ASSEMBLY ON PRIVATE PROPERTY

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The right to peaceably assemble is one of the five freedoms guaranteed in the First Amendment, but that freedom does not necessarily extend to private property.

The 1980 U.S. Supreme Court case *Pruneyard Shopping Center v. Robins*, discussed below, said the U.S. Constitution does not give individuals an absolute right to enter and remain on private property to exercise their right to free expression. Since that decision, most states that have encountered this issue have followed the Court's view.

The first attempt to provide a constitutional basis for the protection of free expression on private property occurred in the mid-1940s. In *Marsh v. Alabama* (1946), the Supreme Court held that the owners and operators of a company town could not prohibit the distribution of religious literature in the town's business district because such expression was protected by the First and 14th amendments. The majority reasoned that the town displayed many of the attributes of a municipality; therefore the state-action requirement was satisfied for constitutional purposes of sustaining the rights of free expression. As stated in *Marsh*, "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." In striking a balance, the Court concluded that the free-speech rights of the individual were paramount over the property rights asserted by the company.

The Court subsequently extended the rationale of *Marsh* to peaceful picketing in a large shopping center known as Logan Valley Mall. In *Amalgamated Food Employees Union v. Logan Valley Plaza* (1968), the Court considered whether non-employee union members could be enjoined from picketing a grocery store in a privately owned shopping center. The Court noted that the answer would be clear "if the shopping-center premises were not privately owned but instead constituted the business area of a municipality."

"In the latter situation," the Court said in a later opinion, *Lloyd Corp. v. Tanner* (1972), "it has often been held that publicly owned streets, sidewalks, and parks are so historically associated with the exercise of First Amendment rights that access to them for purposes of exercising such rights cannot be denied absolutely."

The Court determined that the shopping center involved in *Logan Valley* was the functional equivalent of the business district involved in *Marsh*. The Court was careful, however, to limit the scope of its holding by stating, "all we decide here is that because the shopping center serves as the community business block and is freely accessible and open to the people in the area and those passing through, the state may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property was actually put."

Four years later the Court reconsidered the *Logan Valley* doctrine in *Lloyd Corp. v. Tanner.* In *Lloyd* the Court rejected the pleas of war protesters who sought to express their views at a local mall. The Court distinguished *Logan Valley* on narrow grounds, as limited to a labor dispute involving one of the center's tenants and occurring under conditions where no realistic alternative for expression existed. Neither of these elements were present in *Lloyd*. The

handbilling by the respondents in the malls of Lloyd Center had no relation to any purpose for which the center was built and being used. Rather, the message the respondents sought to convey was directed to all members of the public and could have been distributed in any number of public areas. Notably, the Court opined that "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."

Finally in *Hudgens v. NLRB* (1976), the Court explicitly rejected *Logan Valley*, stating, "if it was not clear before, … the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case." The Supreme Court's finding in *Hudgens* incontestably favored private-property rights over individual free expression.

Despite *Hudgens'* clear statement of federal law, the California Supreme Court held in *Robins v. Pruneyard Shopping Center* that the free-speech and petition provisions of the California Constitution grant mall visitors a constitutional right to free speech that outweighs the private-property interests of mall owners. The California Supreme Court took the position that "all private property is held subject to the power of government to regulate its use for the public welfare." In the unanimous 1980 decision *Pruneyard Shopping Center v. Robins*, the U.S. Supreme Court affirmed the state court's decision, noting that its own reasoning in *Lloyd* "does not ex proprio vigore ("of its own force") limit the authority of the State to exercise its police power" (power to regulate the use of private property) "or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." A state may, therefore, in the exercise of its power to regulate, adopt reasonable restrictions on private property, including granting greater freedom to individuals to use such property, so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision. (In this instance it would be a "taking" of a property owner's right to exclude others.)

Even with the Court's decision in *Pruneyard*, few states have recognized any state constitutional right to free expression on private property. The scope of these decisions is narrow. State constitutional provisions have been held to apply in only two private-property settings: shopping malls and non-public universities. Moreover, the state courts have limited the situations in which these protections are applicable to only a few, such as those involving political speech.

New Jersey has joined California in expanding individual rights on private property such as shopping malls. To date, the New Jersey Supreme Court has provided the most extensive and clearly articulated model for rejecting the traditional state-action requirements by holding mall owners accountable for violations of the state's free-speech protections. The New Jersey Supreme Court interpreted the free-speech provisions of the state constitution as extending to private owners of shopping malls as well as to state action in *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.* (1994). Before deciding *New Jersey Coalition Against the War*, the New Jersey Supreme Court had decided *State v. Schmid* (1980), which required the court to balance individual expression rights with property rights in the context of free speech at a privately owned university. *Schmid* articulated three factors: (1) the nature, purpose and primary use of such private property; (2) the extent and nature of the public's invitation to use that property; and (3) the purpose of the expressive activity undertaken on such property in relation to both the private and public use of the property. After applying the *Schmid* test, the New Jersey Supreme Court reasoned in *New Jersey Coalition* that because the mall owners "have intentionally transformed their property into a public square or market, a public gathering place, a downtown business district, a community," they cannot later deny their own implied invitation to use the space as it was clearly intended.

Colorado and North Dakota both decided cases in 1991 that extended individual free-expression rights to private mall property. These cases, however added an additional element to the mix. In *Bock v. Westminster Mall Company* (Colo. 1991), the Colorado Supreme Court found sufficient entanglement with the government to support a finding of state action on the part of a mall and commercial retail center. The Colorado court noted a highly visible governmental presence in the mall, including a police substation, military recruiting offices and county voter-registration drives. Even without the government presence, the court still found that "the range of activities permitted in the common areas of the Mall … indicates the extent to which the Mall effectively functions as a latter-day public forum." Though the court determined that the open and public areas of the mall effectively functioned as a public place, thus allowing the distribution of political pamphlets and the solicitation of signatures, it left open the issue of whether some lesser degree of governmental involvement would be sufficient for a similar holding. So, the Colorado Supreme Court seems to be advocating a case-by-case review.

In *City of Jamestown v. Beneda*, the North Dakota Supreme Court found that restrictions on speech by mall authorities involved state action. In this case, the city of Jamestown owns the mall and the property and leases it to a private developer. Despite the lease, the court found a government responsibility to protect the people's right of free speech. In addition, the court found "that the common area walkways of the … mall constitute a public forum." The mall authorities could regulate the time, place and, manner of expression but they would have to be consistent with First Amendment standards for limiting speech.

A trial court in New York recently ruled on a case with similar elements. In November 2006, state Supreme Court Justice Vincent Bradley ruled in *Kings Mall v. Wenk* that "a protester has no right to freedom of expression in a privately owned mall." However, "the presence of a government tenant (a military recruitment center) at the mall renders the property … something which is more akin to a public forum." The judge also ruled that "the introduction of a governmental element to the equation should not render the entire mall space … a staging area for protests." His solution was to allow the protests to be conducted immediately outside the enclosed area of the mall where the recruitment offices were located.

Also, in 2004, Florida's 1st District Court of Appeals upheld a 2003 decision by Circuit Court Judge Dedee Costello, who overturned a trespassing conviction against Kevin Wood in *State of Florida v. Wood.* Wood was arrested for trespassing while collecting signatures at a local mall to get his name added to the ballot for the county court clerk position. According to the Osceola News Gazette, Costello wrote that Florida's Constitution "prohibits a private owner of a 'quasi-public' place from using state trespass laws to exclude peaceful political activity."

The above decisions all involved malls, but a recent California ruling shows that when a "stand alone" store is involved the outcome may be different. In 2003, the California Court of Appeals heard *Albertson's v. Young*, in which a supermarket owner brought an action against a number of individuals who stationed themselves immediately outside the entrances to the supermarket to solicit signatures on ballot-initiative petitions. The court upheld the trial court, which found that the store "was a single structure, single-use grocery store that contained no plazas, walkways, or courtyards for patrons to congregate and spend time together." This finding largely led to the ruling that the store was not the functional equivalent of a traditional public forum, and could not be used by the individuals for the purpose of soliciting and gathering signatures or for other such expressive activity.

Other states, Massachusetts, Oregon, Pennsylvania and Washington, all initially extended some state constitutional protection for speech on private property, but they later scaled back the scope of their decisions or overruled the holding altogether. The Supreme Judicial Court of Massachusetts, for example, held in *Batchelder v. Allied Stores Int'l.* (1983) that the state constitution's free-elections provision did not require state action and protected anyone at a shopping center collecting petition signatures to qualify for a place on the ballot for public office. Only six months later, however, in *Commonwealth v. Hood*, the same court declined to extend state constitutional protection to speech unrelated to a pending election that was expressed on private property. In *Hood*, several individuals were arrested after they attempted to distribute leaflets advocating nonviolence and protesting nuclear war outside a privately owned laboratory that performed nuclear testing for the government. The Supreme Judicial Court of Massachusetts made clear that "*Batchelder* does not establish that there is no state action requirement," but added, "even if state action were not required, *Batchelder* does not suggest that we would extend the (constitutional) protections" beyond the shopping-mall context.

In *Lloyd Corp. v. Whiffen* (1993), the Oregon Supreme Court opined that its citizens had a right to seek signatures on initiative petitions in the common areas of shopping malls, basing its decision on the initiative and referendum powers reserved to the citizens of Oregon in Art. IV., Section I. Dramatically, however, in *Stranahan v. Fred Meyer, Inc.* (2000), the Oregon Supreme Court reversed its earlier decision, holding that while Art. IV, Section 1 of the Oregon Constitution conferred the right to propose laws via initiative, it did not extend so far as to create a right to solicit signatures for initiative petitions on private property, including the petitioners privately owned shopping center.

The Pennsylvania Supreme Court first articulated its position in *Commonwealth v. Tate* (1981) by reversing trespass convictions against members of an anti-war group who distributed leaflets on the campus of a private college during a symposium. The court, in *Tate*, appeared to hold that the Pennsylvania Constitution's free-speech and assembly protections were not limited to state action. Yet the same court reached the opposite conclusion five years later in *Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Insurance Co.* In that case, a shopping-mall owner was not required to permit members of a political committee to collect signatures for a candidate's nominating petition on mall premises. Rather than overruling *Tate*, however, the court attempted to distinguish its earlier decision by explaining that the defendants in *Tate* were entitled to distribute leaflets on the private college campus "because the college had made itself into a public forum" by permitting the public to "walk its campus freely and use many of its facilities" and by "encouraging the public to attend the symposium." The shopping center, in contrast, had not made itself a public forum.

In *Alderwood Assocs. v. Washington Envtl. Council* (1981), the Washington Supreme Court concluded that its state's constitutional speech and initiative provisions did not require state action. Subsequently, in *Southcenter Joint Venture v. National Democratic Policy Comm.* (1989), the court reversed its prior holding and ruled that the free-speech provision of the state constitution did not afford a political organization the right to solicit contributions and distribute literature at the mall.

The majority of states to consider the issue have declined to extend any right of free expression to privately owned property. These states include:

- Arizona (*Fiesta Mall Venture v. Mecham Recall Committee*)
- Connecticut (*Cologne v. Westfarms Assocs.*)
- Georgia (*Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assocs.*)
- Hawaii (*Estes v. Kapiolani Women's and Children's Med. Ctr.*)

- Illinois (*Illinois v. DiGuida*)
- Iowa (*State v. Lacey*)
- Michigan (*Woodland v. Michigan Citizens Lobby*)
- Minnesota (*State v. Wicklund*)
- New York (*Shad Alliance v. Smith Haven Mall*)
- North Carolina (*State v. Felmet*)
- Ohio (*Eastwood Mall, Inc. v. Slanco*)
- South Carolina (*Charleston Joint Venture v. McPherson*)
- Texas (*Republican Party v. Dietz*)
- Virginia (*Collins v. Shoppers' World*)
- Wisconsin (*Jacobs v. Major*)

Given their shift in position, Oregon and Washington are also a part of this majoritarian group. These states have decided against reading their free-speech provisions as affirmative rights that can be asserted against both public and private entities. They have similarly declined to adopt a more flexible state-action doctrine. Quite simply, these states have chosen not to interpret their free-speech provisions as granting any broader protection than that granted by the First Amendment.

Since not all states have explicitly addressed this issue and some that have have changed their opinion, it is clear that this issue will continue to be debated among state legislatures and courts.