
January 1972

From Logan Valley Plaza to Hyde Park and Back: Shopping Centers and Free Speech

M. Russell Kruse Jr.

Recommended Citation

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

<https://scholar.smu.edu/smulr/vol26/iss3/4>

This Comment is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

FROM LOGAN VALLEY PLAZA TO HYDE PARK AND BACK: SHOPPING CENTERS AND FREE SPEECH

by M. Russell Kruse, Jr.

Rapid commercial development and evolving constitutional concepts have modified property rights at an unaccustomed rate. With our nation's ongoing flight from city to suburb,¹ the necessity and utility of locating large, privately-owned shopping centers outside the downtown areas have become obvious. The development of these shopping areas has revealed many legal problems,² not the least important of which is the constitutional free speech guaranty of the first and fourteenth amendments. The shopping center provides an excellent arena in which to focus the conflict between the rights of private property ownership and the rights of free speech. This Comment will first examine traditional and fundamental property notions and then explore the constitutional impact of free speech upon those notions.

The population movement away from the inner city in the post-World War II era has been the single most important factor in the success of shopping centers.³ With this population shift there was the following evolution:

First came the 'neighborhood center,' a strip of small shops usually anchored by a supermarket. Then came the slightly larger 'community center,' which included a discount store, [or] junior department store. . . . Then in the mid-1950's came the earliest 'regional centers' anchored by one or two department stores and surrounded by a sea of parking. This was closely followed by the climate-controlled mall.⁴

While the size of the center may vary,⁵ its success in American retailing cannot be questioned.⁶

Ninety percent of these shopping complexes are neighborhood or community centers,⁷ but downtown shopping centers are also being developed in conjunction with urban renewal.⁸ The growth of this retail trend should correspond to the increase in the population movement. Accordingly, the International Council of Shopping Centers claims that \$6 billion annually will be necessary

¹ See generally Roberts, *The Demise of Property Law*, 57 CORNELL L. REV. 1 (1971).

² For example, zoning conflicts have arisen as a result of growing pressure by environmentalists against further commercial alteration of the landscape. Zoning boards have also been tough because of the problems caused by the huge influx of automobile traffic, as well as neighboring residential complaints. Another problem is leasing arrangements which give larger stores a veto power over other tenants' leases. The Federal Trade Commission has investigated the practice as an unfair competition device to keep discount stores out. BUSINESS WEEK, Sept. 4, 1971, at 37, 38.

³ Weiss, *Expect 1000 Pedestrian Shopping Malls by 1980*, 41 ADVERTISING AGE, Sept. 21, 1970, at 50.

⁴ BUSINESS WEEK, Sept. 4, 1971, at 36.

⁵ The Urban Land Institute categorizes shopping centers as follows: (1) neighborhood center, 30,000-100,000 square feet, serving 5,000-40,000 people; (2) community center, 100,000-300,000 square feet, serving 40,000-150,000 people; (3) regional center, 300,000-1,000,000 square feet, serving 150,000-400,000 people. 105 SALES MANAGEMENT, Nov. 1, 1970, at 34.

⁶ The International Council of Shopping Centers estimated that in 1969 some 12,000 centers with over 200,000 stores did \$99.5 billion of business, which is 38% of the top 300 metropolitan markets. *Id.* A later article cites a figure in excess of 40% of all retail sales excluding cars and building materials. 47 CHAIN STORE AGE, Feb. 1971, at 25.

⁷ 47 CHAIN STORE AGE, Feb. 1971, at 25.

⁸ BUSINESS WEEK, Sept. 4, 1971, at 36.

over the next fifteen years for the development of 12,000 additional shopping centers.⁹

I. PROPERTY CONCEPTS

*One does not sell the earth upon which the people walk.*¹⁰

This statement reflects a concept known as the law of the commons.¹¹ The underlying premise is that "common areas" are not owned by individuals but simply used by a community of people with equal access. Total freedom in the commons is quite possible with a limited population. But, as the common area diminishes, total freedom in the commons leads to what has been called the "tragedy of the commons."¹² The conflict between public utility and personal utility will eventually lead to ruin for all if left unchecked by controls.¹³ The fact that certain rules and controls have developed into the concept of property ownership is attributable mainly to this phenomenon.¹⁴ Thomas Aquinas reasoned that the concept of private property with its myriad of societal rules came into existence because of man's fall from a state of innocence.¹⁵ Judging from the primacy with which most Americans view private property rights, the fall was a long one.

America inherited the common-law property concepts of estates in land from England.¹⁶ Also inherited was the right of escheat, which maintains a basic

⁹ These figures are based on a projected population increase of 40 million by the year 1985. Fifty percent of that figure will be in the suburbs. 47 CHAIN STORE AGE, Feb. 1971, at 25.

¹⁰ This simple but eloquent concept was enunciated by Sitting Bull upon learning that Chief Red Cloud, out of desperation and hopelessness, planned to sell their Black Hills hunting ground to the federal government. J. GUINN, THE RED MAN'S LAST STRUGGLE 12 (1966).

¹¹ See, e.g., Lloyd, *The Checks to Population*, in POPULATION, EVOLUTION, AND BIRTH CONTROL 37 (G. Hardin ed. 1964).

¹² Hardin, *The Tragedy of the Commons*, in THE ENVIRONMENTAL HANDBOOK 31 (G. De Bell ed. 1970).

¹³ The most common example of this phenomenon is the ruin of grazing land by herdsmen who will naturally pursue a limited personal utility by increasing their own herd instead of controlling the herd's numbers for the total or public utility. *Id.* at 37.

¹⁴ The concept that property is merely a state of mind without guidelines to delineate ownership was illustrated by philosopher Jeremy Bentham. According to this theory, no savage or animal can experience ownership of property because they lack the proper state of mind. "The savage who has killed a deer may hope to keep it for himself so long as his cave is undiscovered; so long as he watches to defend it, and is stronger than his rivals; but that is all Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases." J. BENTHAM, THE THEORY OF LEGISLATION 112-13 (C. Ogden ed. 1931).

¹⁵ Thus, the natural and proper relationship between man and property was said to be communal ownership. See generally T. AQUINAS, SELECTED POLITICAL WRITINGS 169 (D'Entreves ed. 1959).

¹⁶ 1 AMERICAN LAW OF PROPERTY §§ 1.40-44 (A. Casner ed. 1952). A crucial factor in our common law roots is often forgotten. The concept of "public" or "common" enterprises left many property owners restricted in their use of that property. See generally Arterburn, *The Origin and First Test of Public Callings*, 75 U. PA. L. REV. 411, 418-28 (1927). When a business held itself out as a provider of certain products or services,

[t]he common law attached to these enterprises certain obligations, including—at various stages of doctrinal development—the duty to serve all customers on reasonable terms without discrimination and the duty to provide the kind of product or service reasonably to be expected from their economic role. Such occupations as blacksmith, food seller, veterinarian, and tailor, as well as those of common carrier and innkeeper were probably included in that category.

In re Cox, 3 Cal. 3d 205, 474 P.2d 992, 996, 90 Cal. Rptr. 24, 28 (1970), quoting To-

separation of ownership, with title in the state and use in the citizens.¹⁷ Historically, the notion of holding property absolutely is also rebutted by nuisance laws, zoning, rent control, public health laws, the power of eminent domain, and conservation restrictions.¹⁸ The general sacredness and inviolability of American property rights are, therefore, something of a puzzle. One commentator attributes this "absolutism"¹⁹ to early American perversion of Lockean philosophy to accommodate the emerging concepts of capitalism and individualism.²⁰ The concept that man acquired absolute natural rights in his property because his labor blended into the property²¹ was naturally welcome in a frontier society. Thus, property rights were thought to be sacrosanct and "antecedent to the state."²² Private property absolutism has produced unequivocal judicial dogma.

'So great moreover is the regard of the law for private property that it will not authorize the least violation of it; no not even for the general good of the whole community. . . . Besides, the public good is in nothing more essentially interested than in the protection of every individual's private rights. . . . [T]here are some absolute private rights beyond [the popular majority's] reach and among these the constitution places the right of property.'²³

The inflexibility of such a stance in light of pressing societal needs is obviously intolerable. The crowding and destruction of the commons is directly proportionate to the necessity of increasing the restrictions on use. The same applies to private property restrictions when societal demands exceed the individual utility. To determine which interest shall prevail or what compromise may be reached, a realistic look must be taken at the actual impact upon the conflicting claims.²⁴ The interpretations and definitions by the courts of these

briner & Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 CAL. L. REV. 1247, 1250 (1967). For a treatment of the public enterprise concept as it applies to service stations, see Note, *Service Without a Smile: Proprietors of Gas Stations Must Serve Without Discrimination*, 25 SW. L.J. 651 (1971).

¹⁷ This concept exists today. 1 R. POWELL, REAL PROPERTY 626 (1969) (hereinafter cited as POWELL).

¹⁸ 6 POWELL 72-158. See also Cross, *The Diminishing Fee*, 20 LAW & CONTEMP. PROB. 517 (1955).

¹⁹ "Absolutism" is used to mean unhampered use of private property.

²⁰ Hecht, *From Seisin to Sit-In: Evolving Property Concepts*, 44 B.U.L. REV. 435, 456 (1964).

²¹ 2 J. LOCKE, OF CIVIL GOVERNMENT 129-41 (Everyman's ed. 1955).

²² Hecht, *supra* note 20, at 456. The fallacy of the absolutist position is that Locke distinguished between man in a state of nature and man under a social compact. Once a government was formed Locke took a relativistic stance between property ownership, use, and societal welfare. *Id.* at 457. "Relativism" is used to describe the equilibrium and interaction between personal and property rights as it relates to societal and private utility.

²³ *Wynehamer v. The People*, 13 N.Y. 378, 386-87 (1856), quoting 1 W. BLACKSTONE, COMMENTARIES *139. *But see* *State v. Shack*, 58 N.J. 297, 277 A.2d 369 (1971), in which Chief Judge Weintraub ignored the defendants' constitutional arguments and granted relief under a common law approach of relativism in property rights. The court limited the rights of a farmer in maintaining his privacy; welfare workers were permitted on the land to counsel and aid migrant workers. See also note 24 *infra*.

²⁴ An excellent example of a court's stripping away labels to examine the actual interests at stake is seen in *State v. Shack*, 58 N.J. 297, 277 A.2d 369 (1971). The decision necessitated a balance between the landowners' property rights and the well-documented need for protection of certain human values. While the implications of this case are far-reaching, its authority is limited in the area of quasi-public property and shopping centers. The court did not deal with first amendment freedoms and made it clear that there was no duty imposed on the landowner to open his premises to the general public. His ability to regulate entry upon his land was simply nonabsolute. 277 A.2d at 374. See Note, 46 N.Y.U.L.

interests reveal an affinity for relativism within the confines of the Constitution.²⁵ It should be remembered that the Constitution specifically protects property rights under the fifth and fourteenth amendments, as well as freedom of expression under the first and fourteenth amendments.

II. CONSTITUTIONAL RELATIVISM IN PRIVATE PROPERTY RIGHTS

The first and fourteenth amendments protect persons from the deprivation of the freedoms of speech, association, press, religion, and assembly by the state or federal government.²⁶ It is axiomatic that the Constitution was designed primarily to protect individuals not from each other, but from the Government. While the first amendment prohibits only Congress from abridging free speech, the fourteenth amendment has been construed to impose the same restriction on state governments.²⁷ In order to regulate private action that inhibits the exercise of certain rights and freedoms, the courts have developed theories to associate "state action" with private conduct.²⁸ For the purpose of examining the shopping center issues, the most important doctrine is that of "public function."²⁹

To invoke the doctrine there must exist a private entity which assumes and operates a facility that would ordinarily be maintained by a governmental entity. The action of the private entity is thus considered state action for fourteenth amendment analysis. Private operators of such things as bridges, ferries, turnpikes, and railroads have traditionally been viewed as public functions and subject to state regulation.³⁰ An analogy can be drawn to agency law; a contractor cannot limit his liability by interposing an independent subcontractor to handle the high risk functions.³¹ By the same token, if a state is constitutionally limited within one of its ordinary spheres of public activity, it may not circumvent that limitation by delegating the function to a private concern. An obvious example of this was revealed when primary elections were delegated to private political parties with the resulting disenfranchisement of black voters.³²

REV. 834 (1971); Note, *Granting Poverty Workers Access to Farmworkers Housed on Private Property*, 25 SW. L.J. 780 (1971).

²⁵ See generally Friedman, *Property, Freedom, Security and The Supreme Court of the United States*, 19 MODERN L. REV. 461 (1956).

²⁶ For a review of first amendment judicial history, see *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951).

²⁷ *Gitlow v. New York*, 268 U.S. 652 (1925). For a full judicial treatment of the "incorporation" doctrine, see *Duncan v. Louisiana*, 391 U.S. 145 (1968).

²⁸ Black, "State Action," *Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1968); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

²⁹ *Marsh v. Alabama*, 326 U.S. 501 (1946). This is not to say that there are no other constitutional theories which are relevant. See note 28 *supra*.

³⁰ *American Toll Bridge Co. v. Railroad Comm'n*, 307 U.S. 486 (1939); *Clark's Ferry Bridge Co. v. Public Serv. Comm'n*, 291 U.S. 227 (1934); *Norfolk & S. Turnpike Co. v. Virginia*, 225 U.S. 264 (1912); *Township of Pine Grove v. Tolcott*, 86 U.S. (19 Wall.) 666 (1873).

³¹ W. PROSSER, *TORTS* § 71 (4th ed. 1971).

³² *Terry v. Adams*, 345 U.S. 461 (1953). "This grant [of voting] . . . is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied." *Smith v. Allwright*, 321 U.S. 649, 664 (1944) [overruling *Grovey v. Townsend*, 295 U.S. 45 (1935)]; cf. *Evans v. Newton*,

The beginning of any analysis of property rights in relation to "public function" is *Marsh v. Alabama*.³³ A member of Jehovah's Witnesses used a sidewalk in the business block of a company town³⁴ to distribute religious literature. The Supreme Court of the United States, Mr. Justice Black writing for the Court, reversed a trespass conviction³⁵ and concluded that the town, while privately owned, had assumed a role generally performed by the public sector. "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."³⁶

The Court, in *Marsh*, also struck a telling blow for the concept of relativism by espousing a balancing approach between proprietary and individual rights. In an analysis seemingly independent of the public function concept, the Court acknowledged the actual impact of allowing first amendment rights to be circumscribed³⁷ and concluded:

When we balance the constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, . . . we must remain mindful of the fact that the latter occupy a preferred position.³⁸ As we have stated before, the right to exercise the liberties safeguarded by the First Amendment 'lies at the foundation of free government by free men'³⁹ and we must in all cases 'weigh the circumstances and . . . appraise the . . . reasons . . . in support of the regulation . . . of the rights . . .'⁴⁰ In our view the circumstance that the property rights to the premises where the deprivation of liberty . . . took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties . . .⁴¹

This language indicates a more flexible approach than the standard state action-public function criteria. Without specifically breaking any new legal ground, the Court nevertheless intimated that it would consider all of the

382 U.S. 296 (1966). For a discussion of the public function concept, see *United States v. Wiseman*, 445 F.2d 792 (2d Cir. 1971); *Amalgamated Clothing Workers v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971).

³³ 326 U.S. 501 (1946); *accord*, *Tucker v. Texas*, 326 U.S. 517 (1946) (decided the same day).

³⁴ The town, known as Chickasaw, was a suburb of Mobile, Alabama, and was completely owned by Gulf Shipbuilding Corporation. The court referred to the business block as the "regular shopping center." 326 U.S. at 503.

³⁵ Trespass laws are a common factor in quasi-public property decisions since the owners of the "private" property complain of an unauthorized entry upon their property without invitation which results in an interference with possession. *See* W. PROSSER, *TORTS* § 13 (4th ed. 1971). Certain ordinances which can be viewed as trespass laws have been struck down as restrictive of constitutionally protected conduct. The distribution of literature on private residential property has generally been safeguarded against state interference. *See, e.g.*, *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Largent v. Texas*, 318 U.S. 418 (1943); *Schneider v. State*, 308 U.S. 147 (1939). *But see* *Breard v. City of Alexandria*, 341 U.S. 622 (1951).

³⁶ 326 U.S. at 506.

³⁷ The Court cited numerous studies indicating the number of individuals whose first amendment freedoms would be so affected. *Id.* at 508 n.5.

³⁸ The Court footnoted the following cases: *Follett v. McCormick*, 321 U.S. 573, 577 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943); *Jones v. Opelika*, 316 U.S. 584, 608 (1942).

³⁹ The Court cited *Schneider v. State*, 308 U.S. 147, 161 (1939).

⁴⁰ *Id.*

⁴¹ 326 U.S. at 509.

variables before allowing a restriction upon such important freedoms as those contained in the first amendment.

A. Quasi-Public Property

"Quasi-public" is a label which is attached to property when that private property is intentionally made accessible to the general public.⁴² This transformation of private property means that the proprietary interests must be modified to accommodate first amendment freedoms.⁴³

The concept of quasi-public property came into existence with *Marsh*. However, the precursors to that decision involved picketing on public property.⁴⁴ The landmark case of *Thornhill v. Alabama*⁴⁵ held that the dissemination of information in the form of peaceful picketing was protected by the first amendment. In that case the parties concerned were employees; however, in a later case the protection was extended to include nonemployees (*i.e.*, labor organizers).⁴⁶

The Court has steadfastly upheld the right of peaceful dissemination of ideas in public places.⁴⁷ This is not to say that there are no limitations on such activity.⁴⁸ Generally, however, the Court has upheld the traditional notion that

⁴² *Moreland Corp. v. Retail Store Employees Local 444*, 16 Wis. 2d 499, 114 N.W.2d 876 (1962); *State v. Williams*, 44 L.R.R.M. 2357 (Baltimore, Md., Crim. Ct. 1959).

⁴³ "[T]he private property . . . has taken on the nature of a quasi-public place. By opening it to the public, the owner's property rights have become secondary to broad use by the public, which includes the right of . . . peaceful picketing." *State v. Williams*, 44 L.R.R.M. 2357, 2360 (Baltimore, Md., Crim. Ct. 1959). See also *In re Hoffman*, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967) (freedom of expression was upheld in a privately-owned train station). *Contra*, *Watchtower Bible & Tract Soc'y v. Metropolitan Life Ins. Co.*, 297 N.Y. 339, 99 N.E.2d 433, cert. denied, 335 U.S. 886 (1948) (apartment building corridors); *McLeod v. College of Artesia*, 312 F. Supp. 498 (D.N.M. 1970) (private college campus); *Chumley v. Santa Anita Consol., Inc.*, 15 Cal. App. 3d 452, 93 Cal. Rptr. 77 (1971) (race track).

⁴⁴ Picketing has gone from the extremes of being illegal per se to being protected first amendment conduct. See generally Samoff, *Picketing and the First Amendment: "Full Circle" and "Formal Surrender,"* 9 LAB. L.J. 889 (1958).

⁴⁵ 310 U.S. 88 (1940); accord, *Carlson v. California*, 310 U.S. 106 (1940). See also *Hague v. CIO*, 307 U.S. 496 (1939). The *Thornhill* Court gave picketing full first amendment protection which could only be limited by a clear and present danger. *Schenck v. United States*, 249 U.S. 47 (1919). However, in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949), state regulation of picketing was examined under a reasonableness test as being economic regulation. See, e.g., *Teamsters Local 695 v. Vogt, Inc.*, 354 U.S. 284 (1957).

⁴⁶ *AFL v. Swing*, 312 U.S. 321 (1941) (the picketing was aimed at employees, however). See also *Cafeteria Employees Local 302 v. Angelos*, 320 U.S. 293 (1943); *Bakery Drivers Local 802 v. Wohl*, 315 U.S. 769 (1942) (cases upholding the constitutional protection of picketing).

⁴⁷ See, e.g., *NLRB v. Fruit Packers Local 760*, 377 U.S. 58 (1964) (public sidewalks); *Carlson v. California*, 310 U.S. 106 (1940) (public highways); *Schneider v. State*, 308 U.S. 147 (1939) (public streets). This was not always the case. See *Davis v. Massachusetts*, 167 U.S. 43 (1897).

⁴⁸ See, e.g., *Cameron v. Johnson*, 390 U.S. 611 (1968) (picketing done in an obstructing manner); *Adderley v. Florida*, 385 U.S. 39 (1966) (demonstration near a jail); *Plumbers Local 10 v. Graham*, 345 U.S. 192 (1953) (picketing against state right-to-work law); *Teamsters Local 309 v. Hanke*, 339 U.S. 470 (1950) (picketing to the detriment of small business); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) (picketing to bring about violation of antitrust law). Since picketing involves conduct as well as speech, it has been found to be subject to controls not otherwise permissible in the case of pure free speech. *Cox v. Louisiana*, 379 U.S. 559 (1965); *International Bhd. of Teamsters v. Vogt, Inc.*, 354 U.S. 559 (1957); *Hughes v. Superior Court*, 339 U.S. 460 (1950).

public places are the natural and logical locations for the communication and dissemination of ideas in a free society.⁴⁹

When picketing is done on property which is privately owned, the problem goes deeper than modified free speech considerations. The proprietary rights present serious countervailing obstacles to the otherwise protected conduct.⁵⁰ In the field of labor law, employees have certain statutory organizational rights on their employer's private property.⁵¹ The developments for nonemployees, therefore, have more constitutional interest. The Supreme Court, in *NLRB v. Babcock & Wilcox Co.*,⁵² took the position that an employer could exclude nonemployee union activity under dual criteria: (1) the availability of other adequate channels of communication; and (2) the nondiscriminatory manner in which the employer grants access.⁵³

The first court to apply the *Marsh* concept of quasi-public property to the nonemployee situation was the Seventh Circuit in *Marshall Field & Co. v. NLRB*.⁵⁴ In that case it was held that nonemployees could be excluded from inside the employer's building,⁵⁵ but not from a walkway which evidently had been transformed into quasi-public property by its similarity to a public street. However, the quasi-public property concept was more fully enunciated and developed in a series of shopping center cases.

B. Shopping Center Cases Prior to Logan Valley

The confusion in the courts⁵⁶ preceeding *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*,⁵⁷ was attributable to the lack of definition of the dual aspects of *Marsh* (i.e., the use or characteristics of a public function and the balancing of equities and rights). One aspect of that decision which received continued attention was the property law doctrine of dedication.⁵⁸ When a fee extends to the middle of a street, for example, part of that

⁴⁹ *Schneider v. State*, 308 U.S. 147 (1940).

⁵⁰ See generally Gould, *Union Organizational Rights and The Concept of "Quasi-Public" Property*, 49 MINN. L. REV. 505 (1965).

⁵¹ Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1970). *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Peyton Packing Co.*, 49 N.L.R.B. 28 (1943), enforced, 142 F.2d 1009 (5th Cir.), cert. denied, 323 U.S. 730 (1944).

⁵² 351 U.S. 105 (1956) (involving a parking lot which was not open to the general public). For a case distinguishing *Babcock* and finding a quasi-public parking lot, see *Central Hardware Co. v. NLRB*, 439 F.2d 1321 (8th Cir. 1971).

⁵³ This dual criteria draws no distinction between private and quasi-public property. *Babcock* is due for further consideration according to a recent Supreme Court decision which held inapplicable the rationale of *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) (see text accompanying note 72 *infra*). *Central Hardware Co. v. NLRB*, 439 F.2d 1321, vacated and remanded, 92 S. Ct. 2238, 2243 (1972).

⁵⁴ 200 F.2d 375 (7th Cir. 1953). It should be remembered that the term "quasi-public" is merely a convenient expression for describing property which has been opened to the general public. Whether it implies that a public function has been assumed is unclear.

⁵⁵ This squares with the later *Babcock* decision. See note 52 *supra*, and accompanying text.

⁵⁶ A contributing factor to the confusion is the "pre-emption doctrine" which denies state court jurisdiction. "When an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *San Diego Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). See also *People v. Goduto*, 21 Ill. 2d 605, 174 N.E.2d 385, cert. denied, 368 U.S. 927 (1961); *International Ladies' Garment Workers v. NLRB*, 366 U.S. 731 (1961); Gould, *supra* note 50, at 532.

⁵⁷ 391 U.S. 308 (1968).

⁵⁸ Notice that Justice Frankfurter, in *Marsh*, treats this as immaterial to the Bill of

property may be dedicated to full public use.⁵⁹ "Private property may, by unceremonious act and implication . . . on the part of the landowner, and like act and implication . . . on the part of the public, become subject to public easement by means of common law dedication."⁶⁰

The following cases illustrate various state court developments prior to *Logan Valley Plaza*.⁶¹ In *Hood v. Stafford*⁶² a nonemployee's trespass conviction was upheld. The court limited its inquiry to the physical characteristics of a small grocery store and found no public dedication. The owner's invitation was said not to extend to the general public but only to those who would benefit the business.⁶³ Another trespass conviction was upheld in *South Discount Foods, Inc. v. Retail Clerks Local 1552*⁶⁴ because not only was no invitation extended to the general public (only to customers), but private property could not be deemed to be public merely because it resembled a public facility. At the opposite extreme is *Moreland Corp. v. Retail Store Employees Local 444*,⁶⁵ in which the court was content to dismiss for lack of evidence by looking only to physical characteristics of the shopping center sidewalks. These cases indicate an emphasis on the physical construction of the property in question and a disregard for the relativism or balancing of equities, which was promoted by the Court in *Marsh*.⁶⁶

A case illustrating the nationwide split of opinion was *Amalgamated Clothing Workers v. Wonderland Shopping Center*,⁶⁷ in which half the Michigan Supreme Court viewed the shopping center as the functional equivalent of a public market and hence dedicated to public use.⁶⁸ The other half of the court could find no governmental function because a shopping center was "not a town in any sense of the term. It performs no governmental functions . . ."⁶⁹

These illustrative cases show the danger in the creation of a term such as "quasi-public." Very few courts have stripped away the labels and physical

Rights and preferred freedoms question. 326 U.S. at 510-11 (Frankfurter, J., concurring).

⁵⁹ See, e.g., *Vonderschmitt v. McGuire*, 100 Ind. App. 632, 195 N.E. 585 (1935); 26 C.J.S. *Dedication* §§ 13-25 (1956). See also *Breard v. City of Alexandria*, 341 U.S. 622 (1951). "[I]n neither case [*Marsh* and its companion case, *Tucker v. Texas*] was there dedication to public use, but it seems fair to say that the permissive use of the ways was considered the equivalent to such dedication." *Id.* at 643. *Union Transportation Co. v. Sacramento Co.*, 42 Cal. 2d 235, 267 P.2d 10, 42 Cal. Rptr. 235 (1954) (public dedication does not have to be explicit); *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir.), cert. denied, 393 U.S. 940 (1968) (state involvement such that freedom of expression was protected was found through a dedicated public use of a bus terminal). See Note, *Forced Dedications as a Condition to Subdivision Approval*, 9 SAN DIEGO L. REV. 112 (1972).

⁶⁰ *Amalgamated Clothing Workers v. Wonderland Shopping Center, Inc.*, 370 Mich. 547, 122 N.W.2d 785 (1963).

⁶¹ 391 U.S. 308 (1968).

⁶² 213 Tenn. 684, 378 S.W.2d 766 (1964).

⁶³ See note 35 *supra*. See also *People v. Goduto*, 21 Ill. 2d 605, 174 N.E.2d 385, cert. denied, 368 U.S. 927 (1961) (similar holding involving a Sears, Roebuck parking lot).

⁶⁴ 14 Ohio Misc. 188, 235 N.E.2d 143 (1968). The Ohio court specifically found no public dedication. 235 N.E.2d at 147. "The court also finds that a general invitation to certain classes of persons to use the premises and the exclusion of certain other classes of persons is fully consistent with the right of a property owner to the use and enjoyment of his property." *Id.*

⁶⁵ 16 Wis. 2d 499, 114 N.W.2d 876 (1962).

⁶⁶ See note 41 *supra*, and accompanying text.

⁶⁷ 370 Mich. 547, 122 N.W.2d 785 (1963) (decision affirmed by an evenly split court).

⁶⁸ See text accompanying note 60 *supra*.

⁶⁹ 122 N.W.2d at 788-89.

characteristics to view the realities of the interests at hand.⁷⁰ The desire and need for clarification prior to *Logan Valley* was manifest. "In this complex and dynamic society no legal code, no aggregate of statutory directions and judge-made precedents have as yet furnished explicit and unambiguous commands for the determination of this question."⁷¹

*C. Amalgamated Food Employees Local 590 v.
Logan Valley Plaza, Inc.*

*Logan Valley*⁷² has been criticized for further muddying the water with respect to the dichotomy between free speech and property interests.⁷³ The decision might have had the effect of expanding, as well as contracting, *Marsh*.⁷⁴ The case involved picketing in a supermarket parcel pickup area. The Pennsylvania Supreme Court affirmed an injunction finding the union's activity a trespass.⁷⁵ The Supreme Court reversed.⁷⁶ It was held that the center was the functional equivalent of a business block, and as such the state could not delegate the power to silence first amendment freedoms through use of its trespass laws.⁷⁷ After finding striking similarities to the company town in *Marsh*, however, the Court declined to extend the full free speech protection of that decision. The protection went only to use-related activity.⁷⁸

⁷⁰ Two decisions which attempted to apply the balancing approach as well as the public function aspect of *Marsh* are *Schwartz-Torrance Inv. Corp. v. Bakery Workers Local 31*, 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964), cert. denied, 380 U.S. 906 (1965), and *Freeman v. Retail Clerks Union*, 58 Wash. 2d 426, 363 P.2d 803 (1961).

In *Schwartz-Torrance* the court considered alternative forums for the picketing and found them ineffectual and dangerous because of traffic conditions. It considered the plaintiff's claims for exclusive possession and enjoyment of private property and found them largely theoretical (approximately 10,000 people visited the premises weekly). The court then agreed with the affirming decision in *Amalgamated Clothing Workers* and found that the shopping center had acquired a quasi-public character. "The interest of the union thus rests upon the solid substance of public policy and constitutional right; the interest of the plaintiff lies in the shadow cast by a property right worn thin by public usage." 394 P.2d at 926, 40 Cal. Rptr. at 238.

In *Freeman* the court held that a trespass question was pre-empted (note 56 *supra*) by the NLRA. However, a concurring opinion endorsed five factors enunciated by the trial judge for the purpose of balancing the interests. Free speech on private property should be allowed when all or some of the following are present: (1) the private property is designed for the general public in such a way that the physical characteristics are hard to distinguish from public property; (2) the exercise of free speech is to communicate with people naturally on the property as a result of the primary use of the property; (3) the communication would be allowed if made on public property; (4) there is no interference with the owner's fundamental rights of privacy or personal use, and no direct pecuniary loss; (5) there are no effective alternative places for communication. 363 P.2d at 806.

⁷¹ *South Discount Foods, Inc. v. Retail Clerks Local 1552*, 14 Ohio Misc. 188, 192, 235 N.E.2d 143, 146 (1968).

⁷² *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

⁷³ *Forkosch, Picketing in Shopping Centers*, 26 WASH. & LEE L. REV. 250 (1969).

⁷⁴ *Marsh* was expanded to include areas other than company towns, overruling prior decisions which had limited *Marsh* to those facts. See, e.g., notes 62, 64, 69 *supra*, and accompanying text, as well as 391 U.S. at 331 (Black, J., dissenting). *Logan Valley* may have meant to limit *Marsh* to cases of free speech in which there is a use relationship to a target store. 391 U.S. 319-20. *Marsh* had no such restriction. See note 78 *infra*.

⁷⁵ 425 Pa. 382, 227 A.2d 874 (1967).

⁷⁶ 391 U.S. at 309.

⁷⁷ *Id.* at 319.

⁷⁸ *Logan Valley*, therefore, protects only those members of the public wishing to exercise "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." *Id.* at 319-20. In a footnote the Court declined to consider "whether respondent's property rights could, consistently with the first

The significance of *Logan Valley* lies in the balancing approach used and the compromise struck to accommodate both proprietary and free speech rights. Justice Douglas spoke of degrees of dedication to public use.⁷⁹ He would require a different level of relativism if the Court were to find that the center had been fully dedicated to public use.⁸⁰ The decision was in reality based on a balance of the following factors: (1) the petitioners' placards could not have been deciphered from the distance required by the state court injunction;⁸¹ (2) the speed of traffic and the hazard of handbilling on a heavily traveled road posed an unacceptable risk;⁸² (3) the requirement of picketing outside the shopping center would have made it difficult to limit the effect of the picketing;⁸³ (4) the economic realities of a shift of the population to the suburbs had caused a consequent increase in the use of shopping centers "as a way of life;"⁸⁴ (5) the creation of a *cordon sanitaire* of parking lots around suburban stores would have promoted an inequitable double standard for downtown stores;⁸⁵ and (6) the means to challenge conditions and merchandise in suburban stores would have been unavailable.

Logan Valley took an incremental balancing approach and allowed the petitioners to use free speech in pursuit of a legitimate end, consonant with the use of the property owners. The issue of providing a public forum on private property for first amendment activity unrelated to the businesses was not before the Court.⁸⁶ There was no need to whittle away property rights which have no small measure of constitutional protection through the fifth amendment.⁸⁷ The compromise was well stated by Justice Douglas: "[The proprietors] hold out the mall as 'public' for purposes of attracting customers Why should respondents be permitted to avoid this incidence of carrying on a public business in the name of 'private property'?"⁸⁸

III. THE AFTERMATH: SOAPBOXES IN THE SHOPPING CENTER

The courts continued to grapple with the problem of quasi-public property.⁸⁹ However, few cases came to grips with the unanswered questions left by *Logan* 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." This is what is meant by use-related free speech activity. *Id.* at 320 n.9. See also note 74 *supra*.

⁷⁹ *Id.* at 326 (Douglas, J., concurring).

⁸⁰ The property would be treated as any other public property in relation to the exercise of free speech. Hence, the only limitations would be those recognized on all such activity. See note 48 *supra*, and accompanying text. But the Court did recognize, as a general proposition, that a person may not voluntarily open his property to the public for commercial gain and assert the same rights of privacy available to that property as a domicile. 391 U.S. at 325.

⁸¹ *Id.* at 322.

⁸² *Id.*

⁸³ *Id.* at 323. Petitioners cited the danger of an illegal secondary boycott in regard to common situs picketing. See *Electrical Workers Local 761 v. NLRB*, 366 U.S. 667 (1961).

⁸⁴ 391 U.S. at 324. The court cited statistical studies in support of this factor.

⁸⁵ *Id.* at 324-25.

⁸⁶ See note 78 *supra*.

⁸⁷ *Id.* at 330 (Black, J., dissenting).

⁸⁸ *Id.* at 326 (Douglas, J., concurring).

⁸⁹ Two cases involving college campuses which held to the general idea that a private entity operating in a public fashion may not assert titled property rights to deprive constitutionally protected rights are *Robinson v. Davis*, 447 F.2d 753 (4th Cir. 1971), and *Jones v. Board of Regents*, 436 F.2d 618 (9th Cir. 1970). See also *Chumley v. Santa Anita Consol., Inc.*, 15 Cal. App. 3d 452, 93 Cal. Rptr. 77 (1971).

Valley. That case left no doubts about the validity of free speech activity when it directly related to a target business. The question remained whether the shopping center could be turned into a public forum to accommodate the free flow of communication when that activity has nothing to do with the business conducted in the center.

The first case to deal with the exact question which *Logan Valley* left unanswered was *State v. Miller*.⁹⁰ In a decision based on what can best be characterized as blind faith, the Minnesota Supreme Court reversed a trespass conviction of persons distributing political campaign pamphlets which apparently had no relation whatsoever to the business in the center. The substance of the per curiam opinion was, "The decision [*Logan Valley*] is controlling over the facts involved in the case now before us. On the basis thereof, the convictions must be reversed."⁹¹ It is safe to assume that a better reasoned explanation would have been necessary to convince the Supreme Court that *Logan Valley* was controlling.⁹²

An Oregon federal district court gave the first substantial⁹³ holding dealing with the use-relationship issue in *Tanner v. Lloyd Corp.*⁹⁴ The court actually based its decision on *Marsh* and *Wolin v. Port of New York Authority*⁹⁵ in protecting a draft resistance group's right to handbill in a shopping center. Unlike *Miller*,⁹⁶ the court recognized the distinction between *Logan Valley* and *Marsh* but chose the broader rule in *Marsh* to protect all the typical free speech rights and not just those which sought to cure a commercial ill within the shopping center. In reaching this decision the court balanced the equities and reasoned that otherwise "the public need for uncensored information, on which *Marsh* was based, could be frustrated."⁹⁷ The court apparently concluded that

⁹⁰ 280 Minn. 566, 159 N.W.2d 895 (1968).

⁹¹ 159 N.W.2d at 896.

⁹² *Logan Valley* did not decide these facts. See note 78 *supra*, and accompanying text; cf. *Tanner v. Lloyd Corp.*, 92 S. Ct. 2219 (1972).

⁹³ Two earlier cases greeted *Logan Valley* with disapproval and reluctant acceptance. *Broadmoor Plaza, Inc. v. Amalgamated Meat Cutters*, 21 Ohio Misc. 245, 257 N.E.2d 420 (1969); *Blue Ridge Shopping Center, Inc. v. Scheininger*, 432 S.W.2d 610 (Mo. App.—Kansas City 1968). Both of these cases had fact situations which satisfied the use-relationship criteria of *Logan Valley*. In *Blue Ridge* handbilling in the shopping center was sanctioned on the strength of a quotation from *Marsh* describing quasi-public property which also appeared in *Logan Valley*. See text accompanying note 36 *supra*. In *Broadmoor Plaza* the court overruled *South Discount Foods* (note 64 *supra*, and accompanying text) in finding NLRB jurisdiction. Because of the fact similarities to *Logan Valley*, these cases break no new legal ground and are significant only because they reveal express state level disapproval of the lack of protection afforded private property in *Logan Valley*. See 432 S.W.2d at 616; 257 N.E.2d at 423. See also *In re Lane*, 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969) (single grocery store decision following *Logan Valley*).

⁹⁴ 308 F. Supp. 128 (D. Ore. 1970), *aff'd*, 446 F.2d 545 (9th Cir. 1971), *rev'd*, 92 S. Ct. 2219 (1972). The Supreme Court decision in *Tanner* will be discussed in detail in section IV *infra*.

⁹⁵ *Wolin* protected freedom of expression without a use-nexus in a bus terminal which was found to be dedicated to a public use. 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).

⁹⁶ 280 Minn. 566, 159 N.W.2d 895 (1968).

⁹⁷ 308 F. Supp. at 132. Pertinent factors in the decision were as follows: (1) hand-billing from the public sidewalks outside the mall would be less effective and perhaps dangerous; (2) there was no littering or disturbance; and (3) the shopping center's management had previously allowed football rallies, Veterans' Day ceremonies, as well as American Legion and Salvation Army activity (though it excluded the March of Dimes, Hadassah, and Governor Tom McCall). The court also tried to distinguish handbilling as pure speech from picketing as speech plus. *Id.* at 132. *Contra*, *Amalgamated Food Employees Local 590*

free speech rights occupied a preferred position and "weighed heavier than the [property] owners' rights."⁹⁸

In *Sutherland v. Southcenter Shopping Center, Inc.*,⁹⁹ the court found itself faced with the *Logan Valley* limitation in the form of signature solicitation for legislative certification of an ecology bill. The court acknowledged that the use of shopping centers was the most effective way to obtain signatures.¹⁰⁰ Again, a balancing test¹⁰¹ was applied, and the court spoke of the "diminishing fee"¹⁰² as being outweighed by the first amendment rights. An interesting aspect of the case was not only a finding of quasi-public property as the functional equivalent of a business block, but also a finding of "state action" because of deputized security guards.¹⁰³

The use-relationship limitation was handled in a different manner from the *Tanner* lower court treatment. While both courts noted the inconsistency, the *Sutherland* decision was an attempt at reconciliation.¹⁰⁴ A broad interpretation was given to the *Logan Valley* use-relationship limitation.¹⁰⁵ Picketing was also distinguished as being more objectionable than other free speech activity in a shopping center.¹⁰⁶ These were superficial twists¹⁰⁷ to *Logan Valley* which were utilized to justify the real basis for the decision—the public nature of the enterprise and the balancing of equities between first and fifth amendment rights.¹⁰⁸

The Supreme Court of California has established a consistent line of cases which provide the most thorough, albeit expansive, state court authority dealing with *Logan Valley* and *Marsh*. *In re Hoffman*¹⁰⁹ was a significant pre-*Logan Valley* decision which protected handbilling in a privately-owned train station. Recognizing the public function of the station, the court specifically dispensed with the use-relationship idea¹¹⁰ and found that the first amendment

v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 315-16 (1968); *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). See also note 103 *infra*, and accompanying text.

⁹⁸ 308 F. Supp. at 132; see note 104 *infra*.

⁹⁹ 3 Wash. App. 833, 478 P.2d 792 (1970).

¹⁰⁰ 478 P.2d at 794, citing *Saddler v. State*, 66 Wash. 2d 215, 401 P.2d 848 (1965).

¹⁰¹ "The balancing of conflicting interests is basic to the achievement of justice as the goal of law." 478 P.2d at 799, citing SALMOND ON JURISPRUDENCE 63 (12th ed. P.J. Fitzgerald 1966); Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943); Pound, *The Scope and Purpose of Sociological Jurisprudence* (pts. 1 & 2), 24 HARV. L. REV. 591, 25 HARV. L. REV. 140 (1911).

¹⁰² Cross, *The Diminishing Fee*, 20 LAW & CONTEMP. PROB. 517 (1955).

¹⁰³ For criticism of this concept see Note, *Shopping Centers and the Fourteenth Amendment: Public Function and State Action*, 33 U. PITT. L. REV. 112 (1971).

¹⁰⁴ The *Tanner* lower court primarily chose the reasoning of *Marsh* over *Logan Valley*. It recognized that the latter might not be applicable. "If *Logan Valley* does not go as far as I suggest, the first amendment does." 308 F. Supp. at 132. *But cf.* *Lloyd Corp. v. Tanner*, 92 S. Ct. 2219 (1972).

¹⁰⁵ The limitation was said to restrict activity which would "unreasonably interfere with the normal use of the public of the retail functions of the shopping centers." 478 P.2d at 798.

¹⁰⁶ *Id.* at 799. Handbilling and signature collection must be viewed on equivalent terms with respect to actual physical interference. *Cf.* *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

¹⁰⁷ The *Logan Valley* court was quite specific and clear in its limitation. 391 U.S. at 319-20.

¹⁰⁸ See note 101 *supra*, and accompanying text.

¹⁰⁹ 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).

¹¹⁰ "In neither case can first amendment activities be prohibited solely because the property involved is not maintained primarily as a forum for such activities [T]he test

interest outweighed the interests in property and the functioning of a train station.¹¹¹ Reasonable regulation was possible to accommodate both interests.¹¹² The facts of a second decision, *In re Lane*,¹¹³ satisfied the use-relationship criteria (*i.e.*, handbilling against a particular store). The case is significant only because it stresses the pragmatic assertion of first amendment rights. While no shopping center was involved, the court refused to allow even a single grocery store to maintain a *cordon sanitaire* around itself.¹¹⁴ *In re Cox*¹¹⁵ involved the purest form of freedom of expression, that of appearance and association.¹¹⁶ The management of the shopping center arbitrarily excluded petitioner by having him arrested for trespass, even though his only purpose was to make a purchase. Using the common law characterization of "public enterprise,"¹¹⁷ the court gave a frank portrayal of the nature of the shopping center:

In undertaking to provide the necessities and amenities of life, the shopping center performs an important public function. In some areas the public must rely upon the shopping center as its sole source of food, clothing, and other commodities. . . . Our modern society has become so interdependent and interrelated that those who perform a significant public function may not erect barriers of arbitrary discrimination¹¹⁸

While the above cases did not deal with the specific problem of use-relationship left by *Logan Valley*, they served as supporting background for the most significant state court decision on that issue. *Diamond v. Bland*¹¹⁹ involved signature solicitation and handbilling by an ecology group. The court took portions of both *Logan Valley* and *Marsh* and connected the unrelated first amendment protection given by *Marsh* to citizens in a private business district with the *Logan Valley* parallel of a shopping center to such a district.¹²⁰ The distinction in *Logan Valley* was rationalized as being particular to the facts of that case. It was desirable to limit unrelated picketing in Logan Valley Plaza, for example, because of its small size.¹²¹ The best treatment of the use-

is not whether petitioners' use of the station was a railway use but whether it interfered with that use." 434 P.2d at 356, 64 Cal. Rptr. at 100.

¹¹¹ *Id.*

¹¹² "Had petitioners in any way interfered with the conduct of the railroad business, they could legitimately have been asked to leave." 434 P.2d at 357, 64 Cal. Rptr. at 101. "Persons can be excluded entirely from areas where their presence would threaten personal danger or block the flow of . . . traffic . . ." 434 P.2d at 358, 64 Cal. Rptr. at 102.

¹¹³ 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969).

¹¹⁴ The nearest alternate forum was a public sidewalk some 280 feet away. 457 P.2d at 564, 79 Cal. Rptr. at 732.

¹¹⁵ 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970).

¹¹⁶ The petitioner was accompanied by a friend who wore long hair and unconventional dress. 3 Cal. 3d at 210, 474 P.2d at 994, 90 Cal. Rptr. at 26.

¹¹⁷ 3 Cal. 3d at 212, 474 P.2d at 996, 90 Cal. Rptr. at 28. See note 16 *supra*.

¹¹⁸ 3 Cal. 3d at 218, 474 P.2d at 1000, 90 Cal. Rptr. at 32. The court also stated: "The shopping center may no more exclude individuals who wear long hair or unconventional dress, who are black, who are members of the John Birch Society or who belong to the American Civil Liberties Union, merely because of these characteristics or associations, than may the city . . ." *Id.* For a case striking down a statute purporting to give private property owners the arbitrary power to exclude anyone at the owners' whim, see *Ames v. City of Hermosa Beach*, 16 Cal. App. 3d 146, 93 Cal. Rptr. 786 (1971).

¹¹⁹ 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970), *cert. denied*, 402 U.S. 988 (1971).

¹²⁰ 3 Cal. 3d at 660, 477 P.2d at 736, 91 Cal. Rptr. at 505.

¹²¹ Inland Shopping Center, which was involved in *Diamond*, was the largest shopping center in San Bernadino County. 3 Cal. 3d at 656, 477 P.2d at 734, 91 Cal. Rptr. at 502.

relationship limitation was a comparison with *Schwartz-Torrance Investment Corp. v. Bakery Workers Local 31*,¹²² which was decided by the California court four years prior to *Logan Valley*. The court acknowledged that both cases balanced property interests against union interests; and the only relevance of the use-relationship factor was its service as a strengthening factor on the union's side.¹²³ Often the only truly effective place to call attention to a problem is at the target business location. In the balancing process the property interest is unaffected by whether or not the activity is related to a business use. Thus, the true test turned on the relative unimportance of private property rights when they are "worn thin by public usage."¹²⁴ The court also relied on the specific language rejecting use-relationship in *Hoffman*¹²⁵ and *Wolin*.¹²⁶ The broad holding was expressed as follows: "Unless there is obstruction of or undue interference with normal business operations, the bare title of the property owners does not outweigh the substantial interest of individuals and groups to engage in peaceful and orderly First Amendment activities on the premises of shopping centers open to the public."¹²⁷

The recent state and lower federal court authority thus indicated that *Logan Valley* was not a restriction of *Marsh*. The Supreme Court merely limited *Logan Valley* to its facts and never reached the public forum issue in finding a shopping center the functional equivalent of a business district. However, the courts seized upon this reasoning and then applied *Marsh* to permit unrelated first amendment activity. This theory assumed the vitality of the state action-public function concept when, in fact, those courts attached little emphasis in that area. Some centers may indeed be the equivalent of modern business municipalities, but *Logan Valley* did not say that all of them are. It became apparent that state action was only a secondary consideration. The prime factors were the nature of quasi-public property and the inequity of enforcing full private property limitations to the detriment of vital first amendment freedoms.

IV. LLOYD CORP. V. TANNER

In *Lloyd Corp. v. Tanner*¹²⁸ the Supreme Court alleviated the confusion but not the problem. In a 5-4 decision¹²⁹ the majority gave a narrow reading to *Marsh* and *Logan Valley* and strictly limited them to their respective facts. In *Tanner* the Court found no dedication of the shopping center property to a public use. Under the *Logan Valley* limitation, the respondents in *Tanner*

¹²² 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964); see note 70 *supra*.

¹²³ 3 Cal. 3d at 662, 477 P.2d at 738, 91 Cal. Rptr. at 506.

¹²⁴ 3 Cal. 3d at 663, 477 P.2d at 739, 91 Cal. Rptr. at 507, quoting *Schwartz-Torrance*, 394 P.2d at 926, 40 Cal. Rptr. at 238. The court described the property interest as "naked title." 3 Cal. 3d at 663, 477 P.2d at 739, 91 Cal. Rptr. at 507.

¹²⁵ 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).

¹²⁶ 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).

¹²⁷ 3 Cal. 3d at 666, 477 P.2d at 741, 91 Cal. Rptr. at 509 (emphasis added). A shop owner might justifiably wonder if "premises" includes the area inside his store. Justice White had the same concern in *Logan Valley*, 391 U.S. at 339.

¹²⁸ 92 S. Ct. 2219 (1972). For a discussion of the lower court decision, see note 94 *supra*, and accompanying text.

¹²⁹ Justice Powell, writing for the majority, was joined by the three other Nixon appointees (Burger, C.J., Blackmun, Rehnquist, J.J.) and Justice White. Justice Marshall (the author of *Logan Valley*) wrote a vigorous dissent and was joined by Douglas, Brennan, and Stewart, J.J. (all members of the Court when *Logan Valley* was decided).

could not exercise First Amendment rights which were unrelated to the petitioner's shopping center operations. The Court went further and found that the shopping center was still private in character, notwithstanding the fact that it was open to the public. After distinguishing *Marsh* and *Logan Valley* on their facts, the Court was persuaded that the alternative means of communication available to the respondents justified protection of the petitioner's property. In short, the Court totally rejected a growing body of state and lower federal court law.

The *Tanner*¹³⁰ decision reveals the continuing importance of American property rights; even to the detriment of first amendment rights.¹³¹ The majority must be criticized on various aspects of the decision. First, Lloyd Center exemplified a much stronger case for state action through the assumption of a public function than did Logan Valley Plaza, which was held to be the functional equivalent of a public business district.¹³² It should be remembered that this concept relates only to the first of *Marsh's* dual criteria (public function and balancing the equities).¹³³ Lloyd Center covered some fifty acres of land with more than sixty commercial businesses and professional offices. The commercial and recreational facilities were extremely complete.¹³⁴ Lloyd Center employed guards who wore uniforms identical to other city police and who were given full police power by the city. In various city ordinances the area was referred to as a general retail business district which would require city street and health planning.¹³⁵ Free speech should not be limited under such a situation except through reasonable regulation, especially in view of the following *Marsh* language: "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."¹³⁶ Logan Valley Plaza was considered to be a business district. Lloyd Center, by comparison, approached the proportions of a small city. The majority, rather than dealing with this reality, merely said: "[T]here has been no such dedication of Lloyd's privately owned and operated shopping center to public use . . ."¹³⁷ This language reveals a misunderstanding of the dedication concept.¹³⁸

Second, the majority ignored *Marsh's* second criterion, the balancing of the equities.¹³⁹ This aspect bears directly on the use-relationship criteria of *Logan Valley*. That is, free speech activity was said to be protected if it was "generally consonant with the use to which the property is actually put."¹⁴⁰ It is true that the *Logan Valley* Court reserved the question of indirect use-relationship.¹⁴¹ However, in *Tanner* the relationship between the use to which Lloyd Center

¹³⁰ See also *Central Hardware Co. v. NLRB*, 92 S. Ct. 2238 (1972) (a companion case dealing with the labor law aspects of *Logan Valley*).

¹³¹ See text accompanying note 22 *supra*.

¹³² 391 U.S. 308, 315-16 (1968).

¹³³ See text accompanying note 57 *supra*.

¹³⁴ 92 S. Ct. at 2221.

¹³⁵ *Id.* at 2232 (Marshall, J., dissenting).

¹³⁶ 326 U.S. at 506.

¹³⁷ 92 S. Ct. at 2229.

¹³⁸ See notes 59, 60 *supra*, and accompanying text.

¹³⁹ See text accompanying note 41 *supra*.

¹⁴⁰ 391 U.S. at 320.

¹⁴¹ *Id.* at 320 n.9.

was actually put and the use which was denied the respondents was quite immediate. Lloyd Center in fact was used for selected first amendment activity.¹⁴² Lloyd Center permitted schools to hold rallies, presidential candidates to speak, and the Salvation Army, the Volunteers of America, and the American Legion to solicit funds. On Veteran's Day a parade was held and a speaker was allowed to deliver an address about the "valor of American soldiers."¹⁴³ The American Legion, a veteran's organization, was permitted to sell poppies in the Lloyd Center.¹⁴⁴ Respondent's antiwar leaflets invited the public "to attend a meeting in which different points of view would be expressed than those held by the organizations and persons privileged to use Lloyd Center as a forum for parading their ideas and symbols."¹⁴⁵ Respondent's free speech activity must be viewed as "generally consonant" with the other free speech use of the shopping center. The relationship though contradictory was direct. The Court's non-recognition of this use-relationship opens the way to discriminatory practices in shopping centers. Hereafter, shopping centers can arbitrarily exclude speakers with whom the management does not agree. If such power is available in limiting the preferred freedom of free speech, may shopping centers now exclude individuals whose hair length, dress, or religion is distasteful to management?¹⁴⁶

Third, the *Tanner* majority did not give a realistic treatment of other equitable factors. For example, the respondents were said to have an appropriate alternative forum on the sidewalks approaching Lloyd Center's mall. The district court and the court of appeals made careful findings of fact to the effect that the reachable audience was not the same outside the mall. The quantity of people was found to be less and the hardship in approaching those people was found to be too great. The alternative operation was found to be hazardous to respondents, pedestrians, and automobile passengers.¹⁴⁷ *Logan Valley* placed emphasis on the accessibility and the size of the audience.¹⁴⁸ Furthermore, the leaflet distribution was "quiet and orderly, and there was no littering."¹⁴⁹ There was no interference with the ordinary business carried on in the shopping center. In *Logan Valley* the free speech activity was actually meant to have a detrimental economic effect on one of the shopping center proprietors. It is difficult to see why the latter should be upheld while the former is disallowed.

The Court also neglected to fully explore the impact on certain groups of the pervasiveness of a shopping district like Lloyd Center.¹⁵⁰

For many persons who do not have easy access to television, radio, the major newspapers, and the other forms of mass media, the only way they can express themselves to a broad range of citizens on issues of general public concern is to picket, or to handbill, or to utilize other free or relatively inexpensive means

¹⁴² See note 97 *supra*.

¹⁴³ 92 S. Ct. at 2234 (Marshall, J., dissenting).

¹⁴⁴ "At times the proceeds from selling poppies were used to finance lobbying and other activities directed at increasing the military capacity of the United States." *Id.* at n.3, citing JONES, A HISTORY OF THE AMERICAN LEGION 330-32 (1946).

¹⁴⁵ 92 S. Ct. at 2234 (Marshall, J., dissenting).

¹⁴⁶ See note 118 *supra*.

¹⁴⁷ 92 S. Ct. at 2236 n.7 (Marshall, J., dissenting).

¹⁴⁸ 391 U.S. at 322.

¹⁴⁹ 92 S. Ct. at 2222.

¹⁵⁰ See, e.g., text accompanying note 118 *supra*.

of communication. The only hope that these people have to be able to communicate effectively is to be permitted to speak in those areas in which most of their fellow citizens can be found. One such area is the business district of a city or town or its functional equivalent. And this is why respondents have a tremendous need to express themselves within Lloyd Center.¹⁵¹

If speech by financially weak interests is to reach many citizens in certain communities, it must do so through a shopping area like Lloyd Center.

V. THE EQUITABLE APPROACH VERSUS THE LLOYD CORP. V. TANNER APPROACH

The Public Function Fallacy. In *Diamond*, as well as *Sutherland*, the courts actually were not looking for a public function. If a private entity has not assumed a governmental function, it should not be restricted by the constitutional limitations on government action.¹⁵² Private abridgment of freedoms, as well as discrimination, is not constitutionally prohibited.¹⁵³ None of the recent pre-*Tanner* cases have used the language of "dedication to a public use" in the same way as in the pre-*Logan Valley* cases.¹⁵⁴ The sidewalks of an actual town, although privately owned, are at least physically distinguishable from an indoor mall between stores which are accessible from the outside. Is the latter a state function, even when all non-shopping activity has been consistently prohibited by the management?¹⁵⁵ The fact that an area is open to the shopping public makes it quasi-public; but it does not mean that a state function is being performed.¹⁵⁶ Theoretically, state action is the *sine qua non* for protecting first amendment freedoms from private action. Realistically, the state and lower federal courts imposed a balancing test, and state action, through the public nature of a shopping center, had been merely assumed from *Logan Valley*.¹⁵⁷ After *Tanner* a genuine inquiry must be made in relation to state action through the private assumption of a public function. However, the Court cannot consistently say that Logan Valley Plaza was the functional equivalent of a public business district and Lloyd Center was not.

The True Variables. When quasi-public property is involved, traditional property rights are modified. At one time, the claim that only prospective customers have been invited on the property would not have sustained a trespass conviction. When property rights were worn thin by public usage,¹⁵⁸ the state and lower federal court trend was to look to the realities of the situation. How

¹⁵¹ 92 S. Ct. at 2234-35 (Marshall, J., dissenting).

¹⁵² See note 30 *supra*, and accompanying text.

¹⁵³ See generally authorities cited in note 28 *supra*.

¹⁵⁴ See note 59 *supra*, and accompanying text.

¹⁵⁵ Cf. *Diamond v. Bland*, 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970), *cert. denied*, 402 U.S. 988 (1971); *Sutherland v. Southcenter Shopping Center*, 3 Wash. App. 833, 478 P.2d 792 (1970). *Contra*, *Tanner v. Lloyd*, 308 F. Supp. 128 (D. Ore. 1970), *aff'd*, 446 F.2d 545 (9th Cir. 1971).

¹⁵⁶ *But see* *Cottonwood Mall Shopping Center, Inc. v. Utah Power & Light Co.*, 440 F.2d 36 (10th Cir. 1971), in which a shopping center was held to be subject to regulation as a public utility if it supplied electricity to lessee merchants.

¹⁵⁷ *Schwartz-Torrance Inv. Corp. v. Bakery Workers Local 31*, 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964), *cert. denied*, 380 U.S. 906 (1965).

¹⁵⁸ *Schwartz-Torrance Inv. Corp. v. Bakery Workers Local 31*, 61 Cal. 2d 766, 394 P.2d 921, 926, 40 Cal. Rptr. 233, 238 (1964), *cert. denied*, 380 U.S. 906 (1965).

much interference was there with the primary purpose of the shopping center?¹⁵⁹ Was there an actual disruption or littering?¹⁶⁰ Were there effective alternative forums available?¹⁶¹ Had the management gone beyond opening its property to prospective shoppers and provided a forum for other selected first amendment activity?¹⁶²

Superimposed on these factors was the equalizer of reasonable regulation by the shopping center owners.¹⁶³ The management could prevent interference with pedestrian flow,¹⁶⁴ and limit the time, place, and number of participants involved.¹⁶⁵ By giving the owner reasonable control, a compromise was struck which required the owner to find a way to accommodate first amendment activity. But by this accommodation it would also seem that the owner could minimize all demonstrable economic detriment.¹⁶⁶ This proposition seems entirely reasonable when viewed against the purpose for which the property is opened to the public, *i.e.*, financial gain.

Tanner strikes no such compromise. Apparently because the majority in *Tanner* viewed Lloyd Center's quasi-public property as more private than public, first amendment freedoms are now simply subordinated to property rights.

The Interference Inconsistency. The use-relationship criteria of *Logan Valley* became a meaningless technicality in pre-*Tanner* cases. Property open to the public is quasi-public and is held by a long line of cases to be susceptible to picketing.¹⁶⁷ For the courts to exclude unrelated first amendment activity is to

¹⁵⁹ *Marsh v. Alabama*, 326 U.S. 501 (1946) (Reed, J., dissenting). See also *In re Ball*, 23 Cal. App. 3d 380, 100 Cal. Rptr. 189 (1972). In that recent case defendants sought to conduct a signature solicitation at Disneyland. The court upheld a trespass conviction and refused to find overbroad or vague the following statutory language: "Entering any lands . . . for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation . . ." CAL. PEN. CODE § 602(j) (1956). The court found it unnecessary to reach the constitutional issue of the vagueness of "property rights" because the record showed that the defendant was convicted for entering with the intention of interfering with the owner's lawful business. That standard was thought to be sufficiently narrow. The interference, which was said to distinguish the case from *Diamond*, was the diverting of a passenger tram to another off-loading area. Perhaps the real distinction, which the court declined to discuss, was the fact that a fee was required to gain admittance. This was also true in *Chumley v. Santa Anita Consol., Inc.*, 15 Cal. App. 3d 952, 93 Cal. Rptr. 77 (1971).

¹⁶⁰ Littering, of itself, has not been enough to preclude first amendment activity. See *Lovell v. City of Griffin*, 303 U.S. 444 (1938). See also *Schneider v. State*, 308 U.S. 147 (1939); *In re Hoffman*, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).

¹⁶¹ The availability of alternative forums has not been favored recently because factually the alternative forums were not nearly so effective as the ones chosen by those asserting first amendment freedoms. *In re Lane*, 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969); *In re Hoffman*, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967); *Schwartz-Torrance Inv. Corp. v. Bakery Workers Local 31*, 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964).

¹⁶² See note 97 *supra*, and accompanying text.

¹⁶³ *Diamond v. Bland*, 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970); *cf. In re Hoffman*, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).

¹⁶⁴ *Cameron v. Johnson*, 390 U.S. 611 (1968).

¹⁶⁵ *Diamond v. Bland*, 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970).

¹⁶⁶ This concept relates back to the *Diamond* treatment of the use-relationship restriction (*i.e.*, since a financial interest was affected on the property side of the balance, the use-connection strengthened the first amendment side). This indicates the necessity of a lesser first amendment weight (non-use related) when no financial interest is hurt by the first amendment activity. See note 123 *supra*, and accompanying text.

¹⁶⁷ See generally Samoff, *supra* note 44.

deny the reality of the situation. Use-related picketing is actually meant to cause interference with the enjoyment of property. It is meant to cause economic harm to the target business. Why should this type of activity be protected if neutral and regulable exercise of free speech is disallowed? The latter causes virtually no harm whatsoever to the property rights and promotes the free and effective dissemination of ideas by those who cannot afford expensive electronic medias. When a business opens itself up to the public, it also subjects itself to the possibility of public criticism as a risk of doing business. While this criticism may be made elsewhere, labor experts are quick to point out that the businessman's property is the most effective place to communicate ideas.¹⁶⁸ The same holds true for the public forum concept.¹⁶⁹ The forum is neither effective nor appropriate without the public.¹⁷⁰

The *Tanner* majority has perpetuated the paradox of allowing the greater private property intrusion (*i.e.*, demonstrating against a target store) while disallowing the lesser intrusion (*i.e.*, peaceful non-use related activity). The Court compounded this paradox in *Tanner* because the respondents' activity was in fact related to a use to which Lloyd Center had already been put (other select first amendment activities).¹⁷¹

VI. CONCLUSION

The shopping center industry was moving toward acceptance, pragmatic accommodation, and self-regulation of public forum activity.¹⁷² Nevertheless, the courts and litigants did need the guidance in this area¹⁷³ which *Tanner* supplied.

Of the 12,000 new centers to be built in the next fifteen years,¹⁷⁴ at least 1,000 will be covered malls.¹⁷⁵ These complex mall designs could present challenging factual problems to the judiciary.¹⁷⁶ Indeed, many of the shopping developments could easily be classified as the new American City.¹⁷⁷ The *Tanner*

¹⁶⁸ See Gould, *supra* note 50.

¹⁶⁹ Cf. *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968). The propriety of a place for use as a public forum was said to be equally dependent upon either the object of the protest (target business) or where the relevant audience could be found. 392 F.2d at 90.

¹⁷⁰ See note 161 *supra*, and accompanying text. See also the incomparable audience available at the shopping center in *Diamond* (25,000 people per day). 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970).

¹⁷¹ See text accompanying note 145 *supra*.

¹⁷² One manager stated, "We set up rules for the center to be a community forum on the theory that these troubles were not going to go away and we might as well control them." 47 CHAIN STORE AGE, July 1971, at 27. Management now takes a \$10 deposit to cover damage or littering, and issues permits for a specific time and place on a first-come, first-served basis. *Id.* "The question is not whether malls should be used as public forums; they are being used that way. The point is how best we can accommodate them." *Id.* (quoting Rouse Co. official, Ed Daniels).

¹⁷³ One recent litigant tried unsuccessfully to use *Logan Valley* to justify a "sit-in" in a completely private building in protest of the inaccessibility of an audience with the Cardinal in the Archdiocese office. *Chicago v. Rosser*, 47 Ill. 2d 10, 264 N.E.2d 158 (1970).

¹⁷⁴ 47 CHAIN STORE AGE, Feb. 1971, at 25.

¹⁷⁵ Weiss, *supra* note 3.

¹⁷⁶ 47 CHAIN STORE AGE, Jan. 1971, at 32 (describing new "malls within malls" designs).

¹⁷⁷ The shopping center developers now speak in terms of city planning with complete integration of all functions of modern life. "Now, more and more they are becoming miniature downtowns with three, four, five department stores, scores of smaller stores and

decision indicates that such a city, along with the other conveniences, will have programmed "free speech" in quantity and content.

The pre-*Tanner* courts were sacrificing constitutional structure with their trend toward common-law balancing tests and public enterprise concepts.¹⁷⁸ However, the equitable protection of free speech in relation to property rights revealed an enlightened concern for those whose message might never effectively reach the public. At the same time, the "reasonable regulation" factor protected the property owners.

The theoretical absolutism of property rights has heretofore steadily given way to social utility. The pre-*Tanner* inclination toward a quasi-public balancing test in the area of shopping center forums is best summarized in theory by Justice Cardozo:

Property, like liberty, though immune under the Constitution from destruction, is not immune from regulation essential for the common good. What that regulation shall be, every generation must work out for itself. The generation which gave us *Munn v. Illinois*, 94 U. S. 113 (1876) (upholding ceiling grain storage charges in private storage bins), and like cases, asserted the right of regulation whenever business was 'affected with a public use' Today there is a growing tendency in political and juristic thought to probe the principle more deeply and formulate it more broadly. Men are saying today that property, like every other social institution has a social function to fulfill.¹⁷⁹

Lloyd Corp. v. Tanner, however, reveals that in the United States social function is still secondary to property rights.

services, plus hotels, apartment houses, office buildings, cultural centers, churches, and theaters." BUSINESS WEEK, Sept. 4, 1971, at 34. "New shopping centers will become more integral parts of their surrounding infra-structure. Some of the larger centers are already adding office parks to draw in light industry. Future centers may be focal points for new 'satellite cities' in metro areas. A case in point: the Northlake and Cumberland planned community projects . . . will have two-level shopping centers surrounded by a mixture of apartments and townhouses, office parks, and community halls." 105 SALES MANAGEMENT, Nov. 1, 1970, at 34, 36.

¹⁷⁸ See notes 16, 23, 24 *supra*.

¹⁷⁹ B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 87-88 (1921).