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RECENT DEVELOPMENTS

Lloyd Corporation v. Tanner: Expression of First Amendment Rights in the Privately Owned Shopping Center—A Reevaluation by the Burger Court

In *Lloyd Corporation v. Tanner*, the United States Supreme Court held that the owners of a shopping center, open to the general public, could prohibit the peaceful distribution of handbills whose subject was unrelated to the operations of the shopping center. The Court, in a 5-4 decision written by Justice Powell, vacated an injunction granted by the United States District Court for the District of Oregon and affirmed by the Ninth Circuit Court of Appeals forbidding interference with the distribution of non-commercial handbills within a shopping mall. Realizing that various courts had differed on the question of whether the private property rights of a landowner should override the protection afforded an individual's first amendment rights, the Court attempted to clarify the scope of its decisions in *Marsh v. Alabama* and *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.* In so doing, the Court refused to continue the trend of gradually extending protection afforded elements of free speech in areas not traditionally considered public.

2. Justice Marshall, dissenting, was joined by Justices Douglas, Brennan and Stewart.
4. 446 F.2d 545 (9th Cir. 1971).
7. The concept that speech is protected in streets and parks, and on sidewalks and other public areas developed from an early line of cases dealing with municipal ordinances prohibiting the distribution of handbills. Lovell v. City of Griffin, 303 U.S. 444 (1938), Schneider v. State, 308 U.S. 147 (1939), and Jamison v. Texas, 318 U.S. 413 (1943). Since that time areas where speech is protected have been extended to include: shopping centers (*Logan Valley, supra note 6*); bus terminals (*Wolin v. Port of New York Authority, 392 F.2d 83 (2nd Cir. 1968)*); railway stations (*In re Hoffman, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967)*), and welfare offices (*Massachusetts Welfare Rights Organization v. Ott, 421 F.2d 525 (1st Cir. 1969)*).
Petitioner was the owner of a large retail shopping center built in 1960 in Portland, Oregon, which occupied approximately 50 acres, and which had both open and covered parking facilities for over 1,000 cars. The area was bounded by four public streets, had a perimeter of almost one and one half miles, and was crossed by several public streets with adjacent public sidewalks. The central portion of the shopping center complex consisted of a single multi-level structure with numerous malls and walkways running from it to the interior parking areas and to the exterior public sidewalks and streets. Within these fifty foot wide malls, which were open to the general public at all times, were located about sixty commercial shops and department stores which the tenants leased from the Lloyd Corp., as well as an auditorium, which was rented to groups for public meetings, and a skating rink. The malls, like the walkways, were

... interspersed with gardens, flowerbeds, statuary, murals, various other works of art, benches, elevators and escalators, stairways, and bridges and directories and information booths.8

The entire facility was designed to promote retail business by encouraging customers to enter and shop in an atmosphere isolated from the noise, fumes, confusion and distraction normally found along city streets.9 In an effort to attract shoppers, the malls were not physically closed and window shopping was encouraged within reasonable hours. Yet, although open to the public, Lloyd had placed signs in various places stating that permission to use the public areas of the facility could be revoked at any time.10 It was this alleged power to control the public areas of the center which was challenged by Tanner in this suit.

Lloyd, in accordance with the wishes of its tenants, had enforced a policy forbidding the distribution of handbills within the building complex and its

9. 406 U.S. at 554. It should be noted that not only did petitioner incur the burden of a very substantial initial investment in the facilities but along with his tenants spent approximately $350,000 each year to maintain the privately owned common areas of the center. Supra note 8.
10. The signs carried the following message:

"NOTICE—Areas in Lloyd Center Used By the Public Are Not Public Ways But Are For The Use of Lloyd Center Tenants And The Public Transacting Business With Them. Permission To Use Said Areas May Be Revoked At Any Time. Lloyd Corporation, Ltd.

Supra note 3, at 129.

In the district court opinion there was some question as to the location of the signs. Plaintiffs' counsel went to the Center and was unable to find these signs. Mr. Horn, the manager of the Center, testified that he ordered the signs installed several years ago and that he assumed they were still there although he did not know exactly where they were.

308 F. Supp. at 129 n.4.
malls, because it had found them to be "... controversial, distracting and detrimental to business, and because of the littering that would be caused by discarded handbills." However, Lloyd had permitted a variety of non-commercial activities by outside organizations in these same areas, when it felt that the activities would be beneficial to the center's business. Although both civic and charitable groups had been granted and denied permission to use the center in the past, it was respondents' position that the sole criteria used by Lloyd was not the benefit derived by the center but whether Lloyd approved of the purposes and activities of the particular organization.

Respondents' situation arose on November 14, 1968, when five individuals distributed within the walkways of the main part of the center known as the "Mall" handbill invitations to attend a meeting sponsored by an informal group known as the "Resistance Community". While the distribution was taking place at least one shopper expressed annoyance to the manager of Lloyd Center. As a result security guards, employed by the Center, were instructed to request those individuals seeking to distribute handbills at the Center to do so on the publicly-owned streets and sidewalks. However, after the decision in Logan Valley, Lloyd revised its policy to permit handbilling in the privately-owned areas if related to its business or that of its tenants.

The easiest cases have been those in which the only interest opposing free communication was that of keeping the streets of the community clean. This could scarcely justify prohibiting the dissemination of information by handbills. The Court in Wolin v. Port of New York Authority, 392 F.2d 83, 92 (2d Cir. 1968) came to the same conclusion. "... Non-commercial leaflet distribution is an essential right that cannot be barred except for an especially good reason, and the burden of street cleaning is not good enough."

In this regard, the Lloyd Corp. had deemed beneficial the following activities: football rallies, Veterans Day ceremonies, campaign speeches by presidential candidates, Boy Scout displays, antique automobile displays, and choral and other musical performances. Brief for Respondent at 5, Lloyd Corp. v. Tanner, 406 U.S. 551 (1972).

Lloyd Corp. had permitted the sale of "Buddy Poppies" by the American Legion, solicitation of funds by the Salvation Army and Volunteers of America, and the distribution of literature on Portland tourist attractions on the interior malls and walkways of the center. It had denied permission to use the facilities to the March of Dimes and Hadassah, a national Zionist women's service organization. Supra note 3, at 129.

This contention seems a bit strained when one attempts to draw meaningful distinctions between charitable organizations such as the Salvation Army and the March of Dimes.

The meeting to protest both the war in Vietnam and the Selective Service system was to be held at a church located near the shopping center that same evening. Supra note 3, at 130.

The twelve security officers employed by the Lloyd Center were commissioned...
formed respondents that they were trespassing and would be arrested unless they stopped their activities. The officers suggested that, if respondents wished to continue the handbilling, they move to the public streets and sidewalks adjacent to, but outside of the center complex. The individuals eventually moved outside to continue their distribution and subsequently instituted a suit in the district court against Lloyd seeking a declaratory judgment and an injunction forbidding further denial of permission to distribute non-commercial handbills in the privately-owned areas of Lloyd Center.

The district court found that the Lloyd Corp. invited everyone to the Center and that the Mall was open to the general public. The court also noted that there was no littering or disturbance and that the handbills were distributed to only those who were willing to take them. In rejecting Lloyd's claim that the Center was more like an office building than like a public business district, Chief Judge Solomon stated: "Its parking facilities and sidewalks serve the same purpose as streets and sidewalks of a public business district. I find that the Mall is the functional equivalent of a public business district." Finding that Donald Tanner, Betsy Wheeler, and Susan Roberts were merely expressing their political beliefs, the court likened the situation to the expression of religious beliefs in *Marsh v. Alabama*.

Plaintiffs' distribution of handbills here was identical to the distribution of literature in *Marsh*. Here also, the owner claims the right to bar the distribution of literature or to select which literature may be distributed. The sole distinction between this case and *Marsh* is that this case involves a shopping center whereas * Marsh* involved a town. I do not believe that distinction should cause a different result.

Not wishing to end its opinion at this point, the court went on to say that *Logan Valley* had expressly extended *Marsh* to shopping centers. Admitting that *Logan Valley* had left open the question of whether an owner could bar picketing that was not directly related to the use of the center the court said that "[h]ere, [p]laintiffs' distribution of handbills was pure speech." by the City of Portland as special police officers, wore uniforms similar to those worn by the city police and were licensed to carry handguns. *Id.*

18. *Id.*
19. *Id.* at 130-31.
20. *Id.* at 130. The court in rejecting the analogy to an office building noted that the 1954 Portland ordinance vacating about eight acres of public streets for use by the corporation stated that the City intended the land be used for the construction of a general retail business district.
21. *Id.* at 132.
22. *Id.*
23. *Id.* The statement by the court that handbilling constituted pure speech is erroneous. As the Supreme Court stated in *Logan Valley* supra note 6, at 315-16: "[h]andbilling, like picketing, involves conduct other than speech, namely, the physical presence of the person. . . ."
Chief Judge Solomon, again relying on his analysis of *Marsh* and *Logan Valley*, concluded that

... [A]n owner who opens his land to the general public for business purposes, to the extent that the land becomes the functional equivalent of a public business district, gives up the right to prohibit the distribution of literature or to decide which literature may be distributed. If this were not true, the public need for information, on which *Marsh* was based, could be frustrated.24

The decision of the district court was affirmed by the court of appeals in a brief per curiam opinion which stated that they were bound by the factual determination that the facility was the functional equivalent of a public business district.25 Although stating that the factual determination was not "clearly erroneous" the court of appeals said:

Our opinion is not, of course, an extension of the holdings of the Supreme Court in [Logan Valley] and *Marsh*. The extent to which the appellant's facility had been opened to public use is reflected in the district court's factual determinations.26

By seemingly hedging on the lower court's conclusion, the court of appeals evidenced the problem that many other jurisdictions were having when faced with the ramifications of the *Marsh* - *Logan Valley* rationale, and it was this problem which the Supreme Court faced on appeal. In attempting to clarify the issues the Court re-emphasized the significance of *Marsh*—the foundation on which the later decisions rested.

**Physical Characteristics Test—the Marsh Rationale**

A company town located in a suburb of Mobile, Alabama known as Chickasaw was the locus of the issues raised in *Marsh v. Alabama*. Owned by the Gulf Shipbuilding Corporation, a private company, it had, in the words of Justice Black, "... all the characteristics of any other American town."27

The private property consisted of residential buildings, streets, a "business block" with stores, a post office, a sewer system and a sewage disposal system.28 The area was freely accessible to individuals who desired to use the facilities and was indistinguishable from the property not owned by the company. Grace Marsh, a Jehovah's Witness, came onto the sidewalk29 near the post office and began to distribute religious literature. She was warned

24. Supra note 3, at 132.
25. 446 F.2d at 546.
26. Id. n.1.
27. 326 U.S. at 502.
28. Id. The business establishments were leased by the company to various individuals.
29. The sidewalk, located along the store fronts, was used "in order to enter and leave the stores and the post office." Id. at 503.
that she could not distribute the literature without a permit, that she would not be issued a permit, and that if she continued her activity she would be arrested.\(^{30}\) When Marsh refused to desist she was arrested for criminal trespass\(^{31}\) and later convicted. The Supreme Court in overturning the conviction, reasoned that

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\text{had the title to Chickasaw belonged not to a private but to a municipal corporation and had appellant been arrested for violating a municipal ordinance rather than a ruling by those appointed by the corporation to manage [the] company town it would have been clear that [the] conviction must be reversed.}\(^{32}\)
\]

Therefore, it was necessary for the Court to circumvent the issue of private ownership.

Relying on *Republic Aviation Corp. v. NLRB*,\(^{33}\) Justice Black attacked the issue directly.

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.\(^{34}\)

Disregarding the issue of whether or not the sidewalk had been “dedicated” to public use, Black instead turned to the policy interest of having channels of communication freely available to the public. He noted that in balancing the Constitutional rights of owners of property against the peoples’ right to enjoy freedom of speech and religion “... we remain mindful of the fact that the latter occupy a preferred position.”\(^{35}\)

Since “[t]he ‘business block’ served as the community shopping center and [was] freely accessible and open to the people in the area and those passing through,”\(^{36}\) Black concluded that the fact of private rather than public ownership was not enough to justify the restriction on Marsh and reversed her conviction. The dissent,\(^{37}\) written by Justice Reed, criticized the extension of first amendment rights into private places without the consent of the owner. He stated that he

\(^{30}\) The corporation had posted the following notice in some of the stores: “This is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted.” \textit{Id.}

\(^{31}\) She was charged with violation of Title 14 § 426 of the Code of Alabama (1940) which makes it criminal to enter or remain on the premises of another after having been warned not to do so. \textit{Id.} at 503-04.

\(^{32}\) \textit{Id.}

\(^{33}\) 324 U.S. 793 (1945).

\(^{34}\) 326 U.S. 501, 506.


\(^{36}\) 326 U.S. at 508.

\(^{37}\) Chief Justice Stone and Justice Burton joined Justice Reed in his dissent. Justice Frankfurter wrote a separate concurring opinion while Justice Jackson took no part
hoped the decision would be limited to the precise facts of the case, as he saw them,—"... that is to private property in a company town where the owner for his own advantage has permitted a restricted public use by his licensees and invitees."\(^8\)

The decision in *Marsh* left many unanswered questions, the most important one being the extent to which private property needed to be open to public use before an individual could exercise constitutional rights free from the fear of reprisal. Access to private property seemingly depended on whether the property had acquired sufficient "public character" to equate it to the "business block" in *Marsh*. Yet, Justice Black had stressed not merely the physical characteristics of the company town but also the need to balance the competing interests of owner and citizen. It was in the interim between *Marsh* and the decision in *Logan Valley* that the balancing test was first used and then discarded in favor of the physical characteristics test.

**The Shopping Center Dilemma—Selecting the Appropriate Test**

The growing economy and the mobility of the people caused a change in the traditional idea of the town business center. No longer were the courts able to look only at small individually owned stores and shops to determine whether through their use or physical appearance they had taken on a quasi-public character. They were now faced with conflicts within larger shopping centers and their decision depended upon their conception of the appropriate test to be used.\(^9\) The problem was most apparent in the area of labor relations where union members would picket stores or plants on leased property. The Supreme Court in *NLRB v. Babcock & Wilcox Co.*\(^4\) held that a company could exclude union organizers who were non-employees from the company-owned parking lots when there were reasonable alternative means of reaching the employees elsewhere. Although finding that the only public place in the vicinity of the plant where leaflets could effectively be distributed was unsafe because of traffic conditions, the Court refused to consider the private parking lot as quasi-public.\(^41\) In *State of Maryland v. Williams*\(^42\) the

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\(^8\) Two articles acknowledged the potential for future confusion in this area: Note, 34 Geo. L.J. 244 (1946) and Note, 1947 Wis. L. Rev. 121 (1947).


\(^4\) 351 U.S. 105 (1956).

\(^41\) Id. at 107. The Court found that all 500 of the plant's employees lived within a thirty mile radius of the plant and that the union had in the past made contact through the mails, on the streets of the local community about a mile away, and by telephone.

\(^42\) 44 L.R.R.M. 2357 (1959).
owner of a shopping center with about fifty tenants brought suit to enjoin the picketing of a drugstore within the center. In noting that when an owner leased part of his property he necessarily lost some of his control over it, the NLRB found that “because the private property involved here has been open to the public, it has taken on the nature of a quasi-public place.” Using Marsh as the basis for its opinion, the Board declared that the property was not private anymore and that the competing interest of freedom of speech must be served.

Another labor dispute forced the Illinois courts to deal with the problem of picketing on private property in People v. Goduto. The defendants were union representatives of Local 1550, of the Retail Clerks International Association and had been arrested for distributing leaflets in a parking lot adjacent to a Sears Roebuck store. Relying on Marsh and the rationale of Babcock the defendants argued that there were no other reasonable means of communicating with the employees and that they were merely exercising their right of free speech. However, the court refused to accept this argument and was also not willing to accept the NLRB expansion of Marsh. In adopting a strict reading of Marsh the court stated, “[w]e believe that [Marsh] goes no further than to say that the public has the same rights of discussion on the sidewalks of company towns that it has on the sidewalks of municipalities.” The court, in using the balancing test found that the property owners' rights outweighed the rights of the protestors. In a series of cases which followed, various state courts rejected the balancing test entirely and instead turned to the ideas espoused in Williams. They began to pay strict attention to the physical characteristics and the use of the facilities and found that it was quite reasonable to impose more stringent rules on shopping centers serving a community business area than on private property which was closely held and controlled by the owner.

The owner of a four acre shopping center brought suit to enjoin union picketing on the sidewalk in front of one of the leased stores in Moreland Corp. v. Retail Store Employees Local 444. In rejecting the plaintiff-owner's con-

43. Id. at 2360.
44. The Board also relied upon People v. Barisi, 193 Misc. 934, 86 N.Y.S.2d 277 (1948) which held that Marsh v. Alabama gave free speech protection to union picketing inside Penn Station in New York. In that case the station owners suit against the pickets was dismissed because it was determined that the owners had made the facility quasi-public by opening it up to the general public and by leasing parts of the facility to others.
45. 21 Ill. 2d 605, 174 N.E.2d 385, cert. denied, 368 U.S. 927 (1961).
46. Id. at 611, 174 N.E.2d at 390. In another Illinois case involving union leafleting on private property the court came to a different conclusion when it found that the employer had “virtually dedicated the parking area for public use.” People v. Mazo, 38 CCH Lab. Cas. ¶ 65, 835, at 68,007 (1962).
47. 16 Wis. 2d 499, 114 N.W.2d 876 (1962).
tention that the sidewalk was private and was provided solely for the con-
venience of those persons who it allowed to enter the stores, the court stated
that physical characteristics of the shopping center governed the degree to
which it was open to the public.

If the record before us clearly established that the property in-
volved [was] a multi-store shopping center, with sidewalks simu-
lated so as to appear public in nature, we would have no difficulty
in reaching a conclusion that the property rights of the shopping
center owner must yield to the rights of freedom of speech. . . .

The court sent the case back to the trial court for a determination of the phys-
ical characteristics. The Michigan court followed the same line of reasoning
in upholding the right of union members to distribute handbills in a shopping
center.49 After emphasizing that the center occupied 55 acres, had parking
spaces for 5,500 cars, and had on occasion been visited by over 60,000 peo-
ple in one day the court concluded that although privately owned, the center
was quasi-public in nature. Applying the physical characteristic and use test
the court stated:

The change from the operation of a single store by a storekeeper
to a large, complex multiple shopping center, alters the very nature
of the operation from one of a purely private character to one of
public or quasi-public character . . . [and the owners] no longer
can claim the same rights to their property.50

The court went on to say that the only difference between the public markets
of earlier days and the shopping centers of today was that the same operation
had simply been modernized.51

The Tennessee Supreme Court denied pickets access to a parking area ad-
jacent to a retail store on private property in Hood v. Stafford.52 The partic-
ipants in the picketing were former employees who had not been rehired
when ownership of the store changed hands. Stressing the fact that this was
a single store on private property and not a part of a large shopping center,
the court refused to accept the defendant's contention that the parking lot
was a quasi-public place. Instead, they said that only customers and those

48. Id. at 505, 114 N.W.2d at 879.
547, 122 N.W.2d 785 (1963).
50. Id. at 564-65, 122 N.W.2d at 794.
51. Id. at 567, 122 N.W.2d at 796. The Court also noted the possibility of creat-
ing community centers ten times larger than the instant center thereby denying constitution-
tional rights to many individuals on the ground that it was private property.
52. 213 Tenn. 684, 378 S.W.2d 766 (1964). The defendants claimed that since the
nearest public sidewalk was about 200 to 300 feet away they had a right to picnic on
the private property. The court relying on NLRB v. Babcock & Wilcox, supra note 40,
rejected this contention saying in effect that alternative means of communication
were available.
having business transactions at the store were either expressly or impliedly in-
vited on the premises. Thus, this court also came to the conclusion that characteristics of size and area reflected the apparent intent of the owner to open up his property to use by others. Rather than attempting to balance the competing interests the court simply indicated that the store in this case did not possess the physical requirements necessitating treatment as a quasi-public facility.

Only in *Schwartz-Torrance Inv. Corp. v. Bakery Workers Local 31* was the balancing test revived. The plaintiff operated a shopping center which consisted of a parking lot, driveways, sidewalks, and several stores which were leased to tenants. The defendant union had been unsuccessful in organizing the workers at one of the stores and had picketed on the sidewalk in front of it. The plaintiff, as operator of the center, brought an action to enjoin the union from trespassing on his property. Suggesting that picketing at some other location would be less effective and that it could entail "... the danger of traffic tie-ups, confusion as to the object of the picketing and the requirements of larger signs and more pickets," the court found the interests of the union superior to those of the complainant. Applying the balancing test, the court decided that "[b]ecause of the public character of the shopping center, the impairment of plaintiffs' interest must be largely theoretical." The decision in *Schwartz* indicated that the state courts needed guidance in dealing with the constitutional problems created by labor conflicts in shopping centers. The Supreme Court sought to provide this guidance in *Logan Valley*.

### Logan Valley and its Ramifications

Logan Valley Plaza, Inc. was the owner of a large shopping center complex known as Logan Valley Mall located near Altoona, Pennsylvania. Situated near the intersection of two main highways, it was accessible only from five entrance roads leading directly to the center and was separated from the main highways by earthen berms 12 to 15 feet wide. The perimeter of the area was one mile and expansive parking areas were provided near the buildings located around the mall area. In December, 1965, Weis Markets Inc.,

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54. *Id.* at 234, 394 P.2d at 922. The plaintiff leased the six acre parcel of land on which the shopping center was built from the City of Torrance and subleased the individual stores to others.
55. *Id.* at 236, 394 P.2d at 924.
56. *Id.* For an analysis of the entire area of peaceful picketing in shopping centers, see generally Comment, *Shopping Centers and Labor Relations Law*, 10 STAN. L. REV. 694 (1958).
57. 391 U.S. at 311.
one of the two tenants\textsuperscript{58} that occupied the newly built center was picketed by the food employees union. The peaceful picketing was carried out almost entirely in a parcel pick-up area directly in front of the store and in the parking lot immediately adjacent to it.\textsuperscript{59} After allowing the picketing to continue for ten days, Weis and Logan brought suit to enjoin the picketing. The court immediately issued an \textit{ex parte} order which had the effect of barring any further picketing on the center's property.\textsuperscript{60} As a result, the union members continued their picketing and distributed handbills along the berms beside the public roads outside the center while contesting the validity of the order. On appeal, the Pennsylvania Supreme Court affirmed the issuance of the injunction stating that the Union was guilty of a trespass on Logan's property.

The Supreme Court began with the premise that peaceful picketing on public property was protected by the first amendment\textsuperscript{61} and then posed the question of whether this right was also protected on privately owned property. Referring to \textit{Marsh}, Justice Marshall noted "... that under some circumstances property that is privately owned may, at least for First Amendment purposes be treated as though it were publicly held."\textsuperscript{62} Looking at the physical characteristics of the center it was noted that the mall was adjacent to a heavily travelled highway, that there were sidewalks from the parking areas to the buildings and that parking areas and roadways for vehicles were provided. The Court concluded that

\textsuperscript{58} \textit{Id.} The other store at the time was operated by Sears & Roebuck. At the time of the Supreme Court decision there were fifteen commercial tenants located in the center.

\textsuperscript{59} The parcel pickup area, located directly in front of the store had an abutting porch about 30 to 40 feet in length and four to five feet in width and was marked off with yellow lines. Logan Valley Plaza, Inc. v. Amalgamated Food Employees Local 590, 425 Pa. 382, 384, 227 A.2d 874, 875 (1967).

\textsuperscript{60} The injunction restrained the union from (1) picketing and trespassing on the store proper, the porch and the parcel pickup area; (2) picketing and trespassing upon the parking areas and the entrances and exits belonging to Logan; (3) physically interfering with individuals attempting to enter or leave the Weis store; (4) violence towards Weis' business invitees; (5) interference with Weis' employees in the performance of their duties. \textit{Id.} at 385, 227 A.2d at 876.

\textsuperscript{61} As to protection afforded picketing under the first amendment, see Thornhill v. Alabama, 310 U.S. 88 (1940); AFL v. Swing, 312 U.S. 321 (1941); Bakery Drivers Local 802 v. Wohl, 315 U.S. 769 (1942). However, the Court made it clear that since picketing was not pure speech some controls were constitutionally permissible. See generally Hughes v. Superior Court, 339 U.S. 460 (1950); Building Service Local 262 v. Gazzam, 339 U.S. 532 (1950); Cameron v. Johnson, 390 U.S. 611 (1968); Cox v. Louisiana, 379 U.S. 559 (1964). Picketing has been subjected to a blanket prohibition in some instances when it was found to be directed at an illegal end or directed towards coercing an employer into a decision. See Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Building Service Local 262 v. Gazzam, 339 U.S. 532 (1950); Plumbers Local 10 v. Graham, 345 U.S. 192 (1953); Carpenters Local 213 v. Ritter's Cafe, 315 U.S. 722 (1942); Teamsters Local 309 v. Hanke, 339 U.S. 470 (1950); Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941).

\textsuperscript{62} 391 U.S. at 316.
The general public has unrestricted access to the mall property. The shopping center here is clearly the functional equivalent to the business district of Chickasaw involved in *Marsh*. However, after finding that the shopping center was equivalent to the business district in *Marsh* the court attempted to limit the scope of its conclusion:

*All we decide here* is that because the shopping center serves as the community business block . . . the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a *purpose generally consonant with the use to which the property is actually put*.64

This limitation is especially important when one reads footnote nine of the opinion which was one of the major points which the majority in *Tanner* relied upon.

The picketing carried on by petitioners was directed specifically at patrons of the Weis Market located within the shopping center and the message sought to be conveyed to the public concerned the manner in which that particular market was being operated. We are, therefore, not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus *directly related in its purpose to the use to which the shopping center property was being put*.68

Holding that both the state and the shopping center were able to make reasonable regulations concerning the exercise of first amendment rights on

63. *Id.* at 318. The Court found that the roadways provided for vehicular movement and the sidewalks between the buildings were the functional equivalents of a normal municipal district. In tracing the Court's conclusion Morris Forkosch noted:

The path of reasoning that is pursued is substantially as follows: publicly owned business district streets and sidewalks are open to and belong to the general public; privately owned business district streets and sidewalks are open to all and are used by the general public; privately owned driveways and sidewalks within an enclosed shopping center are used by a significant portion of the general public. Thus, . . . the general public has unrestricted access to the mall property. The shopping center here is clearly the functional equivalent of the business district. . . .'

64. 391 U.S. at 319-20 (emphasis added).

65. 391 U.S. at 320 n.9 (emphasis added). This type of statement has been seen many times in the opinions of the Supreme Court and is evidence of their traditional reluctance to adjudicate an issue which has not been raised. At least four authors have felt that footnote nine might pose an important limitation on the impact of *Logan Valley*, see Note, *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.: The Right to Picket on a Privately Owned Shopping Center*, 73 DICK. L. REV. 519 (1968-69); Note, *Picketing of the Modern Marketplace: The Rights of Ownership and Free Speech*, 48 B.U.L. REV. 699 (1968); Note, 35 BROOKLYN L. REV. 101 (1968-69); and 53 MINN. L. REV. 873, *supra* note 39.

66. Regulation of the exercise of first amendment rights has been upheld when the exercise unduly interferes with the normal use of the property by other individuals,
the private property, the Court found that the absolute prohibition of picketing and trespassing allowed by the Pennsylvania courts could not be sustained since the picketing was directly related to the shopping center’s use. The majority also noted that the practical effect of barring the pickets from the center’s property was to force the pickets to carry on their activities 350 to 500 feet away where it would be more hazardous and less effective. The majority cited statistics showing the growth, in numbers, of shopping centers and feared the possibility of businesses in the suburbs being able to immunize themselves from criticism which their downtown counterparts would be subject to. In their opinion, the businessman who opens his property to the public for his personal benefit should not be able to create a “cordon sanitaire” around his store simply by the construction of parking lots.

In dissenting, Justice Black was extremely critical of the majority’s extension of Marsh to the area of private property: “... I believe that whether this Court likes it or not the Constitution recognizes and supports the concept of private ownership of property.” He felt that the critical factor in Marsh was that the property had encompassed an area which for all practical purposes had been turned into a town. As the author of the Marsh opinion his conclusion that “... Marsh was never intended to apply to this kind of situation” is especially persuasive. Black concluded that the majority had misread Marsh and that the only time private property could be treated as public “... [was] when the property [had] taken on all the attributes of a town. ...”

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Justice White, in his dissent, agreed that the issue should be...
whether all the attributes of a town were present and not that some stores were organized into a "business district". He was fearful of an extension of this rule to other business establishments which were not shopping centers but which had sidewalks and parking areas on their property. Thus, Justices Black and White were willing to follow the physical characteristics test that the majority had accepted, but they did not want it applied narrowly. In their opinion the determination as to whether a shopping center displayed enough characteristics to be deemed open to the general public should depend not on its similarity to the business district alone but to the business district and all those other attributes that a town possesses.

The Logan Valley decision formalized the test that the majority of state courts had already been using, but some questions remained unanswered.

The plaintiffs have granted certain rights to the public but only to that segment who would be potential customers and possibly would contribute to the financial success of the enterprise. The grant or invitation was not to the general public to utilize the area for whatever purpose it deemed advisable. South Discount Foods, Inc. v. Retail Clerks Local 1552, 14 Ohio Misc. 188, 235 N.E.2d 143, 147 (C.P. Ohio 1968) (emphasis added).

In a situation unrelated to shopping centers but which used a similar line of reasoning, see Powe v. Miles, 407 F.2d 73 (2d Cir. 1968) where Judge Friendly upheld the suspension from school of four students who had protested on school property during a ROTC ceremony saying: "Alfred's football field does not fit the rubric of either Marsh or Logan Valley Plaza; it was open only to persons connected with the University or licensed by it to participate in or attend athletic contests or other events." Id. at 80. In Central Hardware Co. v. NLRB, 439 F.2d 1321, 1330 (8th Cir. 1971), Judge Gibson argued that parking lots which were provided solely for employees and potential customers were not of such a public character that the owner waived his right of control over them. "In no sense of the word are these private parking lots . . . public streets, public squares, public parks or their equivalents." See also Chumley v. Santa Anita Consolidated, Inc., 15 Cal. App. 3d 452, 93 Cal. Rptr. 77 (Ct. App. 1971) (race track owner extended invitation to only those individuals who desired to pay the price of admission).

71. Two commentators felt that the Court did not have to reach the question of whether the area was functionally equivalent to the business block in Marsh. In their opinion the Court effectively adopted the five prong test that Judge Hill had enunciated in his concurring opinion in Freeman v. Retail Clerks Local 1207, 58 Wash. 2d 426, 363 P.2d 803 (1961). Hill had noted five separate factors which if present should result in having the court weigh the equities of the parties:

(1) When the private property owner designs his property for use by the general public in such a manner as to make it difficult or impossible to distinguish its physical characteristics from publicly-owned property similarly so devoted; (2) The exercise of the right of free speech is for the purpose of making a communication to persons naturally upon the premises as a result of the inherent nature of the primary use to which the property is devoted; (3) A similar communication clearly would be permitted under identical circumstances had the property been public; (4) Interference with the owner's fundamental rights of privacy or personal use and occupancy is not involved as distinguished from control, and no direct pecuniary loss will result to the owner; (5) The trespasser had no place or means available as an alternate, or the only alternate would be unrealistic or impractical to the point where there exists a serious restriction upon the trespasser's ability to communicate as effectively as would naturally and normally be expected were the legal title in public ownership.
One of the major problems was the extent to which private property would be open to other free speech activities which were not directly related to the use of the property. The Court did not define the term "generally consonant" or attempt to establish guidelines as to what would constitute "reasonable regulations" governing conduct in the centers. Instead, it left the courts to apply Logan Valley on a case by case basis, but the application was by no means uniform and caused as many problems as before.\(^7\)

Just a few weeks after the Logan Valley decision was announced, the Minnesota Supreme Court dealt with the issue of first amendment activities which were not generally consonant with the use to which the property was being put.\(^7\) Citing Logan Valley as controlling, the court found that individuals who had entered a shopping center for the purpose of distributing campaign literature in support of a candidate for state office were not guilty of trespassing on private property. Finding that the shopping center had many business concerns located within it and that it was generally open to the public the court indicated that the reasoning of Logan Valley necessitated that the individuals be allowed to carry on their activities. Although it is arguable that this initial application of the Logan Valley rule may have been overly broad, it exemplifies one of the problems that existed.

In the area of labor disputes the issue frequently litigated concerned not the relationship of the activity to the use of the property, but the factual determination indicating that the facility or area was quasi-public. In Taggart v. Weinacker's Inc.,\(^7\) the Alabama Supreme Court refused to apply Logan Valley to a small privately owned general department store which was being picketed by a Union. The picketing occurred on a private sidewalk four to five feet wide directly in front of the store which was set back from the public street. The court cited three factors which distinguished it from Logan Valley: (1) the trespass was only narrowly enjoined (they could continue to picket on the public street); (2) the trespass was on the property of a single store owner; (3) the trespass obstructed the customers entering the store.\(^7\)

Had the Court presented this test affirmatively some of the later problems of interpretation might have been avoided. See 73 DICK. L. REV. 519, 526 (1968) and 35 BROOKLYN L. REV. 101, 106 (1968).

72. As to conflicting interpretations of the scope of Logan Valley, see 1 U. TOLEDO L. REV. 259, 263 (1969); 48 ORE. L. REV. 426, 428 (1968-69); and 20 SYR. L. REV. 82, 85 (1968).

73. State v. Miller, 280 Minn. 566, 159 N.W.2d 895 (1968).

74. 283 Ala. 171, 214 So. 2d 913 (1968); petition for cert. dismissed, 397 U.S. 223 (1969).

75. Id. at 178, 214 So. 2d at 920. The court also weighed the interests of the two parties and found only a slight inconvenience to the Union in having to move to the public street. But see In re Lane, 71 Cal. 2d 872, 79 Cal. Rptr. 729, 457 P.2d 561 (1969), where a labor union officer was allowed to distribute handbills on a private sidewalk directly in front of a grocery store which was not a part of a shopping center.
They concluded that the sidewalk had not become quasi-public and that the Union should be enjoined from the property. The seventh circuit dealt with the same issue in a case involving a privately owned Chicago industrial park containing buildings which were leased to different companies. Known as the "District," the area had its own streets, sidewalks and signs but there were no thru-streets and only one entrance from the public street. The NLRB had found that the District was a quasi-public place and allowed the distribution of union literature on the property. The court of appeals reversed, stating that the District was neither the functional equivalent of the business district in *Marsh* nor the shopping center in *Logan Valley*.

The problem of determining whether a privately-owned facility or area was quasi-public was not limited to cases involving labor disputes. In *Chumley v. Santa Anita Consolidated, Inc.*, a California court held that an area which was used for pedestrian flow and parking outside of an enclosure which barred the public from a race track facility was private property. It found that the premises neither served as the business district of the surrounding community nor as the "traditional town square." In other situations various courts refused to extend *Logan Valley* to areas which were used by relatively few people. Students at Atlanta University claimed that they were not guilty of a trespass on a vacant lot owned by the school on which they had conducted a four month vigil in honor of Martin Luther King. They asserted that the property was open to public use because neighborhood children had not been barred from playing there, persons used it as a short cut, and because the University was tax-exempt. Menominee Indians unsuccessfully attempted to demonstrate peacefully in the parking lot of a sales office of a corporation in which they held stock. Using the shopping center concept, the court noted that "... a parking lot is not in the same category as a shopping center, the public does not have an unrestricted right to enter a privately-owned parking lot. ..."

Although the handbilling involved a single store the court found that the sidewalk was open to the public and that the closest public sidewalk was about 150 to 280 feet away and compared the situation to that in *Logan Valley*.

76. NLRB v. Solo Cup Co., 422 F.2d 1149, 1150 (7th Cir. 1970). In NLRB v. Monogram Models, Inc., 420 F.2d 1263 (7th Cir. 1969) it had been alleged unsuccessfully that the shoulder area of a public road located directly in front of the main entrance of a plant was distinguishable from both public sidewalks and streets.

77. 15 Cal. App. 3d 452, 93 Cal. Rptr. 77, 82 (Ct. App. 1971).


79. Brooks v. Peters, 322 F. Supp. 1273, 1277 (E.D. Wis. 1971). Offices were the subject of protest in City of Chicago v. Rosser, 47 Ill. 2d 10, 264 N.E.2d 158 (1970) where the court held that protestors were guilty of a trespass—"... [W]e do not believe that the elevator corridor outside the Archdiocese office on the sixth floor of the American Dental Association building in Chicago can be considered functionally, spatially or in any other way equivalent to the town of Chickasaw in *Marsh* [or] the shopping center in *Logan Valley.* ..." See also Lefcourt v. Legal Aid Society,
A different determination as to the public character of a bus terminal was reached in *Wolin v. Port of New York Authority* when a group of individuals were denied access to a bus terminal in New York City. Finding that the general public was afforded access to the facilities inside the terminal, and that the design and physical appearance of the facility resembled that of a street, the court concluded:

The terminal, with its many adjuncts, becomes something of a small city—but built indoors. . . . Thus, we cannot accept the argument that the mere presence of a roof alters the character of the place, or makes the Terminal an inappropriate place for expression.81

Rejecting defendant's argument that the forum was inappropriate because the message to be conveyed bore no special relation to the operation of the Terminal, the court noted that in some situations the place represents the object of protest while in others the place is where the relevant audience may be found. Disregarding the implication of footnote nine in *Logan Valley*, the court set up its own list of factors to be considered:

. . . [T]he inquiry must go further: does 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 invitation extended make it an appropriate place for communication of views on issues of political and social significance.82

The *Wolin* court was not alone in its misinterpretation of *Logan Valley* in regard to the relation of the activity to the particular forum. A series of cases involving shopping centers including the lower court opinion in *Tanner* also concluded that the activity need not be directly related.

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80. 392 F.2d 83 (2d Cir. 1968), cert. denied, 393 U.S. 940 (1968). The individuals were associated with the Fifth Avenue Vietnam Peace Parade Committee and the Veterans and Reservists to End the War. They intended to distribute literature and talk to traveling servicemen. *Id.*

81. *Id.* at 89.

82. *Id.* The California Supreme Court had found that Union Railroad Station in Los Angeles was a valid forum for the distribution of leaflets concerning the Vietnam War. *In re Hoffman*, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967). Noting that a railway station was like a public street or park the court asserted that the test was not whether the protestor's use of the station was a railway use but whether it interfered with that use. *Id.*
In *Diamond v. Bland* the California Supreme Court ruled that a group engaged in securing signatures on two anti-pollution petitions had to be allowed to carry on their campaign within the mall area of the privately owned Inland Center. Located in San Bernardino, its physical layout was very similar to that of the Lloyd Center and the policy as to use of the facilities by outside groups was as strict. The court found that the rationale of *Marsh* plus the analogy drawn between the company town and the shopping center in *Logan Valley* was enough to justify an extension of the rule in this situation. Finding that the contemporary shopping center in many ways resembled the traditional town square the court attempted to weigh the competing interests of the parties, thus rejuvenating the balancing test which had seemingly died with *Logan Valley*. The substantial interest in being able to solicit signatures and distribute information to the thousands of persons passing through the center was matched against the owner's interest in having all non-business related activities prohibited. Feeling that the infringement on the property owners' rights were theoretical and that reasonable regulations enacted by the owner would be permissible, the court held that the complete prohibition was invalid and that the group should be allowed to continue their solicitation. The conclusion of the court was given direct support by a Washington state court which attempted to distinguish picketing from other first amendment activities.

We do not interpret comments in *Logan Valley*, 391 U.S. at 320 n. 9, as compelling a direct relationship between the retail functions of a shopping center and the exercise of all First Amendment privileges. There is good reason to limit picketing in a shopping center to a direct relationship to stores located within a shopping center. There is no limitation of the broad holding of *Marsh* or *Logan Valley* as they relate to other First Amendment privileges.

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83. 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970), cert. denied, 402 U.S. 988 (1971). The lower court opinion which was reversed is found at 8 Cal. App. 3d 58, 87 Cal. Rptr. 97 (1970).

84. The center contained a large parking lot and a totally covered complex which housed 75 tenant stores and which was visited by about 25,000 people daily. The covered mall had 32 foot wide common aisleways with benches, receptacles, and piped-in music where displays were sometimes placed. Homart, the developer, had forbidden all activity on these common aisleways except for the mutually beneficial promotions and displays which were strictly regulated. In this regard, the center had refused all requests regarding solicitation and distribution of handbills from religious, charitable, fraternal and political groups. *Id.* at 656, 477 P.2d at 734, 91 Cal. Rptr. at 502.

85. Sutherland v. Southcenter Shopping Center Inc., 3 Wash. App. 833, 840, 479 P.2d 792, 799 (Ct. App. 1971). This action was brought by the Washington Environmental Council who had attempted to solicit signatures for an initiative dealing with shoreland protection at two shopping centers—Southcenter and Northgate. Southcenter had 115 tenants who occupied over 1.5 million square feet and had an anticipated sales volume of seventy-four million dollars. Northgate had 109 tenants who occupied about
However, after concluding that the activities were different, this court also reverted to the use of the balancing test.

The court in *Marsh* and *Logan Valley* did not state all First Amendment rights would, per se, outweigh the interests of the shopping center owner. It seems to us each case requires an inquiry into the nature of the rights sought to be asserted and their importance as weighed against the interest of the shopping center owner.\(^8\)

Although the California and Washington courts reached a different result than did the United States Supreme Court in *Tanner*, it is apparent that the correct test was employed in each instance. Therefore, it is necessary to examine the rationale of *Tanner* to determine if the test was applied correctly.

**Tanner and the future**

The strict application of the holding in *Logan Valley* by the court in *Tanner* v. *Lloyd* was in some respects an affirmance of Justice Black’s dissent in that case. Conceding that Black was correct when he said that “*Marsh* was never intended to apply to this kind of situation”, the majority nevertheless concluded that both *Marsh* and *Logan Valley* were correctly decided. Stating that *Logan Valley* extended *Marsh* only where the First Amendment activity was directly related to the shopping center, the Court asserted that the decision was in fact only a narrow extension of *Marsh* and that the rest was dicta:

> There is some language in *Logan Valley* unnecessary to the decision, suggesting that the key focus of *Marsh* was upon the “business district”. . . .\(^{87}\)

The Court quoted from Justice Black’s opinion and then concluded

> The holding in *Logan Valley* was not dependent upon the suggestion that the privately owned streets and sidewalks of a business district or a shopping center are the equivalent, for First Amendment purposes, of municipally owned streets and sidewalks. No such expansive reading of the opinion for the Court is necessary or appropriate.\(^{88}\)

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1.25 million square feet and had a slightly lower sales anticipation of seventy million dollars in 1970. Since both facilities were larger than any of the shopping centers involved in previous lawsuits within the scope of this article, it was an easier case in which to extend the *Logan Valley* rationale.

\(^{86}\) *Id.* at 840, 478 P.2d at 799. In applying the balancing test the court used the following criteria to make their determination: (1) the preference accorded first amendment rights; (2) the importance of the initiative process; (3) the quasi-public nature of the streets and sidewalks of the shopping centers; (4) the potential for the reasonable regulation of solicitation activities. *Id.* at 841, 478 P.2d at 800.

\(^{87}\) 407 U.S. at 562 (emphasis added).

\(^{88}\) *Id.* at 563 (emphasis added).
Justice Powell, for the majority, pointed out that in *Marsh* the property owner had in effect become the State. Since the company town had taken on *all* the attributes of a municipality and the owner had invited *all* of the general public, he could not assert the claim of private ownership to deny individuals the right to engage in first amendment activity. Turning to *Logan Valley* and to *Tanner*, Powell noted that the invitation in these cases was only to those members of the public who intended to do business with the tenants. Contending that all retail stores and service establishments are open to the public in the sense that customers and potential customers are encouraged to enter, the Court refused to accept the respondents' argument that no restrictions on handbilling were permissible. Instead it pointed out that the decision in *Logan Valley* had indeed placed severe limitations on unrelated first amendment activities. Stressing that the picketing had been allowed only because it was directly related in its purpose to the use to which the shopping center property was being put and only because there were no reasonable alternative means to convey the message to the intended audience elsewhere, the Court found that the respondents here had failed to show the required relationships. Therefore, in balancing the first amendment rights of the respondents with the fifth and fourteenth amendment rights of the private property owners the Court found that "... on the facts presented in this case the answer was clear."

The majority's determination that consideration be given to the availability of alternative forums in instances where there is a conflict in competing interests seems valid. In *Marsh*, where all of the traditional areas used for the expression of first amendment activities were privately owned, it was necessary to treat parts of the private property as public in order to protect those

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89. By limiting the significance of *Logan Valley* to these points, the majority was able to dismiss Tanner's arguments concerning the Center's quasi public nature summarily. Justice Marshall gave a scathing criticism of the simplistic conclusion when he said:

> It is evident from the Court's opinion that the majority fails to grasp the essence of our decision in *Logan Valley*. The Court notes that there is a difference between a free standing store and extremely large ones, but suggests that because the difference is "of degree—not of principle" it is unimportant. This flies directly in the face of *Logan Valley* where we said that as private property expands to the point where it becomes, in reality, the business district of a community, the rights of the owners to proscribe speech on the part of those invited to use the property diminish. When the Court states that this was broad language that was somehow unnecessary to our decision, it betrays its misunderstanding of the holding. 407 U.S. at 581 n.5.

90. 407 U.S. at 570. The majority agreed that speech occupies a preferred position when equally weighed against a conflicting interest yet found it easy to reach their conclusion. They found that the property interest outweighed the right of an individual to use the property when such a denial would not destroy his ability to effectively communicate his message elsewhere.
rights. If access to the business district in Marsh had been denied there would have been no effective means of conveying outside opinions to the inhabitants. Similarly, in Logan Valley the only area in which picketing could be effective was within the shopping center since, as a practical matter, the audience to whom the communication was directed was near the Weis Market. Although the argument could be made that handbilling or soliciting would be less effective outside of the shopping center, the Court's opinion that "[r]espondents could have distributed these handbills on any public street, on any public sidewalk, in any public park, or in any public building in the city of Portland"91 is well taken.

It should be recognized that when an owner opens a shopping center to the public for his own financial gain he anticipates circumscribing his own property rights in certain instances as a cost of doing business. Thus, he should expect that if labor difficulties arise between one of his tenants and its employees there will be some infringement on his property rights as the employees attempt to direct their activities towards the source of the dispute. However, since the property owner is not benefited and, indeed, may be harmed by the indiscriminate use of his property by those individuals not intending to shop, there seems to be no valid justification for forcing him to provide a facility to be used as a public forum on every popular issue. The burden of showing both the necessity of using the private property in order to communicate effectively and the lack of available alternative forums should be placed on the individual seeking the use of the private property.

In dismissing the claim that consideration must be given to whether the shopping center is the functional equivalent of the Marsh business district, the Court has seemingly discarded the physical characteristics test entirely in favor of the balancing test. This may prove to be a more workable standard since many of the problems in ascertaining whether a facility or area has become quasi-public will be eliminated. Nonetheless, the new test should still involve the consideration of many of the same factors on a case by case basis.

The Court's opinion limited the accessibility of all quasi-public property to individuals seeking to express messages critical of the businesses conducted thereon. In so doing, it severely restricted the ability of individuals to dis-

91. Id. at 564. The same conclusion was reached by one author who also felt that Logan Valley should not be applied broadly:
The Marsh rationale . . . should not be applied indiscriminately to the shopping center problem. There are significant differences between a company town and a shopping center. The ability to communicate with the occupants of a company town without trespassing is severely limited because its people not only shop there, but live and work there as well. Communication with the patrons of a shopping center may conceivably be made at other places and other times. 5 Houston L. Rev. 193, 196 (1968).
seminate different views to a sizeable proportion of the population quickly and effectively. Admitting that one does not spend an entire lifetime in a shopping center and that a multitude of viewpoints will be encountered daily, the realities of suburban living belie the continued existence of the traditional town square. Lloyd Corporation, for example, owned not only the Lloyd Center but other adjacent land on which there were three hotels, four office buildings, a high rise Presbyterian home, a 4.77 acre school and other businesses within a 130 block area. It should be evident that as the property owner begins to expand beyond the shopping mall into both residential and business areas it may become necessary to reexamine the physical characteristics of the facilities to see if they have acquired the attributes of the Marsh company town. Since this situation is not likely to occur very often, the bulk of litigation will probably arise in an attempt to determine the scope of the term "consonant with the use to which the property is being put." In this regard, the Court’s new interpretation of Logan Valley indicates an insistence that the activity be related to the retail function of the shopping center.

Perhaps the most logical justification for the changed interpretation of Logan Valley lies in the dissenting opinion of Justice Marshall who said "[t]he 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." Indeed, four of the five Justices remaining from that court dissented in this opinion and it must be noted that the change in personnel had much to do with the new interpretation. Nevertheless, the Court made valid distinctions between the ability to communicate in a company town, in a shopping center and in other areas of the community. Through this inter-

92. Supra note 13, at 25. Justice Marshall was especially concerned about the fact that members of the Portland community could probably buy all of the things that they might need from the Lloyd Center and that if different viewpoints were to reach these individuals, it would have to occur within Lloyd Center. He noted that to forbid access to the forum where the greatest number of people could be reached would deny those individuals unable to afford access to television, radio, newspapers and other mass media the means to reach the masses. Marshall apparently expects the private property owner to subsidize the citizen seeking expression of first amendment rights. This subsidy would arise because of the citizens’ inability to reach a large proportion of the population with an equivalent expenditure of time and money.

93. 407 U.S. at 584. One author had realistically assessed the possible future expansion in this area of the law as dependent upon the philosophical composition of the Court—

Conclusions as to the repercussions of Logan Valley are logically available, but policy does not necessarily follow logic. Nevertheless, from the fact that of the Logan Valley majority of six (Mr. Justice Douglas concurring separately) only Mr. Chief Justice Warren is retiring at the end of the 1968 term, one may superficially assume that a majority of at least five will continue to support the holding on its facts, even if not agreeing with every implication of Mr. Justice Marshall’s language. Forkosh, supra note 63, at 266.
pretation, the Court has indicated that only in exceptional cases will it over-
ride the rights of the property owner who has designed and maintained his
facility for a business purpose. To succeed, the claimant must prove either
that the relationship between the purposes of the speech and the use of the
facilities is direct or that the private property has taken on all of the attrib-
utes of a town. In making this determination the Court will weigh the equi-
ties of the parties. With the current composition of the Court, the individual
seeking access to quasi-public property will find the task of convincing five
Justices quite difficult. It is apparent that the Tanner Court has finally real-
ized that quasi-public property is also quasi-private.94

Ralph N. Boccarosse

The Comprehensive Health Manpower Training
Act of 1971: Panacea or Placebo?

In 1963, the 88th Congress enacted the Health Professions Educational
Assistance Act,1 which established the first federal program directed to meet
the critical needs for physicians, dentists, and certain other health profes-
sional manpower, providing assistance to schools for construction of facili-
ties and assistance to students in the form of loans. The HPEA programs
have undergone repeated amendment since the original enactment. The
most recent of these is embodied in the Comprehensive Health Manpower
Training Act of 1971.2 It is the underlying need for such programs, their

94. In an opinion dated about three weeks after Tanner the Rhode Island Supreme
Court, in a unanimous decision, reached the same conclusion as the Tanner court re-
garding solicitation of signatures for a nominating petition inside a private mall. Re-
fusing to expand Marsh and Logan Valley beyond their facts and concluding that the
California Supreme Court's holding in Diamond v. Bland was an unwarranted extension
of those principles, the court noted that under these circumstances there was no justifi-
cation for giving the first amendment a preferred position over the fifth. Stating in a
footnote that their decision had been reached prior to the decision of the Supreme
Court, they nevertheless followed the same strict interpretation of footnote nine of

§§ 292-293 (Supp. 1963)).
§§ 293-295h (Supp. 1973)).