majority concluded that a large, self-contained shopping center is private property like any other and not the functional equivalent of a municipality.[53] Private property becomes public for first amendment purposes only when it assumes all of the characteristics of property normally devoted to the public use.[54] The shopping center owner may therefore impose a total ban on the conduct of expressive activities on his property.[55]

As a further basis for overruling *Logan Valley*, the instant Court stated that even if a shopping center could be properly equated with a municipality, the control of speech on quasi-public property through regulation of its contents would violate the fourteenth amendment equal protection clause.[56]

47. See note 43 *supra*.

48. See Comment, *supra* note 34, at 586-87.

49. 408 U.S. 92 (1972).

50. *Id.*

51. This description of the owner of quasi-public property was used by Justice Powell in Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972).

52. 96 S. Ct. 1029, 1033 (1976).

53. In support of this argument, the majority quoted at length from Justice Black's dissent in *Logan Valley* limiting *Marsh* to the company town context. *Id.* at 1034-35.

54. 96 S. Ct. at 1035. Some shopping center complexes do appear to have become private cities. For example, New York's Co-op City contains a high school, two intermediate schools, two elementary schools, seven religious congregations, 150 community organizations, and accommodations for 150,000 residents. Note, *supra* note 40, at 1218 n.246. The *Marsh* rationale should still apply to such extensive complexes.

55. 96 S. Ct. at 1037.

56. *Id.* at 1036. The majority conceded that *Lloyd* had not explicitly overruled *Logan Valley* but insisted that the ultimate holding in *Lloyd* was tantamount to a rejection of the earlier case. *Id.* In a concurring opinion, Justice White rejected this part of the

Notwithstanding the fact that labor picketing is directed against the manner of operation of a particular store in a shopping center, a union must rely solely on the statutory protection of the National Labor Relations Act to secure its right to picket on private property.[57] Other groups without the statutory protection available to labor thus have no right to conduct speech-related activities in a shopping center so long as the owner uses his property exclusively for private purposes.[58]

Justice Marshall, writing for the dissent, expressed the view that although *Lloyd* had overly restricted the applicability of *Logan Valley*, the two decisions were still compatible.[59] The public has a substantial interest in communicating on topics that concern the operations of the modern suburban shopping center.[60] Since the shopping center itself is often the only reasonably effective channel for communicating on these topics, the shopping center owner may effectively surpress any protest against the manner in which his property is utilized.[61] The dissent felt that *Lloyd* prevented such a consequence by preserving the rationale of *Logan Valley* when the subject matter of expressive activity dealt with the functions of a shopping center.[62] Justice Marshall rejected the majority's argument that such a test based on speech content was unconstitutional. Under the *Logan Valley* rationale, the content of expression

majority's opinion and found it unnecessary to inter *Logan Valley* in the instant case. *Id.* at 1039. He was in favor of denying the picketers the protection of the first amendment on the ground that the subject matter of protest dealt with the operation of the Butler Shoe Co. warehouse and not the retail store located in the shopping center. *Id.* See note 1 *supra.* Justice Powell, the author of *Lloyd,* issued a separate concurring opinion in which he agreed that *Lloyd* did not overrule *Logan Valley,* but he welcomed the result reached by the majority as representing a needed clarification of whether labor law or first amendment principles applied in cases dealing with labor picketing in shopping centers. 96 S. Ct. at 1038.

57. In remanding the case for reconsideration under NLRA criteria alone, Justice Stewart distinguished the facts of NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956) (see note 23 *supra*) from those of the instant case: Lawful strike activity was involved in the instant case rather than organizational activity as in *Babcock*; the union activity was conducted by employees and not by nonunion employee organizers as in *Babcock*; and the union activity in the instant case was conducted on the property of someone other than an employer. *Id.* at 1037-38. Thus, the Court indicated that a new NLRA standard must be established for determining the scope of §7 rights in the shopping center. Reliance on *Babcock* alone will no longer be considered sufficient. Justice Marshall's dissenting opinion disagreed with this approach and would have affirmed the court of appeals decision under *Babcock. Id.* at 1044.

The dissent also disagreed with the majority's view that the decision of the court of appeals was based at least in part on first amendment grounds rather than on purely statutory (NLRA) criteria. *Id.* at 1040. Marshall felt that the Fifth Circuit's use of a first amendment standard to determine the scope of §7 rights in the shopping center did not inject a constitutional issue into the case. *Id.* at 1041-42. He concluded that the majority unnecessarily reached a constitutional issue to overrule *Logan Valley. Id.* at 1042. See also text accompanying note 4 *supra.*

58. 96 S. Ct. at 1033.

59. *Id.* at 1044.

60. *Id.* at 1048. Justice Brennan joined in the dissent, Justice Stevens took no part in the decision.

61. *Id.*

62. *Id.* at 1046.

was merely a single factor in a broad formula for determining if a shopping center was an appropriate first amendment forum in a particular factual context.[63] The dissent also stressed that the equal protection objective of preventing government censorship was not at issue in *Logan Valley* or the instant case;[64] instead, the precise question before the Court was whether a private entity should be permitted to possess a monopoly on the most effective channels of communication in a community.[65] Justice Marshall concluded that the majority's failure to recognize this fact was caused by adherence to an "overly formalistic" view of the relationship between private property rights and the first amendment guarantee of freedom of speech.[66]

Through the hasty burial of *Logan Valley*[67] and the restriction of *Marsh*, the instant case severed the philosophical root of the decisional law that emphasized the desirability of maintaining effective first amendment forums for those societal groups without access to the mass media. By refusing to recognize the new role of the shopping center as the hub of economic and social activity in the suburban community, the Court reduced the effectiveness of those modes of communication that had been earlier described as "essential to the poorly financed causes of little people."[68]

The decision in the principal case was reached without examining the weight of the interests of the shopping center owner in excluding all expressive activities from his premises. When these countervailing interests have been described, the argument for preserving the sharp distinction between public and private property in the shopping center context has been less than convincing.[69] Neither the possibility of increased costs for litter collection[70] nor the undocumented assertion that distraction of the consumer

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63. *Id.* at 1047.

64. *Id.*

65. *Id.*

66. *Id.*

67. "Turning to the constitutional issue resolved by the Court, I cannot escape the feeling that *Logan Valley* has been laid to rest without ever having been accorded a proper burial." *Id.* at 1044 (Marshall, J., dissenting).

68. Martin v. City of Struthers, 319 U.S. 141, 146 (1943) (invalidating a municipal ordinance imposing a total ban on handbilling on private residential property; such a decision should be left to the individual property owner).

69. The shopping center owner in *Lloyd*, for example, objected to allowing handbilling on his premises because it was controversial, distracting, and detrimental to business and because of the littering caused by discarded handbills. Brief for Petitioner at 4, Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). On the other hand, the owner stated that he had allowed use-related handbilling in his shopping mall after the *Logan Valley* decision but did not describe any adverse effects of this policy on his business. *Id.* Shopping center owners seem to have concluded that some accommodation of speech activities could be made without unduly interfering with other uses of their property. "A shopping center, which falls somewhere between the extremes of a company town and a private residence, is neither absolutely subject to the control of the owner nor is it absolutely open to all those wishing to engage in speech activities." *Id.* at 9. "We set up rules for the center to be a community forum on the theory that these troubles were not going to go away and we might as well control them." Comment, *supra* note 34, at 587 n.172 (quoting the statement of a shopping center manager to the trade journal, CHAIN STORE AGE).

70. Littering alone is not sufficient reason to restrict first amendment activity on