COMMENTS

THE EXERCISE OF FIRST AMENDMENT RIGHTS IN PRIVATELY OWNED SHOPPING CENTERS

Lloyd Corporation v. Tanner
407 U.S. 551 (1972)

Respondents distributed anti-war handbills in the interior mall of Lloyd Center, a large privately owned shopping center housing sixty commercial tenants and occupying fifty acres of land surrounded by four public streets. Uniformed guards employed by the center's owners and commissioned with full police authority by the city of Portland threatened respondents with arrest under state trespass laws pursuant to Lloyd's policy against all handbilling. To avoid arrest, respondents left the premises and subsequently sought injunctive and declaratory relief[1] to prevent interference with their handbilling, asserting that it was protected by the first and fourteenth amendments. A federal district court granted the injunction, holding that Lloyd's flat prohibition violated respondents' first amendment rights.[2] The Ninth Circuit Court of Appeals affirmed.[3] The Supreme Court reversed and *held*: A shopping center may non-discriminatorily prohibit the exercise of first amendment rights on privately owned property that is open to the public if the speech has no relation to the function of the property and if there are alternative methods available for reaching the desired audience.

In carving out a special position for first amendment freedoms, the Supreme Court has often emphasized the importance of a well-in-

1. Relief was sought under 28 U.S.C. § 2201 and 42 U.S.C. § 1983 (1970). 28 U.S.C. § 2201 provides for declaratory judgments. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. Tanner v. Lloyd Corp., 308 F. Supp. 128 (D. Ore. 1970).
3. Tanner v. Lloyd Corp., 446 F.2d 545 (9th Cir. 1971) (per curiam).

formed public in a democratic society.[4] The Court has consistently recognized the right of access to public streets and parks for the purpose of exercising first amendment rights,[5] subject to reasonable regulations as to time, place, and manner of such activity.[6]

The Supreme Court first dealt with the issue of the exercise of free speech on private property in *Marsh v. Alabama*,[7] which held that the owner of a company town could not, through the use of state trespass laws, prevent a Jehovah's Witness from distributing religious literature in the business district of the town. Writing for the majority, Justice Black emphasized that, although the property was privately owned, no

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4. Watts v. United States, 394 U.S. 705 (1969); New York Times v. Sullivan, 376 U.S. 254 (1964). With reference to the preferred position doctrine, *see, e.g.*, Kovacs v. Cooper, 336 U.S. 77 (1949); Jones v. Opelika, 316 U.S. 584, 608 (1942) (dissenting opinion); Thornhill v. Alabama, 310 U.S. 88 (1940); United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); Grosjean v. American Press Co., 297 U.S. 233 (1936).

5. Hague v. CIO, 307 U.S. 496, 515 (1939):

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions.

The Court has approved the use of the streets for various modes of speech: Gregory v. Chicago, 394 U.S. 111 (1969) (parading); Saia v. New York, 334 U.S. 558 (1948) (sound trucks); Martin v. City of Struthers, 319 U.S. 141 (1943) (door-to-door canvassing for religious purposes); Jamison v. Texas, 318 U.S. 413 (1943) (handbill distribution).

6. There are several permissible reasonable regulations: Adderly v. Florida, 385 U.S. 39 (1966) (exclusion where public property not generally open to the public); Cox v. Louisiana, 379 U.S. 536 (1965) (prevention of obstruction of traffic and building entrance); Feiner v. New York, 340 U.S. 315 (1951) (use of fighting words); Terminiello v. Chicago, 337 U.S. 1 (1949) (fighting words); Kovacs v. Cooper, 336 U.S. 77 (1949) (control of loud and annoying noises); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words); Cox v. New Hampshire, 312 U.S. 569 (1941) (prevention of obstruction).

Regulations of free speech to prevent littering and annoyance have been held invalid. *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141 (1943); Schneider v. State, 308 U.S. 147 (1939). Likewise invalid are fee requirements and systems of discretionary licensing. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536 (1965); Kunz v. New York, 340 U.S. 290 (1951); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cox v. New Hampshire, 312 U.S. 569 (1941); Lovell v. City of Griffin, 303 U.S. 444 (1938).

For a good overview of the early cases concerning the accommodation of first amendment rights to the use of the streets with public order and convenience, *see* Niemotko v. Maryland, 340 U.S. 268, 273 (1951) (Frankfurter, J., concurring). *See also* Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

7. 326 U.S. 501 (1946).

other characteristic distinguished it from any other Alabama town,[8] and that any ordinary municipality clearly could not have prevented Marsh from exercising her first amendment rights.[9] Because the private property served a public function and its owner stood in the shoes of the state, the private action came within the ambit of the first and fourteenth amendments.[10]

In *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*,[11] the Court took *Marsh* one step further and upheld the right of a labor union to carry on peaceful informational picketing on the premises of a supermarket located in a privately owned shopping center. Interpreting *Marsh* to stand for the proposition that "under some circumstances property that is privately owned may, at least for First Amendment purposes, be treated as though it were publicly held,"[12] the opinion relied on the theory that the center was the "functional equivalent" of the business district in *Marsh*.[13] The Court also found it important that there was no reasonable alternative location available on public property.[14] Although the opinion seemed to rest on the broad policy of the public's right of access to information,[15] the hold-

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8. *Id.* at 502-03.

9. Jamison v. Texas, 318 U.S. 413 (1943); Lovell v. City of Griffin, 303 U.S. 444 (1938).

10. Marsh v. Alabama, 326 U.S. 501, 506 (1946):

> 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 his rights become circumscribed by the statutory and constitutional rights of those who use it.

See note 35 *infra* and accompanying text.

11. 391 U.S. 308 (1968).

12. *Id.* at 316.

13. 326 U.S. at 502-03.

14. The Court noted both the practical difficulty of reaching the relevant audience as well as physical dangers which would result from relegating the pickets or handbillers to adjacent highways. Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 322 (1968). The Court also mentioned, but did not comment on the merits of, the union's contention that unless the picketing was carried out near the establishment that was the target of the informational picketing, it might be held to constitute a secondary boycott. *Id.* at 323 n.12.

15. The Court also noted the rapid growth in the number and comprehensiveness of modern suburban shopping centers. To have decided otherwise here would subject downtown businesses to on-the-spot criticism, but "businesses situated in the suburbs could largely immunize themselves by creating a cordon sanitaire of parking lots around their stores. Neither precedent nor policy compels a result so at variance with the goal of free expression and communication that is the heart of the First Amendment." *Id.* at 325.

ing was limited to preventing owners of private property that is the "functional equivalent" of a business district from absolutely prohibiting speech which is related to the function of the property.[16] Justice Black vigorously dissented,[17] saying that *Marsh* turned on the fact that an entire town was involved, not merely a business block.[18]

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16. Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 319-20 (1968):

> All we decide here is that because the shopping center serves as the community business block "and is freely accessible and open to the public in the area and those passing through," [citing Marsh v. Alabama, 326 U.S. 501, 508 (1946)] the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.

The Court explicitly refrained from discussing or deciding a case in which the picketing was not directly related to the use of the property. *Id.* at 320 n.9. Consumers protesting overpricing or shoddy merchandise and workers challenging substandard working conditions were mentioned by the Court as examples of speech that would be related to the function of the property. *Id.* at 324.

Both the opinion and the holding in *Logan Valley* were broad in that they applied not only to picketing but also to handbilling. The Pennsylvania state court injunction at issue in the case purported to prohibit all types of speech on Logan Valley's property, and the Court refused to distinguish between picketing and handbilling for the purpose of the right of access, because they are both "speech plus" situations, and concluded that "a holding that petitioners are entitled to picket within the mall obviously extends to handbilling as well." *Id.* at 322 n.11.

17. Justice Black was the author of the *Marsh* opinion.

18. Justice Black also noted that Marsh had been arrested by a county deputy sheriff who was paid by the town's owner, while no similar showing was made in *Logan Valley*. 391 U.S. at 331 n.5.

Justice Harlan dissented on the ground that under the preemption doctrine the case should have been decided on statutory grounds, National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1970), rather than constitutional grounds. *Id.* at 333. Justice White's dissent noted the logical difficulty of limiting the rationale of the case to only related speech. *Id.* at 339.

Although the lower federal courts and the state courts are split on the extent to which privately owned property may be treated as though publicly held for first amendment purposes, they usually have upheld a right of access to shopping centers, especially since the *Logan Valley* case.

The Second Circuit devised a flexible test which looked to the nature and use of the property rather than the ownership in striking down a blanket prohibition of handbilling in a bus depot. That test considered whether "the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance." Wolin v. Port of New York Authority, 392 F.2d 83, 89 (2d Cir.), *cert. denied*, 393 U.S. 940 (1958). Courts have used similar reasoning to reach comparable results with respect to railway stations. *See, e.g., In re* Hoffman, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967) (railway station); People v. St. Clair, 56 Misc. 2d 326, 288 N.Y.S.2d 388

(City Crim. Ct. 1968) (subway platform). The New York World's Fair Corporation was allowed to exclude N.A.A.C.P. pickets from the fairgrounds on the basis that picketing would unduly interfere with the Fair, but the court indicated that handbilling would have to be allowed on first amendment grounds. Farmer v. Moses, 232 F. Supp. 154, 161 (S.D.N.Y. 1964).

The weight of authority has placed some types of buildings beyond the reach of the first and fourteenth amendments: Chicago v. Rosser, 47 Ill. 2d 10, 264 N.E.2d 158 (1970) (office buildings); Watchtower Bible and Tract Soc. v. Metropolitan Life Ins. Co., 297 N.Y. 339, 79 N.E.2d 433 (1948), *cert. denied*, 335 U.S. 866 (1949) (apartment buildings); Hall v. Commonwealth, 188 Va. 72, 49 S.E.2d 369 (1948) (apartment building); *cf.* Commonwealth v. Richardson, 313 Mass. 632, 48 N.E.2d 678 (1943).

Decisions involving colleges and universities have generally turned on the degree of state or federal financial involvement. *See* Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); Grossner v. Trustees of Columbia University, 287 F. Supp. 535 (S.D.N.Y. 1968); *cf.* O'Leary v. Commonwealth, 441 S.W.2d 150 (Ky. 1969). On the issue of state action, *see* note 34 *infra.*

Many cases involving the exercise of free speech on private property used for commercial purposes, both shopping centers and free-standing stores, have arisen in the context of labor activity, and have been dealt with on statutory grounds. The principal case in this area is NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956), which involved union picketing in an employee parking lot of a manufacturing plant. Basing its opinion on statutory rights of self-organization granted by the National Labor Relations Act §§ 7 and 8(a)(1), the Court held that an invasion of the employer's property would be warranted only where no adequate alternative was available, such as reaching the employees at home. In Central Hardware v. NLRB, 407 U.S. 539 (1972), *on remand*, 468 F.2d 253 (8th Cir. 1972), the court reaffirmed *Babcock & Wilcox* and extended it to a situation where the parking lot was open to the public. The entire Court agreed to dispose of the case on statutory grounds. For cases in this area disposed by the courts on statutory grounds, *see, e.g.*, Taggart v. Weinacker's, Inc., 397 U.S. 223 (1970); Amalgamated Meat Cutters Local 427 v. Fairlawn Meats, 353 U.S. 20 (1957); Marshall Field & Co. v. NLRB, 200 F.2d 375 (7th Cir. 1952); South Discount Foods v. Retail Clerks Local 1552, 14 Ohio Misc. 188, 235 N.E.2d 143 (1968); Freeman v. Retail Clerks Local 1207, 58 Wash. 2d 426, 363 P.2d 803 (1961).

Among the courts that have reached the constitutional issue in a labor situation there is substantial agreement that property rights must yield to first amendment rights. *See, e.g.*, Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers Local 31, 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233, *cert. denied*, 380 U.S. 906 (1964); State v. Williams, 44 L.R.R.M. 2357 (Balt., Md., Crim. Ct. 1959); Amalgamated Clothing Workers v. Wonderland Shopping Center, 370 Mich. 547, 122 N.W.2d 785 (1963) (equally divided court); Moreland Corp. v. Retail Store Employees Local 444, 16 Wis. 2d 499, 114 N.W.2d 876 (1962). California has extended the same rationale to free-standing stores. *In re* Lane, 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969). *Contra*, Hood v. Stafford, 213 Tenn. 684, 378 S.W.2d 766 (1964).

The labor cases would clearly seem to fall within the specific limitation in *Logan Valley* that the speech be related to the function of the property. *See* note 16 *supra.* Some state courts have indicated a willingness to ignore this limitation when faced with cases of non-related speech. *See, e.g.*, Diamond v. Bland, 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970), *cert. denied*, 402 U.S. 988 (1971) (circulation of initiative petitions in shopping center permitted); State v. Miller, 280 Minn. 566, 159 N.W.2d

The Court in *Lloyd Corporation v. Tanner*[19] refused to extend *Marsh* and limited *Logan Valley* to its precise facts. Citing Justice Black's dissent in *Logan Valley*,[20] the majority opinion interpreted *Marsh* to apply only when an entire town was involved, reading the language in *Logan Valley* concerning the "functional equivalent" of a business district as dictum.[21] The Court held that the two requirements imposed by *Logan Valley*,[22] the existence of a direct relation between the function of the property and the speech and the absence of alternative locations,[23] had not been met in the instant case. The majority found it inconclusive that the shopping center was open to the public, since the invitation was limited to the purpose of doing business with the tenants.[24] That the management of Lloyd Center did allow some meetings and fund-raising activities to take place on the premises was considered consistent with the majority's reasoning by characterizing those activities as promotional.[25] The property thus retained its private character and, as such, its protection under the fifth and fourteenth amendments. Even though first amendment freedoms occupy a preferred position,[26] the Court found no difficulty in favoring the accommodation of property rights when there had been no dedi-

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895 (1968) (pamphlet distribution for political candidate); Sutherland v. Southcenter Shopping Center, 3 Wash. App. 833, 478 P.2d 792 (1971) (allowed to use shopping center mall to collect signature on environmental petition, subject to reasonable regulation of conduct). *See also In re* Cox, 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970) (dictum). Courts in these and other cases have noted the logical difficulty in confining *Logan Valley* to its avowed limitation. *See* Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 339 (1968) (dissenting opinion); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 309 (1970); Comment, *Picketing of the Modern Marketplace: The Rights of Ownership and Free Speech*, 48 B.U.L. REV. 699 (1968); Comment, *The Shopping Center: Quasi-Public Forum for Suburbia*, 6 U. SAN FRANCISCO L. REV. 103 (1971); 53 MINN. L. REV. 873 (1969).

19. 407 U.S. 551 (1972).

20. Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 332 (1968).

21. Lloyd Corp. v. Tanner, 407 U.S. 551, 562 (1972).

22. *See* note 16 *supra* and accompanying text.

23. Lloyd Corp. v. Tanner, 407 U.S. 551, 563 (1972).

24. *Id.* at 564.

25. *Id.* at 565.

26. Lloyd Corp. v. Tanner, 407 U.S. 551, 567-68, 570 (1972):

> [T]he First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property used nondiscriminatorily for private purposes only. . . . [T]his Court has never held that a trespasser or uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only.

cation of private property to public use, since the fourteenth amendment limits only state action and not non-discriminatory private action.[27]

Justice Marshall's dissent,[28] however, found no constitutionally significant distinction between *Logan Valley* and the instant case.[29] He claimed *Logan Valley* had extended *Marsh* beyond the context of the company town into situations when property serves as the functional equivalent of the business block.[30] While acknowledging *Logan Valley's* limitation to speech to be "generally consonant with the use to which the property is actually put,"[31] the dissenters noted that the property was being used for first amendment purposes, but only at the management's discretion.[32] The dissent also indicated that, as a practical matter, there was no adequate alternative available to reach the relevant audience.[33]

Lloyd Corporation v. Tanner raises more questions than it answers.

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27. *Id.* at 569.

28. Justice Marshall, the author of the *Logan Valley* opinion, was joined in his dissent by Justices Brennan, Douglas, and Stewart.

29. The differences he did find indicated that Lloyd Center was even more similar to the company town in *Marsh* than was Logan Valley Plaza. Lloyd Center was much larger and housed a greater variety of facilities, there was more interconnection with public streets, and the privately paid policemen were given full police authority by the city. *Id.* at 575.

30. *Id.* at 574-75.

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

32. Lloyd Corp. v. Tanner, 407 U.S. 551, 578 (1972). Lloyd Center's facilities has in the past been open to presidential candidates of both parties, displays of National Guard weaponry, football rallies, concerts, solicitation by the Salvation Army and American Legion, but denied to the March of Dimes and Hadassah. Brief for Respondent at 37-39.

33. Attempting to distribute the handbills to moving autos leaving the center would involve considerable physical danger. The dissent also noted that shopping centers are where the relevant audience is to be found in the suburbs, and the means of reaching this audience is severely circumscribed, especially for poorly financed causes, when the shopping center is eliminated as a potential forum. Lloyd Corp. v. Tanner, 407 U.S. 551, 586 (1972).

Justice Marshall's inability to reconcile the result in *Lloyd* with that in *Logan Valley* called forth a harsh remark on the composition of the Court:

> [I]t is *Logan Valley* itself that the Court finds bothersome. The vote in *Logan Valley* was 6-3, and that decision is only four years old. But I am aware that the composition of this Court has radically changed in four years. . . . There is no distinction between that case and this one, and therefore, the results in both cases should be the same.

Id. at 584.

One of the most important is its effect on the doctrine of state action.[34] The Court ignores the public function of the shopping center, pivotal in *Logan Valley*, and speaks of an apparently stricter test, "dedication to public use,"[35] but fails to give any guidelines for its application.[36] Also disconcerting is the short shrift the majority accords *Logan Valley*. Citing almost exclusively from the dissents in that case,[37] the Court relies far more heavily on *Marsh* and ignores the significant extension of *Marsh* in *Logan Valley*. The most unsettling aspect of this decision, however, lies in the Court's unwillingness to recognize the modern context in which first amendment rights are to be exercised. The policy of keeping the public well informed, which underlies many free speech decisions and which was heavily emphasized in both *Marsh* and *Logan Valley*, can easily be thwarted if courts do not adapt first amendment principles to modern realities. The specter of the suburban *cordon sanitaire* of parking lots evoked in *Logan Valley*[38] may well be realized. Shopping centers have become a suburban way of life, continually growing in size, number, and comprehensiveness, in many communities replacing the traditional town center.[39] How is

34. The complex doctrine of state action lies at the base of all fourteenth amendment cases, but a detailed discussion of that doctrine is beyond the scope of this article. It is clear that some form of state action is necessary to state a cause of action under the fourteenth amendment and 42 U.S.C. § 1983, quoted in note 1 *supra*. *See* Civil Rights Cases, 109 U.S. 3 (1883). In general, there are three principal tests of state action: 1) Significant degree of state involvement. *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Anderson v. Moses, 185 F. Supp. 727 (S.D.N.Y. 1960). 2) State court's enforcement of a common law right. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948). 3) Public nature of the function performed. *See, e.g.*, Evans v. Newton, 382 U.S. 296 (1966); Terry v. Adams, 345 U.S. 461 (1953); Smith v. Alwright, 321 U.S. 649 (1944). The lines between these branches of the doctrine are not always clear, nor is it always clear upon which branch a court is basing its decision. *Marsh v. Alabama* and *Logan Valley Plaza* are generally cited as examples of the "public function" branch. *See, e.g.*, Evans v. Newton, *supra*, Cottonwood Mall Shopping Center v. Utah Power & Light, 440 F.2d 36 (10th Cir. 1971), *cert. denied*, 404 U.S. 857 (1971); Amalgamated Clothing Workers v. Wonderland Shopping Center, 370 Mich. 157, 122 N.W.2d 785 (1963); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 308 (1970); 20 TUL. L. REV. 593 (1946).

35. Lloyd Corp. v. Tanner, 407 U.S. 551, 570 (1972).

36. The question of state action is crucial since it determines whether or not freedom of speech must be balanced against the rights of private property, and given the preferred position of first amendment rights, the balance would almost invariably be struck in favor of speech.

37. *Id.* at 562-63, 565 n.13.

38. *See* note 15 *supra* and accompanying text.

39. In October, 1972, the nation's 14,500 shopping centers accounted for 46 percent of all retail sales (excluding gasoline and autos), and that figure is expected to rise

this public to remain well-informed? Will it inevitably hear only that which building developers wish them to hear, effectively silencing those with no access to the mass media?[40] In the absence of more definite Supreme Court guidelines, the future of the first amendment in suburbia is uncertain.

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steadily, since 80 percent of all new retail space will be in shopping centers. Breckenfeld, *"Downtown" Has Fled to the Suburbs,* FORTUNE, October, 1972, at 87. Shopping center owners consciously attempt to perform the function of a traditional town center. *See, e.g.,* CHAIN STORE AGE, January, 1972, at E 13 (exec. ed.); *Shopping Centers Have Grown into Shopping Cities,* BUSINESS WEEK, September 4, 1971, at 34. There has been a clear trend in recent years for new shopping complexes to include apartments, churches, office buildings, medical centers, etc. *Id.* at 36.

40. An unsuccessful congressional candidate in the 1972 election primarily attributed his landslide defeat in the suburban sections of his district to the recent *Lloyd* decision. Low budget political campaigns generally rely heavily on leaflet distribution in crowded public areas. Once banished from the shopping centers, the district's only central gathering places, he faced the onerous task of door-to-door canvassing of 100,000 widely dispersed houses, while his better-funded opponent conducted a mass media campaign. Shapiro, *Democracy in Action: One Who Lost,* WASHINGTON MONTHLY, December, 1972, at 11.