

PRIVATE BUSINESS DISTRICTS AND THE FIRST AMENDMENT: FROM MARSH TO TANNER

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The post-World War II flight from the central cities to the suburbs opened America's bedroom community doors to the rising shopping center phenomenon. During the past two decades shopping centers have evolved into "shopping cities," with acres of parking lots, multi-leveled covered malls featuring temperature-controlled climates and scores of stores, as well as restaurants, hotels, medical clinics, theaters, auditoriums and a host of other features, all of it on privately-owned property and all of it designed to draw an increasingly larger public. Those who wish to communicate some idea to the public have invariably followed its movement.

The inevitable conflict between the right of the property owner to control his land and the first amendment right of freedom of expression has led to three significant Supreme Court decisions that concern, respectively, a company-owned town and two shopping centers.¹ In the first two cases, the Court struck a balance for the first amendment; in the most recent case, the fifth amendment property right prevailed. The purpose of this note is to consider whether these cases can be reconciled and what their possible impact may be on the growing movement to build large-scale private developments in the downtown areas of our cities.

I. THE LAW: MARSH, LOGAN VALLEY AND TANNER

A. *Marsh v. Alabama*

In *Marsh v. Alabama*,² a Jehovah's Witness was prosecuted for criminal trespass when she ignored the warning of a deputy sheriff

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1. *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Marsh v. Alabama*, 326 U.S. 501 (1946).

2. 326 U.S. 501 (1946). The companion case, *Tucker v. Texas*, 326 U.S.

that her distribution of religious handbills on the sidewalk of a company-owned town's "business block" violated notices posted by the company against solicitation.³ In an opinion by Justice Black, the Supreme Court reversed the conviction, holding: "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."⁴ The Court emphasized the totality of ownership by the Gulf Shipbuilding Corporation,⁵ and in particular, the role of the "business block" as the town shopping center:

The "business block" serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees⁶

The Court explained that because the town served a "public function"⁷ it was subject to the restrictions of the first amendment,⁸ which in constitutional law occupies a "preferred position"⁹ when balanced

517 (1946), concerned the arrest of a Jehovah's Witness in a federal government-owned town.

3. 326 U.S. at 503.

4. *Id.* at 506.

5. The Court explained:

The town, a suburb of Mobile, Alabama, known as Chickasaw, is owned by the Gulf Shipbuilding Corporation. Except for that it has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area.

Id. at 502-03.

6. *Id.* at 508.

7. *Id.* at 506; *see* notes 51-56 and accompanying text *infra*.

8. 326 U.S. at 508.

9. 326 U.S. at 509; *accord*, *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943); *Jones v. Opelika*, 319 U.S. 103 (1943) (adopting Chief Justice Stone's dissent in *Jones v. Opelika*, 316 U.S. 584, 608 (1942)).

The "preferred position" of first amendment rights was a doctrine first argued in a famous footnote by Justice Stone in *United States v. Carolene Prods. Co.*,

against the fifth amendment property rights.¹⁰ In a concurring opinion, Justice Frankfurter reasoned even further that a company town's property relations could in no way control vital civil liberties.¹¹

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

Twenty-two years later, in a second landmark opinion, the Court, having earlier declined to consider the question,¹² extended the *Marsh* rationale to shopping centers. The Court held in *Logan Valley*¹³ that a state court injunction barring petitioners from the premises of a shopping center on the grounds of trespass violated their rights under the first and fourteenth amendments.¹⁴

Petitioners were nonemployee labor union members engaged in peaceful picketing of a nonunion supermarket located in Logan Valley Mall near Altoona, Pennsylvania.¹⁵ Speaking for the Court,

304 U.S. 144, 152 n.4 (1938). Justice Stone wrote that "more exacting judicial scrutiny" must be applied to limitations on political processes than on ordinary commercial transactions. *Id.* In a concurring opinion in *Kovacs v. Cooper*, 336 U.S. 77 (1949), Justice Frankfurter reviewed the "preferred position" doctrine and rejected it as a simplistic formula in constitutional analysis. Yet he did not reject the modern idea that the first amendment occupies a special place within the Constitution. *Id.* at 90.

10. 326 U.S. at 509.

11. He stated:

Title to property as defined by State law controls property relations; it cannot control issues of civil liberties which arise precisely because a company town is a town as well as a congeries of property relations. And similarly the technical distinctions on which a finding of "trespass" so often depends are too tenuous to control decision regarding the scope of the vital liberties guaranteed by the Constitution.

326 U.S. at 511.

12. *Amalgamated Meat Cutters Union v. Fairlawn Meats, Inc.*, 353 U.S. 20, 24 (1957).

13. 391 U.S. 308 (1968).

14. *Id.* at 309, 315.

15. Following the issuance of the injunction, petitioners commenced picketing and handbilling outside the shopping center along the public roads. Because the case was disposed of on constitutional grounds, the Court never reached the federal pre-emption questions of the National Labor Relations Act. 391 U.S. at 309-10 n.1.

It is not within the scope of this Note to consider the large field of labor law and private property. For analyses of this complex area see Broomfield, *Pre-emptive Federal Jurisdiction Over Concerted Trespassory Union Activity*, 83 HARV. L. REV. 552 (1970); Gould, *Union Organizational Rights and the Concept of "Quasi-Public" Property*, 49 MINN. L. REV. 505 (1965); Comment,

Justice Marshall explained: "We start from the premise that peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or manner of the picketing, protected by the First Amendment."¹⁶ But the Court quickly moved past the specific right to picket and focused its inquiry on the general exercise of all first amendment rights in "public places."¹⁷ The Court specifically held that handbilling within the shopping center mall was certainly protected.¹⁸

Citing *Marsh*, the Court pointed out that the similarities between the "business block" in the company town and the shopping center in *Logan Valley* were striking.¹⁹ "The general public has unrestricted access to the mall property. The shopping center here is clearly the *functional equivalent* of the business district of Chickasaw involved in *Marsh*²⁰ [and therefore] . . . for First Amendment purposes must be treated in substantially the same manner."²¹

Expanding the Right of Nonemployee Union Organizers to Solicit on Company Property: Industrial Parks and Retail Stores, 21 BUFFALO L. REV. 451 (1972); Comment, *The Unions, Free Speech, and the Shopping Center*, 37 S. CAL. L. REV. 573 (1964); Note, *Shopping Centers and Labor Relations Law*, 10 STAN. L. REV. 694 (1958).

16. 391 U.S. at 313; *accord*, NLRB v. Fruit Packers Local 760, 377 U.S. 58 (1964); Teamsters Local 795 v. Newell, 356 U.S. 341 (1958); Bakery Drivers Local 802 v. Wohl, 315 U.S. 769 (1942); AFL v. Swing, 312 U.S. 321 (1941); Thornhill v. Alabama, 310 U.S. 88 (1940); *cf.*, *e.g.*, Taggart v. Weinacker's, Inc., 397 U.S. 223 (1970); International Bhd. of Teamsters v. Vogt, Inc., 354 U.S. 284 (1957); Plumbers Local 10 v. Graham, 345 U.S. 192 (1952); International Bhd. of Teamsters v. Hanke, 339 U.S. 470 (1950); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

17. 391 U.S. at 315; *accord*, Jamison v. Texas, 318 U.S. 413 (1943) (right to leaflet on the streets); Schneider v. New Jersey, 308 U.S. 147 (1939) (leafletting on city streets cannot be prohibited); Hague v. CIO, 307 U.S. 496 (1939) (no ordinance can prohibit leafletting in public places); Lovell v. City of Griffin, 303 U.S. 444 (1938) (municipality cannot subject to a permit the right to leaflet).

18. 391 U.S. at 322 n.11.

19. *Id.* at 317.

20. *Id.* at 318.

21. *Id.* at 325 (emphasis added). The Court explained:

We see no reason why access to a business district in a company town for the purposes of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the "business district" is not under the same ownership. Here the roadways provided for vehicular movement within the mall and the sidewalks leading from building to building are the functional equivalents of the streets and sidewalks of a normal municipal business district. The shopping center premises are open to the public to the same extent as the commercial center of a normal town.

Id. at 319.

In language as crucial as the "functional equivalent" language, Justice Marshall then carefully explained that all *Logan Valley* decided was that because the shopping center is the community business block, state trespass laws could not wholly 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."²² It would be this language that the *Tanner* Court would later seize upon largely to justify its decision.²³

Justice Black, the author of the *Marsh* opinion, dissented sharply in *Logan Valley* on behalf of respondents' property rights, stating that "*Marsh* was never intended to apply to this kind of situation."²⁴ He ignored the Court's dicta which both recognized the advent of the suburban shopping center and expressed apprehension that the suburbs would immunize themselves from communicants' ideas with a "*cordon sanitaire*" of parking lots.²⁵

22. *Id.* at 319-20 (emphasis added). In an important footnote, the Court added it was not considering whether respondents' property rights could justify a ban on picketing that was not "directly related" in its purpose to the use to which the property was being put. *Id.* at 320 n.9.

23. Of course, the Court in *Logan Valley* held that "reasonable regulations" governing first amendment rights on private property were permissible. *Id.* at 320; *accord, e.g., Cameron v. Johnson*, 390 U.S. 611 (1968); *Adderley v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana*, 379 U.S. 559 (1965); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. New Jersey*, 308 U.S. 147 (1939); *Hague v. CIO*, 307 U.S. 496 (1939). But prohibition is not regulation. 391 U.S. at 316; *accord, Hague v. CIO*, 307 U.S. 496, 515-16 (1939).

24. 391 U.S. at 330. Justice Harlan dissented, arguing this was a labor case under the National Labor Relations Act and not a constitutional case. *Id.* at 333. Justice White dissented, arguing the public had no "general invitation" to come onto the premises but only an invitation to shop. *Id.* at 338.

But Justice White's reasoning also ironically foreshadowed the argument of the dissenters in *Tanner*:

Nonobstructive handbilling for religious purposes, political campaigning, *protests against government policies*—the Court would apparently place all of these activities carried out on *Logan Valley's* property within the protection of the First Amendment, although the activities may have no connection whatsoever with the views of the Plaza's occupants or with the conduct of their businesses.

Id. at 339 (emphasis added).

25. The Court explained:

The economic development of the United States in the last twenty years reinforces our opinion of the correctness of the approach taken in *Marsh*. The large-scale movement of this country's population from the cities to the suburbs has been accompanied by the suburban shopping center, typically a cluster of individual retail units on a single large privately owned tract. . . .

C. *Lloyd Corp. v. Tanner*

In *Lloyd Corp. v. Tanner*,²⁶ respondents distributed antiwar handbills in the malls of Lloyd Center, a 50-acre shopping center in Portland, Oregon. The Center maintained a policy prohibiting all handbilling on its premises.²⁷ Respondents were peaceful and no littering occurred.²⁸ Threatened with arrest for trespass by petitioner's private police, respondents left the Center and subsequently obtained an injunction and declaratory relief in federal court.²⁹ The Supreme Court reversed, holding that asserted first amendment rights could not prevail on petitioner's private property when the handbilling was contrary to petitioner's wishes, contrary to the Center's policy, and unrelated to the shopping center's operations.³⁰

Justice Powell, speaking for the Court, distinguished *Logan Valley* on two facts. First, the handbilling in Lloyd Center had no "relation" to any purpose for which the Center was being used.³¹ Quoting Justice White's dissent in *Logan Valley*, the Court explained that

Business enterprises located in downtown areas would be subject to on-the-spot public criticism for their practices, but businesses situated in the suburbs could largely immunize themselves from similar criticism 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 324-25.

26. 407 U.S. 551 (1972). In the companion case *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972), the entire Court agreed that union solicitation of employees during an organization campaign on the parking lot of a free-standing store was a labor law case and not under *Logan Valley*. Justices Marshall, Douglas, and Brennan dissented, however, believing the case should have been remanded to the N.L.R.B. instead of the court of appeals. For further discussion of labor law, as it applies to private property, see note 15 *supra*.

27. See notes 37-40 and accompanying text *infra*.

28. 407 U.S. at 556.

29. *Tanner v. Lloyd Corp.*, 308 F. Supp. 128 (D. Ore. 1970). The court, citing *Marsh* and *Logan Valley*, noted:

Although the Mall's multi-level design is not yet common among modern shopping centers, the Mall is a prototype for future city planning. Its parking facilities and sidewalks serve the same purpose as streets and sidewalks of a public business district. I find that the Mall is the functional equivalent of a public business district.

Id. at 130.

The court of appeals affirmed *per curiam*, holding that the opinion was not an extension of *Marsh* and *Logan Valley*. *Tanner v. Lloyd Corp.*, 446 F.2d 545, 546 n.1 (9th Cir. 1971).

30. 407 U.S. at 552, 567.

31. *Id.* at 564.

the only invitation to the general public was the one to do business with the Center's tenants.³² The Court specifically ruled that the private shopping center was not "dedicated to the public use."³³ Second, whereas the union picketers in *Logan Valley* would not have been able to adequately convey their message had they been denied access to the Center, respondents' antiwar handbilling could reach pedestrians and automobile occupants on the public sidewalks and streets surrounding Lloyd Center, thereby providing respondents with an alternative avenue of communication.³⁴

In a bitter dissent, Justice Marshall,³⁵ the author of the *Logan Valley* opinion, attacked the majority for making distinctions that did not exist because "it is *Logan Valley* itself that the Court finds bothersome."³⁶ The dissent found that Lloyd Center was even more

32. *Id.*

33. *Id.* at 569. Justice Powell wrote: "The argument reaches too far. The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use." *Id.*; accord, *McLeod v. College of Artesia*, 312 F. Supp. 498, 501 (D.N.M. 1970) (private college campus). *Contra*, *Wolin v. Port of N.Y. Authority*, 392 F.2d 83, 88 (2d Cir. 1968) (bus terminal dedicated to the public use); *Amalgamated Clothing Workers Union v. Wonderland Shopping Center, Inc.*, 370 Mich. 547, 565, 122 N.W.2d 785, 795 (1963) (equally divided court affirmed dedication of shopping center mall); *State v. Williams*, 44 L.R.R.M. 2357, 2359 (Baltimore Md. Crim. Ct. 1959) (shopping center); *Forkosch, Picketing in Shopping Centers*, 26 WASH. & LEE L. REV. 250, 264 (1969) (effect of *Logan Valley* is to consider a shopping center as dedicated to the public use, thereby requiring it to permit handbilling subject to reasonable regulation). *But see* *Breard v. City of Alexandria*, 341 U.S. 622, 643 (1951):

In the *Marsh* case it was a private corporation, in the *Tucker* case the United States, that owned the property used as permissive passways in company and government-owned towns. In neither case was there dedication to public use but it seems fair to say that the permissive use of the ways was considered equal to such dedication.

34. 407 U.S. at 566. *Contra*, *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939): "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."; accord, *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 323-24 (1968).

The dissent in *Tanner* argued that the Court's ruling would require respondents to approach moving traffic at the shopping center's entrances, thereby arbitrarily overturning the trial court's findings of fact that this would create a safety hazard to respondents, other pedestrians, and the automobile passengers. 407 U.S. at 583 n.7.

35. Justices Douglas, Brennan and Stewart joined the dissent.

36. 407 U.S. at 584. Justice Marshall continued: "The vote in *Logan Valley* was 6-3, and that decision is only four years old. But, I am aware that the com-

of a public place than the smaller Logan Valley Plaza had been: the mall covered 25 of Lloyd Center's 50 acres,³⁷ contained a range of professional and non-professional services not found in Logan Valley (including a skating rink and auditorium),³⁸ was intertwined more with the city's streets, and, unlike Logan Valley, had its private police commissioned with full police powers by the city.³⁹ A city ordinance had vacated eight acres of public streets and provided for the construction of new streets and additional traffic controls so that Lloyd Corporation could develop, in the words of the city council, a "general retail business district."⁴⁰

Finding the Center the functional equivalent of a public "business district,"⁴¹ the dissent then shifted to the first amendment issue. Various organizations had been allowed to use the malls, auditorium, and other facilities: the Cancer Society, Boy and Girl Scouts, American Legion, Salvation Army, Volunteers of America, and presidential candidates.⁴² Because the Center had been opened to noncommercial uses, including first amendment activities, respondents could not be discriminatorily "excluded" from handbilling "solely because Lloyd Center was not enamored of the form or substance of their speech."⁴³ Since respondents' activity in the "functional equivalent of a business district" was "generally consonant with the use" to which the Center was actually put, *Logan Valley's* two-pronged test clearly was satisfied.⁴⁴

position of this Court has radically changed in four years. The fact remains that *Logan Valley* is binding unless and until it is overruled." *Id.*

For post-*Tanner* critiques of the new Court see Bender, *The Techniques of Subtle Erosion*, 245 HARPER'S MAGAZINE 18, 32 (Dec. 1972) and Drew, *The Nixon Court*, 230 THE ATLANTIC MONTHLY 6, 14 (Nov. 1972).

37. 407 U.S. at 571.

38. *Id.* at 553.

39. *Id.* at 575.

40. *Id.* at 576. In actuality, Lloyd Corporation owned 130 city blocks (which included Lloyd Center) and was developing the downtown area in accordance with a master plan. Brief for Respondents at 25, *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

41. 407 U.S. at 576.

42. *Id.* at 555, 578. In addition, football rallies, antique automobile shows, and musical concerts were permitted at the Center. But the March of Dimes and Hadassah (a national Zionist women's service organization) were denied access to the malls and walkways. Brief for Respondents at 5, 6, *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

43. 407 U.S. at 578.

44. *Id.* Justice Marshall concluded: "I believe that the lower courts correctly

Even if Lloyd Center had not been open to first amendment activity, the dissent argued *Logan Valley* would still apply because freedom of speech occupied a "preferred position" over property rights.⁴⁵ For many citizens, Lloyd Center, because of its large and varied offerings of goods and services, was the only public place where they might encounter the views of other citizens; and for those citizens who could not afford access to the mass media, handbilling and other forms of relatively inexpensive means of communication were the only ways they could express themselves to a broad range of citizens.⁴⁶ Petitioner's interests, on the other hand, paled in comparison.⁴⁷

I. State Action

To apply the first amendment to the states and their subdivisions through the fourteenth amendment requires a showing of "state action."⁴⁸ Only the "state" can violate one's first and fourteenth amend-

held that respondents' activities were *directly related* in purpose to the use to which the shopping center was being put." *Id.* at 579 (emphasis added).

45. *Id.* at 580; see note 9 *supra*.

46. 407 U.S. at 580. Indeed, Justice Black had once argued strongly that the political views of the "little people" must take precedence over property and trespass rights, and that a citizen should receive information wherever he desires to receive it:

Of course, as every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support, while the circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes. Door to door distribution of circulars is essential to the poorly financed causes of little people.

Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the *naked restriction of the dissemination of ideas*.

Martin v. Struthers, 319 U.S. 141, 146 (1943) (emphasis added). For a description of *Tanner's* impact on a political contest see note 81 *infra*.

47. 407 U.S. at 581. The arguments that handbilling might disturb the shoppers and create litter were dismissed as illogical, frivolous, and unconstitutional because other non-shopping events occurred at the mall and because littering is not a sufficient reason for barring first amendment activity; see, e.g., *Martin v. Struthers*, 319 U.S. 141, 143 (1943); *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939).

48. The application of the first amendment through the fourteenth amendment was first described in *Gitlow v. New York*, 268 U.S. 652 (1925).

ment rights, although that term's meaning and use has had various applications.⁴⁹ Exactly what constitutes state action has often been a confusing, vague and difficult problem, particularly in the first amendment area. Professor Thomas Emerson wrote: "State action has developed primarily in the equal protection area There are not many Supreme Court decisions dealing with state action in a First Amendment context. But those that exist seem to indicate that the doctrine will be liberally extended to the activities of private associations."⁵⁰ *Tanner*, as will be seen, has limited this development in the law.

Aside from formal operation of a state agency, Emerson notes the three main tests for state action: first, the degree of government involvement in the private party; second, the public nature of the function performed by the private party; or third, court jurisdiction over the internal affairs of a private party through common law doctrine.⁵¹ *Marsh* and *Logan Valley* are Emerson's examples of the second or "public function" test,⁵² and an analysis of those opinions

49. See, e.g., *Evans v. Abney*, 396 U.S. 435 (1970); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *United States v. Guest*, 383 U.S. 745 (1966); *Evans v. Newton*, 382 U.S. 296 (1966); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Williams v. United States*, 341 U.S. 97 (1951); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Screws v. United States*, 325 U.S. 91 (1945); *Civil Rights Cases*, 109 U.S. 3 (1883).

50. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 678 (1970).

51. *Id.* at 678-80; see *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1070-71 (1969).

52. Accord, Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933, 948 (1952); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1097, 1121 (1960); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1071 (1969); Note, *Shopping Centers and the Fourteenth Amendment: Public Function and State Action*, 33 U. PITT. L. REV. 112, 119 (1971); cf. Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375, 412 (1958) (state action in *Marsh* was the trespass prosecution, under the judicial intervention doctrine of *Shelley v. Kraemer*, 334 U.S. 1 (1948)). See also Black, "State Action," *Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69 (1967); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 217 (1957); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3, 40-45 (1961).

One interesting sidelight: In *Cottonwood Mall Shopping Center, Inc. v. Utah Power & Light Co.*, 440 F.2d 36, 42 (10th Cir.), cert. denied, 404 U.S. 857 (1971), the court held that a shopping center employing a total energy plan for its tenants could be regulated as a public utility because the deliberate ben-

proves him correct.⁵³ Although state action in *Tanner* might be found in the extent of government involvement⁵⁴ or in the judicial

efficiary of the lighting, air conditioning, etc. was the public, and that the "public characteristics" of the modern shopping center predominated "whatever may be the nature of legal title." The court cited *Logan Valley*. See Forkosch, *supra* note 33.

53. In *Marsh*, the Court noted that "public places" are open to first amendment activity (326 U.S. at 504), and that because the company town serves a "public function," it may be regulated by the state (326 U.S. at 506). This analysis follows the doctrine laid down in *Hague v. CIO*, 307 U.S. 496 (1939), that first amendment rights are protected from state action through the fourteenth amendment due process clause when:

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 purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and *public places* has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Id. at 515 (emphasis added). See, e.g., *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (handbilling); *Gregory v. City of Chicago*, 394 U.S. 111 (1969) (parading); *Brown v. Louisiana*, 383 U.S. 131 (1966) (library sit-in); *Kunz v. New York*, 340 U.S. 290 (1951) (street meeting); *Saia v. New York*, 334 U.S. 558 (1948) (soundtruck); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (soliciting); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (handbilling). *But see* *Cameron v. Johnson*, 390 U.S. 611 (1968) (picketing); *Adderley v. Florida*, 385 U.S. 39 (1966) (trespassing jailgrounds); *Breard v. City of Alexandria*, 341 U.S. 622 (1951) (door-to-door soliciting); *Feiner v. New York*, 340 U.S. 315 (1951) (sidewalk speech); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (soundtruck); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (parading).

In *Logan Valley*, the Court likewise refers to the *Hague* public places doctrine (391 U.S. at 315), and therefore argues that the state may not use its trespass laws to exclude first amendment rights (391 U.S. at 319). Indeed, the dissent in *Tanner* noted that the "critical issue" in *Logan Valley* was whether private property was "public" enough to warrant the fourteenth amendment reaching it (407 U.S. at 581 n.5). *Accord*, *Diamond v. Bland*, 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970), *cert. denied*, 402 U.S. 988 (1971) (state action in a shopping center's refusal to permit the exercise of first amendment rights in public areas).

54. The city ordinance provided for the vacating of public streets and the spending of public funds to spur Lloyd Center's development. In addition, the Center used city-commissioned private police and city streets traversed and surrounded the Center. The district court, in fact, found state action because the Center's security guards had police authority from the city and exercised that authority. *Tanner v. Lloyd Corp.*, 308 F. Supp. 128, 131 (D. Ore. 1970); *accord*, *Sutherland v. Southcenter Shopping Center, Inc.*, 3 Wash. App. 833, —, 478 P.2d 792, 794 (1971); *see, e.g.*, *Farmer v. Moses*, 232 F. Supp. 154, 158 (S.D.N.Y. 1964) ("[World's] Fair Corporation and its operations are so impregnated with and supported by state and city action as to place them within the ambit of the Fourteenth Amendment."). *But see* *Chumley v. Santa Anita*

application of trespass law,⁵⁵ *Hague v. CIO*,⁵⁶ *Marsh*, and *Logan Valley* clearly necessitate the use of the public function test.

Yet the *Tanner* Court brushed aside *Logan Valley's* "functional equivalent of a public business district" language as unnecessary dictum,⁵⁷ thereby voiding any credible public function analysis. If *Logan Valley Plaza* served no public function, then there could have been no state action, and therefore no first amendment violation could have occurred. Of course, that was not the result in *Logan Valley*.⁵⁸ The dissent in *Tanner* could have made a stronger argument by focusing on this logical inconsistency inherent in the majority's reasoning.⁵⁹

A second problem was revealed when the Court specifically addressed itself to the state action question. Justice Powell wrote that the first and fourteenth amendments safeguard rights from "state action, not . . . action by the owner of private property used non-discriminatorily for private purposes only."⁶⁰ Why "nondiscriminatorily"? If the property were truly private with no public function characteristics, then petitioner had the right to discriminate, as it surely did by refusing respondents but permitting other groups access to the property.⁶¹ Or did the Court mean that the property owner can open his premises to one kind of first amendment activity and yet deny access to another kind as long as no exception were made

Consol., Inc., 15 Cal. App. 3d 452, 458, 93 Cal. Rptr. 77, 81 (Dist. Ct. App. 1971) (state licensing of race track is not sufficient state action). Note:

Without government intervention . . . a downtown shopping center is out of the question. In Torrington, [Conn.] the city condemned and cleared the land at a cost of \$2,500,000. The Federal government paid two-thirds of the cost, the State government paid one-sixth, and the city paid one-sixth. The developer bought the land at public auction for \$455,000, and developed 450,000 square feet of gross leasable area on it.

43 CHAIN STORE AGE 38, 40 (May 1967) (emphasis added).

55. See *Abernathy*, *supra* note 52.

56. See note 53 *supra*.

57. 407 U.S. at 562.

58. See notes 13-14 and accompanying text *supra*.

59. See notes 52-56 and accompanying text *supra*.

60. 407 U.S. at 567.

61. In a unanimous decision, the Supreme Court of California ruled:

The shopping center may no more exclude individuals who wear long hair or unconventional dress, who are black, who are members of the John Birch Society, or who belong to the American Civil Liberties Union, merely because of these characteristics or associations, than may the City of San Rafael.

In re Cox, 3 Cal. 3d 205, 217, 474 P.2d 992, 1000, 90 Cal. Rptr. 24, 32 (1970).

(here, *all* handbilling was prohibited)? If that is the case, then the March of Dimes and Hadassah, which were prohibited from soliciting by the shopping center, would apparently have grounds to sue since the Cancer Society and Salvation Army were allowed on the premises to solicit funds from the public.⁶² The negative implication of Justice Powell's statement was that to discriminate is to violate the law (the first amendment?), although "why" was not made clear since the property's private nature was held to be so much more important than any first amendment right.⁶³

2. Emasculation of *Logan Valley*

Tanner went to great lengths to distinguish *Logan Valley* and yet it failed. The situations in both cases were virtually the same. Even when *Logan Valley* was read narrowly to mean that first amendment activity not aimed at some specific shopping center or tenant use was not protected, the Court carried its analysis too far. Justice Powell stated that although *Logan Valley* extended *Marsh*, it did so only as to first amendment activities "related" to the shopping center's operations, and that the thrice-used "functional equivalent of a public business district" language in *Logan Valley* was unnecessary to the *Logan Valley* decision because Justice Black's dissent in that case emphasized that such language was a misinterpretation of *Marsh*.⁶⁴

A problem with this reasoning is that the Court equated the "directly related" language (the relationship between the first amendment activity and the nature of the property's use) with the "functional equivalent" language (similarities between kinds of commercial centers). Having made this equation, the Court then focused on the limiting language in *Logan Valley* to achieve an opposite but

62. See note 42 *supra*.

63. It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Such an accommodation would diminish property rights without significantly enhancing the asserted right of free speech.

407 U.S. at 567. Yet the Court never escaped the dilemma that the denial of expression in *Tanner* was real, while any diminishing of the property right would have been, at the most, only minimal. The "preferred position" doctrine was simply banished.

64. 407 U.S. at 562.

legitimate result and with the same stroke destroyed the heart of *Logan Valley* for any viable future application.⁶⁵

To argue also that some first amendment activities may "use" the Center's premises but that others may not is to negate both the thrust and substance of the point that a shopping center is open to first amendment activities "generally consonant with the use to which the property is *actually put*."⁶⁶ Indeed, there is little logic in arguing, as *Logan Valley* did, the preferred position of broad first amendment rights, and then limiting those rights to narrow circumstances as *Tanner* does.⁶⁷ Various pre-*Tanner* courts follow this reasoning.⁶⁸

65. Justice Powell wrote:

The holding in *Logan Valley* was not dependent upon the suggestion that the privately owned streets and sidewalks of a business district or a shopping center are the equivalent, for First Amendment purposes, of municipally owned streets and sidewalks. No such expansive reading of the opinion for the Court is necessary or appropriate.

Id. at 563.

66. Judge Kaufman, referring to the N.Y. Port Authority Bus Terminal, stated:

The admission of charity solicitors, glee clubs and automobile exhibitions without untoward incident evidences the ease with which the Terminal accommodates different forms of communication. To deny access to political communication seems an anomalous inversion of our fundamental values. . . . In some situations the place represents the object of protest, the seat of authority against which the protest is directed. . . . In other situations, the place is where the relevant audience may be found. Here, the plaintiff is attempting to communicate his antiwar protest to the general public.

Wolin v. Port of N.Y. Authority, 392 F.2d 83, 90 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968); *accord*, *In re Hoffman*, 67 Cal. 2d 845, 851, 434 P.2d 353, 356, 64 Cal. Rptr. 97, 100 (1967) (also an antiwar handbilling case): "[T]he test is not whether petitioners' use of the station was a railway use but whether it interfered with that use. No interest of the city in the functioning of the station as a transportation terminal was infringed."

67. To give the use of the term "consonant with" an interpretation restricted to "directly related to retail functions" would seem, to us, to render meaningless *Logan Valley's* earlier carefully developed delineation of the broad rights of the public to engage in certain First Amendment practices, in areas that are the functional equivalent of public streets and sidewalks on private property, regardless of the precise nature of the surrounding commercial enterprises.

Sutherland v. Southcenter Shopping Center, Inc., 3 Wash. App. 833, —, 478 P.2d 792, 798-99 (1971).

Most commentators agreed that although *Logan Valley* is not direct authority for protecting speech unrelated to the property:

[T]o enforce a broad denial of unrelated speech on private property would result in defeating free and socially valuable speech while at the same time protecting an ownership interest which is little more than a shadow. *Clearly this is not the result which is sought by the Court in Logan Valley.*

II. IMPACT OF PRIVATE BUSINESS DISTRICTS

Bookmaking, to be sure, is available at few centers. But many other activities formerly associated with large cities are becom-

48 B.U.L. REV. 699, 706 (1968) (emphasis added); *accord*, *The Supreme Court—1967 Term*, 82 HARV. L. REV. 63, 130, 137 (1968); Comment, *The Shopping Center: Quasi-Public Forum for Suburbia*, 6 U. SAN FRANCISCO L. REV. 103, 107 (1971); 35 BROOKLYN L. REV. 101, 108 (1968); 18 BUFFALO L. REV. 364, 372 (1968-69); 73 DICK. L. REV. 519, 531 (1969); 48 N.D.L. REV. 140, 143 (1971). *But see* Forkosch, *supra* note 33; 53 MINN. L. REV. 873, 881 (1969); 33 U. PITT. L. REV. 112, 115 (1971).

Indeed, one commentator who read *Logan Valley* narrowly argued that the shopping center in *Tanner v. Lloyd Corp.*, 308 F. Supp. 128 (D. Ore. 1970), exercised a public function:

While the narrow holding in *Logan Valley* may be justifiable since businesses in a suburban shopping center should not be able to evade public criticism by surrounding their stores with parking lots, the owners of a shopping center should not be required to assume all the constitutional obligations of a municipality. . . . [but] [f]or example, in *Tanner v. Lloyd*, a shopping center was prevented from prohibiting first amendment activity not directly related to the functioning of the mall. But it was pointed out in the opinion that the shopping center served the community as more than just a place to shop. The mall was the scene of football rallies for area high schools, served as a forum for local candidates for political office, and even presidential candidates spoke at the mall. *The shopping center tried to take on the appearance of a town and was assuming a public function.* If the corporate owner wishes to permit and even encourages this type of activity, it is not too great a burden to allow the reasonable exercise of first amendment activity, just as it would seem unfair to allow him to permit only political candidates and activity with views which the owner is in agreement to use the mall.

33 U. PITT. L. REV. 112, 118-19 (1971) (emphasis added).

68. The Supreme Court of California has consistently followed the *Hague-Marsh-Logan Valley* line: *Diamond v. Bland*, 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970), *cert. denied*, 402 U.S. 988 (1971) (in facts almost identical to *Tanner*, first amendment activities unrelated to the business of a shopping center could not be prohibited from the analogue of the "traditional town square"); *see In re Cox*, 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970); *In re Lane*, 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969) (preferred position of first amendment precludes trespass conviction for handbilling on premises of a single store); *In re Hoffman*, 67 Cal. 2d 845, 434 P.2d 553, 64 Cal. Rptr. 97 (1967) (because a privately-owned train station is like a public street or park, antiwar handbilling is protected); *Schwartz-Torrance Inv. Corp. v. Bakery Workers Local 31*, 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964), *cert. denied*, 380 U.S. 906 (1965) (shopping center picketing is only a theoretical invasion of private property).

Other shopping center cases: *State v. Williams*, 44 L.R.R.M. 2357 (Baltimore Md. Crim. Ct. 1959) (property rights secondary to picket right on "quasi-public" property); *Amalgamated Clothing Workers Union v. Wonderland Shopping Center, Inc.*, 370 Mich. 547, 122 N.W.2d 785 (1963) (equally divided court affirmed right to handbill on "Chickasaw-like 'business block'"); *State v. Miller*, 280 Minn. 566, 159 N.W.2d 895 (1968) (political handbilling protected by *Logan Valley*); *Blue Ridge Shopping Center, Inc. v. Schleining*, 432

ing increasingly important elements of shopping center life. At today's shopping centers, you can buy or sell stock, stop in at a political rally, view an art show, attend church, visit a psychiatrist, entertain friends at an expensive restaurant or take your wife to a legitimate theater. A Philadelphia-area center even offers a 2,500-seat psychedelic night club.⁶⁹

As of three years ago, 13,000 shopping centers were operating in the United States, generating more than 40% of all retail sales (excluding automobiles and building materials), with 12,000 additional centers predicted for the next fifteen years.⁷⁰ By comparison, shopping centers in 1965 accounted for a quarter of the retail trade.⁷¹ In spite of, or more likely because of, this enormous commercial growth, the role of the shopping center has changed. Where

S.W.2d 610 (Kansas City Ct. App. 1968) (handbilling protected by *Logan Valley*); *Freeman v. Retail Clerks Local 1207*, 58 Wash. 2d 426, 363 P.2d 803 (1961) (NLR pre-empts complaint against picketing); *Sutherland v. South-center Shopping Center, Inc.*, 3 Wash. App. 833, 478 P.2d 792 (1971) (shopping center is functional equivalent of business district and cannot prohibit first amendment activities); *Moreland Corp. v. Retail Store Employees Local 444*, 16 Wis. 2d 499, 114 N.W.2d 876 (1962) (dictum: property rights must yield to freedom of communication).

See Jones v. Board of Regents, 436 F.2d 618 (9th Cir. 1970) (handbilling in public areas of state university cannot be prohibited); *Wolin v. Port of N.Y. Authority*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968) (handbilling in bus terminal); *Marshall Field & Co. v. NLRB*, 200 F.2d 375 (7th Cir. 1952) (company-owned street); *People v. St. Clair*, 56 Misc. 2d 326, 288 N.Y.S.2d 388 (N.Y.C. Crim. Ct. 1968) (handbilling in subway); *People v. Barisi*, 23 L.R.R.M. 2190 (N.Y.C. Magis. Ct. 1948) (picketing in train station); *cf. McLeod v. College of Artesia*, 312 F. Supp. 498 (D.N.M. 1970) (evidence insufficient to show a private campus is public); *Farmer v. Moses*, 232 F. Supp. 154 (S.D.N.Y. 1964) (handbilling only permitted on public walks of World's Fair); *Chumley v. Santa Anita Consol., Inc.*, 15 Cal. App. 3d 452, 93 Cal. Rptr. 77 (Dist. Ct. App. 1971) (race track not analogous to a business district); *City of Chicago v. Rosser*, 47 Ill. 2d 10, 264 N.E.2d 158 (1970) (sit-in at office building); *Watchtower Bible & Tract Soc'y v. Metropolitan Life Ins. Co.*, 297 N.Y. 339, 79 N.E.2d 433, *cert. denied*, 335 U.S. 886 (1948) (door-to-door soliciting within large apartment complex); *Hall v. Commonwealth*, 188 Va. 72, 49 S.E.2d 369 (1948) (apartment building soliciting). *Contra*, *People v. Goduto*, 21 Ill. 2d 605, 174 N.E.2d 385, *cert. denied*, 368 U.S. 927 (1961) (handbilling on single-store public parking lot); *Hood v. Stafford*, 213 Tenn. 684, 378 S.W.2d 766 (1964) (picketing on single-store parking lot). *But see In re Ball*, 23 Cal. App. 3d 380, 100 Cal. Rptr. 189 (Dist. Ct. App. 1972) (petitioning on Disneyland pay parking lot that interfered with trams not protected by first amendment).

69. *Wall Street Journal*, Feb. 20, 1969, at 1, col. 6.

70. 47 *CHAIN STORE AGE* 25 (Feb. 1971).

71. *BUSINESS WEEK*, Sept. 4, 1971, at 34.

PRIVATE BUSINESS DISTRICTS

once it served merely as the retail outlet for bedroom communities, now, "with apartments, office buildings, and industrial parks moving to the suburbs, the centers are finding they must be more than just merchants."⁷²

Indeed, they are becoming "miniature downtowns,"⁷³ offering a myriad of goods, services, and functions, sprawling over large tracts of land, mushrooming in size from neighborhood centers to community centers to regional centers to, finally, multi-leveled super-regional centers.⁷⁴ Presumably, all of these kinds of shopping centers, small and large alike, fall under the *Tanner* umbrella, for although the Court never defined "shopping center,"⁷⁵ Lloyd Center was of the large, multi-level variety.⁷⁶

A recent trend, however, is for a developer to return to the downtown business district after the city has condemned an area and to build a shopping center, thereby revitalizing "some of the very core areas that are hit hardest by competition from suburban centers."⁷⁷ Buffalo, New Haven, Jersey City and Springfield, Massachusetts are examples of cities where downtown shopping centers have helped spark revivals in decaying city centers.⁷⁸ And on a more ambitious scale, large, multi-block, multi-purpose, high-rise private city centers, patterned after New York City's Rockefeller Center, appear to be the latest design in urban living. Worcester Center in Massachusetts,

72. Wall Street Journal, Feb. 20, 1969, at 1, col. 6.

73. No longer are shopping centers simply the small retail hubs they used to be Now, more and more, they are becoming miniature downtowns with three, four, and five department stores, scores of smaller stores and services, plus hotels, apartment houses, office buildings, cultural centers, churches, and theaters.

BUSINESS WEEK, Sept. 4, 1971, at 34; see Breckenfeld, "Downtown" Has Fled to the Suburbs, 86 FORTUNE 80 (Oct. 1972); SALES MANAGEMENT, Nov. 1, 1970, at 34.

74. Neighborhood shopping centers account for 26.4% of shopping center sales and cover up to 100,000 square feet of gross leasable area; community centers: 30.5% and 101-200,000 square feet; regional centers: 43.1% and 201-800,000 square feet; super-regional centers: 8.2% and over 800,000 square feet. Kaylin, *A Profile of the Shopping Center Industry*, 42 CHAIN STORE AGE 17 (May 1966).

75. In a passing remark, *Logan Valley* gave a functional definition: "[T]ypically a cluster of individual retail units on a single large privately owned tract." 391 U.S. at 324.

76. 407 U.S. at 553.

77. BUSINESS WEEK, Sept. 4, 1971, at 34.

78. 43 CHAIN STORE AGE 38 (May 1967).

Illinois Center in Chicago,⁷⁹ and the proposed Mercantile Center in St. Louis⁸⁰ are all but miniature cities.

With these recent trends in the scope and geographic location of developing private "business districts," where does the first amendment fit under the limitations set by *Tanner*? Are these downtown centers even "business districts" within the *Tanner* meaning, or was *Tanner* only talking about low-lying, multi-store tracts surrounded by vast parking lots? Can, indeed, *Tanner* even apply to these different forms of privately-owned developments? Though we cannot pretend to give any answers, we can observe where the cases lead.

Most important is the realization of the growing economic and political strength of privately-owned developments, be they shopping centers or downtown centers. If political access to these areas is closed off at the owner's discretion, then as they grow in number and size, the first amendment right to hear and be heard is consider-

79. Illinois Center, now under construction on the downtown lakefront, is a \$1 billion, 83-acre complex which will include apartments for 50,000 people, 9.9 million square feet of office space, hotels, shopping, recreational and cultural facilities. *BUSINESS WEEK*, Feb. 17, 1973, at 64. Other major planned projects: Houston Center (a \$1.5 billion office-hotel-retail store project on 33 downtown blocks owned and to be developed by Texas Eastern Transmission Corp.), *id.* at 61; Detroit (a \$500 million hotel-office-tower-commercial-housing project on 32 acres of Ford's downtown riverfront property), *id.* at 59; Crown Center (50-building development by Hallmark Card Co. on 85 Kansas City acres), *id.* at 64; Washington, D.C. (an \$80 million complex of shops, offices, restaurants, an inn, conference center and parks along the Potomac in Georgetown). *Id.* The article notes:

In cities large and small, all over the U.S., an astonishing volume of investment is pouring into major enterprises aimed, like [architect-developer John] Portman's, at maintaining or restoring the economic and social vitality of drooping downtowns. . . . More important, in more than a dozen cities from New York & Los Angeles to Fort Worth and Worcester, Mass., urban complexes that are masterplanned and carefully designed either are under way or are about to start.

Many of these ventures are entirely private undertakings, including some being built by large corporations.

Id. at 60.

80. St. Louis Post-Dispatch, Feb. 22, 1973, at 13A, col. 1. Indeed, entire communities, one for as many as 12,000 people, are being planned by private developers with shopping centers as their core. "Eventually, the developers of these projects see the shopping center core as becoming a true 'downtown' area much like the downtown areas of many major cities, a focal point for everything that goes on in the communities surrounding it." 47 *CHAIN STORE AGE* 4 (Sept. 1971).

ably weakened.⁸¹ And if center owners were “infuriated”⁸² with *Logan Valley* and viewed *Tanner* as ending another “nuisance,”⁸³ it must be remembered that *Logan Valley* and the line of cases stretching behind it are not dead, nor has their reasoning been refuted by the Court’s arguments in *Tanner*. High-rise, multi-purpose downtown centers covering several city blocks and blending in with the traditional “public” areas of the city are certainly more analogous to *Marsh* and its public function test than the shopping center in *Tanner*. Thus, long-held precedent (state and federal), *Tanner*’s own problematic analyses, the factual distinctions between shopping centers and city centers, and, ultimately, the constant pressures to expand the public forum as the concept of what is public expands in our society, all indicate that *Tanner* will not likely be as innovative as its initial impression appears.

CONCLUSION

Tanner is inconsistent with virtually every major first amendment case decided by the Supreme Court in the middle third of this century. Whether the Court’s emphasis on the property right, however tenuous or theoretical that interest may seem, is an indication of where constitutional law is moving, it is at least clear that the Burger Court is putting the brakes on the Warren Court’s acceleration of the *Hague* “public places” doctrine. At this point it can be safely

81. A U.S. congressional candidate with few funds explained how the *Tanner* decision sharply curtailed any realistic access to his largely suburban district; in the six-way primary race, he lost.

Livonia typifies many of the difficulties of politics in the new suburbs. For a candidate, especially an insurgent with a limited local organization, suburbs like Livonia are virtually impregnable.

There is no real center to it, only shopping centers The first line of escape from Detroit, Livonia developed around the automobile, not the pedestrian What cohesion the community has lies in the shared asphalt of interchangeable parking lots and Burger Chefs.

The difficulties of campaigning in Livonia were significantly increased by a Supreme Court ruling this summer. The Court drastically limited the rights of political access to privately-owned shopping centers and closed for me whatever small chance existed of reaching the suburbanites while they consumed.

Shapiro, *One Who Lost*, 4 THE WASHINGTON MONTHLY 7, 11 (Dec. 1972); see *State v. Miller*, 280 Minn. 566, 159 N.W.2d 895 (1968) (*Logan Valley* protects handbilling for a political candidate on shopping center premises).

82. Wall Street Journal, Feb. 20, 1969, at 21, col. 1.

83. Breckenfeld, *supra* note 73, at 156; see 48 CHAIN STORE AGE 4 (Aug. 1972); 48 CHAIN STORE AGE 35 (April 1972); 47 CHAIN STORE AGE 26 (July 1971); 44 CHAIN STORE AGE 22 (Sept. 1968).

said that *Logan Valley* is limited to the proposition that reasonably regulated first amendment activities conveying some message about a shopping center or one of its stores are protected by the first and fourteenth amendments. In any other situation, the Court is likely to hold for the supremacy of the property owner's right to prohibit any specific noncommercial activity he wishes, provided that the owner makes no exception. Where on a continuum between shopping centers and company towns the emerging private city centers are likely to be placed is hard to predict. But the Court would be hard put to justify placing these new "cities" within the narrow confines of *Tanner*.