AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 9: Liberalism Divided—Democratic Rights/Free Speech/Public Property, Subsidies, Employees, and Schools

**Lloyd Corp, Ltd. v. Tanner, 407 U.S. 551** (1972)

*Lloyd Corp., Ltd. owned a retail shopping mall in Portland, Oregon that covered some fifty acres, including parking lots. It was bounded by public streets and sidewalks. The shopping center was of a then-new design with a multi-level building complex with enclosed, interior shops, walkways, skating rink, and food court. The mall itself did not close, though the individual stores did close at night. The mall employed private security guards, and the mall posted signs indicating that the facility was private property and permission to use could be revoked at any time. The mall included an auditorium, which was available for rental. The mall allowed some civic organizations to use the facilities, such as allowing the Salvation Army to collect Christmas donations on the interior walkways and the Boy Scouts to use the auditorium rent-free. The mall did not generally allow use of the facilities for political purposes, though presidential campaigns of both political parties had held rallies in the auditorium. The mall maintained a consistent policy of prohibiting the distribution of handbills on the property.*

*In 1968, a group of antiwar activists distributed handbills advertising a meeting of the “Resistance Community.” Mall security informed that they were trespassing and would have to stop distributing handbills on mall property and should move outside to the public sidewalk. They left, but subsequently filed suit in federal district court seeking an injunction prohibiting the mall from enforcing its no handbills policy. The district court ruled against the mall, and a federal circuit court affirmed. In a 5-4 decision, the U.S. Supreme Court reversed the lower courts, holding that the shopping mall was private property and had not become functionally a public venue and as a consequence was not bound by the First Amendment.*

JUSTICE POWELL delivered the opinion of the Court.

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The courts below considered the critical inquiry to be whether Lloyd Center was "the functional equivalent of a public business district." . . . It is well to consider what *Marsh v. Alabama* (1946) actually decided. It involved an economic anomaly of the past, "the company town." One must have seen such towns to understand that "functionally" they were no different from municipalities of comparable size. . . . Quite literally, towns were built and operated by private capital with all of the customary services and utilities normally afforded by a municipal or state government: there were streets, sidewalks, sewers, public lighting, police and fire protection, business and residential areas, churches, postal facilities, and sometimes schools. In short, as Justice Black said, Chickasaw, Alabama, had "all the characteristics of any other American town." The Court simply held that where private interests were substituting for and performing the customary functions of government, First Amendment freedoms could not be denied where exercised in the customary manner on the town's sidewalks and streets. Indeed, as title to the entire town was held privately, there were no publicly owned streets, sidewalks, or parks where such rights could be exercised.

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The handbilling by respondents in the malls of Lloyd Center had no relation to any purpose for which the center was built and being used. It is nevertheless argued by respondents that, since the Center is open to the public, the private owner cannot enforce a restriction against handbilling on the premises. . . .

Respondents' argument, even if otherwise meritorious, misapprehends the scope of the invitation extended to the public. The invitation is to come to the Center to do business with the tenants. It is true that facilities at the Center are used for certain meetings and for various promotional activities. The obvious purpose, recognized widely as legitimate and responsible business activity, is to bring potential shoppers to the Center, to create a favorable impression, and to generate goodwill. There is no open-ended invitation to the public to use the Center for any and all purposes, however incompatible with the interests of both the stores and the shoppers whom they serve.

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It is noteworthy that respondents' argument based on the Center's being "open to the public" would apply in varying degrees to most retail stores and service establishments across the country. They are all open to the public in the sense that customers and potential customers are invited and encouraged to enter. In terms of being open to the public, there are differences only of degree—not of principle—between a free-standing store and one located in a shopping center, between a small store and a large one, between a single store with some malls and open areas designed to attract customers and Lloyd Center with its elaborate malls and interior landscaping.

. . . . [R]espondents moved to [adjacent] public areas and continued distribution of their handbills after being requested to leave the interior malls. 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.

The basic issue in this case is whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against *all* handbilling. In addressing this issue, it must be remembered that the 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. The Due Process Clauses of the Fifth and Fourteenth Amendments are also relevant to this case. They provide that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." There is the further proscription in the Fifth Amendment against the taking of "private property . . . for public use, without just compensation."

Although accommodations between the values protected by these three Amendments are sometimes necessary, and the courts properly have shown a special solicitude for the guarantees of the First Amendment, this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only. Even where public property is involved, the Court has recognized that it is not necessarily available for speaking, picketing, or other communicative activities. . . .

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*Reversed*.

JUSTICE MARSHALL, with whom JUSTICE DOUGLAS, JUSTICE BRENNAN, and JUSTICE STEWART join, dissenting.

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The question presented by this case is whether one of the incidents of petitioner's private ownership of the Lloyd Center is the power to exclude certain forms of speech from its property. In other words, we must decide whether ownership of the Center gives petitioner unfettered discretion to determine whether or not it will be used as a public forum.

The Court held in *Marsh v. Alabama* (1946) that even though property is privately owned, under some circumstances it may be treated as though it were publicly held, at least for purposes of the First Amendment. . . .

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In the instant case the District Court found that "the Mall is the functional equivalent of a public business district.” . . .

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In 1954, when Lloyd's owners first acquired land for the Center, the city of Portland vacated about eight acres of public streets for their use. . . .

In sum, the Lloyd Center is an integral part of the Portland community. From its inception, the city viewed it as a "business district" of the city and depended on it to supply much-needed employment opportunities. To insure the success of the Center, the city carefully integrated it into the pattern of streets already established and planned future development of streets around the Center. It is plain, therefore, that Lloyd Center is the equivalent of a public "business district." . . .

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On Veterans Day, Lloyd Center allows organizations to parade through the Center with flags, drummers, and color guard units and to have a speaker deliver an address on the meaning of Veterans Day and the valor of American soldiers. Presidential candidates have been permitted to speak without restriction on the issues of the day, which presumably include war and peace. The American Legion is annually given permission to sell poppies in the Mall because Lloyd Center believes that "veterans . . . deserves [*sic*] some comfort and support by the people of the United States." In light of these facts, I perceive no basis for depriving respondents of the opportunity to distribute leaflets inviting patrons of the Center to attend a meeting in which different points of view would be expressed from those held by the organizations and persons privileged to use Lloyd Center as a forum for parading their ideas and symbols.

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We must remember that it is a balance that we are striking—a balance between the freedom to speak, a freedom that is given a preferred place in our hierarchy of values, and the freedom of a private property owner to control his property. When the competing interests are fairly weighed, the balance can only be struck in favor of speech.

Members of the Portland community are able to see doctors, dentists, lawyers, bankers, travel agents, and persons offering countless other services in Lloyd Center. They can buy almost anything that they want or need there. For many Portland citizens, Lloyd Center will so completely satisfy their wants that they will have no reason to go elsewhere for goods or services. If speech is to reach these people, it must reach them in Lloyd Center. . . .

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It would not be surprising in the future to se cities rely more and more on private businesses to perform functions once performed by governmental agencies. The advantage of reduced expenses and an increased tax base cannot be overstated. 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 order citizens. Only the wealthy may find effective communication possible unless we adhere to *Marsh v. Alabama* and continue to hold that "[t]he 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.”

When there are no effective means of communication, free speech is a mere shibboleth. I believe that the First Amendment requires it to be a reality.