COMMENT

LLOYD CORP. V. TANNER: HANDBILLING WITHIN A SHOPPING MALL NOT DIRECTED AT A STORE IS NOT PROTECTED BY THE FIRST AMENDMENT UNLESS NO ADEQUATE ALTERNATIVE LOCATION EXISTS

The first and fourteenth amendments of the United States Constitution guarantee that an individual's freedom of speech will not be abridged by either the national or state governments.[1] In addition, federal statutes and judicial decisions have applied this constitutional protection to speech curtailed by private parties who through their ownership of certain properties act in a quasi-public capacity.[2] In these latter cases, not only must a court define which communicative acts exercised at which times and in which places enjoy the protection of the first amendment,[3] but it must also resolve the seeming conflict between the guarantee of free speech and the guarantee protecting private ownership of property.[4]

This clash of the right of free speech and the right of private property has arisen in many varied contexts, e.g. company towns,[5] migrant camps,[6] railroad stations[7] and supermarket sidewalks.[8] One situation which has provoked considerable litigation is that of picketing and handbilling in privately owned shopping centers.[9] In *Lloyd Corp.*

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[1] "Congress shall make no . . . law abridging the freedom of speech . . ." U.S. Const. amend. I; "No state shall . . . deprive any person of life, liberty or property without due process of law . . ." U.S. Const. amend. XIV, § 1; De Jonge v. Oregon, 299 U.S. 356 (1937); Grosjean v. American Press Co., 297 U.S. 233 (1935); Stromberg v. California, 283 U.S. 359 (1930); Warren, The New "Liberty" under the Fourteenth Amendment, 39 Harv. L. Rev. 431 (1925).

[2] 18 U.S.C. § 241 (1971) (criminal provision for conspiracy against rights of citizens); 18 U.S.C. § 242 (1971) (criminal provision for deprivation of rights under color of law); 42 U.S.C. § 1983 (1971) (civil action for deprivation of rights); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Marsh v. Alabama, 326 U.S. 501 (1946).

[3] See, e.g., Grayned v. City of Rockford, 408 U.S. 104 (1972) (antinoise ordinance prohibiting a person on grounds adjacent to a school from willfully making noise disturbing the peace of the school session held constitutional); Shuttlesworth v. Birmingham, 394 U.S. 147 (1968) (ordinance requiring a city permit to participate in a public demonstration, the issuance of which was dependent upon a consideration of public welfare, held unconstitutional); Cameron v. Johnson, 390 U.S. 611 (1967) (ordinance prohibiting picketing which obstructs free ingress to or egress from any county court house held constitutional); Adderley v. Florida, 385 U.S. 39 (1966) (state trespass statute held constitutionally applicable to a demonstration on the premises of a jail built for security purposes and not open to the public).

[4] "No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation. . . ." U.S. Const. amend. V.

[5] Marsh v. Alabama, 326 U.S. 501 (1946).

[6] Folgueras v. Hassle, 331 F. Supp. 615 (W.D. Mich. 1971); People v. Rewald, 65 Misc. 2d 453, 318 N.Y.S.2d 40 (Cayuga County Ct. 1971).

[7] In re Hoffman, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).

[8] In re Lane, 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969).

[9] Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Diamond v. Bland, 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970), cert. denied sub. nom. Homart Dev. Co. v. Diamond, 402 U.S. 988 (1971); Schwartz-Torrance Inv. Corp. v. Bakery & Confectionary Workers, Local 31, 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964), cert. denied, 380 U.S. 906 (1965); Amalgamated Clothing Workers v. Wonderland Shopping Center, Inc., 370 Mich. 547, 122 N.W.2d 785 (1963); Blue Ridge Shopping Center, Inc. v. Schleininger, 432 S.W.2d 610 (Mo. Ct. App. 1968); Broadmoor Plaza, Inc. v. Amalgamated Meat Cutters & Butcher Workmen, 21 Ohio Misc. 245, 257 N.E.2d 420 (C.P. Montgomery Co. 1969);

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v. Tanner[10] the Supreme Court considered the issue of first amendment rights in such a context and struck a balance in favor of property rights.

The Lloyd Corporation owned a large, retail shopping center occupying about fifty acres in Portland, Oregon. All of the center's shops and department stores were located in an enclosed mall which covered about twenty acres of the center. This mall was crossed by neither public streets nor sidewalks. The area outside and beneath the mall was used principally for parking and was capable of accomodating over one thousand cars. Public streets and sidewalks – the only property within the center not owned by the Lloyd Corporation – bordered the mall and also cut across certain open areas outside the mall. The shops and stores opened either exclusively onto the interior of the mall or both onto the interior and the outside public sidewalks.[11] The mall was open to the general public, but many groups wishing to use the center for their purposes were prohibited from doing so.[12] Other groups were allowed to use the center, in some cases,[13] but not all,[14] on the theory that their presence in the center tended to increase patronage at the center.

Tanner and four other persons opposed to the military draft and the Vietnam War were distributing handbills in the mall in a peaceful, litter free, nondisruptive fashion. Pursuant to a no-handbilling rule, the Lloyd security guards, threatening arrest for trespass,[15] requested that the Tanner group stop handbilling. The guards suggested that the group continue their activity on the center's public sidewalks outside the mall. The leafletters followed the suggestion but subsequently brought an action in the federal district court for declaratory and injunctive relief. The district court declared that the plaintiffs' first amendment rights had been violated and, therefore, enjoined the Lloyd Corporation from interfering with the plaintiffs' handbilling within the mall.[16] The court of appeals affirmed on the ground that the district court's "factual determination" was not "clearly erroneous."[17]

In a five-to-four decision[18] the Supreme Court reversed the lower court judgments. The Court held that the fifth amendment right of the owner of the

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Sutherland v. Southcenter Shopping Center, Inc., 3 Wash. App. 833, 478 P.2d 792 (Wash. Ct. App. 1970); Freeman v. Retail Clerks Local 1207, 58 Wash. 2d 426, 363 P.2d 803 (1961); Moreland Corp. v. Retail Store Employees Local 444, 16 Wis. 2d 499, 114 N.W.2d 876 (1963). See generally Comment, Picketing of the Modern Marketplace: The Rights of Ownership and Free Speech, 48 B.U. L. Rev. 699 (1968); Comment, The Shopping Center: Quasi-Public Forum for Suburbia, 6 U. San Fran. L. Rev. 103 (1971); Comment, The Shopping Center and the Fourteenth Amendment: Public Function and State Action, 33 U. Pitt. L. Rev. 112 (1971).

10 407 U.S. 551 (1972) [hereinafter *Lloyd*].

11 Id. at 553-55.

12 These groups included the March of Dimes, Hadassah and the Governor. Tanner v. Lloyd Corp., 308 F. Supp. 128, 129-30 (D. Ore. 1970).

13 Groups which did increase patronage included schools holding football rallies, service organizations holding Veterans Day ceremonies and presidential candidates delivering speeches. Id. at 129. The mall also contained an auditorium which certain outside groups could use for a rental fee. However, this fee was waived in those cases when the auditorium was being used by civic and charitable organizations. *Lloyd* at 555.

14 Groups which did not increase patronage included the American Legion selling "buddy" poppies and the Salvation Army and Volunteers of America soliciting contributions. 308 F. Supp. at 129-30.

15 The guards, wearing uniforms nearly identical to those worn by city police, had police authority within the center. *Lloyd* at 554. Thus, the district court found as a matter of fact that

> the Guards caused [the Tanner group] to believe that the Guards, in their official capacity as policemen, would arrest [them] or would cause their arrest [by calling in regular city police officers].

308 F. Supp. at 130 n.5.

16 308 F. Supp. at 133.

17 446 F.2d 545 (9th Cir. 1971).

18 The majority consisted of Justices Rhenquist, White, Blackmun, Burger and Powell, with the latter delivering the opinion of the Court. Justice Marshall delivered the dissenting opinion. See note 90 infra.

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shopping center took precedence over the asserted first amendment right of the handbillers for two reasons: the first amendment activity was "unrelated to the shopping center's operations,"[19] and "adequate alternatives of communication"[20] existed for the handbillers. The Court, therefore, ordered the court of appeals to vacate the injunction.

In striking its balance between the competing interests, the Court distinguished two earlier cases which the district court had relied upon in reaching its result:[21] *Marsh v. Alabama*[22] and *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*[23] In *Marsh* a member of the Jehovah's Witnesses sought to proselytize with handbills on the streets of a town owned entirely by a private corporation.[24] Denial of access to these streets was held by the *Marsh* Court to be a violation of first amendment rights. The *Lloyd* majority held that the *Marsh* application of first amendment rights was limited to the factual situation of a private "company-owned town"[25] having all the attributes of a municipality.

Logan Valley expanded *Marsh* and upheld, under the first amendment, labor picketing directed at a supermarket located in a suburban shopping center. *Lloyd* observed that *Logan Valley* had expressly reserved first amendment protection to activity "directly related in its purpose to the use to which the shopping center was being put."[26] Concluding that the finding of such a direct relationship was the basis of the Court's holding in *Logan Valley*, the *Lloyd* majority held that *Logan Valley's* further comment that *Marsh* was designed to apply to private enterprises which were the "functional equivalent of [a] business district"[27] was unnecessary to the *Logan Valley* holding and unavailabe to support the district court's granting of an injunction.[28]

Lloyd indicated further that, given the physical characteristics of the Logan Valley center, the refusal to allow picketing of the supermarket within the center itself, would have deprived the picketers of a "reasonable opportunity" to convey their message to the patrons of the store being picketed.[29] The Lloyd mall presented a "notably different" situation.[30] The mall was surrounded by public sidewalks which had to be crossed by all entering pedestrians, including those who had parked their cars outside the mall area. The only other means for reaching the mall was by entrance from the underground parking facility. However, in leaving this underground facility cars were required by law to come to a full stop. Thus, the *Lloyd* Court felt that handbills could easily be distributed at the alternative location on the public sidewalks. As further evidence of the effectiveness of such distribution, and as a further distinction

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[19] 407 U.S. at 552.

[20] Id. at 567.

[21] The district court had also cited Wolin v. Port of N.Y. Authority, 392 F.2d 83 (2d Cir. 1968), as exemplifying the correctness of its approach. 308 F. Supp. at 130. Given the disposition of the *Lloyd* case, however, the Supreme Court found it necessary to make only passing reference to *Wolin*. 407 U.S. at 557 n.5. See notes 49, 59, and 72 infra.

[22] 326 U.S. 501 (1946) [hereinafter *Marsh*].

[23] 391 U.S. 308 (1968) [hereinafter *Logan Valley*].

[24] The property owned by the corporation consisted of the residential buildings, the streets and sidewalks, the sewer system and disposal plant and the "business block" on which the business places were located.

[25] 407 U.S. at 558.

[26] Id. at 560, citing *Logan Valley*, 391 U.S. at 320 n.9.

[27] 391 U.S. at 318.

[28] 407 U.S. at 562.

[29] Id. at 566. The significant facts were as follows: (1) the great distance between the publicly owned areas surrounding the center and the particular store being picketed, (2) access to the center was by car only and (3) the danger posed to the picketers due to the high speed of cars passing by the center.

[30] Id. at 566.

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from *Logan Valley*, the Court noted that the respondents had, in fact, distributed their literature from the public sidewalks after complying with a request to leave the mall.[31]

Marsh had advanced the broad assertion that

> [o]wnership 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.[32]

This doctrine, which underlies numerous decisions subsequent to *Marsh*,[33] merited scant mention in *Lloyd* and was dismissed as determining "differences only of degree — not of principle."[34] The *Lloyd* Court reasoned that all stores, whether free standing or located within a mall, are open to the public in the sense that "customers and potential customers are invited and encouraged to enter."[35] The Court thereby limited the *Marsh* doctrine to the "company town."[36] However, the *Lloyd* Court ignored *Logan Valley's* specific application of the *Marsh* doctrine to the privately owned shopping center.[37] *Lloyd* did so by overlooking the link provided between *Marsh* and *Logan Valley* by the "functional equivalent" notion first articulated in *Marsh*.[38]

Justice Black's majority opinion in *Marsh*, concluding that private property may become circumscribed by conflicting constitutional rights, analogized the private property of a company town to the private property of railroads and other forms of transportation. In so doing, he pointed out that the latter properties, in addition to being traditionally subject to state regulation, have been subject to federal constitutional limitations despite private ownership, "[s]ince these facilities are built and operated primarily to benefit the public and since their operation is essentially a *public function*."[39] The *Logan Valley* majority, in using this notion of a private interest

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31 Id. at 561.

32 326 U.S. at 506.

33 Diamond v. Bland, 3 Cal. 3d 653, 658, 477 P.2d 733, 736, 91 Cal. Rptr. 501, 504 (1970); Schwartz-Torrance Inv. Corp. v. Bakery & Confectionary Workers, Local 31, 61 Cal. 2d 766, 771, 394 P.2d 921, 924, 40 Cal. Rptr. 233, 236 (1964); Blue Ridge Shopping Center, Inc. v. Scheinenger, 432 S.W.2d 610, 616 (Mo. Ct. App. 1968); Broadmoor Plaza, Inc. v. Amalgamated Meat Cutters & Butcher Workmen, 21 Ohio Misc. 245, 248, 257 N.E.2d 420, 422-23 (C.P. Montgomery Co. 1969); Sutherland v. Southcenter Shopping Center, Inc., 3 Wash. App. 833, 842, 478 P.2d 792, 797 (Wash. Ct. App. 1970).

34 407 U.S. at 565-66.

35 Id. at 565.

36 Id. at 558.

37 391 U.S. at 325.

38 Cf. 326 U.S. at 507-08.

39 Id. at 506 (emphasis added). The issue of whether "state action" is present is not contested in *Marsh* or subsequent cases. In *Marsh*, had the town belonged to a municipal corporation, the conviction would necessarily have been reversed. Id. at 504. Thus, what the Court had to decide was whether private ownership destroyed the town sidewalks as an appropriate place for first amendment activity. State action existed in the state's imposition of criminal sanctions on the defendant. Id. at 509. Likewise in *Logan Valley* the Court, having decided that the shopping center was appropriate for first amendment activity, held that "the State may not delegate the power, through the use of its trespass laws, wholly to exclude . . ." first amendment activity from such a place. 391 U.S. at 319. See also Diamond v. Bland, 3 Cal. 3d 653, 666 n.4, 91 477 P.2d 733, 741 n.4, 91 Cal. Rptr. 501, 509 n.4 (1970).

State action may also exist when, as in *Lloyd*, public property is conveyed to private owners and additional public expenditures are necessary to integrate the now privately held land within the remaining portion of the city. See Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); *Marsh*, 326 U.S. at 507.

Finally, the delegation of full police authority to private security guards may also constitute state action. Sutherland v. Southcenter Shopping Center, Inc., 3 Wash. App. 833, 836, 478 P.2d 792, 794 (Wash. Ct. App. 1970).

In *Lloyd* the argument that there was no action under color of state law was never raised as a separate issue before the Supreme Court. Instead, the focus was on the nature of the property

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performing a public function specifically stated that its holding was based upon the understanding that the facts of *Marsh* did not require that an entire town be privately owned for a finding of a "public function" but only that the "business district" be privately owned.[40]

The "functional equivalent of a business district" test was hardly unnecessary to the *Logan Valley* decision. But only by cutting off *Logan Valley* from its roots in *Marsh* could the *Lloyd* Court have breathed life into the distinction between first amendment activity which was related to the use of the private property and first amendment activity which was unrelated to such use.[41] The activity upheld in *Marsh* was no more related to the use of the company town than was the antiwar handbilling related to the use of the Lloyd mall. The fact that an extension of *Logan Valley* to cover unrelated first amendment activity was logically necessary given the reasoning of the *Logan Valley* majority was first articulated by Justice White in his *Logan Valley* dissent.[42]

The *Lloyd* majority chose to look to the relationship between the business use of the property and the first amendment activity.[43] In other words, the Court would ask whether the activity was directed towards a store within the center in order to determine whether this was related and, therefore, protected activity. On the other hand, *Logan Valley* had looked to the actual use of the property. Its concern was whether such use bore a relationship to the historical notion of a public forum and as such was entitled to first amendment protection.

Traditionally certain public places, such as parks, sidewalks and streets, have been recognized as public forums, inherently consonant with the right of individual expression.[44] Naturally, communicative activity totally consonant with first amendment use is subject to reasonable regulation even on public property.[45] However, such regulation cannot effectively destroy the place as a public forum.[46] *Marsh* relied on

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and whether it fulfilled the requirements seemingly set forth by *Logan Valley.* However, *Lloyd* broadly asserted that

> it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* action, not on action by the owner of private property used nondiscriminatorily for private purposes only.

407 U.S. at 567 (emphasis added). However, the case itself centered on the function of the mall, i.e. whether it was sufficiently open to foreclose proscription of first amendment activity.

[40] 391 U.S. at 318-19.

[41] See Sutherland v. Southgate Shopping Center, Inc., in which the court stated:

> To give the use of the term "consonant with" an interpretation restricted to "directly related to retail functions" would seem, to us, to render meaningless *Logan Valley's* earlier carefully developed definition of the broad rights of the public to engage in certain First Amendment practices, in areas that are the functional equivalent of public streets and sidewalks on private property, regardless of the precise nature of the surrounding commercial enterprises.

3 Wash. App. at 833, 478 P.2d at 798-99.

[42] 391 U.S. at 339 (dissenting opinion).

[43] 407 U.S. at 564-66; Id. at 568-70. See text accompanying note 60 infra.

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> 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 purpose of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been part of the privileges, immunities, rights and liberties of citizens.

Hague v. CIO, 307 U.S. 496, 515 (1939). See also Jamison v. Texas, 318 U.S. 413, 415-16 (1943); Schneider v. State, 308 U.S. 147, 160 (1939); Lovell v. Griffin, 303 U.S. 444, 451 (1938).

[45] See note 3 supra.

[46] Grayned v. City of Rockford, 408 U.S. 104, 117 (1972); Cox v. Louisiana, 379 U.S. 559, 562-64 (1965); Schneider v. State, 308 U.S. 147, 164 (1939); Lovell v. Griffin, 303 U.S. 444, 451 (1938); De Jonge v. Oregon, 299 U.S. 353, 364-65 (1937).

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this public forum notion when it emphasized that if the town in question were owned by a municipality rather than a private corporation, the unenforceability of the trespass statute would be clear.[47] But *Marsh* went one step further in ruling that the private-public distinction must be overlooked when there is the possible denial of access to areas which function, in fact, as the traditional public forum.[48] *Marsh* emphasized the nature of the place in determining the consonance of first amendment activity and overlooked private ownership where denial of access would, in fact, result in a first amendment guarantee not being exercisable in a place traditionally used for such activity. In effect, certain places are "appropriate" for communication and, therefore, communicative activity is consonant with such places.[49]

Logan Valley recognized that *within* public towns there may exist privately owned places which are the functional equivalent of the traditional public forum.[50] The test to determine whether a given parcel of private property is such a functional equivalent is found in the following words of the *Logan Valley* Court:

> The state may not delegate the power, through the use of its trespass law, wholly to exlude those members of the public wishing to exercise their first amendment rights consonant with the use to which the property is actually put.[51]

By emphasizing the actual use of the property the Court evidenced a concern for maintaining for free speech activity those places which actually function in the manner of the public forum.

In determining whether an activity is "consonant," size is a consideration. The larger the place and the more it approaches a town, the more inherently appropriate may be the forum. But as *Lloyd* properly points out, size cannot be the sole consideration in deciding whether a place which is open to the public is required to support first amendment activity.[52] For example, it would be impossible to determine whether handbilling within a twenty-one store mall should be allowed merely because handbilling within a twenty store mall had previously been allowed.[53] However, while size must not be allowed to function as an independent determinant of individual

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47 326 U.S. at 504. See note 39 supra.

48 326 U.S. at 509.

49 The issue of appropriateness of first amendment activity within a place "clearly available to the general public" was raised in Wolin v. Port of N.Y. Authority, in which the place was a publically owned bus terminal. There the court applied the following test:

> [D]oes the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general activity extended make it an appropriate place for communication of views on issues of political and social significance.

392 F.2d at 89. The court indicated that these factors would be equally germane "be the forum selected for expression a street, park, shopping center, bus terminal or office plaza." Id. at 89, citing Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1; Note, Regulation of Demonstrations, 80 Harv. L. Rev. 1773 (1967).

50 391 U.S. at 319.

51 Id. at 319-20. *Logan Valley's* "directly related" reference (see text accompanying note 26 supra) as emphasized in *Lloyd*, contained the narrowest language in the *Logan Valley* decision, insisting upon a "direct" relation rather than "general" consonance and mentioning only picketing rather than all first amendment activity. One court, in fact, has held that the "directly related" limitation was meant to apply only to picketing, as evidenced by the fact that *Marsh* was not a picketing case and did not require a direct relation. Sutherland v. Southcenter Shopping Center, Inc., 3 Wash. App. 833, 845, 478 P.2d 792, 799 (Wash. Ct. App. 1970). But see Comment, The Shopping Center: Quasi-Public Forum for Suburbia, 6 U. San Fran. L. Rev. 103 (1971).

52 407 U.S. at 569.

53 "Sufficient" size also does not *per se* decide the issue as to whether a place is "open to the public." For example, the elevator of a large office building cannot be "considered functionally, spatially, or in any other pertinent way, equivalent to a town, shopping center, bus terminal, or supermarket sidewalk." City of Chicago v. Rosser, 47 Ill. 2d 10, 17, 264 N.E.2d 158, 162 (1970). Likewise, a large, industrial plant, not generally open to the public, is functionally dissimilar to such places. NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

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rights, it is not irrelevant. *Lloyd* chose largely to ignore the size element. While the Logan Valley shopping center, at the time of the picketing, consisted of only two stores,[54] the Lloyd mall had over sixty stores, shops and offices.[55] Additional factors, such as whether the first amendment activity will physically interfere with the use of the place[56] and whether regulation of the activity is possible,[57] must also be considered. In short, consonance is a factual inquiry as to whether the privately owned mall is the contemporary form of the town park and/or business district.[58] Such an inquiry has led every state court which has considered the question to hold that the mall of a shopping center must be open to first amendment activity, even when such activity is not directed at some store within the mall.[59]

While these cases saw the "actual use" of the property in relation to the traditional function of the public forum as determinative, *Lloyd* injected another element: the intent of the private property owner. Citing Justice White's dissent in *Logan Valley*, the *Lloyd* Court emphasized that there was no dedication of the mall by the Lloyd Corporation to the general public to use the property for all purposes but rather only dedication of the property to the public to use the center for patronage of businesses operating there.[60] Consonance was not viewed in terms of the appropriateness of the property as a public forum but rather in terms of whether there was a relationship between the message and the primary use of the property as intended by the owner. Under this reasoning, the opening of the premises for certain uses did not imply that it was open to all uses, including particularly that of communication to the general public by those entering the property. The existence within the mall of facilities for certain community activities proved, according to *Lloyd*, only that the owner was concerned with the profit such facilities would generate through good will

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[54] 391 U.S. at 317 n.8.

[55] Tanner v. Lloyd Corp., 308 F. Supp. at 129.

[56] 391 U.S. at 320.

[57] Id.

[58] This same test finds support in Central Hardware Corp. v. NLRB, in which the Court states:

> Before an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use.

407 U.S. 539, 547 (1972). This statement is reconcilable with the Court's holding in *Lloyd* only if one places a heavy emphasis on the word "devoted." See text accompanying note 60 infra.

[59] Other than the lower federal court opinions in the *Lloyd* case, all cases reaching this holding were decided by state courts. Sutherland v. Southcenter Shopping Center, Inc., permitted the solicitation of signatures for an environmental initiative which was unrelated to the business purposes of the center on the grounds that the shopping center functioned as a business district with the roadways and sidewalks between buildings being functional equivalents of their counterpart in the traditional town. 3 Wash. App. at 843, 473 P.2d at 797-98. And in Diamond v. Bland, which also involved an initiative, the court refused to recognize the related-unrelated distinction, holding, in fact, that the *Logan Valley* rationale was "persuasive authority" to the contrary. The court held that first amendment activities on the premises of a shopping center should be protected to the same extent as they had been in *Marsh* for persons in a company town, when the shopping center "serves as the analogue of the traditional town square." 3 Cal. 2d at 660, 477 P.2d at 737, 91 Cal. Rptr. at 505. In State v. Miller the court, faced with a shopping center question, merely stated in a per curiam decision that *Logan Valley* was factually controlling and, therefore, upheld the presence of "unrelated" first amendment activity. 280 Minn. 566, 159 N.W.2d 895 (1968).

This same reasoning was applied in Wolin v. Port. of N.Y. Authority. Rejecting the Port Authority's argument that the interior of a building is not a traditional place for first amendment activity, the court pointed out that with the fifty foot walkways lined with stores and with people constantly moving to and from the buses and with the allowed presence of certain solicitation groups, "the terminal ... becomes something of a small city – built indoors, with its 'streets' in effect set atop one another, and vehicles operating under, above, and to the side, not unlike some futuristic design for living." 392 F.2d at 89. In short, the terminal was held open to first amendment activity inasmuch as it was "[l]ike a covered marketplace area." Id. at 90.

[60] 407 U.S. at 564-66.

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and the attraction of potential shoppers.[61] In contrast, the respondents' activities would be antithetical to the intent of the Lloyd Corporation to create a controlled, not open ended, environment conducive to shopping.[62] In short, the *Lloyd* Court left wide discretion to the corporation in determining whether the mall would be considered open for free speech activities.[63]

Defining "actual use" by the corporation's "designated purpose" runs headlong against Supreme Court precedent. *Marsh* had emphasized that a determination of the existence of first amendment rights was not to hinge upon a state property law such as the law of "dedication."[64] While the owner might have absolute title and have intended no general easement to the public, *Marsh* determined that certain actual uses might require that the owner's rights in fee be circumscribed by *constitutional* limits.[65] Further, in *Logan Valley* the Court allowed picketing of a business enterprise within a mall despite the fact that such activities were conducted with the express purpose of discouraging patronage. The owner's intent to use the property only for the purpose of making profits was ignored. Instead the Court's analysis focused upon the actual use of the center in order to determine if the forum performed in a quasi-public capacity.

More important than this departure from precedent is the fact that the introduction of the "designated purpose" criterion encourages the creation of public forums with de facto discriminatory policies as to the content of first amendment activities.[66] In *Lloyd* there appeared to be no purposeful discrimination against the respondents. The mall owner had enforced a strict no-handbilling rule for fear that such activity would cause litter, annoy customers, create disorder and be "incompatible

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61 Id. at 555.

62 The purpose of the structure of the mall is to maximize profit by isolating the shopper from "the noise, fumes, confusion and distraction which he normally finds along city streets." 407 U.S. at 554, citing testimony of an architectural expert. The Court appeared to approve of this "clean" environment, describing the mall in pleasant terms as an area "in which flowers and shrubs are planted, and statuary fountains and other amenities are located." Id. at 553. On the other hand, the Court spoke disparagingly of the broad scope of the injunction issued against the Lloyd Corporation which would have permitted access to any persons "[i]rrespective of how controversial, offensive, distracting or extensive the distributions may be." Id. at 564 n.11. The Court, if it feared that "offensive" first amendment activity would occur, could have placed reasonable limits on the injunction. Corporate profit and first amendment activity are not necessarily at odds with one another. Cf. Comment, The Shopping Center: Quasi-Public Forum for Suburbia, 6 U. San Fran. L. Rev. 103 (1971). What is significant, however, is the emphasis the Court placed upon upholding the "controlled, carefree environment." In this regard, it may be enlightening that the Court, in mentioning that government regulation and rights of citizens may arise due to size and diversity of activity of a privately owned place, stated, as its example, the implementation of regulations concerned with public health and safety and not constitutional limitations upon the owner.

63 Appellant, in fact, had argued that *Marsh* was reconcilable with an intent test inasmuch as the company owning the town in *Marsh* had extended an invitation to the general public, while the Lloyd Corporation had only invited that portion of the public seeking to transact business. Brief for Appellant at 10. The question remains whether the owner of the company town could also have so limited his invitation. It might further be asked what significance the *Lloyd* Court attached to the presence of signs, embedded within the center sidewalks, which stated that the mall was for the use of tenants and persons transacting business. Cf. 407 U.S. at 554-55.

64 326 U.S. at 505-06. For an analogous view emphasizing the difference between property and constitutional rights, see Jones v. United States, 362 U.S. 257 (1960) (constitutional right under the fourth amendment to be free from search and seizure not to be determined by common law property rights).

65 326 U.S. at 505-06.

66 It has been determined that government may not restrict first amendment activity because of its content. Police Dep't. of the City of Chicago v. Mosley, 408 U.S. 92 (1972). It seems probable, however, that the Lloyd Corporation was motivated to admit certain groups on the basis of political beliefs. The manager of the Lloyd Center testified that the American Legion was given permission to sell poppies in the mall in the belief that "'veterans ... deserves [*sic*] some comfort and support by the people of the United States.'" 407 U.S. at 579 (Marshall, J., dissenting).

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with the purpose of the Center and the atmosphere sought to be preserved."[67] And yet the mall was already open to other forms of first amendment activity which were not designed to produce profit for the owners of the center,[68] such as the selling of "buddy" poppies by the American Legion and the solicitation of funds by the Salvation Army and Volunteers of America. Resort to a solicitation-handbilling distinction in *Lloyd* would not answer the charge of discrimination. In *Logan Valley* the Court had specifically noted that a picketing-handbilling distinction was immaterial, since both activities involve conduct other than speech and since the issue "is solely one of right of access for the purpose of expression of views."[69] Moreover, the Lloyd Corporation exploited for profit the fact that its mall was the best place for the exercise of first amendment activities.[70] In this light, the Court should at least have recognized such corporate intent and have required the corporation to assume the liabilities and burdens of exploiting first amendment activities.

However, de facto discrimination may not result if there exists an effective alternative for communicative expression. The Court as a second ground for distinguishing *Logan Valley* found such an alternative in *Lloyd.* The traditional standard for the sufficiency of an alternative forum is that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[71] Whether a place is appropriate should depend, in turn, on the audience the speaker is trying to reach.[72] Even if the presence of an effective alternative can limit exercise of first amendment activities in certain locations, still the effectiveness of the alternative forum in reaching the desired audience is as important a consideration in judging appropriateness when the audience is the general public as it is when the audience is the patrons of one particular store. In either case, if the alternative forum is ineffective, first amendment rights would be suppressed under the guise of merely regulating the location of the protected activity. *Lloyd* did stress the need for an "adequate alternative." However, the Court's treatment of the facts dealing with the adequacy of the public streets as an alternative forum in the Lloyd Center indicates that "adequacy" will be a standard easily met in future cases.

The district court in *Lloyd* had carefully examined the alternative location and had found that the respondents could not as effectively and without danger to

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67 407 U.S. at 556.

68 Tanner v. Lloyd Corp., 308 F. Supp. at 129-30 (factual determination by district court); Tanner v. Lloyd Corp. 446 F.2d at 546 n.1 (court of appeals' acceptance of findings as determinative). Justice Marshall's dissent in *Lloyd* took the position, as had the court of appeals, that no extension of *Logan Valley* was necessary inasmuch as the mall was already open to first amendment activity and that, therefore, the related-unrelated distinction need not even be reached. 407 U.S. at 578 (dissenting opinon).

69 391 U.S. at 315. It is worth considering what the *Lloyd* Court would have ruled if, for example, the respondents had attempted to solicit funds instead of violating the no-handbilling rule. It seems most probable that, given the Court's broad discussion of the limited dedication of the mall to public use, the Court would have restrained such solicitation. Thus, the reasoning of the Court in the final analysis renders unimportant the "no-handbilling rule" discussion.

70 The Lloyd Corporation advertised the center's use to presidential and vice-presidential candidates by "boasting 'that our convenient location and setting would provide the largest audience (the candidates) could attract.' " 407 U.S. at 580 (Marshall, J., dissenting).

71 Schneider v. State, 308 U.S. at 163, cited with approval in *Logan Valley*, 391 U.S. at 323-24.

72 In *Logan Valley* the "directly related" issue was founded on the notion that the audience to be reached was located invariably within the center. 391 U.S. at 221-23. Likewise, in Wolin v. Port of N.Y. Authority, the court noted that absence of a relation of the first amendment message to the operation of the place is determinative. However, the location need not represent the object of protest. Instead, the place may be where the relevant audience is found. In *Wolin* such audience was the general public as well as a more special audience comprised of servicemen traveling to and from their bases. 392 F.2d at 90.

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themselves distribute the handbills to the public from the sidewalks outside the mall.[73] The court of appeals expressly affirmed these findings. The Supreme Court overruled the district court by baldly asserting that the handbills "[might] be distributed conveniently" on the public sidewalks and had, in fact, been so distributed.[74] With nothing to guide them except photographs of Lloyd Center, the majority seemed to overrule lower court findings of fact.[75]

The *Lloyd* Court never indicated whether the existence of an alternative forum was *per se* sufficient to deny the individuals admittance to the mall or whether it was also required that the first amendment activity be unrelated to the use of the mall. The Court's emphasis on the "directly related" issue suggests the latter. However, given the Court's insistance on upholding the owner's designated purpose, the existence of an alternative may be given increasing emphasis as an independent criterion in cases where the activity at issue is obviously related to the mall's operation.[76]

In reaching its conclusion that the fifth amendment rights totally controlled in *Lloyd*, the Court gave only scant attention to the nature of the property interest it

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[73] 308 F. Supp. at 131. Distribution to cars entering the underground parking facility was nearly impossible, since such cars are not required to come to a stop. Distribution to cars leaving the facility was complicated by the fact that handbilling of the driver's side of the car would require the handbillers to stand in the entrance lane.

[74] 407 U.S. at 567. The requirement of the Court that there exist no other effective means available for communication seems closer to the standard adopted in labor picketing of industrial plants. NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956) (location of plant and living quarters of nonunion employees constitutes reasonable alternative to distribution of union materials on company owned parking lots). However, such labor cases should be distinguishable from the shopping center situation, since they do not involve private property open to the public. See note 53 supra. Nevertheless the rule proposed by the respondents and rejected by the Court was that the owner must "show that communication of the message elsewhere would reach the large numbers of people attending the shopping center in a similar period of time," i.e. that the alternative be equally effective as the original location. Brief for Respondent at 28.

[75] Fed. R. Civ. P. 52(a) states:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

The *Lloyd* dissent took the position that the majority was reversing the lower court findings as "clearly erroneous":

> The District Court and the Court of Appeals took the view that requiring respondents to run from the sidewalk, to knock on car windows, to ask that the windows be rolled down so that a handbill could be distributed, to offer the handbill, run back to the sidewalk, and to repeat this gesture for every automobile leaving Lloyd Center involved hazards not only to respondents but also to other pedestrians and automobile passengers. Having never seen Lloyd Center, except in photographs contained in the record, and having absolutely no idea of the amount of traffic entering or leaving the Center, the Court cavalierly overturns the careful findings of facts below. This, in my opinion, exceeds even the most expansive view of the proper appellate function of this Court.

407 U.S. at 583 n.7 (Marshall, J., dissenting).

While the Court may feel that the respondents need not have access to the most effective forum – see *Logan Valley*, 391 U.S. at 319 (private property need not be held to same standard as public property) – it is significant that the Court does not remand the case to determine the degree to which the alternative forum itself was effective and whether the alternative would be dangerous. That the respondents "distributed" their literature outside the mall would in no way indicate the effectiveness or adequacy of such distribution.

[76] See Comment, Picketing of the Modern Marketplace: The Rights of Ownership and Free Speech, 48 B. U. L. Rev. 699, 707 (1968) (denial of access to private property of related activity proper where "equally effective" public property).

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was protecting. It ignored the fact that there was no expectation of privacy by the Lloyd Corporation;[77] that there was no desire of prohibiting all first amendment activity in the center given the Lloyd Corporation's practice of admitting selected groups;[78] that disorder could have been prevented by regulating the number of handbillers as well as the time and place for handbilling;[79] and that a no littering policy could have been enforced by prosecuting litterers directly.[80] In effect, the *Lloyd* Court relied soley on the property owner's "naked title" to the detriment of the respondents' interest in securing an effective forum for communicating with the general public. The Court's favoring of this property interest is a far cry from the "preferred position" traditionally accorded the first amendment and the determination of substantive interests based upon a case by case analysis.[81]

Another significant element of the *Lloyd* opinion is that the Court almost completely disregarded the changing structure of the traditional town. *Logan Valley's* analysis of the shopping center as the functional equivalent of the *Marsh* business district explicitly recognized that under modern land use arrangements such centers are increasingly assuming the role of the traditional public forum and that effective implementation of the first amendment required a judicial recognition of this fact.[82] Assuming *arguendo* that the Lloyd Center allowed no political or social activities whatever in the mall, the size of the center, its location, the diversity of its stores and facilities and the resultant number of persons attracted to it, may combine to render the shopping center the only effective place to exercise first amendment rights.[83] The *Logan Valley* Court was rightfully concerned with the possible creation by store

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[77] 391 U.S. at 324. The Lloyd Corporation was certainly aware that it was not merely a large shopping facility within Portland but rather was assuming the role of a significant part of the business district itself. The city of Portland, in vacating about eight acres of public streets for use by the corporation, passed an ordinance which stated that the corporation should use the land for the construction of a "general business district." 308 F. Supp. at 130. Moreover, the city was careful to integrate the center into the existing street pattern and to plan future streets around the center. Id.

[78] See notes 13 and 14 supra.

[79] See note 3 supra.

[80] Littering *per se* is no grounds to deny first amendment activity. Schneider v. State, 308 U.S. at 162. Moreover, the district court in *Lloyd* found that no littering, or other disturbance, had occurred. 308 F. Supp. at 131.

[81] *Marsh*, 326 U.S. 501, 509 (1946). See also Follett v. McCormick, 321 U.S. 573, 577 (1944); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

[82] 391 U.S. at 324. In 1971 shopping centers in the United States and Canada accounted for approximately 40% of all retail sales other than automobiles, building materials and building supplies. Seek Billions for New Centers, 47 Chain Store Age, Feb. 1971, at 25. Increasingly private shopping centers are being constructed within downtown urban areas and purposely made to function as miniature cities. See Shopping Centers Grow into Shopping Cities, Business Week, Sept. 4, 1971, at 434-38.

[83] The *Lloyd* Court briefly mentioned this consideration, but never as a substantive interest to be weighed in the balancing process. 407 U.S. at 561 n.7. *Lloyd* overlooked the fact that the Lloyd mall was not simply a cluster of retail stores, as the Court would assert. Id. at 569. Numerous professional offices were located within the mall, such as those of lawyers, doctors and dentists. Id. at 580 (Marshall, J., dissenting). There was an auditorium specifically for social and political activity. See note 13 supra. Furthermore, the mall functioned as a thoroughfare of community activity. Besides being integrated within the city's street pattern,

> [t]he mall is a multi-level complex of buildings, parking facilities, sub-malls, sidewalks, stairways, elevators, escalators, bridges, and gardens, and contains a skating rink, statues, murals, benches, directories, information booths, and other facilities designed to attract visitors and make them comfortable.

308 F. Supp. at 129.

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owners of a *cordon sanitaire* of parking lots which could have, in effect, immunized the stores from "on-the-spot public criticism."[84] However, the *Lloyd* Court reasoning invites the following inquiries: (1) whether the owner of a shopping center, by having no streets cutting across his property, may relegate "unrelated" first amendment activity to minimally effective areas outside the center; and (2) whether he might thereby be allowed to establish a *place sanitaire*, such that all but "related" first amendment activity would be denied within the city or suburb, apart from television, radio and newspaper advertising which a substantial proportion of persons cannot afford. Perhaps when the speech is related to the business of the shopping center, it would be declared especially onerous to deny access to the center for communicative purposes. However, the fact remains that free speech is greatly impaired if no forum of expression is available even for ideas of a more general nature.

This downplaying of *Logan Valley's* concern for the increasingly important function of the shopping center as the contemporary public forum epitomizes the *Lloyd* Court's dramatic departure from premises advanced by earlier courts. The "preferred position" approach to the first amendment found in *Logan Valley* is based on the notion that the first amendment is necessary to preserve a free society, since such a society can exist only when there are public forums where competing ideas may be expressed and heard.[85] The majority in *Logan Valley* emphasized the *public* interest in maintaining free speech and the insubstantial nature of the fifth amendment claim in the context of the shopping center.[86] Justice Black dissented, viewing *Logan Valley* as a case of two personal freedoms in opposition and fearing that when a court creates "public" forums upon privately owned property in order that individuals might express their views, centralized government is unjustly forcing private individuals to conform to public desire.[87] The fear of the majority, on the other hand, seemed to be that private, corporate interests might abridge the opportunities of many individuals seeking personal expression and thereby limit the public's access to differing opinions.[88] The *Logan Valley* majority, unlike Justice Black in *Logan Valley* and the majority in *Lloyd*, appeared willing to acknowledge the growth of a type of property that is "quasi-public" in nature. The *Lloyd* Court, much like Justice Black, may have viewed the issue solely as one of balancing absolute, private interests. As such it represents a marked retreat in the protection of the public interest in maintaining a free market place for competing ideas.[89]

While the factual basis of *Lloyd* appears to lie within the purview of both the *Marsh* and *Logan Valley* doctrines, its approach to these facts has worked two perversions: (1) it has denied *Logan Valley's* assertion that the functional similarity of a shopping center's operations to those of a municipal business district must be

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84 *Logan Valley*, 391 U.S. at 324-25.

85 Id. at 324-25; *Marsh*, 326 U.S. at 507-09.

86 391 U.S. at 323-25.

87 391 U.S. at 332-33 (dissenting opinion); Justice Black and First Amendment "Absolutes": A Public Interview, 37 N.Y.U. L. Rev. 549 (1962); Black, The Bill of Rights, 35 N.Y.U. L. Rev. 865 (1960). See generally Reich, Mr. Justice Black and the Living Constitution, 76 Harv. L. Rev. 673 (1963).

88 391 U.S. 323-25; *Lloyd*, 407 U.S. at 586 (Marshall, J., dissenting). See also, Martin v. Struthers, 319 U.S. 141, 146 (1942).

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> Much has been written since the end of the Supreme Court term of 10 days ago about the dramatic conservative shift of the Court since the days of Chief Justice Earl Warren. Perhaps no single case of the recent term better illustrates that shift than the [Lloyd] decision handed down on June 22.

N.Y. Times, July 9, 1972, § 4 (News of the Week in Review), at 9, Col. 1.

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weighed in deciding whether first amendment activity shall be permitted within that center;[90] (2) it has placed total emphasis on a distortion of *Logan Valley's* "directly related" test and thereby has so severely limited *Marsh* to its "company town" facts that that case's "public function" criterion, which operated independently to grant first amendment protection, may never do so again. Whatever possibility that a helpful functional analogy might ultimately have been drawn between a self-contained shopping area and a town has been uncompromisingly snuffed out. In addition, in attempting to square its decision with *Logan Valley* on the grounds that "adequate alternatives" were available, *Lloyd* presages an expansion of the "adequate alternatives" test to include any minimally effective areas.

It seems fair to say after *Lloyd* that when the Supreme Court considers the issue of free speech in the context of privately owned property, property rights, not the rights of free speech, will be given preference. It can be expected that the Court will give cursory respect to the "special solicitude" once given the first amendment in balancing it against the fifth amendment, but no longer will the first amendment occupy the same "preferred position" it enjoyed in prior decisions.

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90 *Logan Valley* is not explicitly overruled by *Lloyd*, but it is worth noting that much of the *Lloyd* majority's analysis was drawn from the dissent in *Logan Valley*, not from the majority. 407 U.S. at 562-63, 565, 569 n.13. In justifying reliance on Justice Black's dissent for an understanding of *Marsh*, the Court noted that since he was the author of *Marsh*, "his analysis of its rationale is especially meaningful." Id. at 562 n.10. One may then wonder why the Court did not find Justice Marshall's *Lloyd* dissent "especially meaningful," as he had voiced the majority opinion of *Logan Valley*. In this regard, it is worthy of note that the dissenting Justices in *Lloyd* were members of the majority or the concurrance in *Logan Valley*.

Commenting on whether *Logan Valley* has been overruled by *Lloyd*, Justice Marshall noted that

> one may suspect from reading the [majority] opinion of the Court that it is *Logan Valley* itself that the Court finds bothersome. The vote in *Logan Valley* was 6-3, and that decision is only four years old. But I am aware that the composition of this Court has radically changed in four years. The fact remains that *Logan Valley* is binding unless and until it is overruled.

407 U.S. at 587 (dissenting opinion).

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