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Freedom of Expression on Private College Campuses: An Examination of the Legal Parameters of Privately-Owned Public Forums and their Shared Similarities with Private Campuses

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FREEDOM OF EXPRESSION ON PRIVATE COLLEGE CAMPUSES
AN EXAMINATION OF THE LEGAL PARAMETERS OF PRIVATELY-OWNED PUBLIC FORUMS
AND
THEIR SHARED SIMILARITIES WITH PRIVATE CAMPUSES

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ABSTRACT

This thesis addresses the research question of whether a private college campus meets the definition of a privately-owned public forum for First Amendment purposes. It relies on an examination of the body of federal case law related to freedom of expression on other types of private property, which can be broadly categorized into cases on company towns, migrant labor camps, shopping malls and multitenant dwellings. Analogies are then drawn between each type of private property and two hypothetical private campuses, a nonresidential seminary and a urban, residential private university.

The result is a list of five factors which have been distilled from the case law as defining characteristics for determining whether private property acts as a public forum: 1) physical openness, 2) invitation for public use, 3) the owner's expectation of privacy, 4) similarities to a municipality, and 5) extent of the owner's control over the flow of information on the property.

The thesis offers a continuum along which private property can be placed according to the criteria listed above. The research finds support for the possibility of expanding First Amendment rights on private college campuses.

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TABLE OF CONTENTS

CHAPTER ONE
INTRODUCTION 2

CHAPTER TWO
LITERATURE REVIEW 5

CHAPTER THREE
METHODOLOGY 32

CHAPTER FOUR
DISCUSSION 35

CHAPTER FIVE
CONCLUSION 65

APPENDIX A
BIBLIOGRAPHY

APPENDIX B
LIST OF CASES

Chapter One

INTRODUCTION

In 1976, Muhlenberg College, a private institution in Allentown, Penn., extended an open invitation to the public to attend a symposium which featured as its key speaker Clarence Kelley, then director of the FBI. Members of an anti-war organization handed out leaflets protesting the FBI's refusal to open certain files under the Freedom of Information Act. The distribution was peaceful and nonviolent, although the group had not obtained permission from the college to distribute literature.

The members were arrested and charged with defiant trespass. When the case went to trial, the members relied on the defense that by holding an event open to the public, the college had relinquished its power to control who participated in that forum.[1]

The Pennsylvania Supreme Court, noting that the granting of permits for solicitation on campus did not adhere to any standards but was based on the arbitrary decision of college administrators, determined that the college could not rely on the power of the state to enforce such a policy. In balancing the property rights of the college against the free speech rights of the organization's members, the court found in favor of free speech.

The importance of the Muhlenberg case lies in the application of First Amendment protection in a situation that does not directly involve a government entity under the normal meaning of the 14th Amendment.

The 14th Amendment extended the provisions of the Constitution to the states; "Congress shall make no law" came to mean that state as well as federal governments shall make no law abridging, among other rights, freedom of speech.

The framers of the Constitution could not have envisioned a country where the traditional public venues - the streets, parks and common markets which had provided such a dynamic and far reaching forum during the Revolutionary War - would be replaced by enclosed, climate controlled, privately owned shopping malls; by company-towns which controlled nearly every aspect of workers' lives; and by migrant labor camps, the modern version of the company town.[2]

The advent of mass communication has made gathering on the street corner to chat with neighbors unnecessary. According to one source, "Small communities throughout the United States were traditionally designed in a manner which allowed face-to-face communication of ideas."[3] But people no longer need to meet face to face to communicate with one another.

The need for an informed electorate,[4] however, has not been replaced, and college-aged voters have not been forgotten. Candidates in the 1992 presidential race appeared on MTV specifically to address this age group making the need for a free exchange of ideas on college campuses more important to maintaining that informed electorate.

Public campuses have been subject to First Amendment provisions for well over 100 years. Their private counterparts, however, have continued to enjoy the right to cloister students from each other and from the surrounding community, despite numerous lawsuits, such as *Commonwealth v. Tate*[5], which attempted to increase access to all college campuses, public and private alike.

In addition to the need for an informed electorate, a need which is recognized by scholars[6], courts and the Constitution, college students share with the general populace the need for free speech to facilitate the search for truth, which relies on a free marketplace of ideas,[7] and as an intrinsic part of their human dignity.[8] As Kempler states:

> The selection of an appropriate policy perspective must begin with the recognition that a democratic society should be exposed to diverse expressions and conflicting claims of special interest groups in order to facilitate enlightened choices about its government and quality of life.[9]

But at what point do these considerations outweigh the Fifth Amendment and state legislated rights to property?[10] To what extent is a private land owner who controls places where large numbers of people gather subject to the same limitations the Constitution imposes upon publicly held land that serves an identical purpose?

The question to be considered by this thesis is: Can private college campuses, which have traditionally been defined as being outside of First Amendment protection, meet the definition of a public forum and thus be placed under First Amendment protection? Recognizing that not all private campuses are identical physically and philosophically, what characteristics must a private campus possess to be considered a public forum?

The literature review will address underlying legal concepts, such as the definition of public forum and the state action requirement, as well as academic opinion on the application of the First Amendment to certain categories of private property, including company towns, migrant labor camps and shopping malls.

Chapter Two

REVIEW OF LITERATURE

PUBLIC FORUMS

Courts and scholars have recognized the ability to reach an audience as an essential corollary to free speech.[11] Public forums often provide the most broad based access to an audience. In an age of expensive mass media time and space, the traditional forums have become essentially "the poor man's forums,"[12] filling a necessary function in maintaining the informed electorate needed for a democracy.[13]

Although most publicly owned property falls into the category of public forum,[14] it wasn't until *Jamison v. Texas*[15] that the Supreme Court determined that the state did not have the same control over property as a private property owner.[16]

Public forum, a term originated by Harry Kalven,[17] is basically a more specific application of the state action theory, under which private conduct is considered state conduct in certain instances (see subsection below).[18] Consequently, the term has come to encompass not only publicly-owned property used for communication but privately-owned property that has taken on the same

attributes. The nature and extent of those attributes has been subject to debate by the courts and will be the primary focus of the discussion section.

Hague v. CIO[19] provided the first definition of the public forum based on the English common law which held parks and streets open to public speech and assembly.[20] One author has suggested that control of streets and sidewalks is a public function, and that control of those places by private entities would constitute state action.[21]

In addition to traditional public forums such as streets and parks, the courts have recognized designated public forums, public property which the state has opened for expressive activity.[22] One author has also proposed a category called a nonpublic forum, public property which may have been used for communication or other purposes but which has never been open to free use by the general public for expressive purposes, such as a military installation.[23]

That is not to say, however, that the public or private nature of a particular property determines whether it is a public forum. Certain broad criteria for determining whether private property has become a public forum have been suggested: 1) expectation of privacy, 2) expectation of quiet, 3) physical access, 4) freedom of association, 5) right of exclusion, 6) exclusivity of possession, and 7) expectation of security.[24]

STATE ACTION

The concept of state action fulfills the need, unmet by the 14th Amendment, to prevent government from delegating powers to private entities in order to circumvent constitutional restraints.[25] Although never expressly stated by the courts, legal scholars have distilled from decades of decisions based on state action that the courts will generally find state action on the part of a private entity if 1) the state has delegated authority to that entity or 2) the private entity has assumed powers traditionally governmental in nature.[26]

Students attending public institutions have been able to safeguard their constitutional rights from infringement by the college or university through the application of the 14th Amendment, which extended the Bill of Rights to cover the actions not only of the federal government and its agencies, but those of state and local governments as well.

The state action doctrine, in simple terms, considers nominally private action to be state conduct under the 14th amendment if state control, the performance of a state function, or significant state contacts can be shown.[27] No definitive test for state action has been developed by the courts.[28]

During the 1960s and 1970s, state action was being applied to areas other than the First Amendment as citizens

tested and courts expanded constitutional rights under the Civil Rights Act. Scholars at one point viewed application of state action to private colleges as the most promising method of establishing constitutional rights on private campuses.[29] However, the courts have historically been more willing to find state action in racial discrimination cases than in areas such as due process challenges in private colleges and free speech cases involving shopping centers.[30]

Several cases have attempted to establish state action based on the private college or its students receiving state or federal funding.[31] The relationship between government and defense contractors and the role of the university as a government research department exemplify the extent to which the line between private and public has blurred.[32] However, state funding in the form of student scholarships, direct aid and tax exemptions, has generally been held as insufficient grounds for a finding of state action,[33] as have state regulation, state chartering, powers of eminent domain, state power to appoint board members and the institution's use of the state name, i.e. Nebraska Wesleyan University.[34] Commentators, however, have generally agreed that state funding of private entities should, in fact, be sufficient basis for finding state action.[35]

Despite the narrowing of state action to conform to courts' perceptions of private institutions, a lasting

guideline has not emerged, leaving private college students without a concrete reading of what constitutes state action by a private college or university and lower courts without proper guidance, thereby forcing them in essence to recreate the wheel in every case.[36]

One twist to the state action theory has been to view state enforcement of private action as evidence of state action.[37] A private college that called law enforcement officials to deal with a student march on the campus would become an arm of the state by virtue of having used state power to enforce its policies. The theory presents a mirror in a mirror sort of contradiction, however, making it practically unworkable, since any citizen who then enlisted the help of police would become the state for legal purposes.[38]

PRIVATE PROPERTY

Rather than looking at a private college as a type of college, some student defendants have proposed viewing the campus as a type of private property. Such a view invokes an entirely different body of case law and argues by analogy that where a right to free expression has been found on certain types of private property, that right should also be found on private campuses which share the same property characteristics. This proposed theory takes into

consideration not only the private students' rights to free expression on campus, but also the rights of community members to interact with students on college property.

Public forum theory generally applies the concept of state action to property which is, strictly speaking, private. While the Constitution guarantees citizens the right to property, regulation of that property is one of the powers reserved to the states.

Common law holds that a property owner who allows access to his property, express or implied, may not claim exclusive possession.[39] If the owner has customarily allowed access, he has implied consent, even if the user did not intend to use the property in the way intended, such as purchasing items at a shopping mall.[40] The invitation is to the community as a group, not to individuals within the community.[41]

Several commentators have coined the term "quasi-public forum" to refer to property that is privately owned but intended for use by the public.[42] Such property, they argue, serves a public function, which in turn evokes a finding of state action.[43] Others, however, note that because the constitution applies only to government, it does not recognize a privately owned public forum.[44] Although property owners have attempted to argue a right to privacy,

no such right can realistically be claimed for property generally open to the public.[45]

COMPANY TOWNS

The widely recognized starting point for the public forum theory lies in the landmark case of *Marsh v. Alabama*,[46] which involved a company town. At the dawn of the industrial age, companies requiring large numbers of workers began to develop such settlements -- areas which had characteristics of a normal village or town, including businesses, services and entertainment, but which existed entirely on land owned by the company. Because the company towns so completely met the needs of the workers who lived in them, few had the cause or the means to venture off company owned land.

In *Marsh v. Alabama*[47], a Jehovah's Witness sought to distribute handbills in the business area of a company town called Chickasaw, despite "No Solicitation" signs being posted in the windows of the businesses. The court found that Chickasaw performed the function of a normal municipality to the extent that the company performed an essentially governmental function. Because a city government could not prohibit distribution of handbills on its streets and sidewalks, neither could Chickasaw deny access to its business district.

One of the most important concepts to arise from Marsh lies in Justice Black's statement, "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."[48] This statement, although not expressly noted so in the opinion, has its roots in tort law which held that if a trespasser had reason to believe a property owner had customarily opened his land to use by the community, then the landholder had by implication consented to the trespass.[49]

Degree of openness lies at the heart of the public forum concept.[50] Few would argue that a private home, the extreme case of private property with absolutely no public use, constitutes a public forum. However, as the scope of an owner's invitation to the public increases, his right to absolutely restrict individuals from entering decreases.

Another important concept of the case lies in the idea that private entities which possess the power to deprive a community of rights which the Constitution protects against state infringement should be considered the equivalent of government.[51] As Emerson states:

> Thought and communication are the fountainhead of all expression of the individual personality. To cut off the flow at the source is to dry up the whole stream. Freedom at this point is essential to all other freedoms.[52]

Such a determining factor would seem to get to the heart of the public forum/private property question but raises the qualifying question of just how many people would need to be impacted by the land owner before such a determination is found.

SHOPPING CENTERS

As company towns began to die out due to the unpopularity of the concept as well as the cost of maintaining them[53], the Marsh decision might have become merely another Jehovah's Witness expression case but for the advent of shopping malls. As multi-business centers began to replace the traditional downtowns of many communities, citizens began to attempt to use the centers in the ways they had used the downtown areas for decades, as centers not only for commerce but for communication.

Shopping center owners, however, were unwilling to give citizens carte blanche to use their facilities as forums for expression. Although mall owners expect to forfeit some property rights as the price of attracting large numbers of people, the shopping center cases have revolved around how far the forfeiture extends and to what extent use of malls as public forums harms the revenue producing purposes of the property.[54]

In weighing the balance between first amendment freedoms and property rights, the Supreme Court in

Amalgamated Food Employees Union v. Logan Valley Plaza relied on *Marsh* in finding that whereas shopping centers had effectively replaced the downtown areas, eliminating the streets and sidewalks normally held to be open to expression, they should be required to allow the use of their facilities as public forums.[55] Although the court did not explicitly consider state action as a mechanism for its finding, at least one author has suggested that the court could have made such a finding by expanding the public function concept.[56]

As the Supreme Court became increasingly conservative, however, it chiseled away at initial decisions that determined shopping centers to be public forums.[57] The court's readings of *Marsh* became more literal and led to attempts to formulate 20
several tests for determining when a shopping center or other private property would be termed a public forum.

Lloyd Corporation v. Tanner[58] marked the end of the Warren Court's expansion of First Amendment rights on private property and the beginning of the Burger Court's more conservative approach.[59] In this case involving a group of petitioners gathering signatures in a privately owned mall, the Court widely expanded a footnote in *Logan Valley*, which stated that the court would not consider the question of speech unrelated to use.[60]

Commentators have debated whether the *Logan Valley* court meant that the speech must be "consonant with the use" of the property or simply may not interfere with those purposes.[61] The difference, according to one author, lies in the burden of proof. In the former situation the person seeking access for speech must prove the relationship. In the latter, the property owner must prove interference.[62]

The *Lloyd* court developed a two-pronged test: 1) the speech must be related to the use of the property and 2) there must exist no alternate forum in which the individual could express himself, regardless of whether that alternate forum is as effective as the privately owned property in question.[63]

The departure from the Court's long standing prohibition against free speech determinations based on content[64] notwithstanding, the decision in effect denies those with little financial means the use of the most effective public forum.[65] "If effective First Amendment rights are to be preserved, we should recognize only those alternative public forums which are at least as effective as the quasi-public forum sought to be foreclosed."[66]

Because in utilizing the alternative forum requirement courts must consider content, the test leaves a great deal of room for abuse and discrimination.[67] It also, however, creates a direct link to the search for an alternative

forum, since as the relation of the speech to the property's use increased, the appropriateness of an alternative forum would decrease.[68] Had the court found the shopping center in Lloyd to be a public forum, it could not have used content as a basis for use of the forum, since not only is content discrimination in a public forum unallowable, but in fact all speech is related to the use of a public forum.[69]

Admittedly, however, the finding of an alternative forum eliminates the need to protect the free flow of information from abridgement by private entities, and is thus in keeping with the basis of the Marsh decision.[70]

The *Lloyd* decision, which relied on the dissents in *Marsh* and *Logan Valley*,[71] also ignores societal changes which have resulted in private property replacing traditional public forums and the wielding by private entities of powers once held only by the government.[72]

For all its faults, the *Lloyd* decision did put an end to the quantitative test for governmental indicia that other post-*Marsh* cases had attempted to establish based on a too-literal reading of the *Marsh* court's explanation of its findings.[73] Such simplicity at the cost of curtailing First Amendment rights, however, hardly seems an equitable exchange.[74] The fact remains that the Lloyd court failed to recognize that the key question was the extent that a

private entity could restrict the flow of information to a group of people.[75]

In many of the shopping center cases, mall owners have opened their property to speech which they considered to be beneficial in attracting consumers.[76] By doing so, they have voluntarily created a public forum, and the fact that their reasons for doing so may have been purely economic should not be deciding.[77]

The differences that have been delineated between company towns, shopping centers and private stores suggest a continuum based to a certain extent on degree of openness[78] but also on physical characteristics and use.[79] Prior to *Lloyd*, the Court's decisions had fallen logically along that continuum. *Lloyd*, however, fails to fit the pattern, a fact which may have led the Court to its "related to use" test.[80]

The essence of the apparent contradictions of *Lloyd*, both within itself and with previous case law, may have best been summarized by a law review article which stated, "The opinion in *Lloyd* lends itself to a variety of interpretations, owing to its framing of the issue in terms of property rights while resolving the case in terms of state action."[81]

In *Hudgens v. National Labor Relations Board*,[82] the Court put the nail in *Logan Valley*'s coffin by ruling that because the *Lloyd* decision could not be reconciled with

Logan Valley, the latter stood overruled.[83] The decision ignored the conflict between *Lloyd* and *Marsh*.[84] *Hudgens* did, however, restate the Court's precedent of content neutrality in free speech decisions, thereby eliminating one element of the two-pronged *Lloyd* test.[85] Some authors have speculated that *Hudgens* would limit access to communication to those who could afford it and severely limit access to "poor man's forums."[86]

It should be noted, however, that the Lloyd court never expressly overruled *Logan Valley*[87] and that *Central Hardware Co. v. NLRB*,[88] decided the same day as Lloyd, relied on the *Logan Valley* rationale.[89]

Pruneyard Shopping Center v. Robins[90], decided in 1984, gave what has been the Supreme Court's final word in the matter -- which was really no word at all. The case hinged on the California state constitution's proactive free expression clause, which granted that all citizens had a right to freedom of speech. The U.S. Supreme Court ruled that a state constitution could grant more, but not fewer, rights than its federal counterpart.[91] The ruling left the question of shopping centers as public forums subject to the interpretation by state courts of their own constitutions,[92] something that was unnecessary during the period in which the Warren Court was expanding federal constitutional rights.[93]

Pruneyard did, however, answer a question that had hung in the air since the *Lloyd* decision: whether property owners had a Fifth Amendment claim to a right protecting them against governmental taking of property without due process. The *Pruneyard* court ruled that the right to exclude others was only one in a bundle of rights, and that to prove a taking the owner must show interference with the property's use or economic value.[94] The court stated that Lloyd had been based on the absence of a federally protected speech right, not on the existence of a federal property right.[95]

MIGRANT LABOR CAMPS

Although few if any company towns still exist, the migrant labor camps on large commercial farms may well be their successor. Like the workers who lived in company towns, migrant laborers, their needs met in the camp and lacking the financial means to live elsewhere, may rarely venture off the owner's private property. And like the citizens of the company towns, the laborers' access to information could be controlled by the private property owner.

The transitory nature of the laborers' lifestyle[96], compounded by language barriers, make contact with the community outside the camp even less likely than it was for workers living in a company town. The relative isolation of

the workers, then, makes access crucial because alternate public forums would be inadequate.[97]

Despite the obvious similarities between company towns and migrant labor camps, the camps lack one of the primary factors upon which the *Marsh* decision was based: open ingress and egress of the public at large.[98] However, at least one author has suggested that limited access is more an indication of governmental power than open access because of the increased power of the private entity to control the flow of information.[99]

In developing a litmus test for free speech in migrant labor camps, the U.S. Court of Appeals for the Third Circuit Court in *Asociacion de Trabajadores Agricolas de Puerto Rico v. Green Giant Co.*[100] held the requirements of *Marsh*, *Logan Valley* and *Lloyd* to be cumulative. Thus, according to one source, in order to gain access, plaintiffs would have to show:

> (1) that the property in question was the functional equivalent of a municipal business district, (2) that it was generally held open to the public, (3) that there were no reasonable alternative means of reaching the workers and (4) that the message the plaintiffs sought to convey was directly related to one of the purposes served by the farm.[101]

It is important to remember that the shopping center cases do not necessarily apply to all cases where *Marsh* applies.[102] There is, then, no basis or need for the *Green*

Giant court to read the decisions as cumulative. However, *Lloyd* so limited the *Marsh* decision that in order for *Marsh* to apply, the property in question must be "the total functional and structural equivalent of a town" and have open access.[103]

In addition to the company town test, the criteria for which have never been defined,[104] the courts have applied landlord/tenant doctrine and the balancing test to determine access to migrant labor camps.[105] The former basically states that a landlord cannot restrict the invitees of the tenant.[106] The failure of this concept in terms of the free speech/private property question lies in the fact that outsiders must be invited by tenants; the landlord is not required to allow free access to the property. Exclusion of those who would canvass a multi-tenant property gives the property owner the extended control of the flow of information which the *Marsh* court found unacceptable.[107]

In employing the balancing test, the courts have found that an owner's property rights do not include the power to limit tenants' access to information,[108] a finding that relates directly to the basis for the *Marsh* decision. The balancing test incorporates an oft-cited court doctrine of preferred freedoms[109] and bypasses the need for state action.[110] It also has the flexibility to allow application to different factual circumstances.[111] With a balancing

test, courts would be required to explain decisions, rather than dismiss actions outright for a lack of state action.[112] The key to the balancing test is interference with the normal use of the property, which protects the property owner without a total ban on speech.[113] However, the test does not provide a guideline for owners, workers, those seeking access or lower courts.[114] As Emerson states:

> The full benefits of the system can be realized only when the individual knows the extent of his rights and has some assurance of protection in exercising them. Thus the governing principles of such a system need to be articulated with some precision and clarity. Doubt or uncertainty mitigates the process.[115]

The migrant labor camp provides further proof of the fallacy of a quantitative test for public function or company town indicia, since reliance on such a test could encourage a camp owner to actually provide fewer amenities.[116]

The residential nature of the migrant labor camp makes it closer in nature to the company town than the shopping center and provides at least one possible factor for future determinations of free speech on private property.[117] The residential aspect would also help to reconcile decisions along the above mentioned continuum between private home and public park.

PRIVATE COLLEGES

As early as 1819, the United States Supreme Court faced the question of jurisdiction over the affairs of private colleges. In *Trustees of Dartmouth College v. Woodward*[118], Justice Marshall penned the opinion which has governed the issue for well over 150 years: "That a corporation is established for the purposes of general charity or for education generally, does not, per se, make it a public corporation, liable to the control of the legislature."[119]

In 1991, Rep. Henry Hyde (R-Ill.) sought to bring private colleges and universities under the control of the First Amendment. In March of that year, Hyde introduced H.R. 1380, an amendment to the Civil Rights Act of 1964 known as the Collegiate Speech Protection Act. Drafted in response to a wave of restrictive college speech codes, the bill would have barred private universities from subjecting students to disciplinary sanctions for activities protected from government restriction by the First Amendment.[120] Although widely discussed when introduced, the bill, which exempted religious schools, never emerged from committee.[121]

Many scholars have questioned Marshall's creation of the public-private dichotomy in higher education. Most have concluded that the only difference between the two lies in sheer title to the property itself and not in differences in purpose or function.[122] As Seidman states, "Today, few would argue that the boundary between public and private is in any

way natural. To the extent that it exists at all, the boundary is a human construct that must be fought for and quarreled over."[123]

The line between public and private institutions has blurred with an increase in public support for private schools and, conversely, an increase in private support for public schools. The result has been to make the purely private or purely public institution the exception rather than the rule and the line between the two more difficult to identify.[124]

While maintaining the dichotomy between public and private schools and subsequently granting constitutional rights to public college students through application of the 14th Amendment, courts have failed to develop a clear doctrine governing private college campuses. One of the primary reasons has been a judicial policy of academic abstention, the reluctance of the courts to involve themselves in academic issues.[125]

Some scholars have found the courts' reluctance to interfere with the inner workings of private schools to be unfounded, particularly as it is based on the grounds that such interference would change the essential nature of private institutions. Judicial review of academic sanctions at state colleges has not adversely affected those institutions, so the idea that private colleges would be

threatened has no foundation, except in narrowly drawn circumstances such as seminaries.[126]

A widely accepted rationale for judicial deference to college administrators has been that courts are reluctant to rule in areas outside their expertise.[127] The lack of legal direction in this field may lie in the emphasis courts have placed on trustees and corporate relationships in university charters, rather than on the student-university relationship.[128]

Jones v. Vassar College[129] states clearly at least one court's opinion on staying out of academe. "Private colleges and universities are governed on the principle of academic self regulation, free from judicial restraints."[130]

In the 1970s, university leaders themselves felt their status as strictly private entities to be on the verge of extinction.[131] At a post-secondary education conference in 1972, Thomas C. Fisher, administrative dean of the Antioch School of Law, told colleagues:

> I would like to tell members of private institutions that the status of law in that area is a little bit like the status of the law of separate but equal the day before the Brown decision. I would not rely on it too much.[132]

Such a change has never taken place. Any perceived threat by private universities of judicial redefining that

might have taken place has surely proved by now to have been premature.[133]

First Amendment scholars have generally recognized the importance of finding a means to apply constitutional guarantees to private colleges.[134] However, since the obvious similarities between public and private colleges have not been deemed sufficient nexus by the courts for applying the same constitutional standards, other avenues must be pursued.

PUBLIC FUNCTION

As a corollary to the state action doctrine, the courts have developed the concept of public function,[135] which holds that private entities which perform a function normally performed by the government may be subject to the same restrictions as the government in regard to constitutional rights.[136]

The idea as it relates to educational institutions is most notable in *Brown v. Board of Education*[137]. The United States Supreme Court stated, "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society."[138]

The counterargument to the public function theory has been that private schools operate in addition to, not in

place of, public institutions. Justice John Marshall once wrote "[Private educational institutions] do not fill the place, which would otherwise be occupied by government, but that which would otherwise remain vacant."[139]

The fact remains, however, that the citizenry of this country has come to view education as a function to be performed by the government through the use of tax dollars to the extent that social agencies must ensure that children attend school. The large amount of money spent every year on education, both private and public, should attest to its inherent public function.[140]

State regulation of private colleges through requisite inspection and reporting, the right to remove trustees and the ability to suspend the college's charter have been suggested as indicators of the importance the state places on education.[141]

Despite indicators of public function such as the tax exempt status of private colleges[142] and scholarship and loan programs available to private students, courts have generally held the public function doctrine insufficient for bringing private colleges under the 14th Amendment unless the aid directly contributed to the exercise of government-like power.[143] Such decisions fail to realize that general grants in the end support every activity of the institution, meeting any requirement that the support be related to the

speech restriction.[144] For example, government aid to the math department frees general funds that could then be used for the communication department, which may be restricting free speech in the student newspaper. Opponents predict that adoption of the public function theory would reach too far beyond the private school.[145]

CORPORATIONS AND PRIVATE ASSOCIATIONS

The 1980s saw courts at many levels intervene in the inner workings of private corporations and associations, particularly in cases where women sought access to men only clubs and groups. A few researchers have proposed that the courts could make a similar intervention to expand the rights of college students.

States delegate power to private associations through charters and grant private entities the power to hold and control property.[146] In some cases, such voluntary associations take on many governmental attributes, thereby creating the same need on the part of the individual for protection from infringement of his rights as the Constitution provides against government infringement. As Emerson states:

> A system of freedom of expression that allowed private bureaucracies to throttle all internal discussion of their affairs would be seriously deficient. There seems to be general agreement that at some points the government must step in.[147]

Use of chartering or licensing as a basis for finding state action would require limitation so as not to bring all private conduct associated with state licensing or charter under the 14th Amendment.[148] Licensing may be considered a governmental grant of power to a private entity, which would then be subject to a finding of state action; or it may be considered a type of regulation, in which case the private entity would not be subject to a finding of state action.[149]

STATE CONSTITUTIONS

The Supreme Court's ruling in *Pruneyard* paved the way for state courts to interpret state constitutions independently of the federal constitution.[150] Every state constitution except that of Rhode Island guarantees free speech, and 38 state that right affirmatively.[151]

In *Princeton v. Schmid*,[152] the court ruled that a state may use its police powers to restrict private property if such restrictions do not constitute a taking without due process.[153] The court further stated that a state could limit property owners' rights for reasons of public policy and public welfare and to protect preferred rights such as speech.[154]

The New Jersey Supreme Court in *Schmid* held that private property open to the public cannot be limited by the owner except for time, place and manner restrictions.[155] The state court declined, however, to extend the state action

doctrine,[156] centering its decision on a balancing of individual First Amendment rights against institutional property rights. The institution's First Amendment rights were not considered.[157]

In cases decided since *Pruneyard*, state courts have tended to read their constitutions more liberally.[158] One author, however, has argued that because the state courts do not set precedent for the entire country, they have more flexibility in interpreting their constitutions.[159] By the same token, they do not provide a clear guideline, which could lead to courts deciding factually similar cases on different grounds with different results.[160]

SUMMARY OF LITERATURE REVIEW

As with all case law, courts' decisions regarding privately-owned public forums have changed and evolved over the five decades since the *Marsh* ruling. While judicial opinion at one time seemed to be broadening to allow First Amendment access to a variety of property types, *Lloyd* marked a return to a more strict interpretation of the Constitution.

Company towns, although a phenomenon now vanished from this country, would appear to still be subject to the First Amendment. Their modern-day counterparts, the migrant labor camps, also seem to compel a proactive decision by most courts.

The question of First Amendment access to shopping malls has been remanded to the state courts. The U.S. Supreme Court's ruling in *Pruneyard* closes the door to federal constitutional free speech in malls, but does not prevent state courts from interpreting their own Bills of Rights as more proactive.

Parties bringing suit against private colleges have been hard-pressed to find enough indices of state action to satisfy the courts, which have disallowed government funding, inspection and accreditation and chartering as well as the tax exempt status of such institutions and the public function of education.

The courts have not, it seems, come to a conclusion on what circumstances would result in a finding for freedom of expression on private college campuses. Similarities between private campuses and other types of private property, however, may provide guidance on the question of whether such institutions can be considered privately-owned public forums.

Chapter Three

METHODOLOGY

STATEMENT OF PURPOSE

Private college campuses have long been held not subject to the First Amendment by virtue of being private property. Other forms of private property, however, have fallen under the First Amendment based on the public forum theory.

The purpose of this thesis is to determine whether private college campuses, which have traditionally been defined as being outside First Amendment protection, meet the definition of a public forum and thus should also receive protection under the First Amendment.

METHODOLOGY

Several areas of Constitutional law involving private property which functions as a public forum provide a basis from which analogies may be drawn regarding private college campuses as public forums. The process for determining the extent to which private college campuses meet the established criteria for a public forum will be:

(1) Formulation of the research question: Can private college campuses meet the definition of a public forum and thus be afforded First Amendment protection?

(2) Researching the general background of the problem through secondary sources. Given the nature of the question, those sources consist largely of legal journal articles and books.

(3) Developing a list of cases which relate to the problem. (See Appendix B, List of Cases.) Cases will be limited to federal courts and state high courts, with the exception of lower court cases frequently cited in the case law.

(4) Reading and synthesizing these cases for not only the legal holdings per se but the dominant rationales for those holdings.

(5) Shepardizing these cases for any subsequent decisions which may have altered their applicability to the question.

(6) Determining through analogy the similarities and differences between private college campuses and other types of private property which have been determined by the courts to be public forums. The broad categories should include a) company towns, b) shopping centers, c) migrant labor camps, d) multi-tenant dwellings. The cases will be examined to determine what criteria the courts have established for viewing property in each category as a public forum.

(7) Drawing conclusions from the case review as to whether private college campuses do or do not meet the criteria established for public forums.

The format for the discussion will be a presentation of the pertinent cases in each category, followed by a summary of that case law and a discussion of its application to the central research question. Because the discussion relies on analogy, two hypothetical private colleges have been created: one a nonresidential seminary, the other a large, residential urban campus. Other variations will be included where needed to illustrate the discussion.

The conclusion will synthesize the privately-owned public forum criteria that emerge from each category of case law. This final list of characteristics will then be applied to the two hypothetical institutions.

Chapter Four

DISCUSSION

PRIVATE COLLEGES

A limited amount of case law directly involves First Amendment activities on private college campuses based on state action or the property rights of the college. Many cases that do involve freedom of expression on private campuses draw upon theories such as contract relationships or due process, i.e. students being expelled for participating in free speech activities.[161] A discussion of those cases which directly involve colleges and fit the research question will be presented before moving to other types of private property.

Powe v. Mills presented the unique situation of a public college, New York State College of Ceramics, operating on the campus of Alfred University under a contract between the university and the state. The case involved four Alfred University students who participated in a demonstration on the university's football field. The Second Circuit Court of Appeals ruled that the relationship between the university and the state did not constitute state action; that in order to find state action, the state must be involved in the activity that denied the student his First Amendment right. The court again disallowed state funding as a basis for finding state action as it did the

university president's power to discipline students and the state's regulatory control over educational standards in general.[162]

In *McLeod v. College of Artesia,*[163] the district court held that neither an army reserve unit's use of a cafeteria on private campus initially funded by revenue bonds nor the public use of the college theater were sufficient basis for a finding of state action.[164]

The case review discovered only three cases in which First Amendment activity on private colleges was addressed in terms of the property rights question as it evolved from *Marsh*.

In *Browns v. Mitchell*, the court wrote: "We may concede, without deciding, that judged by the totality of public functions, this University may be likened to *Marsh* and *Logan Valley Plaza* for the purpose of exercising First and Fourteenth Amendment rights in its public ways."[165]

The court went on to dispense with the state action requirement so frequently called upon in private university cases on the grounds that *Marsh* and *Logan Valley Plaza* were concerned only with "delineation of public places for purposes of First Amendment activity" and not with state action in the entities' internal affairs.[166]

Commonwealth v. Tate has been discussed extensively in the introduction. It should be noted that the Pennsylvania

Supreme Court granted access to Muhlenberg college based on its openness to the public and a proactive reading of the state constitution's free speech provision.[167]

The U.S. Supreme Court upheld New Jersey's right to interpret its constitution as granting a proactive free speech right in *Princeton University v. Schmid.*[168] Schmid, who was not a university student, was charged with criminal trespass for distributing political materials on the campus. The U.S. Supreme Court found that the New Jersey court's decision did not deprive Princeton of its First, Fifth or Fourteenth Amendment rights.

SECTION SUMMARY AND APPLICATION TO THE RESEARCH QUESTION

What little case law exists directly related to the question of freedom of expression on private property indicates that, absent a compelling basis for finding state action, the U.S. Supreme Court will not grant such a right. States, however, remain free under their own constitutions to grant a proactive First Amendment right without a finding of state action, such a ruling not being violative of the college's First, Fifth or Fourteenth Amendment rights under the federal constitution.

COMPANY TOWNS

As discussed in the literature review, the first case to extensively examine freedom of expression on private

property was *Marsh v. Alabama* in 1945. The case centered around a Jehovah's Witness who sought to distribute literature in Chickasaw, a Mobile, Ala., suburb owned by the Gulf Shipbuilding Corp. The property had all the characteristics of any other municipality - streets, a sewer system and disposal plant, residential buildings and a business district. Stores in that district had posted notices prohibiting solicitation of any kind without permission.

Marsh stood on the sidewalk near the Chickasaw post office and distributed religious pamphlets. She declined a request to leave and was subsequently arrested by a deputy sheriff and charged with trespass.

In reversing the lower court, the Supreme Court focused largely on the fact that had Chickasaw been a municipal corporation rather than private property, it could not have stopped Marsh from her First Amendment activities.[169] In one of the most often quoted passages throughout this body of case law, Justice Black wrote for the majority:

> 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.[170]

A less noted passage may come closer to the true rationale for the decision. "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."[171]

The court outlines this concept further.

> [Residents of company towns], just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed, their information must be uncensored.[172]

The above passages would indicate that the underlying rationale, rather than being title to property or the use of that property, is the amount of control the property owner exercises over the flow of information to those frequenting or residing on that property. As we will see, this theme holds true in many of the subsequent cases and may be the most logical basis for balancing First Amendment and private property rights.

Interestingly, a case involving a federally-owned village, *Tucker v. Texas*,[173] came before the Supreme Court the year after the Marsh decision. In that case, citing Marsh, the court held that the village must allow the same

freedom of expression as a privately-owned company town or municipality.

MIGRANT LABOR CAMPS

Marsh remains one of the few company town cases, as corporations soon after began divesting themselves of such communities for financial and other reasons. However, the growth of large farms requiring large pools of seasonal labor created a similar phenomenon, the migrant labor camp.

In *Evans v. Newton*,[174] the Supreme Court used a state action rationale to grant First Amendment rights on private property. "When private individuals or groups are endowed by the state with powers or functions governmental in nature, they become agencies or instrumentalities of the state and subject to its constitutional limitations."[175]

The 1970s saw a large number of migrant labor camp cases, usually involving a desire by social assistance agencies (medical, legal and labor) to gain access to workers in the camps. The courts, in keeping with the underlying *Marsh* rationale, clearly saw a need for workers to have uninhibited access to information.

People v. Rewald[176] found that the physical characteristics of the labor camp in that case fit the profile of the company town in *Marsh*. As in that case, the *Rewald* court found that mere title could not dominate in a case involving First Amendment rights.[177]

> Such constitutional rights come into play where, as here, the migrant camp residents spend much time within the camp area. They have under our Constitution a right to free access to information and, most certainly, to visitors, such as news reporters, may not be denied without good cause shown the right of reasonable visitation for purposes of gathering and disseminating the news. Thus, camp residents and public alike may be fully informed, may openly communicate their ideas, may intelligently exercise their franchise to vote and, when and if necessary, petition their government for redress of grievances. Clearly, in such cases, a sharp distinction arises between private property used solely for the owner's private purposes, where the owner's right to protect against criminal trespass and from invasion of his constitutional right to privacy, will take precedence and premises which are clearly open and dedicated to public uses.[178]

In some migrant cases, the question of openness - one of the characteristics the *Marsh* court used in finding Chickasaw to be a town like any other - became a defining one, as many camps are enclosed and have personnel at entrances to monitor visitors. In *State of New Jersey v. Shack*,[179] the court of that state was unwilling to interpret *Marsh* as controlling because the camp lacked some of the company town attributes. However, the court went on to say that ownership of property does not include the right to deny those residing on that property access to government services. "Title to real property cannot include dominion over the destiny of persons the owner permits to come upon

the premises ... We find it unthinkable that the farmer-employer can assert a right to isolate the migrant worker in any respect significant for the worker's well being."[180] The court further noted that its decision did not open labor camps to the general public but only to those with a legitimate interest in access.[181]

The court in *Folgueras v. Hassle*[182] noted that access of outsiders, particularly representatives of social service agencies, is important to migrant workers overcoming poverty and isolation.[183] The court included in its rationale the migrant worker's right, based on the landlord-tenant tort law, to receive visitors of his choice. *Folgueras* also incorporated the concept set forth in *Shelley v. Kramer*[184] that, in some instances, a property owner's invocation of state trespass laws can meet the state action requirement, thus making his actions subject to constitutional limitations.

An essential characteristic of the privately-owned public forum is that the messages expressed cannot be restricted arbitrarily. The Illinois district court raised that question in *Francheschina v. Morgan,*[185] in which a labor camp owner made no effort to enforce his no trespassing rule until he didn't like the message of those seeking access. The court held that access of visitors to the camp is "subject to the discretion of the migrants and

not the company, its employees or political auxiliary."[186] Interestingly, the court found that neither *Marsh*, *Logan Valley*, *Lloyd* or *Central Hardware* specifically applied to this case, and that the application of *Marsh* and *Lloyd* begs the question of whether a camp owner may limit who talks to his workers. He cannot.[187]

Until 1975, the doctrine of First Amendment rights on migrant labor camps appeared to be progressing in favor of access. The Fifth Circuit Court of Appeals in *Petersen v. Talisman Sugar Corp.*[188] found the labor camp in the case similar enough to the company town in *Marsh* to grant access to a group of ministers. The court stated,

> The mere fact that the owner has sequestered its employees from general social intercourse with mankind can afford it no immunity from the prohibitions of the First Amendment ... By using its property as a round-the-clock habitat for its employees, Talisman has forfeited the broad right which the owner of sawgrass and marches alone would have to envoice strictly a `No Trespassers' policy.[189]

State v. Fox[190] granted access to an attorney and a union organizer based on the workers' landlord-tenant relationship, their right to counsel and their right to organize. *Velez v. Amenta*[191] noted that a labor camp shared more characteristics with public property than with private and granted access based on workers' right to be informed,

again the underlying notion in *Marsh* that property owners should not be allowed to restrict the free flow of information. *Freedman v. New Jersey State Police*[192] granted access based on the workers' rights as tenants, subject only to time, place and manner restrictions and recognition of the workers' privacy rights.

However, in the 1975 case *Asociacion de Trabajadores Agricolas de Puerto Rico v. Green Giant Co.*[193] the Third Circuit Court held that in order to be considered the functional equivalent of a town, such as Chickasaw, private property must have *all* of the characteristics of a municipality. Lacking any of those characteristics, the question, based on *Lloyd*, becomes that of the expression's relation to the property's use and the existence of alternate forums. The court held that because the Green Giant camp lacked the openness that characterized Chickasaw, it could not be considered the equivalent of a town.

The Third Circuit did note, however, that an owner cannot categorically circumvent the First Amendment by restricting access to the camp. The court also suggested that, had more evidence of the camp's municipal nature been presented, a finding for First Amendment access might have been possible.

Despite the apparent setback of Green Giant's all-inclusive requirement, a month later the 7th Circuit Court

of Appeals in *Illinois Migrant Council v. Campbell Soup Co.*[194] ruled that size alone could not be the defining factor in determining whether a camp was the functional equivalent of a company town. The court found that if property met that test, it need not meet the Lloyd tests of related to use and absence of alternate forums, a ruling adhered to by the court in *Mid-Hudson Legal Services v. G&U Inc.*[195]

SECTION SUMMARY AND APPLICATION TO CENTRAL QUESTION

In distilling the basic tenets of the public forum question as outlined in the company town and migrant labor camp cases, we can see that courts have generally found physical and philosophical reasons for considering those types of private property to be open to the public and suitable for expressive purposes.

The physical characteristics include the degree of openness, a question which became less important as the migrant camp case law developed; the presence of traditionally municipal features and services such as streets, sewage disposal and postal facilities; presence of a business district or general store; and residential features such as living quarters, dining accommodations and laundry facilities.

The underlying philosophy behind the decisions allowing access is that a property owner should not, by virtue of naked title, be allowed to restrict the free flow of information to residents necessary for them to contribute to the democratic process.

In an examination of how those physical and philosophical requirements apply to the private college, it appears that much depends on the characteristics of the individual campus. For example, a religious seminary housed in a single building used exclusively for the education of those attending would most certainly lack the physical attributes of a town. At the other extreme, a large, urban private campus with multiple buildings, including student housing and dining, a bookstore or general merchandise store, open ingress and egress by the public at large, and presumably providing sanitary and utility functions, would meet more of the requirements of a functional equivalent of a town.

Turning to the philosophical nature of those two examples, a seminary with student residency provides the greatest opportunity for the property owner to more strictly regulate the flow of information. A similar institution that did not have on-site student housing would lack that type of control. With the large urban campus, while the property owner may have less direct control over the flow of

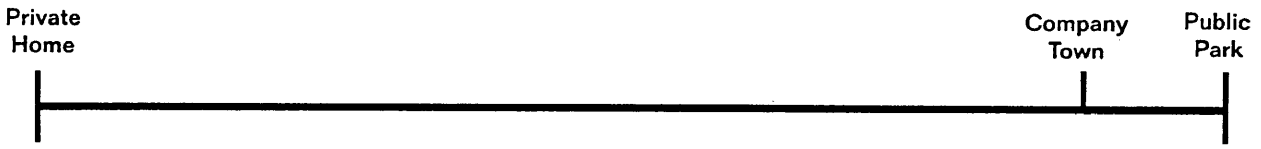
information to students, it leaves little need for students to leave the campus to seek services - and thus little opportunity for outside information to reach them.

In looking specifically at migrant labor camps, similarities can be seen between migrant workers and colleges students. Like migrant workers, college students occupy campus residencies seasonally. Like workers, they may have limited economic resources to take them off campus, including transportation and spending money. And like migrant workers, college students tend to form groups which socially may be isolated from the community at large.

Access to private property for First Amendment purposes, i.e. the degree to which the property serves as a public forum, can be thought of as a continuum. At one end, we have private residences, which have no openness, no invitation to the public, no municipal characteristics, the greatest need for privacy, and most importantly, total control over the flow of information to other groups or individuals.

At the opposite end are public streets, sidewalks and parks -- the traditional public forums. These places have the greatest degree of openness, invitation to the public, municipal characteristics, the least expectation for privacy and no control over the flow of information to other groups.

Different types of private property can be placed along this continuum based on their varying degrees of the above criteria. Company towns have a degree of openness, invitation and municipal functions equal to public property. Owners have no expectation for privacy but the least potential to control the flow of information to those residing in them. On the continuum, such privately-owned public forums would be place as follows.



Migrant labor camps may or may not allow open ingress and egress of those other than company employees and workers. They generally have made no invitation for public use but have all or most of the characteristics of a town. Owners have no privacy expectation, although workers have such a right in their individual dwellings. However, because the workers are generally only in the camp for the season and because language and social barriers may keep them from mingling with the greater community, the potential for the owner to control the flow of information exceeds even the company town. As the courts have generally held camps open to governmental agencies with specific business in the camp

and not to the public at large for general First Amendment purposes, the camps would be placed on the continuum as below.

MALLS AND SHOPPING CENTERS

Shopping centers have been perhaps the most common instance of individuals and groups seeking access to private property for First Amendment purposes, the research having turned up 23 such cases since 1962. That year, in *Moreland Corp. v. Retail Store Employees Union Local No. 444 AFL-CIO,*[196] the Wisconsin Supreme Court stated that if the property were indeed "a multi-store shopping center, with sidewalks simulated so as to appear public in nature" (the evidence from the trial court was insufficient for such a conclusion), that property rights must yield to First Amendment rights.

Courts in Michigan[197] and California[198] also held malls to be appropriate forums for First Amendment activities, both citing the malls' public character. Michigan's Justice Carr, in the majority opinion in *Amalgamated Clothing Workers v. Wonderland Shopping Center*[199], wrote:

> The nature of the public right of use, promenade and concourse, in and about the public areas' of a modern shopping center which has been set up and made attractively business-operable as here, is not particularly difficult of ascertainment and identity; there being no pertinently appreciable difference between these shopping centers and the historic public markets of earlier days. Wonderland is simply a modern public marketplace. Any handbiller, political leafleteer, ticket seller, hawker or speechmaker, utilizing the public walkways and malls thereof and being otherwise peaceable and law-abiding, can no more be indicted and tried as a trespasser, by and at the will of the holder of the naked fee of the place, than could his possible more boisterous counterpart of yesteryear.[200]

Carr also addresses the question of access based on content.

> If this appeal should be upheld, the handbiller upon such `public areas' is to be made a *trespasser* if his handbill is undesirable; and undesirable not by the law but by the arbitrary decision of the property owner, who, for business purposes, has made of his freehold a much greater public `business-block' than that considered in *Marsh*.[201]

Schwartz-Torrance[202] addresses the alternate forum question, which would also become part of the *Lloyd* test, stating that the existence of other places for the expressive activity did not diminish the right to that activity in the mall.[203]

The U.S. Supreme Court's first word on the First Amendment and shopping malls came in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza Inc.*[204] In that case, the court found the shopping center to be the "functional equivalent"[205] of the business block in *Marsh*. The court ruled that Logan Valley Plaza had no meaningful claim to privacy, and that the state could not delegate power through its trespass laws to exclude people wishing to exercise First Amendment rights "in a manner consonant with the use of the property."[206] In a footnote, the court specifically withheld ruling on whether the First Amendment rights would be protected for speech unrelated to use, a fact which would become a major part of the *Lloyd* decision.[207]

For the next four years, courts across the country used the *Logan Valley* decision as a basis for granting First Amendment rights in shopping malls.[208] At the same time, those wishing to exercise their First Amendment rights on private property were pushing the limits of that right.

In *Brooks v. Peters,*[209] the district court held that a parking lot, though access was unrestricted, was not the same as a shopping center for first amendment purposes, since openness did not distinguish it from other parking lots.

In 1972, the Rhode Island Supreme Court, in *Homart Development Co. v. Fein,*[210] upheld a trial judge's decision that three men attempting to gather signatures to get their names on a general election ballot did not have the right to do so in a mall. The judge cited the mall owner's national policy against all solicitations,[211] the fact that the activity was not related to mall business,[212] and the men's admission that their choice of the mall for gathering signatures was a matter of convenience.[213]

In his concurrence, Chief Justice Roberts relied extensively on the large body of case law based on *Marsh*.

> A careful study of those cases cited by the majority makes it clear that the essential inquiry is not whether title to property rests in the public or private hands. The answer to that query is simple but inconclusive. Rather, the essential question is the nature of the use to which the owner dedicates his property. Whenever an owner opens his property to the public to a degree whereby the property assumes a public character and the owner reaps great financial benefit from this invitation, he subjects himself at the same time to those minor inconveniences which might result from the presence of political campaigners so long as they do not interfere in any substantial way with the essential business purpose.[214]

As the *Homart* case was being edited, the U.S. Supreme Court handed down its decision in *Lloyd Corp. v. Tanner,*[215] a case which would dramatically change the direction of First Amendment/private property cases.

The *Lloyd* court held that the shopping center's invitation to the public was for the limited purpose of patronizing the businesses within, and not for general expressive activity.[216] The court initiated the "adequate alternative forums" test[217] and, taking up where the *Logan Valley* court had left off, determined that speech unrelated to the use of the shopping center could be prohibited.[218]

In his dissent, Justice Marshall, author of the majority opinion in *Logan Valley,* again pointed to the importance of the mall's function as the modern equivalent of the business district or marketplace.[219] He also addressed the question of arbitrariness, noting that Lloyd Corp. had already allowed other types of First Amendment activity, and therefore could not prohibit this particular activity because it disagreed with the message.[220] He found no reason for the "related to use" test implemented by the majority[221] and, noting the wide variety of services available at the mall, found alternative forums would inhibit the ability to get the message across.[222]

Finally, Justice Marshall makes note of the importance of public forums, including those privately owned, in the changing society.

> It would not be surprising in the future to see cities rely more and more in private businesses to perform functions once performed by

> governmental agencies ... As governments rely on private enterprise, public property decreases in favor of privately owned property. It becomes harder and harder for citizens to find means to communicate with other citizens. Only the wealthy may find effective communication possible unless we adhere to *Marsh v. Alabama* ... When there are no effective means of communication, free speech is a mere shibboleth.[223]

The U.S. Supreme Court dealt the final blow to *Logan Valley* in *Central Hardware Co. v. National Labor Relations Board,*[224] decided the same day as *Lloyd.* In that case, the court found that union members had no right to picket in the parking lot of a single, free-standing store based solely on the openness of that property.

Lower courts took immediate notice of the *Lloyd* decision. Illinois ruled against the right to pamphlet in a mall in September 1972[225], three months after the *Lloyd* decision, and Oregon barred Hare Krishnas from similar activity in December.[226]

It was California, however, which presented a new twist on First Amendment activity on private property to the U.S. Supreme Court in 1979. The High Court upheld the California Supreme Court's ruling in *Pruneyard Shopping Center v. Robinson*[227] that the California Constitution's Bill of Rights could provide individuals more protection than its federal counterpart.[228] The court held that California's more proactive First Amendment, which granted citizens the

right to freedom of expression without reference to state law, did not violate the mall owner's First, Fifth or Fourteenth Amendment rights under the federal constitution.[229]

The decision opened the door for states to interpret their own constitutions differently from the federal document. North Carolina found its constitution did not afford greater rights than the U.S. constitution.[230] Connecticut agreed,[231] as did New York[232] and Wisconsin.[233]

Washington, relying on Marsh, found that its constitution conferred a right to freedom of expression on property which functioned as a business district.[234] Massachusetts agreed.[235]

Other state courts sent mixed messages. Michigan found that while its constitution may give greater First Amendment protection than the federal constitution, its framers did not intend for the state Bill of Rights to grant protection for citizens against each other.[236] The court refused to go against the historical intent and interpretation of the state document to allow First Amendment activity in a mall.[237]

Pennsylvania's court, while finding in *Tate* that pamphleteers had a First Amendment right on a private college campus which had opened its facility to public use, found that members of a Socialist Workers party did not have

the right to gather signatures in a mall which had categorically and without discrimination disallowed such activity.[238] The court held that the social aspects of the mall were ancillary to its primary business function[239] and that by having a strict policy against such activity the mall had prevented itself from becoming a public forum.[240]

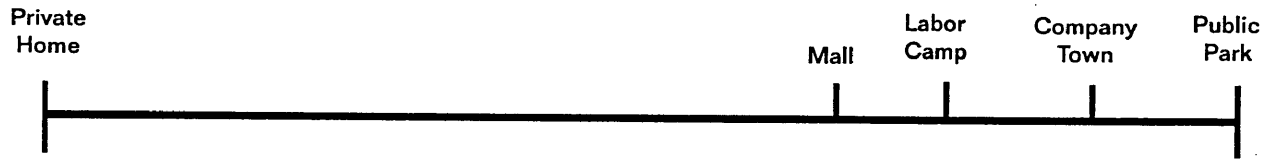
SECTION SUMMARY AND APPLICATION TO RESEARCH QUESTION

To summarize then the case law on freedom of expression in shopping malls, the Supreme Court in *Lloyd* restricted its once affirmative position to find that the First Amendment does not grant access to private property in cases where the message is unrelated to the use of the property and where adequate alternative forums exist. However, through *Pruneyard*, the High Court did allow that states, having power over property law, could interpret their own constitutions as granting such a freedom.

In comparing the courts' rationale in shopping centers to the circumstances of private college campuses, we find that while the two may share degrees of openness, invitation to the public and expectation of privacy, they are dissimilar on other counts. While malls have some characteristics of a town, such as a business district, streets and sidewalks, they lack the sanitary functions and

other services associated with municipalities. On the vital question of control over the flow of information, we find that shopping centers have little power, since shoppers do not reside or work on the property, providing ample opportunity for them to be reached in other forums.

In placing shopping centers on the continuum, we find them between private residences and migrant camps, having openness, invitation and some municipal characteristics, but lacking the residential aspect and thus the ability to control the flow of information.



MULTI-TENANT DWELLINGS

A small body of case law exists relating to the question of freedom of expression in apartment buildings, retirement communities and enclosed communities. Three of the five found during the course of this research involved Jehovah's Witnesses seeking access to those residing in such communities. In the earliest case, *Commonwealth v. Richardson*, the Massachusetts Supreme Judicial Court found that an apartment building owner could not prevent Jehovah's Witnesses from calling on tenants who agreed to see them.[241] In the other two cases involving the religious sect, the

court held representatives did not have the right to distribute materials door to door.[242] In one instance, the building owner did allow distribution of materials on its privately owned streets and sidewalks.[243]

In *State v. Kolcz*,[244] a county court held that a retirement village must allow door-to-door political and religious canvassing, but not commercial solicitation, on the basis that it was essentially a self-sufficient community.[245]

Finally, in *Laguna Publishing v. Golden Rain Foundation*,[246] a California appellate court found that under the state constitution an enclosed, privately-owned residential community could not discriminate against a give-away newspaper in favor of another similar publication in which it had historically had a business interest. The court noted that although not a company town, Leisure World's characteristics brought it close to the definition under *Marsh*.[247] The court also found state action present in Golden Rain Foundation's attempt to invoke state law to deprive the competing newspaper access.[248]

While *Lloyd* until this point had seemed iron clad in its support of free expression prohibitions on private property, the *Laguna* court distinguished this case on the grounds that it involved discriminatory prohibition. The California court speculated that had *Lloyd* involved a

discriminatory limitation on free speech, it may have reached a different conclusion.[249]

> While Leisure World is not a `company town' so as to require that it yield to the results reached in *Marsh*, it is a hybrid in this sense. The question then becomes, notwithstanding that the public is generally excluded except upon invitation of the residents, whether its town-like characteristics compel Golden Rain's yielding to certain constitutional guarantees as a consequence of its adding discrimination to the picture. When that element is added, the balance tips to the side of the scale which imports the presence of state action per Mulkey[250] and the lunch counter cases. In other words, Golden Rain, in the proper exercise of its private property rights, may certainly choose to exclude all give-away, unsolicited newspapers from Leisure World, but once it chooses to admit one, where that decision is not made in concert with the residents, then the discriminatory exclusion of another newspaper represents an abridgement of the free speech, free press rights of the excluded newspaper secured under our state Constitution.[251]

SECTION SUMMARY

AND APPLICATION TO RESEARCH QUESTION

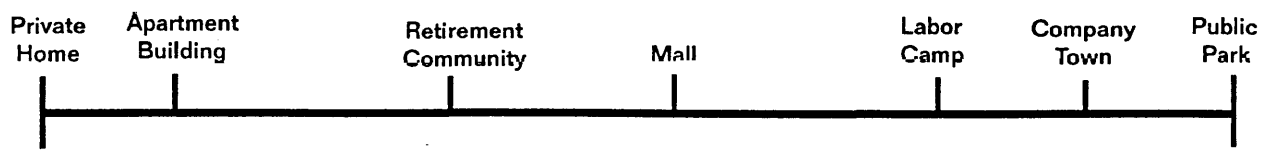
The cases involving multi-tenant residences vary in their results regarding free expression on private property. However, given the influence of *Lloyd* and *Pruneyard* in subsequent cases involving property of all types, one could generalize that courts have been unwilling to find a right of access to such property under the federal constitution, and that such a right could be granted to common areas under

the state constitution, particularly in instances where the community, as in *Laguna* and *Kolcz*, has taken on most of the attributes of a municipality.

Using the examples of the residential seminary and the private, residential urban campus, we could deduce that courts would not allow access to dormitories under the federal constitution, but that access to common areas - sidewalks, streets, park areas - could be granted, particularly under a proactive reading of a state's free speech provision.

In placing multi-tenant buildings on the continuum, we find them directly to the right of private homes, having the same degree of openness, public invitation, need for privacy and municipal characteristics. The potential for control over the flow of information is slightly less, since the landlord could restrict access to individual apartments.

In the instance of enclosed communities and retirement villages, particularly where such property includes multiple buildings providing serves beyond residential dwellings, we would place them right of multi-tenant buildings based on the greater degree of municipal characteristics and the lesser potential for limiting the flow of information.



MISCELLANEOUS PRIVATE PROPERTY

In the course of researching the case law, a number of cases were found which did not lend themselves to the categories delineated above. The decisions in these cases varied according to degree of openness and public invitation as well as their historical placement, i.e. before or after landmark cases such as *Marsh*, *Logan Valley*, *Lloyd*, and *Pruneyard*. They are summarized here briefly.

In *People v. Barisi*,[252] a city magistrate ruled that while a railroad station may technically be private property, it was not a private place, and that having made it such, the owners were subject to constitutional restrictions.

In a ruling preceding *Lloyd*'s consonant with use requirement, the Supreme Court of California found that the question of whether free expression could be carried out in a railway station depended not on whether the activity is consonant with the use of the station but whether it interfered with its function.[253]

> The railway station is like a public street or park ... The railroads seek neither privacy within nor exclusive possession of their station. They therefore cannot invoke the law of trespass against petitioners to protect those interests.[254]

The court in this case also held the presence of alternative forums to be immaterial.[255]

In *Good v. Dow Chemical Co.*,[256] the Texas Appellate Court held that Jehovah's Witnesses did not have the right to meet in a company-owned park which had not been dedicated to public use.

The District Court of New York held in *Farmer v. Moses*[257] that the New York World's Fair Corp., although private, had become so impregnated with state and city action, including financial support, that it fell under the Fourteenth Amendment.[258] In a comment of particular interest in studying private colleges, the court stated:

> Educating the populace is a proper function of the state, and where the state creates separate instrumentalities to carry on its work, the latter may become subject to the constitutional restraints imposed upon the state itself.[259]

The court also noted that if a city or state leases or sells property to a private entity for a purpose it could perform itself, the private entity becomes subject to the constitution.[260]

The question of interference with the property's normal function came before the Minnesota Supreme Court in *State v. Quinnell*,[261] in which the court found that even when the owner has invited the public to use his property, that

invitation does not allow activity hostile to the owner's business.[262] That rationale also applied to a case in which the court held demonstrators could picket on public property but not enter or disrupt services at a church.[263]

The question of freedom of expression on the private property of individual businesses has come before several courts,[264] always with the results that individuals do not have access to such property for First Amendment activity, but only for the limited purposes that the owner has intended.

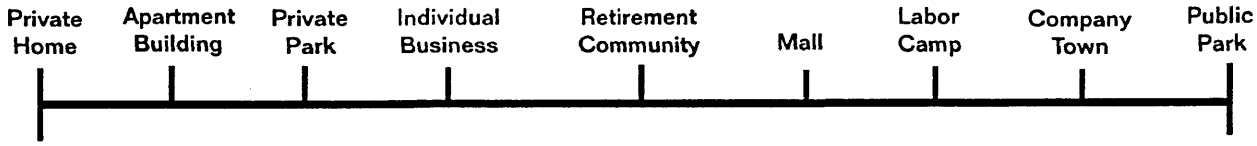
Finally, in an unusual application of the *Lloyd* related-to-use test, a Michigan Court of Appeals held that a privately owned and operated bridge, although public in the sense of transportation, was otherwise private for constitutional purposes and that speech unrelated to its function as a bridge could be prohibited.[265] The case involved commercial speech, making its application to other sets of circumstances questionable.

SECTION SUMMARY AND APPLICATION TO RESEARCH QUESTION

With the exception of the private bridge, the types of property discussed above - railway stations, privately-owned parks and individual businesses - have been subject to First Amendment restraints on the basis of openness, extent of invitation to the public, expectation of privacy, and

similarity to a municipality. The result has been that private parks and individual businesses have been determined not to be public forums, while railway stations have been ruled appropriate places for First Amendment activity.

The circumstances of these cases make their specifics difficult to apply to the two examples of private campuses; however, their results contribute to the developing list of criteria for a privately-held public forum. As a result, they would be placed along the continuum as shown.



Chapter Five

CONCLUSION

Throughout the course of discussion of the cases, a general list of criteria for a public forum has emerged:

1. The degree to which the property is physically open to the public.

2. The extent of the owner's invitation to the public to use the property, including the normal purpose of the property.

3. The extent of the owner's expectation for privacy.

4. The number and extent of similarities between the property and a municipality.

5. The amount of control the owner has over the flow of information to those using his property.

The list of criteria contains both objective and subjective factors. As a result, a mere checklist approach or summing of the points provides an inadequate analysis of whether the property should be considered a public forum. Rather, the answer to each question must be weighed appropriately, with the last factor, the control over the flow of information, receiving the most weight. It is this element - the ability of a private individual or entity to limit or influence the flow of information to another in a way that government is prohibited by the Constitution from

doing - that lies at the heart of the research question. Whether a private college or university campus constitutes a public forum depends, essentially, on the institution's ability to control the flow of information to those living within or using its facilities.

The answer to that question remains subject to the extent to which the college meets the public forum criteria outlines above. The two extreme examples -- the nonresidential seminary and the private, residential urban campus -- can be judged accordingly.

THE NONRESIDENTIAL SEMINARY

1. Degree of openness to the public: little or none.

2. Extent of owner's invitation to the public: barring any invitation or use of the seminary's facilities for community gatherings, the invitation is limited to faculty, staff and enrolled students.

3. Expectation of privacy: although nonresidential, lacking an invitation for public use for gatherings, the owner's expectation for privacy remains high.

4. Similarities to municipality: Being nonresidential, the seminary would lack most of the services and "brick and mortar" attributes of a city, including streets, sewer lines and treatment plant, residences, fire and police.

5. Control: given little openess, high expectation of privacy and no municipal characteristics, the seminary would have a high level of control over the flow of information on its property.

PRIVATE, RESIDENTIAL, URBAN CAMPUS

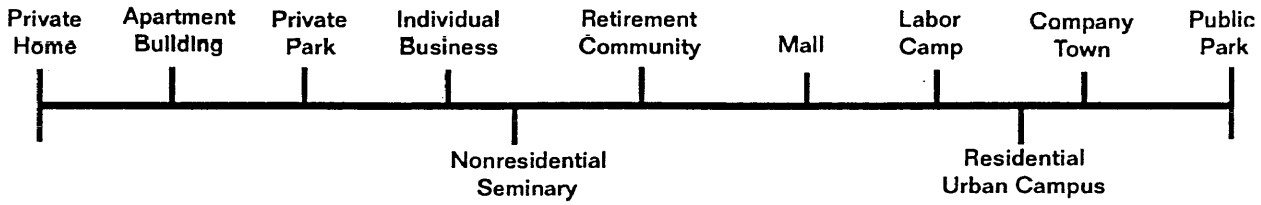
1. Degree to which property is physically open to the public: lacking walled grounds with gated entries, the campus would be generally open to anyone wanting to drive or walk through its grounds.

2. Invitation to the public: in this example, we assume the university allows the general populace to attend plays, sporting events, concerts, art exhibitions and other events. A large university may also allow community organizations the use of meeting facilities.

3. Expectation of privacy: given the circumstances outlined above, the university as an entity has no expectation for privacy. Its students, however, have such a right within their residence halls or other housing.

4. Similarities to a municipality: A large university will normally provide residences, food service, sanitation, fire and police protection, leisure activities, postal facilities and shopping opportunities. In essence, it could be considered a self-sustaining community.

5. Control: Given the factors outlined in No. 4, particularly the low expectation of privacy and the high level of municipal characteristics, the university would have a low degree of control over the flow of information.



Admittedly, the gap between these two examples contains unlimited shades of gray. However, by utilizing the criteria developed in all aspects of First Amendment/private property case law, courts can have the flexibility to reach conclusions that benefit the student, the university and the community without placing an undo burden on any of those entities.

It is the interrelationship between the student, the campus and the community that makes this approach workable. First Amendment/private campus cases and scholarly literature from the 1960s and 1970s focused on the student-university relationship, usually on the question of due process. What these works failed to include was the element the community brings to the equation. A right for students of private universities to speak freely on campus property is empty without the community's right -- not subject to the whims of the university -- to enter the campus to communicate with students.

This essential component becomes possible when courts look at private campuses not as enclaves for a particular sect or belief, but as privately-owned public forums -- when those campuses have essentially created that forum by their very structure.

The conclusion of this research has to be that the groundwork exists for courts to find private campuses to be privately-owned public forums when they meet the criteria distilled from more than 40 years of case law. At the same time, private campuses which have not, by design or intent, met those criteria remain free from the responsibility and burden associated with a privately-owned public forum.

LIMITATIONS OF THE RESEARCH

As with any research based on legal precedent, the conclusions reached remain subject to interpretation by the courts. The case law shows how a single decision can dramatically impact the direction a body of law takes and how differently various courts can interpret the results. The reliance upon state constitutional law in the shopping center cases and other categories makes future outcomes particularly difficult to ascertain.

The outcome of future cases also remains subject to the particulars of the cases themselves, a flaw inherent in any type of balancing approach.

FOOTNOTES

[1] Commonwealth v. Tate, 495 Pa. 158, 432 A.2d 1382 (Pa. 1981).

[2] W. Freedman, Freedom of Speech on Private Property (1988).

[3] *Lloyd Corp. v. Tanner: Death of the Public Forum?* 7 U.S.F. L. Rev. 582, 583 (1973) [hereinafter *Death of the Public Forum*].

[4] C.J. Berger, *Pruneyard Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. Rev. 633, 635 (1991).

[5] *Tate supra* note 1.

[6] *Lloyd Corp. v. Tanner: A Shopping Center Open for Business but not for Dissent*, 25 Maine L. Rev. 131 (1973) [hereinafter *Dissent*]; L.M. Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 Yale L.J. 1006, 1007 (1987)

[7] K.L. Karst, *Equality as a Central Principle of the First Amendment*, 43 U. Chi. L. Rev. 20, 25 (1975).

[8] R. Smolla, Free Speech in an Open Society (1992); Karst *supra* note 7 at 23; T. Emerson, The System of Freedom of Expression 6-7 (1970).

[9] C. Kempler, *Shopping for the First Amendment*, 7 *Human Rights* 38, 39 (1978).

[10] Property rights are a state power, not a federal one. Notes, *Private Abridgement of Speech and the State Constitutions*, 90 Yale L.J. 165, 177 (1980) [hereinafter *Private Abridgement*].

[11] *The Public Forum from Marsh to Lloyd*, 24 Amer. Univ. L. Rev. 159, 191 (1974); T. Emerson, *supra* note 8 at 299; *Supreme Court 1967 Term*, 82 Harv. L. Rev. 63, 135 (1968); Salzman, *Pruneyard's Progeny: State-Created Free Speech Access to Quasi-Public Property*, 1984 Ann. Survey of Amer. Law 121, 121 (1984); Stevenson, *The Privately Owned Shopping*

Center: Is It a Marketplace of Ideas? 8 Emp. Rel. L.J. 684, 685 (1983).

[12] Berger, *supra* note 4 at 638, 663.

[13] Constitutional Law -- First Amendment, *Shopping Centers and the Quasi-Public Forum*, 51 N.C. L. Rev. 123, 125 (1972) [hereinafter *Shopping Centers*]; Ragosta, *Free Speech Access to Shipping Malls Under State Constitutions: Analysis and Rejection*, 37 Syracuse L. Rev. 1, 1 (1986); Berger, *supra* note 4 at 637.

[14] *First Amendment Rights vs. Private Property Rights -- The Death of the "Functional Equivalent,"* 27 Univ. Miami L. Rev. 220, 220 (1972) [hereinafter *Functional Equivalent*].

[15] 318 U.S. 413 (1943).

[16] W. Freedman, *supra* note 2 at 37.

[17] Karst, *supra* note 7 at 35.

[18] Notes, *State Action: Theories for Applying Constutional Restrictions to Private Activity*, 74 Colum. L. Rev. 656, 673 (1974) [hereinafter *Theories*].

[19] 307 U.S. 496 (1939).

[20] Constitutional Law, *The Public Forum in Nontraditional Areas*, 51 Wash. L. Rev. 142, 145 (1975); *The Public Forum from Marsh to Lloyd*, *supra* note 11 at 166; *Death of the Public Forum? supra* note 3 at 582; Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 The Supreme Court Law Reveiw 11; Stevenson, *supra* note 11 at 684; Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 953 (1963); T. Emerson, *supra* note 8 at 299; *Shopping Centers*, *supra* note 13 at 125; R. Smolla, *supra* note 8 at 208; *Free Speech, Initiative and Property Rights -- Four Alternatives to the State Action Requirement in Washington*, 58 Wash. L. Rev. 608, 614 (1983) [hereinafter *Free Speech*]. The Supreme Court did not recognize a right to free speech in such "traditional" public forums until Davis v. Massachusetts in 1897. The court specifically compared the

government's control of public property to the individual's control of his home.

[21] Comments, *The Shopping Center: Quasi-Public Forum for Suburbia*, 5 U.S.F. L. Rev. 103, 106 (1971) [hereinafter *Suburbia*].

[22] R. Smolla, *supra* note 8 at 210.

[23] Id. at 210; Henely, *Property Rights and First Amendment Rights, Balance and Conflict*, 62 A.B.A.J. 77, 77 (1976).

[24] Berger, *supra* note 4 at 653.

[25] *Theories supra* note 18 at 656; *Post-Pruneyard Access to Michigan Shopping Centers: The "Malling" of Constitutional Rights*, 30 Wayne L. Rev. 93, 101 (1983) [hereinafter *Post-Pruneyard*].

[26] *Applicability of the Fourteenth Amendment to Private Organizations*, 61 Harv. L. Rev. 334, 347 (1948) [hereinafter *Private Organizations*]; *Post-Pruneyard, supra* note 25 at 103; Constitutional Law, *Toward a Constitutional Right of Access to Migrant Labor Camps*, 29 Rutgers L. Rev. 972, 977 (1976) [hereinafter *Right of Access]*; Property which has governmental attributes should be considered the same as public property for First Amendment purposes. T. Emerson, *supra* note 8 at 307.

[27] *Student Due Process in the Private University: The State Action Doctrine*, 20 Syracuse L. Rev. 911, 914 (1969) [hereinafter *Student Due Process*]; Case Comments -- Constitutional Law, *Shopping Centers Not Open to First Amendment Activities Unrelated to Use*, 57 Minn. L. Rev. 603, 605 (1973) [hereinafter *Activities*]; *Theories, supra* note 18 at 65.

[28] Comments, *State Constitutional Rights of Free Speech on Private Property: The Liberal Loophole*, 18 Gonzaga L. Rev. 81, 92 (1982) [hereinafter *Liberal Loophole*]; *Activities, supra* note 27 at 605; *Private Organizations, supra* note 26 347.

[29] P.C. Schubert, *State Action and the Private University*, 24 Rutgers L. Rev. 323, 323 (1970).
[30] *Theories*, *supra* note 18 at 658; T. Emerson, *supra* note 8 at 309.
[31] *See Broderick v. Catholic University*, 365 F. Supp. 147 (D.D.C. 1978); *Corp. of Haverford College v. Reeher*, 329 F. Supp. 1196 (E.D. Pa. 1971); *Greenya v. George Washington Univ.*, 512 F. 2d 556 (D.C. Cir. 1975); *Grove City College v. Bell*, 687 F.2d 684 (3d Cir. 1983); *Samson v. Columbia Univ.*, 167 N.Y.S. 202 (N.Y. 1917).
[32] P.C. Schubert, *supra* note 29 at 342; M.M. Chambers, The Campus and the People, 49 (1960).
[33] Thigpen, *The Application of Fourteenth Amendment Norms to Private Colleges and Universities*, 11 J.L. & Educ. 171, 197 (1982); L.M. Cohen, *The Private-Public Legal Aspects of Institutions of Higher Education*, 45 Den. L.J. 643, 646 (1968).
[34] Thigpen, *supra* note 33 at 197.
[35] *Theories*, *supra* note 18 at 672; Spriggs, *Access of Visitors to Labor Camps on Privately Owned Property*, 21 U. Fla. L. Rev. 295, 306 (1969).
[36] *Supreme Court 1967 Term*, *supra* note 11 at 132; Faccenda and Ross, *Constitutional and Statutory Regulation of Private Colleges and Universities*, 9 Val. Univ. L. Rev. 539, 544-45 (1975).
[37] *Union Organizational Rights and the Concept of Quasi-Public Property*, 49 Minn. L. Rev. 505, 515 (1965); Schwartz, *A Landholder's Right to Possession of Property Versus a Citizen's Right of Free Speech: Tort Law as a Resource for Conflict Resolution*, 45 U. Chi. L. Rev. 1, 2 (1976); *Dissent*, *supra* note 6 at 137.
[38] Schubert, *supra* note 29 at 347.
[39] Schwartz, *supra* note 37 at 17.
[40] Id.

[41] Id.
[42] *The Public Forum from Marsh to Lloyd*, *supra* note 11 at 164; Henely, *supra* note 23 at 77.
[43] Id. at 78
[44] Berger, *supra* note 4 at 649.
[45] Henely, *supra* note 23 at 82; DuFresne & McDonnell, *The Migrant Labor Camps: Enclaves of Isolation in Our Midst*, 40 Fordham L. Rev. 279, 303 (1971).
[46] 326 U.S. 501 (1946).
[47] Id.
[48] Id. at 506.
[49] Schwartz, *supra* note 37 at 2.
[50] *The Public Forum from Marsh to Lloyd*, *supra* note 11 at 165; Case Comment, *Shopping for a Public Forum: Pruneyard Shopping Center v. Robins, Publicly Used Private Property and Constitutionally Protected Speech*, 21 Santa Clara L. Rev. 801, 807 (1981) [hereinafter *Shopping*]; Berger, *supra* note 4 at 636; *Shopping Center Control: The Developer Besieged*, 51 U. Det. J. Urb. L. 585, 646 (1974) [hereinafter *Developer Besieged*]; Dorsen & Gora, *Free Speech, Property and the Burger Court: Old Values, New Balances*, 1982 Supreme Court Review 195, 198 (1982).
[51] *Theories*, *supra* note 18 at 691; Recent Decisions, *Constitutional law -- Freedom of Speech -- Distribution of Handbills in a Privately Owned Shopping Mall is not Protected by the First Amendment When the Handbilling is Unrelated to the Operations of the Shopping Mall*, 7 Geo. L. Rev. 177, 184 (1972) [hereinafter *Distribution of Handbills*]; *Dissent*, *supra* note 6 at 139; *Post-Pruneyard*, *supra* note 25 at 104; Stevenson, *supra* note 11 at 687; *Access to Farms as Mandated by the U.S. Constitution and by the Action of the California Board of Agricultural Labor Relations*, 8 S.W. L. Rev. 165, 176 (1976) [hereinafter *Access*]; *Access to Migrant Labor Camps: Marsh v. Alabama*

Revisted, 55 Chi-Kent L. Rev. 285, 299 (1979) [hereinafter *Migrant*]; *The Bill of Rights, State Action, and Private Migrant Labor Camps*, 1 Utah L. Rev. 214, 223 (1976) [hereinafter *Bill of Rights*]; DuFresne & McDonnell, *supra* note 45 at 290; Karst, *supra* note 7 at 28; *Suburbia*, *supra* note 21 at 104; Salzman, *supra* note 11 at 125; *Shopping Centers*, *supra* note 13 at 126.

[52] T. Emerson, *supra* note 8 at 9.

[53] Schwartz, *supra* note 37 at 5.

[54] Recent Developments, *Lloyd Corp. v. Tanner: Expression of First Amendment Rights in the Privately Owned Shopping Center -- A Reevaluation by the Burger Court*, 22 Cath. Univ. L. Rev. 807, 827 (1973) [hereinafter *Reevaluation*].

[55] 391 U.S. 308 (1968).

[56] *Supreme Court 1967 Term*, *supra* note 11 at 133.

[57] *See The Shopping Center as a Forum for the Exercise of First Amendment Rights*, 37 Albany L. Rev. 556, 565 (1973);

[58] 407 U.S. 551 (1971); *Shopping*, *supra* note 50 at 811.

[59] *Reevaluation*, *supra* note 54 at 807; Stevenson, *supra* note 11 at 695; Constitutional Law, *A State-Created Right to Petition Upon Private Proeprty Does Not Violate the Property Owners Fifth and Fourteenth or First and Fourteenth Amendment Rights*, 30 Drake L. Rev. 422, 427 (1980) [hereinafter *State-Created Right*]; *Shopping*, *supra* note 50 at 811, 828, suggesting that the only rationale for the changes from Marsh to Logan Valley to Lloyd to Hudgens is the change in the court; *Shopping Center Picketing: The Impact of Hudgens v. National Labor Relations Board*, 45 George Wash. L. Rev. 1, 8 (1977) [hereinafter *Picketing*]; Dorsen & Gora, *supra* note 50 at 202.

[60] *Shopping Centers*, *supra* note 13 at 129; *The Public Forum from Marsh to Lloyd*, *supra* note 11 at 175.

[61] *The Public Forum from Marsh to Lloyd*, *supra* note 11 at 178, stating that the court meant interference. *Suburbia*,

supra note 21 at 108, stating consonant with use does not mean consonant with a public business district.

[62] *The Public Forum from Marsh to Lloyd*, *supra* note 11 at 195.

[63] *Bill of Rights*, *supra* note 51 at 220.

[64] Stevenson, *supra* note 11 at 694; R. O'Neil, *Private Universities and Pubic Law*, 19 Buffalo L. Rev. 155, 169 (1970); *The Public Forum from Marsh to Lloyd*, *supra* note 11 at 177, 182.

[65] Notes, *First Amendment and the Problem of Access to Migrant Labor Camps After Lloyd Corp. v. Tanner*, 61 Cornell L. Rev. 560, 582 (1976) [hereinafter *Problem of Access*]; *Death of the Public Forum?* *supra* note 3 at 593; *Private Abridgement*, *supra* note 10 at 165.

[66] Henely, *supra* note 23 at 82.

[67] Constitutional Law -- Freedom of Speech, *Owners' Fifth Amendment Property Rights Prevent a State Constitution from Providing Broader Free Speech Rights than Provided by the First Amendment*, 86 Harv. L. Rev. 1592, 1601 (1973); *The Public Forum from Marsh to Lloyd*, *supra* note 11 at 176.

[68] *Supreme Court 1967 Term*, *supra* note 11 at 136; *Activities*, *supra* note 27 at 613; *Shopping Centers*, *supra* note 13 at 132.

[69] Berger, *supra* note 4 at 686; Constitutional Law -- First Amendment, *Center Owner May Use State Trespass Statutes to Prohibit Speech Within His Shopping Center*, 8 St. Mary's L.J. 366, 368 (1976) [hereinafter *Center Owner*]; *The Public Forum from Marsh to Lloyd*, *supra* note 11 at 184.

[70] *Dissent*, *supra* note 6 at 140; *Suburbia*, *supra* note 21 at 113.

[71] *Shopping*, *supra* note 50 at 813.

[72] *Lloyd Corp. v. Tanner: Property Rights in a Privately Owned Shopping Center v. The Rights of Free Speech*, 9 Will. L.J. 181, 188 (1973); DuFresne & McDonnell, *supra* note 45 at

292; *Shopping Centers*, *supra* note 13 at 133.

[73] *Reevaluation*, *supra* note 54 at 827; Stevenson, *supra* note 11 at 690; *Access*, *supra* note 51 at 168.
One author, however, has proposed that Lloyd limits Marsh to property which has all of the attributes of a town, although that was not the intention of the Marsh court. *See Bill of Rights*, *supra* note 51 at 220; *Shopping*, *supra* note 50 at 810; *Shopping Centers and the Fourteenth Amendment: Public Function and State Action*, 33 Univ. Pitt. L. Rev. 112, 119 (1971).

[74] *Shopping*, *supra* note 50 at 812.

[75] Stevenson, *supra* note 11 at 690.

[76] *Developer Besieged*, *supra* note 50 at 632.

[77] *Dissent*, *supra* note 6 at 144.

[78] *Developer Besieged*, *supra* note 50 at 646; Stevenson, *supra* note 11 at 693.

[79] Berger, *supra* note 4 at 655.

[80] Stevenson, *supra* note 11 at 693.

[81] *Robins v. Pruneyard Shopping Center: Federalism and State Protection of Free Speech*, 10 Golden Gate U. L. Rev. 805, 829 (1980) [hereinafter *Federalism*].

[82] 424 U.S. 507 (1976).

[83] *Center Owner*, *supra* note 69 at 371; *Functional Equivalent*, *supra* note 14 at 225.

[84] *Picketing*, *supra* note 59 at 11.

[85] Stevenson, *supra* note 11 at 698; *Migrant*, *supra* note 51 at 291.

[86] *Center Owner*, *supra* note 69 at 372; *Death of the Public Forum*, *supra* note 3 at 592; Kempler, *supra* note 9 at 41.

[87] *Shopping*, *supra* note 50 at 816; In fact, only two other justices agreed with *Hudgens* author Justice Stewart that *Lloyd* had overruled *Logan Valley*.

[88] 407 U.S. 539 (1972).

[89] Stevenson, *supra* note 11 at 697.

[90] 447 U.S. 74 (1984).
[91] Stevenson, *supra* note 11 at 705.
[92] Constitutional Law -- Freedom of Speech, *Handbilling Unrelated to the Business Function of a Shopping Center not Protected by First Amendment*, 19 N.Y.L.F. 174, 176 (1973) [hereinafter *Handbilling*].
[93] Case Notes, *State Constitutions and Freedom of Speech on Private Property*, 18 Amer. Bus. L.J. 562, 563 (1981).
[94] *State-Created Right*, *supra* note 59 at 430; *Shopping*, *supra* note 50 at 827; Case Comments -- Constitutional Law, *Speak Freely in California Shopping Centers*, 32 U. Fla. L. Rev. 760, 766 (1980); Dorsen & Gora, *supra* note 50 at 225.
[95] *Shopping*, *supra* note 50 at 823; Stevenson, *supra* note 11 at 702; Ragosta, *supra* note 13 at 5.
[96] Sherman & Levy, *Free Access to Migrant Labor Camps*, 57 ABA J. 434, 437 (1971).
[97] *Access*, *supra* note 51 at 172; Spriggs, *supra* note 35 at 297; Salzman, *supra* note 11 at 143; Ragosta, *supra* note 13 at 36.
[98] *Access*, *supra* note 51 at 168; *Right of Access*, *supra* note 26 at 993.
[99] *Access*, *supra* note 51 at 175.
[100] 376 F. Supp. 357 (D. Del. 1974), aff'd, 518 F.2d 130 (3d Cir. 1975).
[101] *Access*, *supra* note 51 at 173.
[102] *Right of Access*, *supra* note 26 at 989; *Distribution of Handbills*, *supra* note 51 at 186.
[103] *Bill of Rights*, *supra* note 51 at 219; *Federalism*, *supra* note 81 at 828.
[104] *Problem of Access*, *supra* note 65 at 575.
[105] *Migrant*, *supra* note 51 at 292; *Access*, *supra* note 51 at 177; *Problem of Access*, *supra* note 65 at 562, 585.
[106] Spriggs, *supra* note 35 at 315.
[107] *Private Abridgement*, *supra* note 10 at 171; *Migrant*,

supra note 51 at 301.

[108] *Migrant, supra* note 51 at 295; DuFresne & McDonnell, *supra* note 45 at 304.

[109] Spriggs, *supra* note 35 at 299.

[110] *Free Speech, supra* note 20 at 608 .

[111] Id.

[112] *Liberal Loophole, supra* note 28 at 97.

[113] *Activities, supra* note 27 at 616.

[114] *Migrant, supra* note 51 at 295; *Free Speech, supra* note 20 at 611.

[115] Emerson, *supra* note 8 at 12

[116] *Migrant, supra* note 51 at 300; *Bill of Rights, supra* note 51 at 225; *Problem of Access, supra* note 65 at 576; Constitutional Law -- Freedom of Speech, *State Constitution Creates Right of Access to Private Property Independent of Federal Constitution*, 12 Seton Hall L. Rev. 76, 93 (1981).

[117] *Migrant, supra* note 51 at 300; *Bill of Rights, supra* note 51 at 224; Catz & Scher, *Recent Developments in the Law of Access to Migrant Labor Camps*, 8 Clearinghouse Rev. 848, 849 (1975); *Right of Access, supra* note 26 at 991.

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[121] Cong. Quart. Almanac, 1991 at 381.

[122] Cohen, *supra* note 33 at 644; R. O'Neil, *supra* note 64 at 161; *State Constitution Creates Right, supra* note 116 at 87; *Handbilling, supra* note 92 at 181 note 5.

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[137] 347 U.S. 483 (1954).
[138] Id. at
[139] *Trustees v. Dartmouth, supra* note 118 at 124.
[140] R. O'Neil, *supra* note 64 at 178; Schubert, *supra* note 29 at 331; M.M. Chambers, *supra* note 32 at 69; Thigpen, *supra* note 33 at 180; Van Alstyne, *The Judicial Trend Toward Student Academic Freedom,* 20 U. Fla. L. Rev. 290, 291 (1968). *Theories, supra* note 18 at 672.
[141] R. O'Neil, *supra* note 64 at 332.
[142] *Private Organizations, supra* note 26 at 350; *Theories, supra* note 18 at 675, citing *Green v. Connally,* 330 F. Supp. 1150 (1971) and *McGlotten v. Connally,* 338 F. Supp. 448 (1972). *See also, Bob Jones Univ. v. Connally,* 341 F. Supp. 277 (1971); *Bob Jones Univ. v. Johnson,* 396 F. Supp. 597 (1974); *Bob Jones Univ. v. Simon,* 416 U.S. 497 (1954); *Bob*

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