1973

Constitutional Law: Shopping Center Not Open to First Amendment Actitivies Unrelated to Use

Minn. L. Rev. Editorial Board

Case Comments

Constitutional Law: Shopping Center Not Open to First Amendment Activities Unrelated to Use

Respondents distributed handbills in petitioner's shopping center which contained numerous commercial businesses and professional offices and included a large surrounding parking area dissected and bounded by public streets and sidewalks. The handbills, which were distributed in the interior mall area, invited the public to a meeting to protest the draft and the Vietnam war. Petitioner's security guards told respondents that they would be subject to arrest for trespass[1] if they continued the distribution and suggested they transfer their activity to public streets and sidewalks on the exterior. In an action brought by respondents charging violation of their first amendment rights, the district court held that the shopping center was "the functional equivalent of a public business district" and therefore open for the exercise of such rights.[2] The Court of Appeals for the Ninth Circuit affirmed.[3] The Supreme Court reversed and remanded, *holding* that there had been no dedication of petitioner's shopping center to public use which would entitle respondents to exercise free expression unrelated to the center's operations, especially where adequate alternative means of communication existed. *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).[4]

Although the rights guaranteed by the first amendment have been said to occupy a preferred position,[5] they are not absolute.[6]

---

1. Pursuant to the PORTLAND, ORE., POLICE CODE § 16-613.
2. Tanner v. Lloyd Corp., 308 F. Supp. 128 (D. Ore. 1970).
3. Tanner v. Lloyd Corp., 446 F.2d 545 (9th Cir. 1971).
4. The Court was divided 5-4. Mr. Justice Powell wrote the opinion for the Court. Marshall, J. dissented in an opinion in which Douglas, Brennan, and Stewart, J.J., joined.
5. *See, e.g.*, Thomas v. Collins, 323 U.S. 516 (1945); Follett v. McCormick, 321 U.S. 573 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943).
6. The clear and present danger test and the fighting words doctrine demonstrate that not every form of speech will be protected. For the former *see, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969); Dennis v. United States, 341 U.S. 494 (1951); Whitney v. California, 274 U.S. 357 (1927); Schenck v. United States, 249 U.S. 47 (1919). The principle was restated in the most recent case:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Brandenburg v. Ohio, *supra* at 447 (footnote omitted). Speech which consists of "fighting" or insulting words likely to incite the hearer to

In deciding what activity should be protected, courts often balance the interests involved,[7] taking into consideration the manner[8] and place[9] in which the rights are asserted as well as the nature and degree of the interference with the rights of others.[10]

---

fight is not constitutionally protected. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). *But see* Terminiello v. Chicago, 337 U.S. 1 (1949), where the Court said freedom of speech is protected "unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."

7. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501 (1946); Jamison v. Texas, 318 U.S. 413 (1943); Thornhill v. Alabama, 310 U.S. 88 (1940); Schneider v. State, 308 U.S. 147 (1939). Even where the conduct is found to be protected, reasonable regulation will be permitted. *See, e.g.*, Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968); Cox v. Louisiana, 379 U.S. 536 (1965); Cox v. New Hampshire, 312 U.S. 569 (1941).

8. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 555 (1965), where the Court said:

> We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.

Picketing which is done in an oppressive or coercive manner is not protected. Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Thornhill v. Alabama, 310 U.S. 88 (1940). However, conduct which is not disruptive or disorderly may be protected. Brown v. Louisiana, 383 U.S. 131 (1966). The more the activity involves conduct as opposed to pure speech, the less likely it is to be protected. *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968).

9. *See, e.g.*, Public Service Comm'n v. Polak, 343 U.S. 451 (1952), where first amendment rights were said to be limited by the rights of others when traveling in a public conveyance and Kovaks v. Cooper, 336 U.S. 77 (1949), where the Court stated that the use of sound trucks in a residential neighborhood would be an impermissible interference with the right of privacy.

There is no absolute right to use public places for first amendment activities even though they have long been associated with such use. On the one hand the Supreme Court has stated:

> 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.

Hague v. CIO, 307 U.S. 496, 515 (1939). On the other hand, even state-owned property will not always be an appropriate place to assert such rights, and the state may prohibit communicative activities in places not suited to them. Cameron v. Johnson, 390 U.S. 611 (1968); Adderley v. Florida, 385 U.S. 39 (1966). The basic standard used to determine where expressive activities may be carried on is whether or not they would interfere with the use to which the property is dedicated. Adderley v. Florida, *supra* at 47.

10. *See, e.g.*, Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969); Watchtower Bible & Tract Soc'y, Inc. v. Metropolitan

Before the protection of the first amendment applies, there must be a finding of "state action"[11] which may arise from direct or indirect state involvement, from the state's delegation of its functions to a nonpublic entity, or under the concept of public use. There is no clear agreement as to the nature and degree of state involvement required, but the Supreme Court has gone so far as to find state involvement where a state leased space to a discriminator.[12] Some commentators would classify the mere use of a state trespass law as state action.[13] Under the delegation of function doctrine, functions which are uniquely governmental in nature, such as the provision and operation of parks, transit systems, and the elective process, may not be delegated to a private individual or institution without the concomitant carry-over of first amendment rights.[14] Closely related to this doc-

---

Life Ins. Co., 297 N.Y. 339, 79 N.E.2d 433 (1948), *cert. denied*, 335 U.S. 886 (1949).

11. The first amendment was intended as a restriction solely on the federal government, but it has been applied to the states through the due process clause of the fourteenth amendment. *See, e.g.*, Hughes v. Superior Court, 339 U.S. 460 (1950); Winters v. New York, 333 U.S. 507 (1948); Lovell v. Griffin, 303 U.S. 444 (1938); De Jonge v. Oregon, 299 U.S. 353 (1937); Gitlow v. New York, 268 U.S. 652 (1925).

12. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

13. Some have interpreted Shelley v. Kraemer, 334 U.S. 1 (1948), to mean that there is state action whenever a state enforces private discrimination. *See* Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962). This line of reasoning may be carried over into the first amendment area:

> [W]henever a state court is presented with a choice one resolution of which would serve to prevent racial discrimination, the fourteenth amendment subjects to review as state action the choice of the other resolution. If, analogously, the individual's right to be free of unconstitutional infringement of first amendment expression runs against any state choice not to vindicate the free exercise of that expression, then . . . a state court [may be barred] from aiding private action that threatened to infringe free speech . . . .

The Supreme Court 1967 Term, 82 HARV. L. REV. 63, 133 (1968).

14. *See, e.g.*, Evans v. Newton, 382 U.S. 296 (1966) (park); Terry v. Adams, 345 U.S. 461 (1953) (elective process); Public Service Comm'n v. Pollak, 343 U.S. 451 (1952) (transit system); Smith v. Allwright, 321 U.S. 649 (1944) (elective process); Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956), *cert. denied*, 353 U.S. 924 (1957) (cafeteria in courthouse).

Under the delegation of function doctrine a state may be held accountable under the fourteenth amendment for its *failure* to act. "[W]hen a state permits this kind of private activity it must couple the permission with certain restrictions. If these are not supplied, the Court will supply them. . . ." Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1097 (1960).

Justice Douglas has gone so far as to suggest that retail stores and restaurants perform a function similar to common carriers, so that, even though privately owned, they may be open to the exercise of first

trine is the public use concept under which private property which has been opened to the public may become subject to the provisions of the first amendment.

The public use concept originated in *Marsh v. Alabama*,[15] where, in addition to noting that the state had "permitted" a private corporation "to use its property as a town,"[16] the Court said, "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."[17] On such quasi-public property, ownership rights must sometimes yield to first amendment activity.[18]

In deciding *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*,[19] the first Supreme Court case to deal

amendment activities. Lombard v. Louisiana, 373 U.S. 267, 275-79 (1963) (concurring opinion).

15. 326 U.S. 501 (1946). In *Marsh*, a Jehovah's Witness was convicted under the Alabama trespass law for failing to leave the sidewalk of a company town where she was distributing religious literature. The conviction was upheld by the Alabama Court of Appeals and certiorari was denied by the Supreme Court of Alabama. The United States Supreme Court reversed on the ground that the town served a public function so close to that of an ordinary municipality that the restraints of the first and fourteenth amendments must be held to apply. The Court observed that the town consisted of a "business block" as well as a residential area, streets, and a sewage system and that "the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation." 326 U.S. at 503.

16. *Id.* at 507.

17. *Id.* at 506. The Court continued:

> Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation.

Id. (Footnote omitted).

18. The policy reason for the development of this theory has been said to be the desire to allow continued protection for free expression in a time of changing patterns of commercial development. A finding that property is quasi-public permits the courts to balance the competing values of free speech and property rights in each case. Note, *Free Speech: Peaceful Picketing on Quasi-Public Property*, 53 MINN. L. REV. 873, 880-81 (1969).

19. 391 U.S. 308 (1968). *Logan* involved a union engaged in the peaceful picketing of a nonunion supermarket in Logan Valley Plaza. Pickets patrolled in the parcel pickup area and the adjacent parking lot until the supermarket and Logan obtained an *ex parte* order from the Court of Common Pleas of Blair County which in effect restricted their activity to grassy berms adjacent to the public roads surrounding the center. After a hearing, the court continued its injunction based on

with expressive activity in a shopping center, the Court based its holding on the public use concept. In *Logan*, the Court upheld the right of a union to picket a particular store on the center's property, reasoning that the center was comparable to the company town in *Marsh* because it "serves as the community business block 'and is freely accessible and open to the people in the area and those passing through.' "[20] Therefore, the Court continued, communicative activities conducted therein were protected by the first amendment but could be limited to expression "in a manner and for a purpose generally consonant with the use to which the property is actually put."[21] It was not clear from the opinion, however, whether the "consonant with use" limitation meant that first amendment activities would be allowed so long as they did not interfere with the normal use of the property or that they would be permitted only if their message related to the use to which the property was put.[22]

In a sense Justice Powell's majority opinion in *Lloyd* clarified the ambiguity created by *Logan*. The Court distinguished *Marsh* on the ground that it involved a peculiar situation because it dealt with a company town, "an economic anomaly of the past,"[23] which encompassed all of the components and services characterizing any other town.[24] While the decision in *Logan*

---

the protection of property rights and what it held was unlawful coercion to join the union. The Pennsylvania Supreme Court affirmed on the sole ground of trespass. In reversing, the United States Supreme Court held that the berms were too far from the supermarket to allow its patrons to read the union's message and that the pickets were placed in danger by having to walk in close proximity to traffic. "Naked title" was not a sufficient interest to justify the interference with the union's interest in communication. *Id.* at 324.

20. *Id.* at 319 (citation omitted).

21. *Id.* at 319-20 (footnote omitted).

22. The language immediately following the holding suggests that the "consonant with use" limitation is a standard of interference by which the conduct in question is to be judged. It discusses interference with the use to which the owner has put the property and with the normal use by the public. *See* 391 U.S. at 320-21. The Court, however, specifically reserved the question of a case where picketing would not be "directly related in its purpose to the use to which the shopping center property was being put." *Id.* at 320, n.9. And later, only business-related illustrations are used in assessing the potential impact of the decision: Justice Marshall referred specifically to "the substantial consequences for workers seeking to challenge substandard working conditions, consumers protesting shoddy or overpriced merchandise, and minority groups seeking nondiscriminatory hiring policies". *Id.* at 324.

23. 407 U.S. at 561.

24. And so "where private interests were substituting for and performing the customary functions of government, First Amendment freedoms could not be denied. . . ." *Id.* at 562.

"extended *Marsh* to a shopping center situation . . . it did so only in a context where the First Amendment activity was related to the shopping center's operations."[25] Thus, the Court held that *Logan*'s "consonant with use" wording limited the availability of the center to those expressive activities related to the use to which the property was put.[26] In short, the Court found no dedication of the center to public use, pointing out that the scope of the invitation to the public was limited to potential shoppers.[27] In reaching this conclusion the Court expressed concern about the difficulty of applying the public use standard[28] and also

25. *Id.*

26. The Court said that it would be incorrect to rely on the dicta in *Logan* to argue that "whenever a privately owned business district serves the public generally its sidewalks and streets become the functional equivalents of similar public facilities." *Id.* (footnote omitted). In this context, it is interesting to note the development in California of this area of law. The California Supreme Court had reached the same result as *Logan Valley* four years earlier, largely by use of a balancing technique, although in weighing the interest of the shopping center owner it noted that he had "fully opened his property to the public." Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers' Union, Local 31, 61 Cal. 2d 766, 771, 394 P.2d 921, 924, 40 Cal. Rptr. 233, 236 (1964), *cert. denied*, 380 U.S. 906 (1965). In a later case involving the distribution of anti-war leaflets in a privately owned railroad terminal, the court said that, since the railroads seek neither privacy nor exclusive possession of their terminal, they are not entitled to exclude first amendment activities. Furthermore, the appropriateness of the terminal for such activities is determined not by whether they are related to the use to which the terminal is put but whether they interfere with that use. *In re* Hoffman, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967). The holding in *Logan Valley* was added to this line of thought and extended to cover an area perhaps less open to the general public (the privately owned sidewalk of a large supermarket). *In re* Lane, 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969). In a subsequent case, it was held that, in addition to the demands of the first amendment, the fourteenth amendment's prohibition against arbitrary discrimination may also apply to a shopping center which has "undertaken the public function of providing society with the necessities of life and has become the modern suburban counterpart of the town center." *In re* Cox, 3 Cal. 3d 205, 216, n.11, 474 P.2d 992, 999, n.11, 90 Cal. Rptr. 24, 31, n.11 (1970). Finally in a decision relying on *Logan Valley* and the prior California cases, it was held that the covered mall area of a shopping center was open to communicative activities unrelated to the business use of the center. Diamond v. Bland, 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970), *cert. denied*, 402 U.S. 988 (1971) (Burger, C.J., & Blackmun, J. favored the granting of certiorari) (plaintiffs had sought to gather signatures for two anti-pollution petitions).

27. The Court said, "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." 407 U.S. at 565.

28. The Court observed that the public use argument might be applied to most stores and businesses and that the difference is only

about the need to consider property rights.[29]

In discussing the question of an alternate forum, the Court distinguished *Logan* on the basis of the apparent unavailability of such a forum for petitioners in that case. Because the message of the labor picketers in *Logan* was directed at a specific audience which could only be reached in the vicinity of the store, there were "no other reasonable opportunities" for communication.[30] The Court contrasted this with respondents' handbilling in *Lloyd* which it said could have been effective in any public area of the city, including the public streets and sidewalks on the exterior of the mall.

Although it may appear that the *Lloyd* majority has fashioned a more workable standard by relying on a "related to use" test rather than the more vague notion of public use, its rather brief discussion fails to fully consider the issues before it. Perhaps most striking is the majority's complete failure to discuss the possibility of finding state action through the more conventional method of state involvement, despite the existence of several facts upon which such a finding could have been based.[31] For example, the city of Portland vacated some eight acres of public streets to further the development of Lloyd Center as a "*general retail business district*" and indicated that it recognized a need for the city "to build new streets and to take other steps to control the traffic flow that the Center would engender."[32] The Court ignored the apparent similarity to racial dis-

---

one of degree. It would be difficult, if not impossible, to draw a line between them, and it would be unacceptable to apply the strictures of the first amendment to all. *Id.* at 565-66, 569.

29. *Id.* at 570.

30. *Id.* at 563.

31. While the dissent mentioned the extent of the city's involvement, it did so only in the attempt to bolster its argument that Lloyd Center fit the public business district standard of *Marsh* more closely than did Logan Valley Plaza. *Id.* at 576-77. In that connection it also indicated that the center itself was interlaced with public streets and sidewalks and that the City of Portland had delegated "full police power" to its private police. It noted that such a delegation of police power was one basis for the holding in *Marsh* that was not present in *Logan*. *Id.* at 575.

In contrast to the majority, the district court in *Lloyd* held that the use of the authority which had been granted to Lloyd's private guards by the state constituted state action under 42 U.S.C. § 1983, citing two cases which held that private detectives were acting under color of state law. 308 F. Supp. at 131. *See* Williams v. United States, 341 U.S. 97 (1951); De Carlo v. Joseph Horne & Co., 251 F. Supp. 935 (W.D. Pa. 1966).

32. 407 U.S. at 576 (emphasis in original) concerning ordinances passed by the city of Portland relative to Lloyd Center in 1954 and 1958.

crimination cases in which it has found state action on the basis that the property involved was transferred by the state to a private owner[33] or where the state was viewed as "a joint participant in the challenged activity"[34] due to the expenditure of public funds.

Furthermore, the majority's consideration of the public use issue is not entirely satisfying. Despite evident displeasure with the public use doctrine as extended in *Logan*, it failed to overrule that case and therefore did not specifically renounce the doctrine. Moreover, while the Court mentioned the difficulty of drawing a line somewhere on the continuum between a single shop and a large modern shopping center, it overlooked elements which could have provided a means for distinguishing Lloyd's operations from those of ordinary stores or shopping strips. For example, Lloyd had allowed its premises to be used for political campaign speeches and Veterans' Day activities, as well as by the Scouts and the Cancer Society, and had made the mall available for the solicitations of the American Legion and the Volunteers of America.[35] Many of these activities are exactly the kind traditionally associated with public areas. It can be argued that

33. Evans v. Newton, 382 U.S. 296 (1966) (transfer of a municipal park). Nor may a state relieve itself of responsibility by appointing independent trustees to manage something previously under its control. Pennsylvania v. Board of Trusts, 353 U.S. 230 (1957) (relating to Girard College).

34. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). While the role of the city in *Evans* and of the state in *Girard College* might be distinguished from that of Portland by characterizing the former as deliberate attempts to avoid state action, that argument would not be available in regard to *Burton* where the state leased space to a private restaurant which discriminated. *Evans* and *Burton* have also been cited as authority for finding state action in the context of the first amendment. *See, e.g., In re* Cox, 3 Cal. 3d 205, 216 n.11, 474 P.2d 992, 999 n.11, 90 Cal. Rptr. 24, 31 n.11 (1970).

Another example involving free expression in which such reasoning predominated is Farmer v. Moses, 232 F. Supp. 154 (S.D.N.Y. 1964). There plaintiffs were held entitled to access to the grounds of the New York World's Fair to picket and distribute handbills protesting racial injustice where the court found the following elements of state involvement: a state law setting up a fair commission, tax exemptions, a special rent-free lease with New York City, expenditures by several government units on exhibits, accelerated highway construction, and a statute making fair guards "peace officers." The court said that when the state leases or sells property to someone who then performs services of a kind that the state "could render or has rendered" (referring in that case to educational services), the proscriptions of the fourteenth amendment must apply. In fact the "crucial test of state action is . . . 'the actuality of state involvement rather than the form of the transaction.'" *Id.* at 159-60.

35. 407 U.S. at 555, 579.

the extent to which property has been opened for such use rather than the owner's motivation in permitting the activity should be the controlling factor.[36]

Although the majority established a "related to use" requirement[37] that is probably easier to define than are the requisite

---

36. Such an argument was successful in the California cases cited in note 26 *supra*. A policy argument which may be advanced in opposition to this line of thought is that it would work to the disadvantage of the public by discouraging private property owners from making their facilities available to community groups.

Use of the facilities by outside groups is one of several factors which the Second Circuit has used in determining whether a place is appropriate for first amendment activity. Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir. 1968), *cert. denied*, 393 U.S. 940 (1968). The court in *Wolin* upheld the right to distribute anti-war leaflets in the Authority's terminal. Although the title to the property was in a separate corporation rather than the state, it had been created by New York and New Jersey and was subject to statutory regulation. The court said that this plus the involvement in the public function of transportation would be sufficient to constitute state action if it were a case of discrimination under the fourteenth amendment, but:

> [W]here the issue involves the exercise of First Amendment rights in a place clearly available to the general public, the inquiry must go further: does the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance.

Id. at 89. The terminal was found to be dedicated to public use because it was used by thousands each day, because it contained shops and restaurants open to the general public, and because it had its own police force which could enforce state law. In applying its factors for the appropriate place test, the court found communicative activities would not interfere with the normal use of the facility which was characterized by noise and a certain amount of disorder. Furthermore, previous authorization for use by charity solicitors, glee clubs and automobile exhibitors demonstrated "the ease with which the Terminal accommodates different forms of communication." *Id.* at 90.

37. The many cases involving the protection of the distribution of religious pamphlets, for example, make it clear that there has never been a general first amendment requirement that the message to be communicated relate to the activities of the locale. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501 (1946); Martin v. Struthers, 319 U.S. 141 (1943); Lovell v. Griffin, 303 U.S. 444 (1938). The purpose or use to which the state-owned property is put is relevant insofar as expressive activity would not be permitted if it would interfere with this "lawfully dedicated" use. Adderley v. Florida, 385 U.S. 39, 47 (1966). The appearance of the "related to use" standard in cases involving private and quasi-public property suggests that it is connected there to the scope of the owner's invitation to the public.

According to the Second Circuit, a relation between the expressive activity and the forum may be found in two ways: when the place "represents the object of the protest" or when "the place is where the relevant audience may be found." Wolin v. Port of New York Authority, 392 F.2d 83, 90 (2d Cir. 1968). However, *Wolin* may perhaps be distin-

elements for a finding of public use, this standard can be ambiguous, and was perhaps incorrectly applied in this case. The majority implies that the "related to use" test refers to business use, but it neither specifically so states, nor does it respond to the dissent's argument that respondents' activity was directly related to the use to which the center was put on Veterans' Day and by presidential candidates and by the American Legion.[38] Fundamental fairness would seem to dictate that access not be denied to respondents when others were allowed to use the premises for public expression, although it may be argued that the center should only be required to provide a comparable period of access.[39]

If in fact "related to use" is intended to encompass only business use, it remains to be seen how it will be applied in different fact situations. If outside groups are allowed to use private property in order to promote sales, then the activities of these groups are arguably related to business use, and other communicants might attempt to justify their right to the forum by establishing a connection between their message and the activities of the favored groups. It might appear from the Court's own analysis that distribution of handbills would not have been prohibited if they had been directed at the center's policy of allow-

---

guished from *Lloyd* on the basis that in *Wolin* the communicants (*i.e.* traveling servicemen) were especially interested in reaching an audience likely to be found in the terminal.

38. 407 U.S. at 579.

39. Even-handed enforcement is a prime consideration in first amendment cases. *See, e.g.*, Schacht v. United States, 398 U.S. 58 (1970); Adderley v. Florida, 385 U.S. 39, 47 (1966); Cox v. Louisiana, 379 U.S. 536, 558 (1965). Such reasoning was applied by the California court to a shopping center context in *In re* Cox, 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970). In holding that a shopping center may not constitutionally exclude persons on the basis of long hair or unconventional clothing, the court said, "those who perform a significant public function may not erect barriers of arbitrary discrimination in the marketplace." 3 Cal. 3d at 218, 474 P.2d at 1000, 90 Cal. Rptr. at 32. Moreover, the arbitrary power to decide who can exercise first amendment rights in a particular location has been seen as a major element in finding a dedication to public use. *See* Gould, *Quasi Public Property*, 49 MINN. L. REV. 505, 528 (1965).

Nevertheless, if Lloyd has allowed the American Legion to use the center for one day, for example, it may be argued that fairness would only require that the center be open for handbill distribution for a comparable period of time. This would protect the owner from being required to open his property to an indefinite number of groups. However, an interference test could also protect the owner's interest by drawing a line at the point at which an interference with his normal business is shown.

ing the American Legion to solicit even though they also made reference to the Legion's position on the draft and the war. Under a broad interpretation of business use, it might be argued that picketing in protest of corporate policies relating to racial injustice or defense contracts would be permissible if the corporation or its subdivision were doing business in the center, although this would represent an extension of the apparent scope of *Logan*.[40]

In addition to discussing the "related to use" test, the Court implied that an additional element necessary to bring a case successfully under the *Logan* precedent is the absence of an alternate forum. Since it had already determined that there was no general dedication to public use and that respondents' message was not related to the use to which the property was put, it is not clear why the majority felt it necessary to go on to consider the question of an alternate forum. Arguably, availability of an alternate forum may be a factor which will grow in importance to the extent that the related to use question is evenly balanced. It is also unclear whether the alternate forum test is a part of the Court's holding or merely an additional means of distinguishing *Logan*. Since the question of an alternate forum was not integral to the holding in *Logan* but appeared in the form of a superfluous argument,[41] *Lloyd* has introduced a new test if this requirement of alternate forum unavailability is to be read as part of its holding. The two tests may be logically interrelated since arguably if the message is related to the use of the property, no other forum can be adequate for effective communication. However, if the implication is that there can be no adequate alternative when the message is related to the use of the property, it would appear that the availability of an alternate forum is going to decide the public use question and that it is up to the protestor to justify his right of access by showing the relation of his message to the forum. This result would be unfortunate both conceptually and from the standpoint of public policy.

Since there has been no general requirement in first amend-

40. *See* note 22 *supra*.

41. The consideration of an alternate forum in *Logan* arose only in response to respondent's contention that his injunction amounted to a lawful regulation of expressive activity rather than a suppression of it. The Court accepted arguendo his characterization of "the requirement that picketing be carried on outside" the center as only a regulation. 391 U.S. at 321. It concluded, however, that even if the injunction could be characterized as a regulation, it was an impermissible one, at least partly because of the inadequacy of the petitioners' opportunity for effective communication in the area along the public road.

ment cases to show the lack of an alternate forum in order to gain access to property for expressive activities,[42] there is no clear definition of this concept and none was formulated in *Lloyd*. It would appear, however, that forum adequacy should depend on whether the communication reaches the audience the speaker intends to address. The *Lloyd* Court, on the other hand, appeared to take the position that the communicant is entitled to reach only the general public with his message, even though some courts have gone so far as to say that the communicant is entitled to choose a convenient forum or one in keeping with his means.[43] It would seem that the broader view of an adequate forum would better serve the public interest in the free dissemination of ideas.

Even under the restrictive view of an adequate alternate forum adopted in *Lloyd*, the Court recognized the need of communicants for "other reasonable opportunities to convey their message to their intended audience"[44] but failed to ascertain under this standard whether the forum was adequate. The majority suggested that the availability of public streets and sidewalks exterior to the mall complex furnished an alternate location for respondents' distribution. The Court distinguished the situation in *Logan* where access to the vicinity of the store was needed

42. In fact the Court has said that "one 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." Schneider v. State, 308 U.S. 147, 163 (1939).

43. The California Supreme Court has recognized that persons may have a significant interest in a particular forum even when an alternate is available:

> Access to the thousands of persons who congregate on foot daily at the Center is a highly significant vehicle for the dissemination of ideas. . . . The Inland Center serves as the primary business district for a large surrounding community and is the most effective and desirable location for the conduct of plaintiffs' First Amendment activities.

Diamond v. Bland, 3 Cal. 3d 653, 662, 477 P.2d 733, 738, 91 Cal. Rptr. 501, 506 (1970), *cert. denied*, 402 U.S. 988 (1971). It is up to the communicant to choose the forum, and the appropriateness should be determined by weighing the conflicting interests rather than by the availability of an alternate forum. *In re* Hoffman, 67 Cal. 2d 845, 852 n.7, 434 P.2d 353, 357 n.7 (1967).

The *Lloyd* dissent expressed concern for those without access to the media and feared that "[o]nly the wealthy may find effective communication possible" if the Court no longer upholds the public use concept. 407 U.S. at 586. The only way in which those who are not wealthy "can express themselves to a broad range of citizens on issues of general public concern" is if they are permitted to utilize "those areas in which most of their fellow citizens can be found." *Id.* at 580-81.

44. 407 U.S. at 563.

in order to reach a particular audience and to prevent undue hazard to the communicants.[45] But it may also be argued that the respondents in *Lloyd* had the same need.[46] Since other groups had used the forum for expressive activity, respondents could have been seen to have a strong interest in reaching the same audience, and since there were some parking facilities located in the mall complex itself, some visitors would have no occasion to use the surrounding public sidewalks. Not only was the mall the place at which the greatest number of people could be easily reached, but it was also probably the place at which the communication would be most effective.[47] While the majority dismissed the possibility of hazard by suggesting that respondents station themselves at stop signs, this arguably would still place them in considerably more danger than is desirable. Furthermore, the proposal is of questionable effectiveness since drivers moving in traffic are unlikely to be as receptive to handbills as pedestrians.[48]

In arriving at its holding in *Lloyd* the majority abandoned the balancing technique of *March* and *Logan* despite its use of the term "accommodation" of rights and values.[49] The Court simply stated that petitioner's property rights would have been infringed by the handbill distribution despite a failure to show actual interference with shopping center operations. This is in sharp contrast to the dissent's emphasis on balancing.[50] There is

---

45. *Id.* at 566 n.12.

46. The dissent pointed out that the district court found that the mall was the only place where respondents had reasonable access to all of Lloyd Center's patrons, and suggested that the majority had exceeded "even the most expansive view of the proper appellate function" by overturning the lower court's finding of fact. 407 U.S. at 583-84 n.7.

47. Since access to most stores was from the mall only, almost all visitors would pass through it. The landscaping and benches in the central mall might be expected to have attracted those who came to shop or to use the auditorium or skating rink to pause in the area, making them perhaps more receptive to communicative efforts than in other situations.

48. The difficulty of approaching drivers is discussed in the dissent. *Id.* at 584 n.7.

49. *Id.* at 567, 570.

50. The dissent said:

> 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 weighted, the balance can only be struck in favor of speech.

Id. at 580. It concluded that respondents' interest in effective communication must outweigh the owner's interest in preventing litter or disrup-

good authority for the view that when important constitutional rights are involved, a more satisfying result will be obtained by balancing the interests in each case as opposed to setting out a hard and fast rule.[51] The great advantage of balancing is that it allows a court to weigh the particular circumstances of each case. Not only can the communicant's interest in an effective forum be weighed against the property interest of the owner,[52] but the individual's right to access to information[53] and the public's interest in the free exchange of information[54] can be considered.

One of the basic ingredients in first amendment balancing is an "interference with normal use" standard.[55] Under such a test

---

tion, especially since it failed to see any evidence of interference with "the motivation of customers to buy." *Id.* at 581-82.

51. *See, e.g.*, cases cited note 7 *supra*. For an application of the balancing test in a shopping center case involving public expression on private property, *see* Diamond v. Bland, 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970), *cert. denied*, 402 U.S. 988 (1971), and discussion in note 26 *supra*.

In *Diamond*, the court observed that the communicant's interest in effective communication must be balanced against the property rights of the owner which have become "largely theoretical" and "diluted" because of the public character of the center. *Id.* at 662, 477 P.2d at 739, 91 Cal. Rptr. at 507.

52. Too great an interference with the owner's interest could constitute a "taking" under the fifth amendment as Justice Powell indicated in *Lloyd*. 407 U.S. at 567. However, an examination of the development of the law regarding what constitutes a taking would indicate that private property rights may be considerably impaired by the institution of zoning laws, for example, without it amounting to a taking. *See, e.g.*, Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Nuisance law also may permit restrictions on private property when there is an interference with the rights of others.

53. The policy underlying the holding in *Marsh* was to give persons who happen to live in company towns the same right to unrestricted access to information as any other citizens. 326 U.S. at 508-09. The right of the individual to receive information was also emphasized in Martin v. Struthers, 319 U.S. 141, 143 (1943).

54. The public interest in the free exchange of information has been said to be essential to the functioning of our democracy. *See, e.g.*, Marsh v. Alabama, 326 U.S. at 507; Thornhill v. Alabama, 310 U.S. at 95; Stromberg v. California, 283 U.S. 359, 369 (1931). In this light it has been said that if the place is appropriate for any communicative activities, it would be "an anomalous inversion of our fundamental values" to deny access to political communication. Wolin v. Port of New York Authority, 392 F.2d 83, 90 (2d Cir. 1968), *cert. denied*, 393 U.S. 940 (1968).

A further public policy argument favoring liberal application of the first amendment is that resort to violence is prevented by permitting expressive activities. *See, e.g.*, Adderley v. Florida, 385 U.S. 39, 56 (1966) (dissenting opinion).

55. It may be necessary to prohibit expression if it would interfere with the "general comfort and convenience" or "peace and good order." *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 306-07 (1940); Hague v. CIO, 307 U.S. 496, 515-16 (1939). As to interference with traffic flow or

the *Lloyd* facts should lead to a different result.[56] If the distribution were orderly and nondisruptive and no actual damage to business could be shown, respondents' interests should outweigh the "naked title" of petitioners.[57] Moreover, it would be possible to protect the owner's interest without imposing an absolute ban on the expressive activity.[58]

---

highway safety, *see, e.g.*, Cox v. New Hampshire, 312 U.S. 569, 574 (1941); Schneider v. State, 308 U.S. 147, 160 (1939).

Other first amendment cases suggest that expression may be allowed up to the point that it becomes disruptive or coercive. *See, e.g.*, Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969); Pickering v. Board of Education, 391 U.S. 563 (1968). Using this rationale it would not appear that the interests of the visitors to Lloyd Center have been harmed since the distribution was peaceful and orderly with no apparent coercive effect. (The district court made a finding of fact that the distribution was "quiet, orderly, and did not interfere with the Mall selling activities, and there was no littering." 308 F. Supp. at 130. The Supreme Court noted that there had been a complaint from one customer but did not discuss the finding of no interference. 407 U.S. at 556.) Even under a stricter standard it is unlikely that the shoppers' interest in not being disturbed would be materially affected by a leaflet distribution. The interest in privacy cannot be given the same protection in a public setting as in a residential one. *See, e.g.*, Public Utilities Comm'n. v. Pollack, 343 U.S. 451 (1952); Watchtower Bible & Tract Soc'y v. Metropolitan Life Ins. Co., 297 N.Y. 339, 79 N.E. 2d 433 (1948), *cert. denied*, 335 U.S. 886 (1949).

The distribution of handbills approaches pure speech and, therefore, would be more justifiably entitled to protection than if respondents had been engaging in guerilla theater or a demonstration. *See* Jamison v. State, 318 U.S. 413, 416 (1943), where the Court said that the constitutional right of free expression extends to "the communication of ideas by handbills and literature as well as by the spoken word." *See, e.g.*, Talley v. California, 362 U.S. 60 (1960); Martin v. Struthers, 319 U.S. 141 (1943); Schneider v. State, 308 U.S. 147 (1939); Hague v. CIO, 307 U.S. 496 (1939); Lovell v. Griffin, 303 U.S. 444 (1938).

56. The choice of standard can also affect the outcome by altering the burden of proof. Under the "related to use" standard, the burden would presumably be on the communicant to show that his message was related to the center's operations whereas an interference standard would require the owner to prove actual interference with his operations. It has been suggested, however, that an interference with normal use standard would also be inadequate to protect the communicant's interest unless the property owner is required to show the availability of an adequate alternate forum. *See The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 138-41 (1967). The necessity to consider a variety of factors regardless of the standard used would support the view that balancing is the most suitable technique.

57. In *Logan* the Court said that in the absence of any showing of significant interference "with the use to which the mall property was being put, . . . [n]aked title is essentially all that is at issue." 391 U.S. at 324. This terminology is similar to the "bare title" of *Diamond*, 3 Cal. 3d at 667, 477 P.2d at 741, 91 Cal. Rptr. at 509, and the "property right worn thin by public usage" in *Schwartz-Torrance*, 61 Cal. 2d at 775, 394 P.2d at 926, 40 Cal. Rptr. at 238.

58. The interests of the owners and of visitors alike could be con-

Lloyd has several possible implications for the future course of state action theory and the first amendment area. By restricting the public use concept[59] *Lloyd* may have the effect of encouraging an attempt to develop the public function doctrine in its place. There is language in *Marsh* which suggests that the real basis of the public use concept is the delegation by the state of a public function.[60] In *Central Hardware Co. v. NLRB*,[61] decided on the same day as *Lloyd*, the Court indicated that the determinative factor may be the degree to which private property has assumed the "functional attributes of public property devoted to public use."[62] Arguably the public function doctrine is a more precise analytic tool because it would facilitate line drawing[63] and

---

ceivably safeguarded by rules which would reasonably regulate the number of persons who could engage in the first amendment activity and the area and manner in which the rights could be exercised. *See, e.g.*, Martin v. Struthers, 319 U.S. 141, 147 (1943), where the Court said that the possible danger involved in door to door distribution could be easily controlled so that "stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas."

An argument somewhat similar to that advanced in *Martin* was raised by the *Lloyd* petitioners in the district court where they attempted to justify their exclusion of respondents on the ground that the distribution violated the Selective Service laws; the court suggested that, if this allegation was proved, Lloyd's remedy would lie in "arrest and prosecution in the normal course" rather than in the "prohibition of all speech." 308 F. Supp. at 133. The dissent indicates that this argument was subsequently abandoned. 407 U.S. at 584.

59. The majority would apply it only to an area with all the characteristics of a town. 407 U.S. at 562-63. The dissent argued that the controlling factor is whether the property serves as the public business district. *Id.* at 576.

The rejection of a broad reading of *Logan* may foreclose any further application of the public use concept to commercial property. However, it is not clear that the limited invitation approach can be applied to the quasi-public kind of property involved in *Wolin* and in *In re Hoffman.*

60. *See* notes 15-18 *supra*, and accompanying text.

61. 407 U.S. 539 (1972). In *Central Hardware*, the Court refused to apply *Logan* to allow nonemployee union picketing in parking lots adjacent to two hardware stores. Both the majority and the dissent indicated that the case should have been decided under NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). 407 U.S. at 548. The constitutional issue might have been avoided by relying on *Babcock* which laid out guidelines for the accommodation of property rights and labor organization rights under the National Labor Relations Act.

62. *Id.* at 547.

63. While it is clear that public use could not extend to the interior hallways of an apartment house in which the right to privacy will prevail (Watchtower Bible & Tract Soc'y, Inc. v. Metropolitan Life Ins. Co., 297 N.Y. 339, 79 N.E.2d 433 (1948), *cert. denied*, 335 U.S. 886 (1949)), it is uncertain if it could have been extended to the interior of a large department store, for example. Public use is an imprecise standard

make it easier to understand why constitutional restraints might be imposed on the owner of private property. *Lloyd* might also be seen as rejecting some of the state action theory developed in racial discrimination cases, but the better view would seem to be that the Court did not speak to that area at all since it completely ignored the potential issue of direct state involvement.

It remains to be seen whether the Court will also apply the tests used in *Lloyd* when dealing with free expression cases involving state-owned property. Since the "related to use" requirement is linked with the scope of the invitation to the public, it clearly could not be imposed on all public property, but could be used in cases similar to *Adderley v. Florida*[64] where a special kind of property is involved. In *Adderley* demonstrators were denied the right to use the jailhouse grounds to protest certain arrests and racial segregation in the jail because of a possible interference with normal use. The *Lloyd* test could lead to a different result since the message was related to the use to which the property was put.[65] The alternate forum test, on the other hand, could have the effect of drastically limiting the areas

although it has been said to have the advantage of speaking to the interest to be protected. *See* Note, B.U.L. REV. 699, 704-05 (1968).

The reason that the public function standard might be easier to apply is that there have traditionally been certain functions which have been regarded as peculiarly associated with the state. It has been suggested that any displacement of the state in the performance of such functions might constitute state action. *See The Supreme Court 1967 Term, supra* note 13, at 133. In the shopping center context this might be seen as the displacement of the municipal business center including the municipal market and town square or gathering place, as well as maintenance of streets and sidewalks and the provision of police protection and possibly also of water and lighting. This line of thought has been criticized, however, as possibly leading to "an enormous expansion of the concept of state action" requiring the "examination of the social and economic role in the community of the entity whose action was challenged." *Id.* at 134.

Statistical data were made available in *Logan* relative to the growing number and importance of large shopping centers. 391 U.S. at 324. The 1966 data could not, however, reflect significant recent developments in the nature and role of shopping centers. Since no mention was made in *Lloyd* of such data, one may presume none were offered by the parties. However, the dissent predicts that cities might find it to their financial advantage increasingly to rely on private business to perform functions once governmental in nature. 407 U.S. at 585-86. The effect would be to reduce the number of potential forums for expressive activity unless there were a concomitant carryover of the first amendment.

64. 385 U.S. 39 (1966).

65. However, it may be argued that the courthouse grounds, for example, would have provided an adequate alternate forum, in which case the result would be the same.

available for public expression if it were carried over into first amendment cases generally.[66]

The long tradition in first amendment cases of balancing the interests involved would indicate that the balancing technique is likely to survive even though not employed in *Lloyd*. It is especially likely to be used in situations where the "related to use" and "alternate forum" tests are more difficult to apply. Nevertheless, the substance and tone of the *Lloyd* opinion suggest that the current Court will give greater weight to property rights in general than has been seen in recent years, regardless of the test applied.

66. Since this test has not been generally used in determining whether free expression could be exercised on public property, its application in such cases would place another obstacle in the path of the communicant.

Constitutional Law: State Action: UCC Self-Help Repossession Provisions (§§ 9-503, 9-504) Violate Due Process Requirements

In two cases consolidated for trial plaintiffs executed security agreements in favor of defendant lenders to cover the purchase price of motor vehicles. In *Adams v. Egley* the agreement provided for the right of the creditor to take possession of the vehicle under the California Commercial Code "or other applicable law" in the event of default. In the companion case, *Posadas v. Star & Crescent Federal Credit Union*, the agreement provided for repossession "according to law." In both cases plaintiffs failed to make payments and defendants repossessed the vehicles through collection agencies. Plaintiffs brought suit against both the lenders and the collection agencies, asserting that California Commercial Code sections 9503 and 9504 (UCC sections 9-503 and 9-504)[1] violate due process of law in providing for repossession and disposition of collateral by a secured party without prior notice and hearing.[2] The issues were presented for decision on motion for partial summary judgment. The District Court *held* that California's passage of sections 9503 and 9504 provided the requisite state action to confer federal jurisdiction, and that the procedures allowed amounted to a taking of property without due process of law. The court further held that plaintiffs had not effectively waived their constitutional rights by signing the security agreement since the creditors had complete control over the terms of the contract. *Adams v. Egley*, 338 F. Supp. 614 (S.D. Cal. 1972).[3]

---

1. CAL. COMM. CODE § 9503 (West 1964) provides in part: "In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action." Section 9504 allows sale of the repossessed property by the creditor. Section 9503 is identical to UCC § 9-503. Section 9504 does not differ from UCC § 9-504 in any aspect relevant to this case. Citations herein will be made to the pertinent California provisions.

2. Plaintiffs alleged federal question jurisdiction under 28 U.S.C. § 1331 and under the Civil Rights Act, 28 U.S.C. § 1343 and 42 U.S.C. § 1983. Section 1331(a) confers jurisdiction on the district courts over any civil action which "arises under the Constitution, laws or treaties of the United States." Section 1343(3) provides that the district courts have jurisdiction over any civil action "[t]o redress the deprivation, under color of any state law . . . of any right, privilege or immunity secured by the Constitution of the United States . . . ."

3. *Appeal docketed*, No. 72-1484, 9th Cir., Feb. 29, 1972. As an incidental matter, the court held that the security agreement gave the

I.

The court first concluded that in order to establish jurisdiction it was necessary to find some significant state involvement in defendants' activities.[4] It stated that "the conduct of private individuals, however wrongful or discriminatory, does not come within the purview of those sections if the state has in no way authorized, sanctioned, or encouraged it."[5]

During the Warren Court years, the Supreme Court broadened the scope of federal question jurisdiction by expanding the definition of state action. In *Burton v. Wilmington Parking Authority*,[6] a restaurant which leased space in a parking facility owned by a state agency had discriminated against blacks. State action was found even though the state had done nothing to encourage the wrongful action by its tenant other than enter into the lease with him. A similarly broad definition of state action was employed in *Lombard v. Louisiana*,[7] which involved trespass convictions secured by the operator of a private restaurant. Announcements by city officials opposing the integration of private restaurants were there held sufficient state action for federal jurisdiction.[8] In *Reitman v. Mulkey*[9] an amendment to the California State Constitution which prohibited the state from placing restrictions on an individual's right to sell real property to whomever he chose was held unconstitutional. Prior to the amendment, the legislature had enacted several laws which proscribed discrimination in real estate sales. The Court found that, in

creditor no interest in items found in the vehicle at the time of repossession. "[A]s to these, the denial of due process is self-evident." 338 F. Supp. at 621.

4. At the time of the *Adams* decision, it was generally held that 28 U.S.C. § 1343(3) conferred jurisdiction when personal rights were in issue but not when only property rights were involved. *See* Hague v. CIO, 307 U.S. 496, 531 (1939) (concurring opinion). The *Adams* court referred to this distinction, 338 F. Supp. at 617 n.2, but determined that it was not necessary to decide the issue. Since that time, Lynch v. Household Fin. Corp., 405 U.S. 538 (1972) has removed the distinction and affords property rights the same protection as formerly attached to personal rights under § 1343(3).

5. 338 F. Supp. at 617.

6. 365 U.S. 715 (1961).

7. 373 U.S. 267 (1963).

8. *See also* Nixon v. Condon, 286 U.S. 73 (1932) (statute empowering a political party to prescribe the qualifications of its members was sufficient state involvement for jurisdiction when the party used that power to prevent blacks from voting in primary elections); and 28 U.S.C.A. § 1343 (1962), n.27 (insufficient complaints) and n.28 (sufficient complaints).

9. 387 U.S. 369 (1967).

overturning prior law, the amendment had incorporated the right to discriminate into the state's constitution. Despite the fact that the discrimination would be performed entirely by private individuals, the provision was found to have produced a state involvement in private racial discrimination through encouraging discriminatory practices. The *Reitman* Court specifically avoided the creation of any test to determine when state involvement exists, holding that it can be found " '[o]nly by sifting facts and weighing circumstances' on a case-by-case basis . . . ."[10] This formulation was later applied by the Supreme Court in *Evans v. Abney*.[11] There a private citizen had willed property for a park to a city on the condition that its use be restricted to whites. The fact that state law at the time permitted such a restriction was held not to be state action:

> Nor is there any indication that Senator Bacon in drawing up his will was persuaded or induced to include racial restrictions by the fact that such restrictions were permitted by the Georgia trust statutes.[12]

The *Adams* court relied heavily on *Reitman*, while distinguishing *Evans*, in finding state action. While the *Evans* Court found a clear lack of influence from the statute involved, the *Adams* court concluded on the basis of reference to the UCC and to repossession according to law in the security agreements that the creditors "were 'persuaded or induced to include' repossession by the fact that such repossession was permitted by statute."[13] Having shown a causal connection between the statute and the private conduct, the court concluded that *Reitman* was applicable and supported a finding of jurisdiction.

The court's finding of state action and a causal relationship is subject to criticism on three grounds. First, it is generally accepted that the statutes which authorize the use of self-help repossession are merely enactments of widely followed common law.[14] Since the common law procedure did not require the intervention of the state's powers, no state action existed prior to the statutory enactment. Since the statutes made no change in the procedures, arguably no new element had been injected upon

---

10. 387 U.S. at 378 (1967).
11. 396 U.S. 435 (1970).
12. *Id.* at 445.
13. 338 F. Supp. at 617.
14. *See, e.g.*, Annot., 45 A.L.R.3d 1233, 1243 (1972); CAL. COMM. CODE § 9501 (West 1964), Comment 2(f) (prior California law); MINN. STAT. ANN. § 336.9-503 (1966), Minnesota Code Comment; Comment, 39 MARQ. L. REV. 246, 254 (1956).

which a finding of state action could be predicated.[15]

Second, it might be contended that the effect of the references to the UCC is to incorporate only the statutory *language* into the terms of the contract. Arguably the creditor holds a right to repossess based solely on the contract, the enforcement of which is not contingent upon any statutory enactment. Repossession under this reasoning is thus a totally independent action by the creditor in which no state involvement exists.[16] The court in *Adams* noted the decision in *Santiago v. McElroy*,[17] which dealt with this issue when it considered the constitutionality of Pennsylvania distraint procedures. *Santiago* imposed a restrictive interpretation on the language of the contract to avoid the creation of an independent right to distrain. It was the view of the court in *Adams* that any independent right to repossess was nonetheless created under the authority of state law and that the state of the law influenced the exercise of that right. Thus the court found it unnecessary to follow the reasoning of *Santiago* to reach the same conclusion.

Third, the quantum of state action necessary for a finding of jurisdiction is arguably greater where property rights rather than civil rights are involved. In *Oller v. Bank of America*,[18] a case decided three weeks after *Adams* on an identical set of facts, the federal district court declined to find state action on the ground that *Reitman* extended its broad definition of state action only to cases involving racial discrimination. The court in *Oller* restricted state action in non-racial cases to situations where state law compels the private action or where the power exercised is purely of statutory as distinguished from common law or contractual origin. This limitation of an expansive interpretation of state action to cases involving racial discrimination is question-

15. This analysis prevailed in Green v. First Nat'l Exch. Bank, 348 F. Supp. 672 (W.D. Va. 1972), which involved a challenge to the Virginia version of UCC § 9-503 on facts identical to *Adams*. The court held that "passive state action such as is present in the instant case is not violative of due process. There must be active and direct state action." 348 F. Supp. at 675. *Cf.* Kirksey v. Theilig, 351 F. Supp. 727 (D. Colo. 1972).

16. McCormick v. First Nat'l Bank, 322 F. Supp. 604 (S.D. Fla. 1971) upheld the Florida version of UCC § 9-503 on facts indistinguishable from *Adams* on the ground that the independent contract right made the existence of state involvement irrelevant.

17. 319 F. Supp. 284 (E.D. Pa. 1970).

18. 342 F. Supp. 21 (N.D. Cal. 1972).

able in light of *Lynch v. Household Finance Corp.*,[19] which struck down distinctions between rights of the person and property rights in determining jurisdiction under 28 U.S.C. § 1343(3). However, *Lynch* did not specifically require that all rights be subject to the same standards in determining federal jurisdiction. Further clarification by the Supreme Court on this issue is necessary.

Subsequent to *Adams*, the Supreme Court has indicated some outer limits of the definition of state action. In *Moose Lodge v. Irvis*,[20] a black guest of a club member was refused service at the club's bar and dining room because of his race. State action was asserted on the grounds that the Pennsylvania Liquor Authority had issued a liquor license to the club. The Court held that the liquor regulations were not so directly related to the discrimination as to constitute state involvement in the actions of the club. This was true despite the comprehensive regulation of the club's liquor sales and the limitation on the number of licenses authorized in any municipality. The basis of the holding was the conclusion that the liquor regulations did not in any way foster or encourage the wrongful private conduct. The Court noted that "[t]here is no suggestion in this record that the Pennsylvania statutes and regulations governing the sale of liquor are intended either overtly or covertly to encourage discrimination."[21] The opinion referred to state enforcement of "privately originated discrimination,"[22] fostering discrimination,[23] and the state becoming a partner with the discriminating club,[24] all of which connote a cause-effect relationship. On the other hand, the Court discussed the significant involvement[25] and implication of the state,[26] indicating that statutory authorization or sanction even without a causal relationship might constitute state action. The *Moose Lodge* opinion did hold, however, that a regulation adopted by the State Liquor Control Board[27] requiring the licensee to adhere to all provisions of its constitution and by-

19. 405 U.S. 538 (1972). *See* note 2 *supra*.
20. 407 U.S. 163 (1972).
21. *Id.* at 173.
22. *Id.* at 172.
23. *Id.* at 176, 177.
24. *Id.* at 177.
25. *Id.* at 173.
26. *Id.* at 177.
27. Regulations of the Pennsylvania Liquor Control Board § 113.09 (1970).

laws was sufficient state action to warrant enjoining its enforcement where the club's constitution required discriminatory practices.[28] The fact that the statute was racially neutral on its face was held irrelevant where the practical effect of the statute was to enforce discrimination.

The *Adams* holding that passage of the statutes in question by the state equals state action seems to lie between the two holdings of *Moose Lodge*. Unlike *Moose Lodge*, where the fact that the liquor regulations were not addressed to the private discriminatory conduct was crucial in finding that licensing did not amount to state action, clearly the repossession statutes are directly related to the private action involved, *viz.*, summary repossession. However, the state is merely assuming the passive role of failing to prevent creditors from using self-help repossessions rather than actively requiring that such methods be used or assisting in their use, an important factor in the second holding of *Moose Lodge*.

The *Adams* court found a causal connection in the references to state law in the contracts. However, the existence of the common law and independent contractual rights to repossession render it extremely doubtful that the sections in question were the motivating force in the preparation of the contract terms. It is a more reasonable conclusion that the terms would have been the same had the statutes never been passed.[29] The apparent requirement of *Moose Lodge* of a causal connection between the statute and the proscribed conduct is therefore not satisfied. If, however, *Moose Lodge* does not require a causal relationship, sections 9-503 and 9-504, which are directly related to the private conduct (repossession) and which *mandate* a given procedure, may well be found to involve the state significantly in proscribed private conduct.

28. "Even though the Liquor Control Board regulation in question is neutral in its terms, the result of its application in a case where the constitution and bylaws of a club required racial discrimination would be to invoke the sanctions of the State to enforce a concededly discriminatory private rule." 407 U.S. at 178-79.

29. A holding of state action based on the terms of the contracts could justify a different result in *Adams* than in *Posadas* since the contract in *Adams* specifically mentioned the code provisions whereas the *Posadas* contract referred to repossession according to law. Such a difference in outcome hardly seems justified considering the otherwise identical situations of the plaintiffs. Even more important is the fact that creditors could avoid the holding merely by deleting all references to the statute law and still provide for pre-judgment summary repossession in the contracts. The defeat of jurisdiction by this tactic would reduce *Adams* to an exercise in judicial logic with no practical effects.

II.

In finding a violation of due process, the *Adams* court relied on *Sniadach v. Family Finance Corp.*[30] The Wisconsin pre-judgment garnishment procedure there considered permitted a summons to be issued at the request of the creditor's lawyer,[31] thereby freezing the debtor's wages prior to trial. This procedure was held to be a violation of due process in not affording the debtor notice and hearing prior to garnishment. Some lower courts have subsequently confined *Sniadach* strictly to its facts, holding that it was a unique case "involving a specialized type of property presenting distinct problems in our economic system."[32] Other courts have viewed *Sniadach* as setting forth a general requirement for due process in the field of pre-judgment proceedings.[33] At the same time, the Supreme Court has relied upon *Sniadach* in extending the requirements of prior notice and hearing to other statutory procedures affecting various property interests.[34]

A major portion of *Adams* was devoted to the analysis of these divergent lines of cases. However, the Supreme Court has since put the issue to rest. In *Fuentes v. Shevin*,[35] the Court held that the analysis which limited *Sniadach* to its facts was erroneous and that the case stands for the broader interpretation of the requirements of due process.[36] In *Fuentes*, Pennsylvania and Florida replevin statutes[37] authorizing the issuance of a writ di-

30. 395 U.S. 337 (1969), *noted in* 54 MINN. L. REV. 853 (1970).

31. *Sniadach* and the cases which have followed it dealt with pre-judgment procedures which utilized a state official in some capacity during the proceedings. Thus the issue of state action was not before the court.

32. Brunswick Corp. v. J & P, Inc., 424 F.2d 100, 105 (10th Cir. 1970).

33. For a listing of cases following either view, *see* Adams v. Egley, 338 F. Supp. 614, 618 (1972).

34. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of welfare payments); Bell v. Burson, 402 U.S. 535 (1971), *noted in* 56 MINN. L. REV. 264 (1971) (suspension of driver's license); Swarb v. Lennox, 405 U.S. 191 (1972) (confession of judgment proceedings).

35. 407 U.S. 67 (1972).

36. "This reading of *Sniadach* and *Goldberg* reflects the premise that those cases marked a radical departure from established principles of procedural due process. They did not. Both decisions were in the mainstream of past cases, having little or nothing to do with the absolute 'necessities' of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect." *Id.* at 88.

37. FLA. STAT. ANN. §§ 78.01, .07, .08, .10, & .13 (Supp. 1972); PA. STAT. ANN. tit. 12, § 1821 (1968).

recting the sheriff to seize secured property were challenged. It was held that due process requires that a debtor be given notice and opportunity to be heard before he is deprived of his property interest, even though he lacks full title to the goods at the time of repossession. As with the replevin statutes, the use of summary repossession under section 9503 results in deprivation of conditionally sold property without an opportunity for hearing. Further, the replevin procedure, unlike sections 9503 and 9504, at least provides that the debtor be given three days to redeem the property by posting bond. The presence of the sheriff in the replevin procedure also gives the debtor protection not available in summary repossession.

The Court in *Fuentes* recognized an exception to its holding where: (1) seizure is necessary to secure an important governmental or general public interest; (2) there is a special need for prompt action; and (3) the state keeps strict control over the use of legitimate force.[38] All three criteria must be met. The facts of *Adams* apparently do not satisfy these special circumstances. While the interest of the creditor in collecting his debt was not sufficient in *Fuentes* to satisfy the first criterion, the Court was there dealing with replevin, a procedure much less widely used than summary repossession.[39] A correct application of this first criterion requires that the public interest in preserving the due process rights of citizens be balanced against the public interest in the collection of debts. It is of course in the public interest that the costs of credit be minimized and that credit be available to a large portion of the population. The additional cost entailed by the loss of the replevin procedure outlined in *Fuentes* will arguably not approach the costs occasioned by the loss of summary repossession. Hence, *Fuentes* may not be controlling. The elimination of summary repossession may result in higher costs to everyone and decreased availability of credit. However, it is uncertain whether costs and restrictions will greatly increase after *Adams*. Even under the present system, the creditor normally sends informal notices of default before he resorts to repossession. It is possible that many debtors would not claim their right to a hearing even after notification that such a right exists. Also, the increased cost of the prior hearings must be balanced against the present cost of debtor suits to reclaim repossessed goods. It should also be noted that, since sec-

38. 407 U.S. at 91.
39. *Id.* at 92.

tion 9503 authorizes summary repossesion only if no breach of the peace is necessary, creditors are often forced to employ judicial process even absent the holding of *Adams*. On balance, it is entirely possible that the costs to the public of protecting the debtor's rights will be minimal compared to the value of the rights protected.

Clearly, situations exist in which prompt repossession of security is imperative, especially in the case of automobiles, which are easily concealed or sold by the debtor.[40] However, any system that delays repossession not only assists the unscrupulous debtor in his attempts to evade payment but also protects the debtor who believes he has a valid defense to the creditor's claim. Where summary repossession is allowed, the good-faith debtor loses possession of collateral even though he may prevail at trial. Depriving an honest individual of his rights in order to prevent others from dishonestly benefiting from those rights runs contrary to notions of justice. This is especially upsetting where there is no showing that any substantial number of debtors will abuse the hearing process. If that occurs the courts will be presented with an issue which perhaps calls for a redefinition of the procedure. Even if it is shown that situations exist in which prompt repossession is vital, sections 9503 and 9504 are not "narrowly drawn to meet any such unusual conditions,"[41] as required by the second criterion of *Fuentes*. Because section 9503 places the control of the use of summary repossession entirely in the hands of private persons, the state retains no control so long as the repossession is peaceable. This abdication of state control clearly violates the third criterion of the exception to *Fuentes*. While *Adams* requires that the debtor be afforded certain rights before repossession, the holding of *Adams* may achieve no net gain in the protection of these rights. Absent a legislative prohibition, state courts could continue to uphold summary repossession, based either on common law or an independent contractual right, reducing *Adams* to "ideological tinkering with state law."[42]

---

40. The District Judge in *Adams* voiced reservations as to the desirability of the result which his view of the cases compelled him to reach. He felt that creditors are more than willing to deal flexibly with persons making an honest attempt to pay rather than resorting immediately to summary repossession. He feared that his decision would benefit only those with no desire to pay and to whom the manner of repossession was irrelevant. 338 F. Supp. at 622.

41. Sniadach v. Family Fin. Corp., 395 U.S. 337, 339 (1969).

42. Fuentes v. Shevin, 407 U.S. 67, 102 (1972) (dissenting opinion).

In order to implement the decision and consider all competing interests, the states should enact statutes providing a right to notice and hearing prior to repossession and creating inexpensive procedures whereby the creditor can quickly determine whether the debtor has grounds for objecting to repossession. The Supreme Court has not required that the procedure be a full judicial hearing. Rather, the form of the hearing must be "appropriate to the nature of the case."[43] A system implementing the following procedures may meet due process requirements: (1) notice of default from creditor to debtor; (2) a short period in which the debtor may file objection to repossession; and (3) repossession if no objection is filed; or (4) hearing before a referee with powers to stay or order repossession if the debtor contests.[44] Absent legislative leadership, the courts will be left to a case-by-case balancing of interests in attempting to protect honest creditors and debtors from their more unscrupulous counterparts. Regardless of the form of the legislative solution, its ability to establish rights with certainty commends it in this situation.

III.

Answering a third issue, the *Adams* court held that any purported waiver of constitutional rights is ineffective where there is an adhesion contract whose provisions are dictated by the lender. Since *Adams*, the Supreme Court has had occasion to comment on the validity of waivers of constitutional rights. In *D. H. Overmeyer Co. v. Frick Co.*,[45] the Court upheld the validity of a cognovit provision waiving rights to a pre-judgment hearing in a contract negotiated between two corporations. The Court held, however, that "where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue."[46] *Swarb v. Lennox*,[47] decided the same day as *Overmeyer*, held that in appropriate circumstances it is possible for a debtor to waive his rights effectively by contract

43. Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 313 (1950).

44. *See* Fuentes v. Shevin, 407 U.S. 67, 102 (1972) (dissenting opinion) for an analysis of simplified methods of satisfying due process, suggesting that the debtor gains nothing significant under such procedures. However, abbreviated procedures would enable the state courts to cope with the influx of hearings likely to be generated by the abolition of the self-help procedures.

45. 405 U.S. 174 (1972).

46. *Id.* at 188.

47. 405 U.S. 191 (1972).

provisions consenting to the use of Pennsylvania confession of judgment procedures. However, the decision left standing the lower court's determination that this waiver is not effective where the debtor had annual income of less than $10,000.[48] *Fuentes* cited the language of *Overmeyer* as setting forth the proper guidelines for weighing the effectiveness of a waiver of constitutional rights in a contract.[49] Consequently, it seems almost certain that a security agreement granting the creditor the right to summary repossession as part of the standardized form contract, as in *Adams*, would be held by the Supreme Court to be ineffective as a waiver of the debtor's constitutional rights to prior notice and hearing.

Finance companies could possibly modify their form contracts to provide for a sufficient waiver of the debtor's rights. *Overmeyer* applied the same standards to waiver of rights in a contract as are used in a criminal proceeding—the waiver must be voluntary, intelligent, and knowingly made.[50] It might be possible to reflect such a waiver through appropriately drawn and highlighted language of a security agreement. However, the wide disparity in the bargaining power of the parties may lead a court to conclude that such a waiver is ineffective regardless of the clarity of the contract language.[51]

IV.

The courts presently appear to have embarked on an expansion of the due process rights which are guaranteed an individual prior to deprivation of any significant property interest. A creditor's best hope of avoiding the result in *Adams* in future litigation is to attack federal jurisdiction on grounds of lack of state action. Once jurisdiction is recognized, *Fuentes* compels the conclusion that a summary repossession violates due process and it is unlikely that an effective waiver of rights will exist in the ordinary circumstances.

---

48. Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970).

49. 407 U.S. at 95. In *Fuentes*, since the language of the specific contracts involved did not purport to be a waiver, it was unnecessary for the court to weigh its effectiveness.

50. 405 U.S. at 187.

51. Swarb v. Lennox, 405 U.S. 191 (1972), suggests that such waivers may be per se ineffective where the debtor falls below an appropriate income level. The lower court had set this level at $10,000 per year.

Environmental Control: Environmental Impact Statements Must Include Discussion of Alternatives Beyond Scope of Authority of Reporting Body

Defendant Secretary of the Interior proposed to sell oil and natural gas leases of some 80 tracts of submerged land in the Gulf of Mexico.[1] The Interior Department issued an environmental impact statement which, as required by the National Environmental Policy Act (NEPA),[2] disclosed adverse environmental effects of the plan and listed alternative methods of procuring the needed energy. Prior to the opening of sealed bids, plaintiff environmental organization sought a preliminary injunction against the sale on the ground that the defendant's discussion of alternatives did not satisfy the NEPA requirement since the alternatives were discussed very superficially, the consequences of each were not considered, and some alternatives were omitted altogether. The United States District Court for the District of Columbia granted the injunction.[3] The court of appeals affirmed, *holding* that the environmental impact statement required by NEPA must consider the consequences of all alternatives currently practical in sufficient detail to make a reasoned choice possible. Analysis of alternatives must include those which the reviewing agency lacks the power to bring about, such as solutions requiring legislative and executive action. Further, the court impliedly held that NEPA requires a re-examination of previous legislative and executive policies whenever governmental action might result in significant environmental effects. *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972).[4]

NEPA is the first effort by the federal government to ensure that the environmental consequences of all federal actions are

---

1. The sale was authorized by the Outer Continental Shelf Lands Act, 43 U.S.C. § 1337 (1970).

2. 42 U.S.C. § 4331 *et seq.* (1970).

3. Natural Resources Defense Council, Inc. v. Morton, 337 F. Supp. 165 (D.D.C. 1971).

4. The scope of appellate review in *Morton* was broader than is typical on a motion for summary reversal, the court ruling on the merits to the extent that they were ripe for decision. The issues presented were primarily legal, and the court noted: "[t]he present case is one of public moment, where expedition should be provided if possible." 458 F.2d at 832. *See* Meccano, Ltd. v. Wanamaker, 253 U.S. 136, 141 (1920); A Quaker Action Group v. Hickel, 421 F.2d 1111, 1115 (D.C. Cir. 1969).

thoroughly considered in the administrative process.[5] NEPA requires all federal agencies to issue a "detailed statement" on the environmental impact of all "major Federal actions significantly affecting the quality of the human environment."[6] The statement must evaluate a proposed action in terms of environmental impact, unavoidable adverse effects, alternatives, short-term uses vs. long-term productivity, and irreversible and irretrievable commitments of resources.[7] In addition it has been established that NEPA is an environmental full disclosure law. *Morton* extends the requirement of full disclosure to the discussion of alternatives.[8]

Although several cases have considered whether a NEPA environmental impact statement is required,[9] the general require-

5. Calvert Cliffs Co-ordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971).

6. 42 U.S.C. § 4332(2)(C) (1970).

7. *Id.* In addition the statute requires that the responsible official must consult with and obtain comments from any federal agency with either legal jurisdiction or special expertise with respect to the environmental impact involved. *Id.*

8. The point was first made by Judge Eisele in Environmental Defense Fund v. Corps of Engineers. "At the very least, NEPA is an environmental full disclosure law." 325 F. Supp. 749, 759 (E.D. Ark. 1971). Calvert Cliffs Co-ordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971); Committee for Nuclear Responsibility v. Seaborg, 3 E.R.C. 1126 (D.C. Cir. 1971); Environmental Defense Fund v. TVA, 3 E.R.C. 1553 (E.D. Tenn. 1972); Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972).

9. Much NEPA litigation is concerned with the applicability of the statute to specific situations. One aspect of this problem is retroactivity. A case for retroactivity is presented in Note, *Retroactive Application of the National Environmental Policy Act of 1969*, 69 MICH. L. REV. 732 (1971). However, the courts have generally denied retroactive application of NEPA; *see, e.g.*, Ragland v. Mueller, 460 F.2d 1196 (5th Cir. 1972). Even so, an impact statement is often required for administrative agency actions already under way when NEPA took effect. The Council on Environmental Quality guidelines make specific reference to "continuing activities." 36 Fed. Reg. 7724 (1971). Also, significant incremental steps can themselves be treated as "major Federal actions." Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 749 (E.D. Ark. 1971).

Another aspect of this problem is the extent to which federal involvement is needed before an impact statement will be required. If only state funds are involved, there is no NEPA jurisdiction. Bradford Township v. Highway Authority, 4 E.R.C. 1301 (7th Cir. 1972). Similarly, Kitchen v. FCC, 464 F.2d 801 (D.C. Cir. 1972), held that NEPA does not apply to the construction of a building to house a state regulated telephone exchange despite the applicability of some federal regulations to its operation.

On the other hand, in SCRAP v. United States, 346 F. Supp. 189 (D.D.C. 1972), *appeal filed*, 41 U.S.L.W. 3261 (U.S. Oct. 10, 1972), NEPA was held to apply to rate changes authorized by the ICC which affect

ments of impact statements have not been subject to extensive judicial construction. Prior to the *Morton* decision only two important issues concerning the content required in an impact statement had been determined. In *Calvert Cliffs Coordinating Committee, Inc. v. Atomic Energy Commission*,[10] it was held that an agency must examine all the environmental effects of a proposed action including those effects outside its regulatory purview. The court in *Environmental Defense Fund, Inc. v. Corps of Engineers*[11] held that in an impact statement for a dam, the alternative of leaving the river alone and doing nothing must be considered.

The Government's first contention in *Morton*, that NEPA requirements are satisfied by a listing of alternatives without discussion of their environmental consequences, was quickly rejected. The court of appeals found that the legislative history and the guidelines promulgated by the Council on Environmental Quality indicated that NEPA was intended to require that alternatives be developed in sufficient detail to permit reasoned choices on the part of subsequent decision makers.[12] However, the amount of discussion which constitutes the basis for a reasoned decision is subject to a "rule of reason"[13] or a construction of "reasonableness."[14] Thus, the court noted that where environmental effects are insignificant a brief statement of them is sufficient.[15]

Second, the Government contended that alternatives which an agency is without power to implement need not be discussed. Since oil import quotas involve national security and are beyond the authority of the Interior Department, the Government argued

---

the shipment of materials for recycling. This interpretation of NEPA would require an impact statement for virtually every action affecting federally regulated industries. This approach to NEPA is strongly criticized by Cramton in *Joint Hearings on the Operation of the National Environmental Policy Act of 1969 Before the House Comm. on Public Works and the Senate Comm. on Interior & Insular Affairs*, 92nd Cong., 2d Sess., ser. no. 92-H32, at 416-17 (1972).

10. 449 F.2d 1109 (D.C. Cir. 1971).

11. 325 F. Supp. 749 (E.D. Ark. 1971).

12. 458 F.2d at 834. *See* 115 CONG. REC. 40419-20 (1969). The Council on Environmental Quality guidelines provide: "Sufficient analysis of such alternatives and their costs and impact on the environment should accompany the proposed action through the agency review process in order not to foreclose prematurely options which might have less detrimental effects." 36 Fed. Reg. 7724, 7725 (1971).

13. 458 F.2d at 834.

14. *Id.* at 837.

15. *Id.* at 834.

that it was unnecessary to examine the environmental consequences of their removal or modification.[16] In rejecting this reasoning, the court noted that the environmental impact statement has the dual purpose of aiding in the agency decision-making process and providing environmental information for Congress, the President and the public.[17] This latter, broader purpose required an examination of alternatives which would not ordinarily be considered in internal agency decision making.[18]

The obligation, however, does not require the discussion of remote or speculative alternatives. The proposed sale of offshore leases in *Morton* was designed to help meet energy needs for the next ten years. Environmentalists urged the discussion of the possible development of oil shale, coal liquefaction and gasification and geothermal reserves. The court found that although these alternatives held great promise for the future, they were not currently viable, and therefore no discussion of them was necessary. Alternatives not available within the timespan of the projected action need not be considered.[19]

Third, the Government argued that a previous congressional determination that offshore development is urgently needed and that oil import quotas are essential to the national defense overrides the NEPA requirement that projects be examined in the light of alternatives. The court held that NEPA imposed an obligation to re-examine all previous declarations of congressional or executive policy if significant harm to the environment may result from federal action in furtherance of that policy. The court concluded no other interpretation of the requirement of the act would comport with the NEPA objectives of

> government coordination, a comprehensive approach to environmental management, and a determination to face problems of pollution "while they are still of manageable proportions and while alternative solutions are still available. . . .[20]

Judge MacKinnon, in dissent, urged that the decision-making official be required to discuss only those alternatives which he

---

16. *Id.*

17. Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 835 (D.C. Cir. 1972); Calvert Cliffs Coordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109, 1117-19 (D.C. Cir. 1971).

18. Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 835 (D.C. Cir. 1972). For criticism of this position see Cramton, *supra* note 9, at 421-22.

19. Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 835 (D.C. Cir. 1972).

20. *Id.* at 836.

had the authority to enforce.[21] Although it would be desirable to have environmental review undertaken by officials with the authority to effectuate the various alternatives considered, the environmental impact of major projects rarely corresponds to the authority of existing federal agencies. The majority, attempting to give some guidance for the future, suggested that the preparation of environmental impact statements dealing with broad problems should be assigned to agencies with correspondingly wide authority. In this case, initial review of the proposed sale of offshore oil leases could have been given to the Energy Subcommittee of the Domestic Council.[22] The court suggested that a sweeping review of effects and alternatives first be undertaken by an agency with broad authority before establishing a general policy. Then, specific projects designed to implement the general policy should be thoroughly examined by the agency directly involved in the project. Its review may incorporate by reference the conclusions reached in the previously issued broad impact statement.[23]

It should be noted that NEPA merely mandates a set of procedures; it does not require the agency to reach a substantively pro-environment result.[24] The role of the judiciary is limited to overseeing the procedures and does not extend to second guessing administrative agencies on substantive matters.[25] Expansive procedures and full consideration of environmental effects will no doubt promote more balanced and well reasoned decisions.

There is a corresponding danger resulting from the extension of responsibility dictated by *Morton*. An overly expansive

21. *Id.* at 840-41. Judge MacKinnon also indicated that the policy set forth in the Outer Continental Shelf Lands Act should be given great weight and that considerations of national security ruled out the need to consider the elimination of oil import quotas.

22. *Id.* at 835. The Domestic Council is the White House overseer of domestic cabinet level policy.

23. *Id.* *See also* Committee to Stop Route 7 v. Volpe, 346 F. Supp. 731 (D. Conn. 1972), which held that to satisfy NEPA there must be a broad impact statement for the whole of a proposed highway; impact statements dealing with the various segments of the highway separately do not provide a sufficient assessment of the environmental consequences and possible alternatives.

24. The view that NEPA creates substantive rights championed in Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230 (1970), has been rejected by the courts. *See* GREEN, THE NATIONAL ENVIRONMENTAL POLICY ACT IN THE COURTS 3-4 (1972).

25. Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 837 (1972).

interpretation of the procedural requirements of NEPA might necessitate so much time and effort as to completely inundate administrative agencies in additional paperwork. Such a result would ill serve environmental values, which can best be protected by vigorous regulation.[26] Furthermore, a congressional backlash either in the form of restrictive amendments to NEPA or of exempting specific projects from its provisions is a real possibility. This is not to ignore that without the type of constraints imposed by *Morton* agencies will in some instances do no more than go through the motions of an environmental review to reach a pre-ordained conclusion. However, an effective attack upon such bureaucratic malaise will usually require direct political action to restructure and re-orient the agency in question rather than the limited review available in the courts.

The requirement that alternatives outside the decision makers' competence be considered could easily pose an unreasonable burden if applied indiscriminately. In dealing with a major project, such as the sale of offshore oil and gas leases, it is necessary to obtain a perspective view of the environmental consequences of all practical alternatives. However, acquiring a broad overview will be more nuisance than guidance in dealing with a small project. For example, it would be absurd to be forced to consider the merits of rapid transit in an environmental impact statement dealing with ten miles of new highway.

The "rule of reason" imposed in *Morton*, relative to the extent to which alternatives must be discussed, should be extended to reach this problem. The court in *Morton* implied as much in stating:

> When the proposed action is an integral part of a coordinated plan to deal with a broad problem, the range of alternatives that must be evaluated is broadened.[27]

In determining the breadth of alternatives that require consideration under the rule of reason, the magnitude of the project should be the first component. With experience, administrative agencies and courts should be capable of dividing projects into rough classifications based upon the types of alternatives that must be considered in environmental review.

The vagueness of NEPA[28] makes it necessary to develop

---

26. Cramton, *supra* note 9, at 420-21.

27. 458 F.2d at 835.

28. Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972); Calvert Cliffs Co-ordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971). In *Hanly* Judge Feinberg referred to NEPA as "a

these distinctions on a trial and error basis. Unfortunately, it is procedurally inefficient to require issuance of an impact statement, review of its adequacy in the courts and to permit subsequent delay in those cases where a second impact statement must be prepared in accordance with judicial opinion. Clearly, *Morton* demands a greater degree of advance planning by government agencies and regulated industries.[29] Nonetheless, the number and variety of federal projects makes the establishment of specific standards for the content and scope of environmental impact statements a legislative impossibility. A judicial balancing approach, similar to that followed in *Morton*, may be the best available course.

Finally, it is not at all certain that the task facing environmental groups seeking to challenge federal actions has been made substantially easier by *Morton*. A challenge can be based upon either the failure to discuss one or more practical alternatives or upon the failure to provide adequate detail in support of a reasoned choice among alternatives.[30] The burden of establishing either the practicality of an esoteric alternative or the fact that an agency relied upon inadequate supporting data in reaching its conclusion is likely to be a difficult one to carry.

---

statute whose meaning is more uncertain than most, not merely because it is relatively new, but also because of the generality of its phrasing."

29. Other NEPA decisions may also contribute to this development. *See* Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir. 1972) and Note, *Environmental Impact Statements—A Duty of Independent Investigation by Federal Agencies*, 44 U. COLO. L. REV. 161 (1972). The expanded effort will result in expanded costs. *See* the estimates of losses from nuclear power plant down time in Murphy, *The National Environmental Policy Act and the Licensing Process: Environmentalist Magna Carta or Agency Coup de Grace*, 72 COLUM. L. REV. 962, 969 (1972). Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 787 (D.C. Cir. 1971), held that responsible opposing views must be considered; it follows logically that this requirement applies to suggested alternatives as well. Greene County Planning Bd. v. FPC, 455 F.2d 412 (2nd Cir. 1972), emphasizes the necessity of public participation in NEPA proceedings.

30. Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972).