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Constitutional Law -- First Amendment -- Shopping Centers and the "Quasi-Public" Forum

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The economic impact of *Fuentes* has yet to be demonstrated. The dissent expressed concern that "the availability of credit may well be diminished or, in any event, the expense of securing it increased."[91] It seems probable, though, that the requirements of *Fuentes* will have minimal effect on consumer credit. Only where the debtor is willing to destroy or conceal the goods would the creditor's risk be appreciably increased by the requirement of notice before seizure. And if this is indeed an "extraordinary circumstance," then *Fuentes* does not preclude seizure without notice. Moreover, even where required, the expense of procedural due process need not be substantial, since informal hearings may suffice in many cases[92] and may probably be waived[93] in others. It seems probable that the prophecy of the dissent in *Fuentes* will not materialize.

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Constitutional Law—First Amendment—Shopping Centers and the "Quasi-Public" Forum

That "freedom of speech" involves something more than a federal and state[1] laissez-faire attitude toward expression is hardly a novel concept.[2] The Supreme Court has typically asserted that an affirmative "maintenance of the opportunity for free political discussion . . . is a

Text, but makes the notice provisions more specific. CAL. COMM. CODE ANN. § 9503-04 (1964).

[91]92 S. Ct. at 2005. This same fear was expressed by the court in *Adams*. 338 F. Supp. at 622. The same argument was made in support of the California summary attachment procedure to the court in *Randone*—and was rejected. Randone v. Appellate Dept., 5 Cal. 3d 536, 555-56, 488 P.2d 13, 24-26, 96 Cal. Rptr. 709, 721-22 (1971); *see* Comment, 17 U.C.L.A.L. REV., *supra* note 72, at 846. Collection agencies also had argued that wage garnishment was essential to the economy, but an empirical study has indicated that "the extension of consumer credit is unrelated to garnishment laws." Brunn, *Wage Garnishment in California: A Study and Recommendations*, 53 CALIF. L. REV. 1214, 1240 (1965).

[92]*See* text accompanying notes 76-79 *supra*.

[93]*See* text accompanying notes 83-84 *supra*.

[1]The first amendment reaches the states through the fourteenth amendment. Gitlow v. New York, 268 U.S. 652 (1925).

[2]*See, e.g.*, Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 559 (1941). Professor Barron maintains that "[a]s a Constitutional theory for the communication of ideas, laissez-faire is manifestly irrelevant." Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1656 (1967).

fundamental principle of our constitutional system."[3] Yet behind the rhetoric lies the persistent problem of defining the contours of first amendment protection in particular situations.[4] Especially difficult is the resolution of those cases which reveal an asserted first amendment right posed in direct confrontation with other rights and interests no less traditional in our society.[5] It is thus interesting to note that in a recent case involving conflicting claims of free speech and private property interests, a majority of the Supreme Court found few obstacles in holding squarely on the side of the property owner.

Lloyd Corp. v. Tanner[6] involved the mall of a large privately owned shopping center as the stage for respondents' short-lived attempts to circulate antiwar leaflets. The shopping center prohibited handbilling on the premises, and respondents were advised by security guards that a failure to cease their activity could result in trespass prosecutions. Respondents subsequently petitioned for relief in federal district court, alleging a violation of their first amendment right to distribute leaflets in Lloyd Center in a nondisruptive manner. In granting broad injunctive relief,[7] the district court cited *Marsh v. Alabama*[8] and *Food Employees Local 590 v. Logan Valley Plaza, Inc.*[9] as authority for the proposition that to the extent that private property is open to the public and resembles a "business district," the owner loses the absolute right to prohibit first amendment activity on his premises.[10]

On appeal,[11] the Supreme Court reversed.[12] Writing for a five-to-four majority, Justice Powell reasoned that *Marsh* and *Logan Valley* were inapposite precedents for a case in which the asserted first amendment exercise was not related to the shopping center's normal use and an adequate alternative forum was available. The consistent enforcement of a nondiscriminatory policy prohibiting all handbilling was enti-

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[3]Stromberg v. California, 283 U.S. 359, 369 (1931).

[4]T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT vii-viii (1963).

[5]*See, e.g.*, Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (wearing of armbands threatens school discipline); United States v. O'Brien, 391 U.S. 367 (1968) (destruction of draft card).

[6]92 S. Ct. 2219 (1972).

[7]Tanner v. Lloyd Corp., 308 F. Supp. 128 (D. Ore. 1970).

[8]326 U.S. 501 (1946).

[9]391 U.S. 308 (1968).

[10]308 F. Supp. at 132.

[11]The Court of Appeals for the Ninth Circuit affirmed the district court's decision per curiam. Tanner v. Lloyd Corp., 446 F.2d 545 (9th Cir. 1971).

[12]Lloyd Corp. v. Tanner, 92 S. Ct. 2219 (1972).

tled to protection under the due process clause of the fourteenth amendment.[13] Justice Marshall in dissent sharply attacked the majority's opinion as an arbitrary limitation of the rationale of *Logan Valley* and *Marsh*.[14] An understanding of the judicial conflicts present in this case is impossible at this point without a brief review of *Marsh* and *Logan Valley* and their place in first amendment theory.

One first amendment concept that runs consistently throughout cases and commentaries alike is that an open "marketplace of ideas" is essential to the health of a democratic society.[15] To maintain an informed electorate as a check on the powers of the state, it is held necessary that debate, "even of ideas we hate,"[16] be kept "uninhibited, robust, and wide open."[17] The rights protected by the first amendment are the rights of the public, and the special solicitude shown by the courts for the guarantees of free "speech"[18] attests to judicial recognition of this public interest.[19] This concept has received dramatic support in the Supreme Court's development of special protection of the "public forum." The town square, the streets, the parks, and the sidewalks of a community have been accorded special status as the proper and traditional locale for public discussion and assembly. Although the privilege of their use may be regulated in the public interest, "it must not, in the guise of regulation, be abridged or denied."[20] Of central importance is

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[13]*Id.* at 2228.

[14]*Id.* at 2230 (Marshall, J., dissenting).

[15]*See, e.g.*, Thornhill v. Alabama, 310 U.S. 88, 102 (1940); De Jonge v. Oregon, 299 U.S. 353, 365 (1937); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *See generally* T. EMERSON, *supra* note 4; A. MEIKLEJOHN, POLITICAL FREEDOM (1948).

[16]"Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions." Dennis v. United States, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting).

[17]New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[18]"Speech" in the first amendment sense includes more than verbal expression. *See, e.g.*, Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (wearing of armband); Edwards v. South Carolina, 372 U.S. 229 (1963) ("freedom march"); Thornhill v. Alabama, 310 U.S. 88 (1940) (picketing). But even "pure speech" is not absolutely protected, Schenck v. United States, 249 U.S. 47, 52 (1919), and first amendment exercise may be regulated to the extent that it conflicts with other important interests, United States v. O'Brien, 391 U.S. 367, 376 (1968). Professor Kalven suggests that the pure speech-speech plus dichotomy is misleading. He proposes instead the notion that regulation of speech should be deemed constitutionally permissible only insofar as it controls conduct and not content. Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 25-27. *See also* A. MEIKLEJOHN, *supra* note 15, at 24-28.

[19]*Cf.* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969): "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."

[20]Hague v. CIO, 307 U.S. 496, 515-16 (1939).

the assumption that the public's access to all sides of an issue can best be protected by providing a readily available forum for the "poor man's press": the leaflets, placards, and soapbox oratory of those who have no access to more expensive or exclusive media, but whose ideas deserve to be heard nevertheless.[21]

Marsh v. Alabama[22] represented another step in the genesis of the public forum doctrine, but with a new twist. When Gracie Marsh sought to distribute religious literature in the downtown business district of Chickasaw, Alabama, she was treading on private, not public property. Her chosen forum for spreading the Word chanced to be in the midst of a company town owned lock, stock, and sidewalk by a private corporation. Simply posed, the issue was whether a "private" town could impose restrictions that would not pass constitutional scrutiny if they emanated from a municipality. The Court held that it could not. In reversing the trespass conviction, Justice Black stressed the interests of the community's citizens in free access to uncensored information.[23] The fact that title to the property was privately held was of little consequence; a corporation, carrying on what properly were state functions of municipal government, could not restrict the residents' rights any more than could the state. Property rights were not to be taken as absolute: "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.*"[24]

Marsh was more than just an interesting "state action" case.[25] Of no small import to Justice Black were the interests of the *public,* not merely the rights of the individual defendant, in the maintenance of an open channel of communication. *Logan Valley* found this theme no less relevant to the modern shopping center. The case involved a labor union's peaceful picketing of a supermarket located in a private shop-

[21]*Cf.* Martin v. City of Struthers, 319 U.S. 141, 146 (1942), wherein Justice Black spoke of the "poorly financed causes of little people."

[22]326 U.S. 501 (1946).

[23]Chickasaw residents "must make decisions which affect the welfare of the community and nation. To act as good citizens they must be informed . . . [t]heir information must be uncensored." 326 U.S. at 508.

[24]326 U.S. at 506 (emphasis added).

[25]In *Marsh,* "state action" for fourteenth amendment purposes was found in the delegation of normal state functions to a private concern. See the further discussion of "state action" problems *infra.*

ping center. A five-to-four majority held that state trespass law could not be the basis of an antipicket injunction. Characterizing *Marsh* as representative of the principle that "under some circumstances property that is privately owned may, at least for First Amendment purposes, be treated as though it were publicly held,"[26] Justice Marshall found no significant distinction between Chickasaw's business district and Logan Valley Plaza. In support of the holding that the center was "clearly the functional equivalent of the business district . . . involved in *Marsh,*" he noted the substantial size of the shopping center involved, the public's unrestricted access to Plaza property, the presence of two large enterprises, and the elaborate system of streets and sidewalks traversing the complex.[27]

It is true that Justice Black, the father of *Marsh,* refused to acknowledge the legitimacy of *Marsh's* offspring in *Logan Valley.* It is further true that Justice Marshall's shopping center-business district comparison glossed over some factual dissimilarities between the two cases that the dissenting opinions found important.[28] One must examine the reason *why* Justice Marshall found the analogy so compelling. A clue may be found in the closing passages of his opinion in which he examined the sociological impact of the "advent of the suburban shopping center."[29] Here he made it clear that the shopping center had become such an important phenomenon in suburban life that any decision restricting the exercise of first amendment freedoms in such areas would adversely affect "workers seeking to challenge substandard working conditions, consumers protesting shoddy or overpriced merchandise, and minority groups seeking nondiscriminatory hiring practices."[30] Such a result would be "at variance with the goal of free expression and communication that is at the heart of the First Amendment."[31] Measured in this context, the owner's property rights were not so strong as to negate the public interests involved.

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[26]*Id.* at 316.

[27]*Id.* at 317-18.

[28]Justice Black insisted in *Logan Valley* that *Marsh* allowed private property to be treated as public only when it had taken on *all* the attributes of a municipality and not merely a few. *Id.* at 327 (Black, J., dissenting). Justice White added the fear that the rationale of *Logan Valley* would compel all businesses to open up to unwanted first amendment activity. *Id.* at 338-40 (White, J., ddissenting).

[29]391 U.S. at 324.

[30]*Id.*

[31]*Id.* at 325.

Two points central to the reasoning in *Logan Valley* merit special attention. First, the view of the shopping center as an increasingly significant forum for suburban activity led to the "business district" analogy. Justice Marshall reasserted this point in *Lloyd*: "For many . . . citizens, Lloyd Center will so completely satisfy their wants that they will have no reason to go elsewhere . . . . *If speech is to reach these people, it must reach them in Lloyd Center.*"[32] The suburban shopping center does not merely resemble the urban business district; it replaces it. Secondly, although the public's interest in the maintenance of an open forum was found to outweigh the owner's property interests in *Logan Valley,* the owner was said to retain the power to make "reasonable regulations" as to the location and manner of the first amendment exercise on his property.[33] The Court's holding was the result of a balancing process that weighed the various interests of each party.

In spite of the inventiveness of *Logan Valley's* extension of the *Marsh* "principle," the opinion unfortunately contained one major ambiguity. The holding was limited to a situation in which the "message sought to be conveyed" concerned the employment practices of a store on the premises; expressly not considered was "whether . . . property rights could . . . justify a bar on [first amendment activity] not thus directly related in its purpose to the use to which the shopping center was being put."[34] The intended meaning of this language is not clear.[35] Typical of the confusion that resulted was the disparate treatment given on two levels of appeal to a post-*Logan Valley* case involving "unrelated-to" first amendment activity. In *Diamond v. Bland,*[36] plaintiffs sought to confirm their alleged right to enter a private shopping center and solicit signatures for an anti-pollution petition. The California Court of Appeals refused relief. Relying on *Logan Valley's* "related-to" language, the court fashioned a twofold requirement: the asserted first amendment exercise must be both relevant to shopping center busi-

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[32]Lloyd Corp. v. Tanner, 92 S. Ct. 2219, 2234 (1972) (Marshall, J., dissenting) (emphasis added).

[33]391 U.S. at 320-21. Thus the owner may reasonably regulate conduct but not content. *Cf.* note 18 *supra.*

[34]391 U.S. at 320 n.9.

[35]It has been suggested that the limitation was an attempt to calm the fears of dissenting Justice White. Comment, *The Shopping Center: Quasi-Public Forum for Suburbia,* 6 U.S.F.L. REV. 103, 108 (1971).

[36]8 Cal. App. 3d 58, 87 Cal. Rptr. 97 (1970), *rev'd,* 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501, *cert. denied,* 402 U.S. 988 (1971).

ness and without any effective alternative channel of communication before it may demand a forum on private property.[37] On appeal the California Supreme Court reversed. Conceding that the question of "relatedness" merited some consideration, the majority nevertheless concluded that plaintiffs' interests outweighed the owner's right to impose a complete ban on nonrelated communicatory activity. Regardless of the possibility of alternative forums available to the plaintiffs, the court stressed that access to the center provided a particularly appropriate vehicle for the obtaining of signatures on a petition.[38] A completely different "balance" was struck than that obtained in the lower court.

The two *Diamond* cases prove that *Logan Valley's* "related-to" language could be conveniently seized upon or as easily bypassed, depending upon the result desired. The *Lloyd* decision has now at least identified the authoritative (five-to-four) interpretation. Justice Powell, writing for the majority, emphasized the lack of any relation, direct or indirect, between antiwar leafletting and shopping center operations. He further noted that respondents had been free to pursue their handbilling in the public areas outside Lloyd Center.[39] These two factors were deemed sufficient to distinguish the *Lloyd* situation from that in *Logan Valley*:

> *Logan Valley* extended *Marsh* . . . only in a context where the First Amendment activity was related to the shopping center's operations. . . . 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.*[40]

Thus, a footnote in *Logan Valley* indicating what was not being decided[41] was elevated to the status of expressing the "rationale" of that case. The *Lloyd* court adopted substantially the same formula as that engendered in the California intermediate court's treatment of *Diamond*. Once this judicial plastic surgery was performed, the respondents' theories were quickly dismissed. Their argument that Lloyd Center was open to the public and resembled in function the public forum

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[37]8 Cal. App. 3d at 73-74, 87 Cal. Rptr. at 107-08.

[38]3 Cal. 3d at 662, 477 P.2d at 738, 91 Cal. Rptr. at 506; *accord*, Sutherland v. Southcenter Shopping Center, Inc., 3 Wash. App. 833, 478 P.2d 792 (1971).

[39]Lloyd Corp. v. Tanner, 92 S. Ct. 2219, 2226-27 (1972).

[40]*Id.* at 225-26 (emphasis added).

[41]*See* text accompanying note 34 *supra*.

of a municipal business district could now be rejected as "considerably broader than the rationale in *Logan Valley*."[42] In short, "[t]he Constitution by no means requires such an attenuated doctrine of dedication of private property to public use."[43]

Dissenting in *Lloyd,* Justice Marshall observed that the majority was "obviously troubled" by the decision in *Logan Valley.* Certainly it is significant that Justice Powell's analysis of *Logan Valley* quoted extensively and with approval from the dissenting opinions in that case.[44] The *Lloyd* majority apparently felt that *Logan Valley* represented the maximum in imposing constitutionally tolerable burdens on the property owner's interests. First amendment interests were deemed sufficiently protected by requiring a forum to be provided on private property only where both (a) the speech is "directly related" to the normal use of the locale, and (b) no "adequate" alternative forum exists.[45] Forcing an owner to yield in other situations "would diminish property rights without significantly enhancing the asserted right of free speech."[46]

The "related to" and "no adequate alternative" criteria may be seen as an attempt to formulate workable guidelines for the complex process of accomodating conflicting rights. If this is so, the question is whether it is a successful attempt. An examination of a number of problems implicit in the *Lloyd* holding is therefore appropriate.

A. The Uneasy Marriage of "Related To" and "Adequate Alternative Forum"

Justice Marshall indicated in his *Lloyd* dissent that the shopping center management in the past had found it a good business practice to allow the use of its facilities by certain political candidates and service organizations. Thus, he reasoned, having already opened its premises to

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[42]92 S. Ct. at 2226.

[43]*Id.* at 2229.

[44]*Id.* at 2226-27.

[45]*Logan Valley* was characterized as representing just such a situation and no more:

> The [*Logan Valley*] opinion was carefully phrased to limit its holding to the picketing involved, where the picketing was "directly related in its purpose to the use to which the shopping center property was being put" . . . and where . . . no other reasonable opportunities for the pickets to convey their message . . . were available.
>
> Neither of these elements is present in the case now before the Court.

Id. at 2226.

[46]*Id.* at 2228.

first amendment activities, Lloyd Center should not be heard to claim that respondents' handbilling was not related to the normal use of the mall.[47] This interpretation was rejected. Instead, Justice Powell apparently would require that the *subject* of the message touch more directly on some aspect of the center's retail enterprise. But how substantial should the connection be? What of the situation in which the ultimate objective of a protest relates only indirectly to a part of the shopping center, as where a union pickets a store because that store buys advertising space from an antiunion newspaper?[48] To go one step further, could the respondents in *Lloyd* have transformed their handbilling into "related" activity simply by amending their leaflets to include a protest against the sale of Dow Chemical products by a shopping center store? It is doubtful that such a transparent maneuver would succeed,[49] but the contours of the "related to" requirement remain unclear nevertheless.

When considered in light of the amount of traffic involved and the convenience of the public, a shopping center may be the most effective and appropriate place to gather signatures for a petition. On the other hand, any public sidewalk might be deemed an "adequate alternative" to the shopping center forum when no more than the assurance of *some* opportunity for the message to get to *some* of the public is examined. It is not clear to what degree the *Lloyd* concept of "adequate" encompasses the idea of "equally effective." At the very least, an adequate alternative forum should be one that reaches substantially the same audience, whether or not the message had been directed specifically to them or generally to the public. Any lesser measure would ignore the "public forum" basis of the first amendment. Thus the *Lloyd* criteria are ambiguous. Justice Powell noted at one point in his opinion that respondents could have moved to "any public street" (access to *some*

[47]If a "quasi-public" enterprise has offered a neutral forum for *some* "speech" of a certain medium, it cannot logically claim that it is hurt by having to accept other "speech" of the same medium and on the same basis, without regard to content. This "equal protection" approach to the first amendment has gained some limited acceptance in recent mass media cases. *See, e.g.*, Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971), *cert. granted*, 92 S. Ct. 1174 (1972) (broadcasting station must accept antiwar editorials); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969) (school newspaper must publish antiwar editorial); Wirta v. Alameda-Contra Costa Transit District, 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967) (transit company that accepts commercial ads must accept political ads). *See also* Barron, *Access-The Only Choice for the Media?*, 48 TEXAS L. REV. 766 (1970).

[48]*In re* Lane, 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969). The *Lane* court held that the shopping center must provide a forum.

[49]*Cf.* Valentine v. Chrestensen, 316 U.S. 52, 55 (1942).

of the public);[50] elsewhere, however, he emphasized that access to the patrons of Lloyd Center (the same audience) was readily available on the sidewalks surrounding the complex.[51]

It is obvious that the more the message is related to the normal use of the shopping center, the less likely it is that a suitable alternative forum exists, since the message propagated in any other place would prove largely irrelevant. "Related to" and "adequate alternative forum" are thus interrelated criteria. But one is not always the function of the other. Consider the assertion of "nonrelated to" first amendment activity in the context of a private shopping center located at the crossroads of a private industrial complex but otherwise proximate to no streets or sidewalks on which the "speech" could safety be exercised. Areas such as this are not uncommon today; presumably it was this kind of phenomenon, less the physical copy of the town square than its functional replacement, upon which Justice Marshall was meditating when he wrote *Logan Valley*. As applied here, the dual requirement test of *Lloyd* would apparently deny use of the center to those without consent. Yet with *no* forum available, "adequate" or otherwise, the public right to an open "marketplace of ideas" would be abridged.[52] Insofar as it is intended to preserve a proper balance between first amendment interests and private property rights, the *Lloyd* formula breaks down at this point.

B. THE UNEASY DIVORCE OF *Lloyd* FROM *Logan Valley*

Justice Powell's argument in *Lloyd* stressed the protection of property accorded by the due process clause and found that free speech would not be "significantly enhanced" by allowing respondents to prevail. Justice Marshall stressed in dissent the "preferred place" of freedom of speech "in our hierarchy of values"[53] and found that the prop-

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[50]92 S. Ct. at 2227.

[51]*Id.* at 2228.

[52]There is room for the contention that such a result is not necessarily compelled by *Lloyd*, since affording a forum in this case would "significantly enhance" the right of free speech. However, with *Logan Valley* specifically restricted to the fact situation in which *both* the elements of "related to" and "no adequate alternative" are present, *see* note 45 and accompanying text *supra*, such an argument would have to be forged anew from a general theory that the first amendment requires affirmative state action in the providing of public forums. But *Lloyd* indicates that the present majority of the Court is something less than receptive to this concept. *See* text accompanying notes 54-55 *infra*.

[53]92 S. Ct. at 2234 (Marshall, J., dissenting).

erty rights asserted in *Lloyd* paled in comparison. The two opinions simply approached the same problem from opposite ends of the spectrum.

But *Lloyd* represents more than a limitation of the holding in *Logan Valley*. If *Lloyd* did not expressly overrule the holding in *Logan Valley*, it effectively mutilated its rationale. This discussion thus far has been confined to the subject of shopping centers because, after *Lloyd*, it is doubtful whether *Logan Valley* has precedential value in any other context. The key to this problem lies in the concept of "state action." Before first amendment rights may be asserted in a nonfederal context, some involvement of the state in the alleged abridgement of free speech must be found to invoke the fourteenth amendment. *Marsh* was based on the fiction that municipal government carried on by a private concern constituted a delegation of state authority. However, if the state is primarily responsible for the maintenance of its municipalities, it is not so affirmatively charged with regard to shopping centers. Thus, Justice Marshall's reliance on *Marsh* to extend first amendment protection within the confines of Logan Valley Plaza represented a rather dramatic extension of notions of state action. His treatment of *Marsh* implied that as private property takes on the attributes of a citizens' forum, the first amendment compels the state to guarantee free speech no less than on the public streets.

By undercutting Justice Marshall's "business district" analogy, the *Lloyd* majority effectively sterilizes *Logan Valley* as authority for this concept of the "quasi-public forum." The validity of various applications of the *Logan Valley* rationale[54] to non-shopping center situations is thus put in doubt. More importantly, the *Lloyd* majority's distinguishing away of *Logan Valley* connotes a conservative reluctance to embrace the concept of the "quasi-public" forum. At least where private property interests are concerned, the Court does not seem very sympathetic to the argument that social regulation should assume a more affirmative role in the maintenance of the open forum.[55]

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[54]*E.g.*, Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968) (bus terminal); *In re* Hoffman, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967) (railway terminal).

[55]*Cf.* T. EMERSON, *supra* note 4, at 38: "The complexities of modern society have introduced into the free marketplace of ideas blockages and distortions that can only be removed by affirmative social controls."

CONCLUSION

Lloyd Corporation v. Tanner is an unfortunate decision. The *Lloyd* test of "related to" and "adequate alternative forum" conceals more problems than it resolves. The *Lloyd* rationale cripples *Logan Valley* without attempting to refute its logic. And the *Lloyd* result, although perhaps acceptable on the particular facts of the case,[56] represents a rather inflexible approach to the delicate process of accommodating conflicting rights. Taken together, *Logan Valley* and *Lloyd* pose such a sharp contrast that one is tempted to sympathize with Justice Marshall: "I am aware," he said, "that the composition of this Court has radically changed. . . ."[57]

FRANK M. PARKER, JR.

Constitutional Law—Jury Unanimity No Longer Required in State Criminal Trials

For more than six centuries the common law tradition has required a unanimous vote of a twelve-man jury to convict an accused in a criminal proceeding.[1] The Burger Court, in a pair of sharply divided opinions, has radically altered that traditional formula. Two years ago, in *Williams v. Florida*,[2] the Court held that the twelve-man jury panel is not an indispensable element of the sixth amendment jury trial guarantee. A panel of six was found adequate in that case, and the Court left open the possibility of an even smaller jury in some cases. More recently, in *Apodaca v. Oregon*[3] and a companion case from Louisiana,

[56] If, as Justice Powell maintained, respondents could have moved to the sidewalks surrounding Lloyd Center and reached virtually the same audience as was inside the mall, *Lloyd's* reversal of the lower court's decision did not compromise first amendment interests. An inquiry into whether or not an *equally effective* forum existed would have been relevant to the balancing of rights involved. However, the "related to" criterion is immaterial to the balancing process. Furthermore, its use allows the property owner an unjustified measure of control over the content of the asserted "speech."

[57] 92 S. Ct. at 2237 (Marshall, J., dissenting).

[1] 1. W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 318 (7th ed. 1956); J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 88-90 (1898).

[2] 399 U.S. 78 (1970).

[3] 92 S. Ct. 1628 (1972). The companion case, Johnson v. Louisiana, 92 S. Ct. 1620 (1972), was originally tried several months before the Court's decision in Duncan v. Louisiana, 391 U.S. 145 (1968), which held the sixth amendment jury trial right applicable to the states under the due