

# University of Miami Law Review

---

Volume 27  
Number 1 *Volume 27 Issues 1-2 (Fall & Winter  
1972)*

---

Article 12

1-1-1972

## First Amendment Rights vs. Private Property Rights – The Death of the "Functional Equivalent"

John R. Dwyer Jr.

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

---

### Recommended Citation

John R. Dwyer Jr., *First Amendment Rights vs. Private Property Rights -- The Death of the "Functional Equivalent"*, 27 U. Miami L. Rev. 219 (1972)

Available at: <https://repository.law.miami.edu/umlr/vol27/iss1/12>

This Case Noted is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

The Court avoided the issue of the scope of the Executive's surveillance power over foreign elements, leaving an ominous loophole—the vague “significant connection” standard<sup>37</sup>—which the Executive took advantage of without hesitation. The Justice Department's failure to discontinue all but six of the acknowledged wiretaps was an exercise of the kind of executive discretion the Court seemingly intended to curtail. The citizen is hardly reassured “that indiscriminate wiretapping and bugging of law-abiding citizens cannot occur.”<sup>38</sup>

JUAN P. LOUMIET

### FIRST AMENDMENT RIGHTS VS. PRIVATE PROPERTY RIGHTS—THE DEATH OF THE “FUNCTIONAL EQUIVALENT”

When respondents began to distribute anti-Vietnam War handbills within the mall of petitioner's shopping center, uniformed security guards threatened to arrest them for trespassing. The respondents left peacefully, but then sought a declaratory judgment in federal district court to establish their right to exercise the freedoms of speech and press and to enjoin further interference from the petitioner. They argued that the shopping center was the “functional equivalent” of public property, and, therefore, the first and fourteenth amendments guaranteed their rights.<sup>1</sup> The petitioner, Lloyd Corporation, contended that since the shopping center was private property, it could enforce its strict and nondiscriminatory no-handbilling rule under the protection of the fifth and fourteenth amendments.<sup>2</sup> The federal district court of Oregon held for the respondents and enjoined interference by the petitioner.<sup>3</sup> This decision was

---

37. Although we attempt no precise definition, we use the term “domestic organization” in this opinion to mean a group or organization (whether formally or informally constituted) composed of citizens of the United States and which has *no significant connection with a foreign power, its agents or agencies*. No doubt there are cases where it will be difficult to distinguish between “domestic” and “foreign” unlawful activities directed against the Government of the United States where there is collaboration in varying degrees between domestic groups or organizations and agents or agencies of foreign powers. But this is not such a case.

92 S. Ct. at 2133 n.8 (emphasis added).

38. *Id.* at 2132. For an argument that electronic surveillance is per se unconstitutional see Spritzer, *Electronic Surveillance by Leave of the Magistrate: The Case in Opposition*, 118 U. Pa. L. REV. 169 (1969).

1. U.S. CONST. amend. I provides, “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .” U.S. CONST. amend. XIV, § 1 provides, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . without due process of law . . .”

2. U.S. CONST. amend. V provides, “No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

3. *Tanner v. Lloyd Corp.*, 308 F. Supp. 128 (D. Ore. 1970).

affirmed by the United States Court of Appeals for the Ninth Circuit.<sup>4</sup> On certiorari to the United States Supreme Court, in a five-four decision, *held*, reversed: The owners of a privately owned shopping center may nondiscriminatorily prohibit the distribution of handbills on their property where the subject of the handbills is unrelated to the shopping center's operations, and where there is a reasonably available public place for persons to effectively communicate their views. *Lloyd Corp. v. Tanner*, 92 S. Ct. 2219 (1972).

The problem that faced the Court was primarily one of balancing two distinct constitutional rights which had been drawn into conflict: the social interest in freedom of expression, versus the social interest in privately owned property. The right to freedom of expression on publicly owned property is well established,<sup>5</sup> and holds a preferred place in our constitutional system<sup>6</sup> as the cornerstone of our democratic way of life.<sup>7</sup> However, the existence of this right does not mean that individuals have a constitutional right to propagandize their views whenever or wherever they please.<sup>8</sup>

Conversely, the fifth amendment, applicable to the states through the fourteenth amendment, guarantees that no person shall be deprived of his property without due process and just compensation. A private property owner's right to prevent trespassory invasions is also deeply rooted in our common law,<sup>9</sup> as is his right to preserve his property for a lawful use.<sup>10</sup>

The respondents' principal argument was that the Lloyd Shopping Center was the "functional equivalent" of the business district in *Marsh v. Alabama*,<sup>11</sup> as extended and applied in *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*<sup>12</sup> Consequently, they reasoned that the shopping center should be treated as public property for first amendment purposes, and that the property owner should be enjoined, under the authority of *Marsh* and *Logan Valley*, from disturbing the exercise of their constitutionally guaranteed freedoms of speech and press.

*Marsh* involved a town which was entirely owned and operated by a private company for its employees. It consisted of a residential section, a business district, streets and sidewalks, and a sewage disposal plant. A

4. *Tanner v. Lloyd Corp.*, 446 F.2d 545 (9th Cir. 1971).

5. *Jamison v. Texas*, 318 U.S. 413 (1943); *Hague v. CIO.*, 307 U.S. 496 (1939); *Van Nuys Publishing Co. v. City of Thousand Oaks*, 5 Cal. 3d 817, 489 P.2d 809, 97 Cal. Rptr. 777 (1971).

6. *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Thomas v. Collins*, 323 U.S. 516 (1945); *Lovell v. Griffin*, 303 U.S. 444 (1938); *Palko v. Connecticut*, 302 U.S. 319 (1937).

7. *Lovell v. Griffin*, 303 U.S. 444 (1938); *De Jonge v. Oregon*, 299 U.S. 353 (1937).

8. *Adderley v. Florida*, 385 U.S. 39 (1966) [hereinafter cited as *Adderley*]; *Cox v. Louisiana*, 379 U.S. 536 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963).

9. *See, e.g., Star v. Rookesby*, 91 Eng. Rep. 295 (K.B. 1711).

10. *Adderley v. Florida*, 385 U.S. 39 (1966).

11. 326 U.S. 501 (1946) [hereinafter cited as *Marsh*].

12. 391 U.S. 308 (1968) [hereinafter cited as *Logan Valley*].

member of the Jehovah Witnesses attempted to distribute religious literature in the business district, but was arrested and subsequently convicted under a state trespass statute. The conviction was reversed by the United States Supreme Court. Mr. Justice Black, in the majority opinion, stressed the complete similarity of the town with any other town, as well as the fact that the company had assumed all the customary functions of a governmental municipality. He concluded that under these circumstances private property could be treated as public and held:

Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free . . . [and] the managers appointed by the corporation cannot curtail the liberty of the press and religion . . . .<sup>13</sup>

The broad language of *Marsh* moved the fulcrum so that the freedoms of the first amendment were in a preferred position when balanced against the rights of property owners, and it has subsequently provided much momentum and authority for allowing picketing<sup>14</sup> and other first amendment activities<sup>15</sup> on private property.

The respondents also relied on the Court's decision in *Logan Valley*. They argued that the Court had extended the holding of *Marsh* to protect peaceful and nondisruptive first amendment activities within a privately owned shopping center. In *Logan Valley*, the owners of a shopping center and a supermarket sought to enjoin a labor union from picketing on their property. The union was attempting to inform patrons that the employees of the market were nonunion, and in turn, to organize those employees. However, in a footnote, the Court expressly limited its holding by authorizing picketing on shopping center property when it is "directly related in its purpose to the use to which the shopping center

13. *Marsh v. Alabama*, 326 U.S. 501, 507-08 (1946).

14. *Marshall Field & Co. v. NLRB*, 200 F.2d 375 (7th Cir. 1953); *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); *People v. Barisi*, 193 Misc. 934, 86 N.Y.S.2d 277 (Magis. Ct. 1948). *Contra*, *People v. Goduto*, 21 Ill. 2d 605, 174 N.E.2d 385, *cert. denied*, 368 U.S. 927 (1961), where the court recognized that certain language in *Marsh* would appear to protect the right to use private property for speech, press and assembly, but then held that the language must be read in the light of and limited to the facts in *Marsh*; *Hood v. Stafford*, 213 Tenn. 684, 378 S.W.2d 766 (1964). For a short discussion of picketing on private property, see Note, *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.: The Right to Picket on a Privately Owned Shopping Center*, 73 DICK. L. REV. 519 (1969).

15. *Tanner v. Lloyd Corp.*, 446 F.2d 545 (9th Cir. 1971), *aff'g* 308 F. Supp. 128 (D. Ore. 1970); *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968); *Diamond v. Bland*, 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970), where the court relied on *Marsh*, *Logan Valley*, and the lower courts' reasoning in *Lloyd*; *In re Hoffman*, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967); *Blue Ridge Shopping Center, Inc. v. Schleining*, 432 S.W.2d 610 (Mo. App. 1968); *Sutherland v. Southcenter Shopping Center, Inc.*, 3 Wash. App. 833, 478 P.2d 792 (1970).

property was being put.”<sup>16</sup> Thus, the question presented in the instant case had been left open.

Two factors have complicated *Logan Valley's* application. Although the facts involved picketing, the majority consistently referred to “first amendment rights,” implying that first amendment rights other than picketing could likewise be protected under these circumstances. Second, the Court thoroughly discussed the analogies between the company town in *Marsh* and the Logan Valley Shopping Center, and then concluded that the shopping center was the “functional equivalent”<sup>17</sup> of the business district in *Marsh*. Since *Logan Valley*, this “functional equivalency” principle has been interpreted by lower courts as being the determinative test,<sup>18</sup> and they have almost uniformly protected such activity on private property once they have found that the property is the “functional equivalent” of the business district in *Marsh*.

The respondents in the present case adopted this interpretation. They argued by analogy that the Lloyd Shopping Center was virtually identical to the Logan Valley Mall and was even considerably larger. They concluded that the Lloyd Shopping Center, like that in *Logan Valley*, must be considered as the “functional equivalent” of a public business district, and that their first amendment rights must therefore be protected.

Keeping in mind the treatment of *Logan Valley* by the lower courts, Mr. Justice Powell, speaking for the majority in *Lloyd*, not only rejected the offered analogy, but dismissed the “functional equivalency” test as dictum that had been conceived in *Marsh* and that was “unnecessary to the decision” in *Logan Valley*.<sup>19</sup> He went on to restate the holding of *Logan Valley* as authorizing peaceful picketing on privately owned shopping centers if: (1) the purpose of the picketing is directly related to the shopping center’s operations; and (2) the particular business being picketed is in such a location that there is no other reasonable place for the pickets to convey their message to their intended audience.<sup>20</sup>

Justice Marshall’s dissent took issue with this interpretation of *Marsh* and *Logan Valley*.<sup>21</sup> He maintained that the majority in *Logan Valley* had relied heavily on *Marsh* and the concept of “functional

---

16. *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 320 n.9 (1968).

17. *Id.* at 325.

18. *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968); *State v. Miller*, 280 Minn. 566, 159 N.W.2d 895 (1968); *Blue Ridge Shopping Center, Inc. v. Schleining*, 432 S.W.2d 610 (Mo. App. 1968), wherein Commissioner Maughmer admitted that, had not *Logan Valley* dictated the result, he would have been inclined to enjoin the handbilling in the shopping center; *Sutherland v. Southcenter Shopping Center, Inc.*, 3 Wash. App. 833, 478 P.2d 792 (1970).

19. 92 S. Ct. at 2225.

20. *Id.* at 2226.

21. 92 S. Ct. at 2229 (dissenting opinion).

equivalency."<sup>22</sup> However, in dissenting in *Logan Valley*, Justice Black had suggested that the majority was misreading *Marsh* if it was using that case as authority to create a "functional equivalency" test. He insisted that *Marsh* specifically held that private property could be treated as public only when it "has taken on *all* the attributes of a town"<sup>23</sup> and that the object of the picketing in *Logan Valley*, the shopping center, had not met that test. His position lends credence to Justice Powell's analysis of *Marsh*, since Justice Black had written the majority opinion in *Marsh*.

By disregarding the "functional equivalency" test, Justice Powell, in effect, limited *Logan Valley* to its precise facts. He distinguished the instant case by emphasizing that the handbilling did not have the necessary relationship to the operations for which the center was built and being used. He also pointed out that the respondents' message was not directed solely to the patrons of Lloyd Shopping Center, and that they could have adequately conveyed their views in nearby and readily accessible public places.<sup>24</sup> With this alternative avenue of communication available to the respondents, while presumably not present in *Marsh* and *Logan Valley*, the Court weighted the scale in favor of the property owner.

Mr. Justice Marshall's dissenting opinion recognized that the composition of the Court has changed radically in the four years since *Logan Valley*.<sup>25</sup> This shift is significant in itself, and *Lloyd* could be the leading indicator of a new direction of the Court when balancing competing constitutional rights.

The supporters of the "Warren Court" have considered *Marsh* and *Logan Valley* as correctly preferring the individual's first amendment rights when they are in conflict with general property rights,<sup>26</sup> and perhaps these supporters will view *Lloyd* as a retreat which will weaken first amendment rights. However, the majority in *Lloyd* could be suggesting that the conflict is more precisely one between individual fifth amendment guarantees and individual first amendment guarantees, even though it recognized that there are times when the public interests must be preferred over property interests. But Mr. Justice Black's dissent in *Logan Valley* reminded the Court that the Constitution recognizes and protects an individual's property rights as well, and that if the Court wishes to act as the government's agent to take or use an individual's property, it must make reasonable compensation.<sup>27</sup>

---

22. *Id.* As Mr. Justice Marshall was the author of the Court's opinion in *Logan Valley*, his analysis is especially meaningful.

23. *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 332 (1968) (dissenting opinion) (emphasis supplied by the Court).

24. 92 S. Ct. at 2219.

25. *Id.* at 2229.

26. *Adderley v. Florida*, 385 U.S. 39 (1966) (dissenting opinion).

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

*Lloyd* does not overrule *Logan Valley*, but the majority could be establishing the foundation for reconsideration of first amendment rights, including picketing, when they are balanced against an individual's property rights. The "Warren Court" was admittedly permissive when faced with such an issue and generally legitimized any such protest as long as it was orderly and without the threat of violence,<sup>28</sup> even though the Court recognized that first amendment rights may be regulated when their exercise unduly interferes with other members of the public.<sup>29</sup>

Now it seems that the "Nixon Court" has begun to reemphasize an individual's right to control his property, and it is clear from *Lloyd* that the Court will subordinate that right only where: (1) the first amendment activity is directly related to the use of the property; (2) the protestors cannot effectively communicate their views on reasonably available public property; and (3) the owner's prohibition of a particular form of first amendment activity has been applied discriminatorily. The *Lloyd* Court did not, however, clarify the question created by the *Logan Valley* Court as to which activities would prevail over private property rights. Since the *Logan Valley* case involved picketing, which historically has been given less protection than other first amendment activities,<sup>30</sup> it seems that the activities in *Marsh*, *Logan Valley* and *Lloyd* will be protected if they meet the criteria established by the *Lloyd Court*. Conversely, it seems that none may be protected if they do not.

This last conclusion is the most troublesome aspect of *Lloyd* in that the decision may pose practical difficulties to persons wishing to express their views in the modern community. For example, with the proliferation of large suburban shopping centers and the consequent demise of the traditional town business districts, the shopping center may be the only central location where differing views can be effectively communicated. However, if these views do not directly relate to the use of the shopping center, *Lloyd* appears to prohibit their expression on that property.

The *Lloyd* Court found that there were adequate public places available for the protestors to distribute their literature, but in so finding, the Court seemed to baptize the "*cordon sanitaire* of parking lots"<sup>31</sup> which normally surrounds large shopping centers and is generally used for such expression. Perhaps this baptism was inadvertent since the majority relied heavily on *Marsh* and on Justice Black's dissent in *Logan Valley*, which

---

28. *Adderley v. Florida*, 385 U.S. 39 (1966) (dissenting opinion).

29. *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Adderley v. Florida*, 385 U.S. 39 (1966); *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Cox v. New Hampshire*, 312 U.S. 569 (1941).

30. *E.g.*, *NLRB v. Babcock & Wilcox Co.*, 35 U.S. 105 (1956) (union picketing in employee parking lot of a manufacturing plant); *Central Hardware v. NLRB*, 407 U.S. 539, *on remand*, 468 F.2d 253 (8th Cir. 1972) (extended *Babcock* to cases where the lot was open to the public).

31. *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 325 (1968).

stressed the concept that "good citizens . . . must be informed."<sup>32</sup> Hopefully, the courts will recognize the realities of today's suburban communities and allow such activity unless it is certain that there is a public area which is reasonably accessible. If the courts fail to require this, the right of expression will be severely restricted.

In the final analysis, these problems may be more imaginary than real. If any one of the test factors are missing, there is no language in the holding which should prevent courts from subordinating private property rights to the first amendment rights which were involved in these cases. In any event, and regardless of how the courts will treat these factors, the *Logan Valley* "functional equivalency" test is dead.

JOHN R. DWYER, JR.

### STANDING: A PUBLIC ACTION REQUIRES A DIRECT PRIVATE WRONG

The defendant, United States Department of the Interior, was in the planning stages of developing Mineral King Valley into an extensive recreational ski resort. Plaintiff, Sierra Club, claiming a special interest in the conservation and sound maintenance of the nation's national parks, brought suit for a declaratory judgment and a preliminary and permanent injunction restraining federal officials from approving the development. Plaintiff relied upon section 10 of the Administrative Procedure Act as a basis for judicial review, claiming itself to be a "person aggrieved" within the meaning of the Act.<sup>1</sup> Plaintiff did not allege that the threatened action would affect the club or its members personally, but rather maintained that its special interest in conservation was encompassed by the Act and was an adequate basis for standing. The United States District Court for the Northern District of California granted a preliminary injunction. The Court of Appeals for the Ninth Circuit reversed,<sup>2</sup> holding that the plaintiff did not have standing because it failed to allege any private wrong. The court also held that the plaintiff failed to show an irreparable injury justifying a preliminary injunction. On writ of certiorari, the Supreme Court of the United States *held*, affirmed: A litigant has standing under the Administrative Procedure Act to seek judicial review only if he can show that he has suffered or will suffer injury, economic or otherwise. As the plaintiff in the instant case had not alleged injury to itself or its members, it was without standing to maintain the action. *Sierra Club v. Morton*, 92 S. Ct. 1361 (1972).

---

32. *Marsh v. Alabama*, 326 U.S. 501, 508 (1946).

1. 5 U.S.C. § 701 (1970).

2. *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970).