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Shopping Center Owner May Use State Trespass Statutes to Prohibit Speech within His Shopping Center.

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CONSTITUTIONAL LAW—First Amendment—Shopping Center Owner May Use State Trespass Statutes To Prohibit Speech Within His Shopping Center

Hudgens v. NLRB,

—— U.S. ——, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976).

In January 1971, members of Local 315, Retail, Wholesale, and Department Store Union went on strike against their employer, the Butler Shoe Company Warehouse. The strikers decided to picket not only the warehouse but also the company's several retail stores, including the outlet inside a suburban Atlanta, Georgia shopping center. Petitioner, Scott Hudgens, owner of the center, had his general manager inform the pickets that they could not picket within the mall or on the center's parking lot and threatened them with arrest for trespassing if they failed to leave. After a second warning the picketers complied but subsequently filed an unfair labor practice charge with the National Labor Relations Board alleging that Hudgens' arrest threat violated section 8(a)(1) of the National Labor Relations Act.[1] The NLRB found that Hudgens' actions did violate the NLRA.[2] On the third appeal by Hudgens, the NLRB asserted that the first amendment guarantee of freedom of speech governed the conflict between the unions' right to picket and Hudgens' property rights. Held—*Vacated and remanded.* The owner of a privately owned shopping center generally open to the public may refuse to allow the exercise of first amendment rights of free expression on his property because the owner's property and activities are not endowed by the state with a public function sufficient to constitute state action.[3] As a result, the first amendment guarantee of free expression is not at issue in determining the rights and liabilities of the parties which are

1. Hudgens, 192 N.L.R.B. 671 (1971). Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) (1970), says that an employer commits an unfair labor practice if he restrains or coerces employees in the exercise of their section 7 rights. Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1970) provides that: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

2. Although Hudgens was not the actual employer of the pickets, he was an employer engaged in commerce within the meaning of sections 2(6) and (7) of the National Labor Relations Act, 29 U.S.C. § 152(6) and (7) (1970); *see* Austin Co., 101 N.L.R.B. 1257, 1258-59 (1952) (a statutory employer may violate section 8(a)(1) concerning employees other than his own). *See also* section 2(13) of the National Labor Relations Act, 29 U.S.C. § 152(13) (1970) (for agent's act to impute responsibility to another, act need not be specifically authorized or ratified).

3. Hudgens v. NLRB, — U.S. —, 96 S. Ct. 1029, 1036-37, 47 L. Ed. 2d 196, 207 (1976).

now dependent on the NLRA as interpreted by the NLRB in resolving conflicts between section 7 rights and private property rights.[4]

The first amendment guarantee of free expression is protected against any infringement by the actions of national, state, and local governments[5] but affords no protection against strictly private conduct.[6] The term "state action" is synonymous with the requirement that a governmental act or its equivalent be involved in any denial of free speech before the protections of the first amendment can be invoked.[7] "State action" encompasses not only state and local legislative action, but also any acts committed by state officials and agents.[8] The United States Supreme Court formulated the idea that the prohibition against denying equal protection was limited to "state action" by the wording of the fourteenth amendment.[9] The Court subsequently reasoned that the wrongful act of an individual, unsupported by any state authority, is simply a private wrong committed by that individual for which adequate legal remedies exist.[10]

Despite the requirement of "state action," modern courts have found that private acts restricting free speech may come under the protection of the first amendment through the fourteenth amendment when the acts rise to the level of "state action."[11] In order for a private act to rise to the level of "state action" it must be done under a claim or color of law[12] or be

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4. *Id.* at —, 96 S. Ct. at 1037-38, 47 L. Ed. 2d at 207-08.

5. U.S. CONST. amend. I provides that: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

6. *E.g.*, Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 114 (1973); Shelley v. Kraemer, 334 U.S. 1, 13 (1948); Civil Rights Cases, 109 U.S. 3, 11 (1883). *See generally* Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960).

7. Burton v. Wilmington Parking Authority, 365 U.S. 715, 721-22 (1961); Shelley v. Kraemer, 334 U.S. 1, 13 (1948); *see* United States v. Guest, 383 U.S. 745, 755-56 (1966). *See generally* Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960).

8. *E.g.*, Cooper v. Aaron, 358 U.S. 1, 4 (1958); Shelley v. Kraemer, 334 U.S. 1, 14-18 (1948); Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 680 (1930); Civil Rights Cases, 109 U.S. 3, 13 (1883).

9. *See* Civil Rights Cases, 109 U.S. 3, 10-11 (1883). U.S. CONST. amend. XIV, § 1 provides in pertinent part:

> *No State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *State* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(emphasis added).

10. Civil Rights Cases, 109 U.S. 3, 17 (1883). The Court explained that although a private individual may invade the rights of another, he cannot, without state authority, destroy, deprive, or injure that right given by the state. *Id.* at 17.

11. *E.g.*, Marsh v. Alabama, 326 U.S. 501, 507-08 (1946); Steele v. Louisville & Nashville R.R., 323 U.S. 192, 202 (1944); Smith v. Allwright, 321 U.S. 649, 663-65 (1944).

12. United States v. Guest, 383 U.S. 745, 755 (1966); Griffin v. Maryland, 378 U.S. 130, 135 (1964); *see* Steele v. Louisville & Nashville R.R., 323 U.S. 192, 202 (1944).

committed by a party receiving some sort of benefit from the state either in the form of aid or a direct license.[13] Also, those private acts which assume the nature or characteristics of a governmental action, and thereby perform an essentially "state function," constitute "state action."[14] The circumstances in which "state action" is applied to private property and actions is by no means settled and depends in each case on the relationship between the government, the private party, and the function performed.[15]

Free expression is not limited to verbal or written communication but includes any method of expression which appears well suited to bring ideas and views to the attention of the desired audience.[16] A citizen's right to exercise freedom of speech does not extend to all public property but is restricted to those areas deemed appropriate public forums.[17] Actions by the state may properly limit or prohibit first amendment rights conducted on public property where the time, place, and manner of speech activity conflict with other citizen's rights of comfort, convenience, and peaceful conduct in using the property.[18] No state or municipality, however, has the right to completely bar the exercise of first amendment expression on its streets, sidewalks, or public places or to make that right dependent on a license or permit which can be denied at will.[19] Once the forum is established, the

13. *See, e.g.*, Lombard v. Louisiana, 373 U.S. 267, 281-83 (1963); Garner v. Louisiana, 368 U.S. 157, 183-85 (1961); Burton v. Wilmington Parking Authority, 365 U.S. 715, 724-26 (1961).

14. *See, e.g.*, Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 318-19 (1968); Evans v. Newton, 382 U.S. 296, 299 (1966); Public Util. Comm. v. Pollak, 343 U.S. 451, 461-63 (1952).

15. *See* Anderson v. Martin, 375 U.S. 399, 403 (1964). *See generally* Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960).

16. *E.g.*, Carlson v. California, 310 U.S. 106, 113 (1940); Thornhill v. Alabama, 310 U.S. 88, 102 (1940). Although these cases recognized picketing as communication protected by the first amendment, later cases distinguished picketing as "speech plus" or speech involving conduct which the government has a legitimate right to regulate in the public interest. *See* Bakery Drivers Local 802 v. Wohl, 315 U.S. 769, 776-77 (1942) (Douglas, J., concurring); AFL v. Swing, 312 U.S. 321, 325-26 (1941). *See generally* Note, *The Invisible Hand and the Clenched Fist: Is There a Safe Way to Picket Under the First Amendment?*, 26 HASTINGS L.J. 167 (1974).

17. *See* Adderley v. Florida, 385 U.S. 39, 47-48 (1966); Cox v. Louisiana, 379 U.S. 536, 554-55 (1965); Wolin v. Port Authority, 392 F.2d 83, 88 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).

18. *E.g.*, Adderley v. Florida, 385 U.S. 39, 47, 48 (1966); Jamison v. Texas, 318 U.S. 413, 417 (1943); *see* Cox v. New Hampshire, 312 U.S. 569, 574 (1941); Hague v. CIO, 307 U.S. 496, 516 (1939).

19. Largent v. Texas, 318 U.S. 418, 422 (1943) (municipal ordinance requiring permit for dissemination of literature); Jamison v. Texas, 318 U.S. 413, 415-17 (1943) (Dallas city ordinance prohibiting distribution of handbills); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (state statute requiring permit to solicit purchase of religious literature); Schneider v. State, 308 U.S. 147, 157-60 (1939) (ordinance requiring permit from police chief to distribute handbills); Lovell v. City of Griffin, 303 U.S. 444, 445, 450-51 (1938) (ordinance holding any distribution of literature without written permission of the city manager a nuisance).

first amendment prohibits any government action which denies others access to the forum on the basis of the content or philosophy of their expression.[20]

Owners of property used nondiscriminatorily for private purposes only are not subject to the constraints of the first amendment in dealing with people who desire to exercise their first amendment rights on such property.[21] Private property may assume the characteristics of public property and thereby become an appropriate public forum.[22] In determining when private property assumes the features of public property,[23] the courts have adopted an approach which balances the rights of the property owner with the rights of free speech.[24] The balancing approach was first applied in the landmark decision of *Marsh v. Alabama*,[25] which held that application of the state's criminal trespass statute to deny Marsh the right to distribute religious literature on a sidewalk in the business block of a company owned town constituted "state action" in violation of Marsh's first amendment rights.[26] The Court reasoned that the business district, although privately owned, was substantially open to the public use, functioned as the equivalent of a municipality, and therefore was an appropriate forum for the exercise of first amendment rights.[27] In balancing the rights of property owners to regulate the use of their property and the rights of individuals to enjoy freedom of expression, the majority in *Marsh* established the policy that freedom of speech occupies a preferred position.[28]

With the decision and policy considerations expressed in *Marsh* firmly in mind, the Court, in 1968, decided *Food Employees Local 590 v. Logan Valley Plaza, Inc.*[29] In *Logan Valley* it was determined that since the

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20. Police Dep't v. Mosley, 408 U.S. 92, 96 (1972).

21. *See, e.g.*, Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 114 (1973); Shelley v. Kraemer, 334 U.S. 1, 13 (1948); Civil Rights Cases, 109 U.S. 3, 11 (1883).

22. Marsh v. Alabama, 326 U.S. 501, 508 (1946); Munn v. Illinois, 94 U.S. 113, 125-26 (1876).

23. The term "quasi-public" property will hereinafter be applied to describe private property having a public use and character.

24. *E.g.*, Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 319-20 (1968); Marsh v. Alabama, 326 U.S. 501, 509 (1946); Diamond v. Bland, 91 Cal. Rptr. 501, 507 (1970), *cert. denied*, 402 U.S. 988 (1971). For a general discussion of the Supreme Court's method of applying this somewhat vague approach, see Henely, *Property Rights and First Amendment Rights: Balance and Conflict*, 62 A.B.A.J. 77 (1976).

25. 326 U.S. 501 (1946).

26. *Id.* at 509. The Court in *Marsh* stated that: "[w]hether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free." *Id.* at 507.

27. *Id.* at 506; *accord*, Wolin v. Port Authority, 392 F.2d 83, 88 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).

28. Marsh v. Alabama, 326 U.S. 501, 509 (1946).

29. 391 U.S. 308 (1968).

shopping center served as the community business block and was freely accessible and open to the public, it was therefore an appropriate public forum for the exercise of first amendment rights.[30] The holding was limited to the exercise of first amendment rights in a manner and for a purpose generally consonant with the use to which the property is actually put.[31] The Court approved of the reasoning in *Marsh* which stated that a major consideration in finding "state action" by the company town was the desire to preserve first amendment forums from destruction by economic and social changes.[32]

Four years later, in cases involving, respectively, the parking lot of a single, free standing store and a privately owned shopping center, the Court held that the rights of property owners were superior to first amendment rights.[33] In *Central Hardware Co. v. NLRB*,[34] the Court decided that the parking lots surrounding a store need not be made available for the exercise of first amendment rights because the lots had not assumed the "functional attributes of public property devoted to public use."[35] The decision specifically allowed such suburban businesses to prevent any protest or labor activity of nonemployees, while failing to grant the same protection to businesses in the downtown business block, which front on a public street.[36]

Lloyd Corp. v. Tanner[37] was concerned with a mammoth shopping mall located in downtown Portland, Oregon. Five persons attempted to distribute handbills protesting the Vietnam war and were threatened with arrest for

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30. *Id.* at 319-20.

31. *Id.* at 319-20. The Court established the "related to the use" test for determining when such first amendment activities would be protected on quasi-public property. In discussing the test's application, the Court made it clear that the speech activity must relate to a specific activity for which the property is being utilized. *Id.* at 320 n.9.

32. *Id.* at 324.

33. Lloyd Corp. v. Tanner, 407 U.S. 551, 569-70 (1972) (privately owned shopping center); Central Hardware Co. v. NLRB, 407 U.S. 539, 544-45 (1972) (parking lot of store). In *Central Hardware* the Court based their decision upon the statutory criteria of the NLRA, not the first amendment. *Id.* at 544-45.

34. 407 U.S. 539 (1972).

35. *Id.* at 547. The Court's holding, although not directly rejecting *Marsh* and *Logan Valley*, is inconsistent with the rationale of those cases which attempted to prevent the restriction of first amendment rights resulting from social and economic changes.

36. *Id.* at 547. The *Central Hardware* decision directly contradicts the language and reasoning expressed in *Logan Valley* where the Court said:

> 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.

Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 324-25 (1968).

37. 407 U.S. 551 (1972).

trespassing if they failed to observe the center's no handbilling policy.[38] In the resulting declaratory judgment suit, the Supreme Court held that the privately owned shopping center had the right to prohibit the distribution of handbills which were unrelated to the operations of the center.[39] Although the Court made factual distinctions in reconciling *Lloyd* with *Marsh* and *Logan Valley*, the reasoning behind those distinctions incorporated the dissents in *Logan Valley* and essentially contradicted the reasoning established in the prior two cases.[40] After *Lloyd* distinguished *Logan Valley* and *Marsh*, the state of the law was such that private property generally open to the public was deemed to be a public forum only if the speech activity was related to the use of the property and no other public property existed on which the activity could reasonably occur.[41]

Hudgens v. NLRB[42] signals the demise of the *Logan Valley* rationale and its concurrent constitutional policy regarding free speech by recognizing that the reasoning in *Lloyd* and *Logan Valley* are irreconcilable.[43] The *Marsh* decision, although not overruled, was necessarily restricted to its specific facts.[44] Since the *Logan Valley* opinion was based on the policy arguments in *Marsh*, it now appears that those frequently quoted arguments have been invalidated.[45] Recognizing the differences between the reasoning in *Lloyd* and *Logan Valley*, *Hudgens* states its approval of *Lloyd*'s reasoning and rejects *Logan*'s finding of "state action" where private property is merely equivalent to a central business district and generally open to the public.[46] The *Hudgens* decision also discards the dual criteria set out in *Lloyd* which

38. *Id.* at 556.

39. *Id.* at 567-70. *Lloyd* distinguished *Logan Valley* on the fact that picketing related to the center's use, but protesting the war did not (utilizing the "related to the use" test of *Logan Valley*). *Id.* at 564.

40. *Id.* at 562-63 (majority opinion adopting and utilizing the dissenting opinion of Mr. Justice Black in *Logan Valley*).

41. *Id.* at 564-65, 567. In rejecting the plaintiff's argument that the property functioned as a municipal business district, the Court stated that "there was no comparable assumption or exercise of municipal functions or power . . ." and therefore no "state action." For an excellent treatment of *Lloyd*'s impact on previous public forum cases see Comment, *The Public Forum from Marsh to Lloyd*, 24 AM. U.L. REV. 159 (1974); Note, *Lloyd Corp. v. Tanner: The Demise of Logan Valley and the Disguise of Marsh*, 61 GEO. L.J. 1187 (1973).

42. — U.S. —, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976).

43. *Id.* at —, 96 S. Ct. at 1035-36, 47 L. Ed. 2d at 206. The Court acknowledged the fact that the *Lloyd* opinion incorporated dissenting opinions from *Logan Valley* and said that: "[T]he rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case." *Id.* at —, 96 S. Ct. at 1036, 47 L. Ed. 2d at 206.

44. *Id.* at —, 96 S. Ct. at 1034-35, 47 L. Ed. 2d at 204-05 (adopting Mr. Justice Black's interpretation of *Marsh* in the *Logan Valley* dissent). The effect is to restrict a finding of "state action" to situations where the "public function" of the private act is overwhelming.

45. *Id.* at —, 96 S. Ct. at 1035, 47 L. Ed. 2d at 204-05 (adopting the reasoning set forth by *Lloyd*).

46. *Id.* at —, 96 S. Ct. at 1033, 47 L. Ed. 2d at 202.

held speech on quasi-public property to be protected if it was related to the use of that property and no alternative public forum existed.[47]

The apparent result of *Hudgens'* acceptance of the *Lloyd* reasoning is to narrow considerably the situations where quasi-public property may become a public forum. The establishment of a public forum on private property can now occur only if the property or its owners either acquire or are endowed by the state with powers or functions governmental in nature, so that their actions become "state actions" within the meaning of *Lloyd.*[48] By adopting this criteria, the Court has chosen an approach in resolving the conflict of property rights and freedom of speech which depends on whether the facts of each case are consistent with the traditionally strict conceptions of "state action."[49]

The Supreme Court in *Hudgens v. NLRB*[50] has clarified the law and its policies concerning the conflict of property rights and freedom of speech. The Court has now adopted the view that property rights should take precedence over the right to exercise free speech on quasi-public property. The requirements necessary to show "state action" by a private property owner, while not specifically enumerated, have been made more difficult to prove.[51] The result is a general restriction of the types of private property deemed to be appropriate public forums for the exercise of first amendment rights. Although the eventual effect of this decision on the dissemination of information remains uncertain, it is probable that the ability to effectively communicate a particular position or point of view will be restricted to a smaller group of citizens who, by virtue of their financial or social status, have greater access to the major forums of mass communication. Conversely, it appears likely that the groups without access to the mass media, who depend on picketing, demonstrations, and handbilling to communicate their message, will be denied access to an ever increasing number of locations for the purpose of exercising first amendment rights.

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47. *See id.* at —, 96 S. Ct. at 1037, 47 L. Ed. 2d at 207. Although it does not specifically reject those criteria, the application of the decision to the facts in this case leaves no doubt as to the Court's intent.

48. Hudgens v. NLRB, — U.S. —, 96 S. Ct. 1029, 1035, 47 L. Ed. 2d 196, 206 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972). *Lloyd* takes the extreme view that the private property must rise to "semi-official municipal functions as a delegate of the State, . . ." or exercise municipal functions or powers so broad that it stands "in the shoes of the State." *Id.* at 569.

49. *See* Hudgens v. NLRB, — U.S. —, 96 S. Ct. at 1029, 1036, 47 L. Ed. 2d 196, 206 (1976). By adopting such a stringent and narrow view of "state action," the Court has apparently ignored its previous reasoning in other "state action" cases such as Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961) (courts should carefully look for nonobvious state involvement in private acts).

50. — U.S. —, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976).

51. *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972). In order to constitute "state action," private property must rise to "semi-official municipal functions as a delegate of the State, . . ." or exercise municipal functions or powers so broad that it stands "in the shoes of the State." *Id.* at 569.