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# Constitutional Law - Deprivation of Personal Rights - Private Property Rights Yield to First Amendment

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ligious practices only upon demonstration that some compelling state interest outweighs defendants' interest in religious freedom."[33]

The Courts have concluded there is a compelling state interest when the child's health is endangered.[34] *Prince v. Commonwealth of Massachusetts*,[35] upheld the conviction of a Jehovah's Witness for allowing a minor to sell religious literature in public in violation of a child labor law. "The right to practice religion freely does not include liberty to expose . . . the child . . . to ill health."[36] Likewise, vaccinations have been required[37] as well as blood transfusions.[38]

Thus the obvious question is presented: Is there a compelling state interest in compulsory education of the Amish to age 16 years? It appears the Wisconsin Supreme Court should be applauded for a decision in the negative. What is gained by forcing a student to live between two worlds? *Brown v. Board of Education*,[39] speaks of a world which is foreign to the Amish. The law only forces a father to choose between criminal sanction and loss of salvation. Is there a state interest which forces a man to sell his farm and move elsewhere? The answers to these questions can only result in a decision upholding the Wisconsin Supreme Court.

It must be concluded from the decision above that the states will have to recognize the freedom of the Amish to follow their religious beliefs, even to the point of sacrificing the compulsory education statutes. The standard of "compelling state interest" will safeguard this decision from abuses injurious to health and safety.

REED E. HALL

CONSTITUTIONAL LAW—DEPRIVATION OF PERSONAL RIGHTS—PRIVATE PROPERTY RIGHTS YIELD TO FIRST AMENDMENT—Defendants are large, privately owned shopping centers built entirely on privately owned land, but open to the public seven days a week. Plaintiff is a citizens' environmental council which seeks an injunction against the defendant centers. Defendants had requested that the plaintiff refrain from soliciting signatures for an initiative outside of the business premises on shopping center property. The Court of Appeals of Washington, reversing the lower court's decision,

33. *Id.* at 815.
34. Prince v. Commonwealth of Mass., 321 U.S. 158 (1944).
35. *Id.*
36. *Id.* at 166-67.
37. Cude v. State, 237 Ark. 927, 377 S.W.2d 816 (1964).
38. Application of the President and Directors of Georgetown College, Inc., 331 F.2d 1000, (D.C. Cir.) *cert. denied*, 377 U.S. 978 (1964).
39. Brown v. Board of Education, 347 U.S. 483 (1954).

found for the plaintiff and issued a permanent injunction. *Held*: Where privately owned shopping centers function as business districts, the unconsented invasion of owners' property by persons soliciting signatures for an initiative was protected by the State and Federal Constitutions. The exercise of such first amendment rights on private propertry is protected so long as the expression of these rights does not unduly interfere with the normal use of the property, irrespective of the fact that solicitation of signatures is not related to and consonant with the use to which the shopping center is put. *Sutherland v. Southcenter Shopping Center, Inc.*, 3 Wash. App. 833, 478 P.2d 792 (1970).[1]

Property dedicated to public use has historically been held to be a proper forum for the exercise of first amendment rights.[2] However, the courts have been far less consistent in upholding first amendment freedoms when the exercise takes place on private property, with state courts often holding for the property owner.[3]

The rights of private ownership first gave way to the exercise of constitutional rights of free speech in *Marsh v. Alabama*.[4] In that case, the United States Supreme Court recognized that under some circumstances property that is privately owned may, at least for first amendment purposes, be treated as though it were publicly held. The fact situation in *Marsh* involved a Jehovah's Witness who sought permission to distribute religious literature on the streets of a company owned town. She was refused permission, and when she persisted in distributing her materials, was arrested and convicted of violation of a criminal trespass statute. The town in question was accessible to and freely used by the public in general and except for the fact that title to the property was privately held, was indistinguishable from any other town. The Court reversed the conviction holding that the owners of a company town could not prevent the exercise of first amendment rights on privately owned streets in the business district.[5]

In reaching this decision the Court was concerned not only with the ownership of property, but also with its use and characteristics. The Court reasoned that:

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1. Two days prior to the decision in this case, the Supreme Court of California, in Diamond v. Bland, 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970), facing a factual situation nearly identical to that of the instant case, reversed the Court of Appeals decision [Diamond v. Bland, 8 Cal. App. 3d 58, 87 Cal. Rptr. 97 (1970)] and in accord with the instant case, upheld the right of the plaintiffs to circulate initiative petitions and engage in other peaceful and orderly first amendment activities on premises of shopping center.

2. Amalgamated Food Employee's Local 509 v. Logan Valley Plaza, Inc., 391 U.S. 308, 313, 315 (1968); Jamison v. State, 318 U.S. 413 (1943); Hague v. C.I.O., 307 U.S. 496 (1939); Schneider v. State, 308 U.S. 147 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938).

3. 53 MINN. L. REV. 873, 876 & n.24 (1968-1969).

4. Marsh v. Ala., 326 U.S. 501 (1946).

5. *Id.* at 509.

> 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. . . .
>
> . . . Whether a corporation or municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such a manner that the channels of communication remain free.[6]

In balancing the constitutionally protected rights of the owners against the first amendment rights of the people, the Court felt the latter, as fundamental liberties, occupy a preferred position and must prevail.[7]

Distinctions may be drawn between a company-owned town and a privately owned shopping center with regard to the availability of alternate forums for first amendment expression on surrounding public property. However, the effect of any distinctions has been substantially limited by subsequent court decisions such as *Amalgamated Food Employee's Local* 509 *v. Logan Valley Plaza, Inc.*[8] The issue involved in *Logan* was whether peaceful picketing of a business enterprise located within a shopping center could be enjoined on the groud that it constituted an unconsented invasion of the property rights of the land owners. In its reasoning, the Court pointed to similarities between the company-owned town in *Marsh* and the Logan Valley shopping center. The Court held that a shopping center which served as a community business block and allowed unrestricted access to the public was, for first amendment purposes, the functional equivalent of a business district, and in such a situation the mere rights of private ownership do not justify absolute prohibition of first amendment privileges that could lawfully be conducted on public propery.[9]

Shopping centers, though privately owned in fact, are by their design and use quasi-public in nature.[10] Within the last twenty-five years there has been an astounding growth in the construction of shopping centers and in the percentage of retail sales for which they account.[11] This growth reflects the expanding public function which the shopping center has assumed in providing society with the necessities of life. The shopping center has, in effect, become

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6. *Id.* at 506-507.
7. *Id.* at 509; People v. Mazo, 38 CCH Lab. Cas. 68001, 68002 (Ill. Cir. Ct. 1959).
8. Amalgamated Food Employee's Local 509 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).
9. *Id.* at 319; *accord, In re* Lane, 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969); Schwartz-Torrence Investment Corporation v. Bakery and Confectionary Workers Local 31, 61 Cal. 2d 766, 394 P.2d 921, 923-926, 40 Cal. Rptr. 233 (1964).
10. Amalgamated Clothing Workers of America v. Wonderland Shopping Center, Inc., 370 Mich. 547, 122 N.W.2d 785, 794 (1963) (affirming opinion).
11. 6 LAW NOTES 49, 50 (1970).

the modern suburban counterpart of the town center,[12] with the result that the property though privately owned is more properly termed quasi-public.[13] Where the property is quasi-public in nature the rights of the owners become subrogated to the constitutionally protected rights of those individuals who utilize such property.[14]

The doctrine expressed in *Marsh* and *Logan* however, cannot be extended so far as to support the exercise of first amendment activities on all private property. Where there is a conflict between the wishes of the property owner and those groups of persons desiring to engage in first amendment activities, the courts look to the nature and use of the property as a determining factor in the balance of interests.[15] Where the property involved is generally not held open to the public, access for first amendment purposes may be absolutely denied.[16] But where the private property is the functional equivalent of public streets and sidewalks, the broad rights of the public to engage in certain first amendment activities thereon will prevail.[17]

The Supreme Court in *Marsh* and *Logan* declined to rule on the question of whether the activity must necessarily be directly related to the use to which the shopping center property was being put. Yet the broad holdings expressed in those cases would seem to support the right of the public to engage in first amendment activities on private property in areas that are the functional equivalent of public streets and sidewalks regardless of the relationship of those activities to the character of the surrounding commercial enterprises.[18] Furthermore, subsequent cases have upheld the right of persons to distribute both political pamphlets in behalf of particular candidates running for public office[19] and anti-war leaflets on shopping center and other privately owned property of a quasi-public nature.[20] The implication of these cases is that a direct

12. *In re* Cox, 3 Cal. 3d 205, 474 P.2d 992, 999 n.11, 90 Cal. Rptr. 24 (1970).
13. 25 WASH. & LEE L. REV. 53 (1968).
14. Amalgamated Food Employee's Local 509 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Marsh v. Ala., 326 U.S. 501 (1946); People v. Barisi, 193 Misc. 934, 86 N.Y.S.2d 277 (Magis. Ct. 1948); State v. Williams, 44 L.R.R.M. 2357 (Balt. Crim. Ct. Md. 1959); *accord*, Moreland Corporation v. Retail Store Employee's Local 444, 16 Wis. 2d 499, 114 N.W.2d 876, 879 (1962).
15. Freeman v. Retail Clerks Local 1207, 58 Wash. 2d 426, 363 P.2d 803, 806 (1961) (concurring opinion).
16. *Id.* at 807; Adderley v. Fla., 385 U.S. 39 (1966).
17. Amalgamated Food Employee's Local 509 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); *In re* Lane, 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969); Schwartz-Torrence v. Bakery and Confectionary Workers Local 31, 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964).
18. The court suggests that in the instance of picketing as contrasted with other first amendment privileges, there would be good reason to limit the picketing in a shopping center to situations where it bears a direct relationship to stores located within the shopping center. Sutherland v. Southcenter Shopping Center, Inc., 3 Wash. App. 833, 478 P.2d 792, 799 (1970).
19. Taggart v. Weinackers, Inc., 397 U.S. 223 (1970); State v. Miller, 280 Minn. 566, 159 N.W.2d 895 (1968).
20. Tanner v. Lloyd Corporation, 308 F. Supp. 128 (D. Ore. 1970); Wolin v. Port of

relation of activity to normal use of the property is not a valid limitation on the exercise of first amendment privileges.[21]

Another question presented is whether the privately owned shopping center must provide a forum for first amendment activities when other areas of access are available. The courts have held that if the chosen forum is an appropriate place for first amendment expression, the fact that these rights may be exercised elsewhere does not furnish valid grounds for their abridgment.[22] Thus, shopping centers have been required to provide a forum on the theory that streets and sidewalks are the traditional forum for first amendment expression, and where private property is the functional equivalent of streets and sidewalks these rights of expression should likewise be upheld.[23] Where private property through use becomes public in nature, it consequently also becomes an appropriate place for first amendment activities, and the availability of other forums for expression are considered irrelevant.[24]

Though first amendment activities cannot be absolutely denied on quasi-public property, these rights are subject to some limitation. The courts have deemed proper the application of reasonable regulations designed to prevent undue interference with the normal use of the property which would deprive other members of the public of an equal right of access to it.[25] Thus the property owner retains the power of reasonable non-discriminatory limitation as to the time, place or manner of expression of first amendment activities.[26] This right of regulation provides the property owner adequate means, in theory if not in fact, to protect his business interests.

Allowing the plaintiff to solicit signatures for an initiative on privately owned shopping center property is the logical extension of a clear line of precedent. The courts have consistently upheld the right of first amendment expression on publicly held property.[27] The doctrine of *Marsh* established that under some circum-

N.Y. Authority, 268 F. Supp. 855 (S.D.N.Y. 1967); *In re* Hoffman, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).

21. The test proposed in *In re* Hoffman, 67 Cal. 2d 845, 434 P.2d 353, 356, 64 Cal. Rptr. 97 (1967), was not whether petitioner's use was directly related to the use to which the quasi-public property is put, but rather whether the proposed use interferred with that use.

22. Schneider v. State, 308 U.S. 147, 163 (1939).

23. Amalgamated Food Employee's Local 509 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

24. Wolin v. Port of N.Y. Authority, 268 F. Supp. 855 (S.D.N.Y. 1967); *In re* Hoffman, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).

25. Amalgamated Food Employee's Local 509 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

26. Wolin v. Port of N.Y. Authority, 268 F. Supp. 855 (S.D.N.Y. 1967); *In re* Hoffman, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967). Note also that the seeking of signatures on a petition as in the instant case involves both pure speech (informing the public of the subject matter) and non-speech (obtaining the signatures and qualifying the signer). Consequently, the conduct may be subjected to controls that would not be permitted if it were pure speech. Cox v. State, 379 U.S. 356 (1965).

27. Amalgamated Food Employee's Local 509 v. Logan Valley Plaza, Inc., 391 U.S. 308, 313, 315 (1968).

stances property that is privately owned may be treated as if it were public.[28] In *Logan*, the Court recognized that a shopping center, because of its physical features and public function, was in essence the equivalent of a public business district. Due to this public quality, the rights of private ownership were not sufficient to justify absolute prohibition of first amendment privileges.[29] The instant case acknowledges the quasi-public nature of the shopping center in today's society which makes it a proper forum for first amendment expression. Furthermore, the case decides that first amendment activities need not be directly related to or consonant with the use to which the shopping center is put. Nor can such activities be simply denied on the grounds that other areas of access are available.[30] When property is held open to the public, the bare title of the property owner is not sufficient to outweigh the substantial interest of individuals who seek to engage in first amendment activities.

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28. Marsh v. Ala., 326 U.S. 501 (1946).
29. Amalgamated Food Employee's Local 509 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).
30. Sutherland v. Southcenter Shopping Center, Inc., 3 Wash. App. 833, 478 P.2d 792 (1970); Diamond v. Bland, 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970).