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Constitutional Law - Access to Private Property

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NOTES

CONSTITUTIONAL LAW — ACCESS TO PRIVATE PROPERTY—Cape Cod Nursing Home Council v. Rambling Rose Rest Home, 667 F.2d 238 (1st Cir. 1981)

INTRODUCTION

On January 7, 1946, the United States Supreme Court, according to Justice Reed, established as a principle “that one may remain on private property against the will of the owner and contrary to the law of the State so long as the only objection to his presence is that he is exercising an asserted right to spread there his religious views.” Justice Reed and two other justices dissented to the Court's decision in Marsh v. Alabama which allowed a Jehovah's Witness access to the business block of a privately owned company town against the wishes of its owners, for purposes of distributing religious literature. The majority in Marsh noted at length the characteristics of the company town which were the same as any other American town, including streets, sewers, sewage disposal, police and a business block. The Court concluded that since the residents and visitors of a public town would not be denied freedom of press and religion, the residents and visitors of a company town could not be denied these freedoms simply because a single company held legal title to all the town's property. Since 1946, it has been argued that this principle of Marsh applied to those who sought access for religious or nonreligious purposes to a shopping center, a migrant labor camp, an industrial park, a mo-

2. Id. at 501.
3. Id. at 502.
4. Id. at 502-03.
5. Id. at 505, 509.
7. Illinois Migrant Council v. Campbell Soup Co., 574 F.2d 374 (7th Cir.)
bile home park and a private university. For the first time, in *Cape Cod Nursing Home Council v. Rambling Rose Rest Home,* an appellate court was asked to apply this principle of *Marsh* to a plaintiff who sought access to a privately owned nursing home.

The United States Supreme Court most recently construed the constitutional implications of *Marsh* in *Hudgens v. NLRB.* In *Hudgens,* the Supreme Court was asked to determine whether the Constitution protected the right of union members to picket in a privately owned shopping mall. The Court (quoting Justice Black's dissent in *Food Employees Local 590 v. Logan Valley Plaza, Inc.*) stated that:

>The question is, Under what circumstances can private property be treated as though it were public? The answer that *Marsh* gives is when that property has taken on all the attributes of a town, i.e., 'residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated.' I can find nothing in *Marsh* which indicates that if one of these features is present, e.g., a business district, this is sufficient for the Court to confiscate a part of an owner's private property and give its use to people who want to picket on it.

Justice Reed believed that *Marsh* was a "novel constitutional doctrine" and he predicted that "such principle may subsequently be

8. *NLRB v. Solo Cup Co.,* 422 F.2d 1149 (7th Cir. 1970).
11. 667 F.2d 238 (1st Cir. 1981). The Court in Cape Cod acknowledged that they were not aware of any published decisions addressing the applicability of *Marsh* to a nursing home. 667 F.2d at 240 n.2. Two additional suits, *Health Law Project v. Sarah Allen Nursing Home,* No. 71-1795 (E.D. Pa. filed, July 20, 1971), and *Citizens for Better Care v. Alden Care Enterprises, Inc.,* No. 72-214876 (Wayne Co. Cir. Ct. Mich. filed, Aug. 11, 1972), have been filed by outsiders who were denied access to a privately owned nursing home but stipulated settlements were reached in both cases. These suits are discussed in *Nursing Home Access: Making the Patient Bill of Rights Work,* 54 U. Det. J. Urb. L. 473 (1977).
13. *Id.* at 508.
15. 424 U.S. at 516-17.
16. 326 U.S. at 512.
restricted by this Court to the precise facts of this case — that is to private property in a company town where the owner for his own advantage has permitted a restrictive public use by his licensees and invitees.\(^\text{17}\) In this regard both Justice Black, the author of the majority opinion in \textit{Marsh}, and Justice Reed, the author of the dissent, seem to concur that only the unique circumstances of \textit{Marsh} could prompt such a constitutional remedy. If this is so, then the \textit{Marsh} precedent is nearing death as the company town is on the verge of extinction.\(^\text{18}\) If the Court in \textit{Marsh} intended to provide access in order that, in the name of private property, a cordon sanitaire would not be created, then \textit{Marsh} can continue to stand for the proposition that when extreme circumstances isolate the public from the normal channels of public information, the Constitution will fashion a remedy. In this note the term “cordon sanitaire” is used to describe those situations where an owner of land completely surrounds a population with private property to the extent that the owner can justify the control of the flow of information to this population on private property grounds.\(^\text{19}\)

Justice Black’s dissent in \textit{Logan Valley}\(^\text{20}\) does not necessarily mean the end of \textit{Marsh}. Black’s statement was made in response to a court majority that applied \textit{Marsh} when only one attribute of a company town was present and arguably without any of the extreme circumstances which create a cordon sanitaire. Whether

\begin{itemize}
  \item \textit{Id.}
  \item The company town has become a relic of the past. A 1974 survey of 190 company towns found more than 150 abandoned or sold to a variety of private owners. Churcher, \textit{In One Company Towns, Some Yearn for the Good Old Days of Paternalism}, \textit{Wall Street Journal}, Dec. 31. 1974 at 18, col. 1. The Supreme Court in \textit{Central Hardware v. NLRB}, 407 U.S. 539, 545 (1972) referred to the company town as an “economic anachronism rarely encountered today.”
  \item The term “cordon sanitaire” was used in \textit{Logan Valley} to describe the situation in which a business could avoid a direct confrontation with picketers by surrounding itself with sufficient private property (such as parking lots) to maintain a distance between the picketer’s message and the object so that the public would not associate the two. 391 U.S. at 324-25. This note redefines this term so that it describes the impact created by a landowner who satisfies two criteria. First, the owner of private property must completely surround a population so that those seeking access to disseminate information must receive the landowner’s approval or be subject to state trespass laws. Second, the people within the cordon sanitaire must not be likely to go beyond the boundary established by the landowner whether because of physical infirmity (nursing home), conditions of employment (migrant labor camp) or because all necessaries are provided on site (company town).
  \item 391 U.S. 308, 327 (1968) (Black, J., dissenting).
\end{itemize}
Black, and the Hudgens Court, meant that Marsh should apply only when all the attributes of a town are present or whether they were demonstrating the extreme circumstances that must be present before such a remedy will be invoked is unclear. The former view leads to a mechanical checklist where even the omission of one insignificant factor (such as the presence of a sewage disposal plant) would allow the conclusion that Marsh did not apply. The latter view leads to the conclusion that the Court’s requirement that all the attributes of a company town be present is not an end in itself, but instead represents an analytical tool for testing the extent to which extreme circumstances have created a cordon sanitaire.

THE CASE

In Cape Cod Nursing Home Council v. Rambling Rose Rest Home, plaintiffs sought access to a privately owned nursing home in order to inform the residents of the legal services they provided. They were repeatedly denied access and on one occasion a member of plaintiff’s council was arrested for criminal trespass. Plaintiffs brought this action in federal district court alleging an infringement of their first amendment rights, primarily on the theory that the nursing home was analagous to the company town in Marsh. The First Circuit Court of Appeals affirmed the district court’s dismissal for failure to state a claim, on grounds that the nursing home could not possibly come within the Marsh ruling since it was not structurally or functionally similar to a typical municipality, was not freely used by the public in general, and the owner of the nursing home was not performing a full range of municipal services, thus standing in the shoes of the State.

Plaintiffs contended that entry to the rest home was necessary

22. 667 F.2d 238 (1st Cir. 1981).
23. Id. at 239.
24. Id.
25. Id.
26. Plaintiffs also contended, unsuccessfully, that a conspiracy existed between the defendant and the police creating state action. The Court found this argument insufficient to create “a First Amendment right of access where none would otherwise exist.” Id. 243.
27. Id. at 240.
29. Id. at 240-41.
because the residents' total existence revolved around the rest home, residents were elderly and frequently infirm, and they seldom ventured from the rest home.\textsuperscript{30} Since the residents were dependent upon the rest home staff and administration for their existence, plaintiffs also contended that any exposure to outside sources of information would necessarily have to take place at the rest home.\textsuperscript{31} Plaintiffs relied upon \textit{Marsh} for the proposition that they were entitled to access and the State could not enforce its criminal trespass laws against them as their activity fell within the protection of the first amendment.\textsuperscript{32}

The court of appeals affirmed the district court's finding that the allegations by the plaintiff were not sufficient to bring the nursing home within the theory of a company town.\textsuperscript{33} The court found that a nursing home lacked the streets, homes, sewers and business block necessary to satisfy the company town requirement.\textsuperscript{34} The court also found that the nursing home was not accessible to and freely used by the public in general as was the business block in \textit{Marsh}, nor was a nursing home a "traditional public channel of communication."\textsuperscript{35} Finally, applying the \textit{Marsh} doctrine, the court concluded that the operator of a nursing home had not "stood in the shoes of the State," through the exercise of municipal or quasi-municipal powers.\textsuperscript{36} In this regard the court pointed out that no allegations were made that the rest home provided such public services as police and fire protection or utilities or that the home had the authority to make and to enforce standards of conduct, such as criminal statutes, as a delegate of the state.\textsuperscript{37}

In an effort to search for a "valid claim raised by the facts alleged," the court of appeals was willing to apply "questionable" modifications of the \textit{Marsh} doctrine as made by \textit{Lloyd Corp., Ltd.}

\textsuperscript{30} Plaintiff's complaint alleged that the nursing home provides its residents a place where they live, sleep, get their meals, receive medical attention, and carry out their daily activities, including social, cultural, recreational and political activities. \textit{Id. at 240.}

\textsuperscript{31} \textit{Id.}

\textsuperscript{32} \textit{Id.}

\textsuperscript{33} \textit{Id.}

\textsuperscript{34} \textit{Id.}

\textsuperscript{35} \textit{Id.}

\textsuperscript{36} \textit{Id. at 241.}

\textsuperscript{37} \textit{Id.}
v. Tanner. In Lloyd, the Supreme Court introduced the possibility that private property would have to yield to the first amendment, even when the company town test could not be satisfied, if adequate alternative avenues of communication were not present. Thus, the court of appeals considered whether plaintiffs had alternative means of communicating their message to the residents short of a violation of the owner's property rights. Since no allegations were made that direct physical access was the only adequate means of communication, the Court concluded that plaintiffs could still reach the residents by phone, by mail, or by an invitation to enter tendered by a resident.

BACKGROUND

In Hudgens the court prefaced its pivotal analysis of Marsh and its progeny by stating: "It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state." And, "[t]his elementary proposition is little more than a truism. But even truisms are not always unexceptionally true, and an exception to this one was recognized almost 30 years ago in Marsh v. Alabama." Marsh found its roots in the concept of the public forum as expressed in Lovell v. Griffin, and Hague v. CIO and in the concept of uncensored individual choice as expressed in Martin v. City of Struthers. Both Lovell and Hague dealt with governmental regulations which restricted the rights of citizens to distribute literature in public places. In response to the Mayor of Jersey City's contention in Hague that a city ordinance which re-

38. Id. at 241 n.4, citing Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551 (1972).
39. 407 U.S. at 567.
41. 424 U.S. 507.
42. 326 U.S. 501.
43. 424 U.S. at 513.
44. Id.
45. 303 U.S. 444 (1938).
47. 319 U.S. 141 (1943).
48. 303 U.S. 444.
49. 307 U.S. 496.
quired a permit to meet in a public place was justified, Justice Roberts stated in dictum that:

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. Such use of the streets and public places has, from ancient times, been part of the privileges, immunities, rights and liberty of citizens.50

In *Martin v. City of Struthers*51 the Supreme Court was asked to determine the constitutionality of a city ordinance which prohibited any person from knocking on doors or ringing doorbells of residences for the purpose of distributing circulars.52 Justice Black, delivering the opinion of the Court, stressed that it was the decision of the individual of each household to allow a stranger access to his house and it was not a community's decision.53 Black based this finding on that fact that "[p]amphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people."54 Black also noted that "door to door distribution of circulars is essential to the poorly financed causes of little people."55

The public forum and uncensored individual choice themes were significantly expanded in *Marsh*.56 While *Lovell*57 and *Hague*58 spoke of public forums in terms of parks, streets and other public places, *Marsh* applied the same doctrine to private property which was the functional equivalent of public property. *Marsh* also expanded the concept of uncensored individual choice by protecting that choice, not from government action, but from action of a private person whose dominion over the individual was tantamount to that of government. The concept of uncensored individual choice may represent the dominant rationale of *Marsh*.59 Justice Black championed the cause of all those who lived in company towns by

50. *Id.* at 515.
51. 319 U.S. 141 (1943).
52. *Id.* at 141-42.
53. *Id.* at 141.
54. *Id.* at 145, quoting *Schneider v. State*, 308 U.S. 147, 164 (1939).
55. *Id.* at 146.
57. 303 U.S. 444.
58. 307 U.S. 496.
stating that:

These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens, they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed, their information must be uncensored.\textsuperscript{60}

Following the Court's decision in \textit{Marsh}, the doctrine associated with this case remained relatively inactive for a period of twenty-two years.\textsuperscript{61} During this period, the Court declined to review a New York decision in which \textit{Marsh} was found inapplicable to a privately owned 129 acre residential apartment complex of 35,000 residents which prohibited Jehovah's Witnesses from entering any apartment building to canvass, peddle or distribute literature.\textsuperscript{62} In \textit{Watchtower Bible and Tract Society v. Metropolitan Life Insurance Co.},\textsuperscript{63} the Supreme Court did not disturb a New York Court of Appeals finding that the public forum theory was inapplicable on grounds that "[a] narrow inner hallway on an upper floor of an apartment house is hardly an appropriate place at which to demand free exercise of those ancient rights,"\textsuperscript{64} and that "no case we know of extends the reach of the Bill of Rights so far as to prescribe the reasonable regulation, by an owner of conduct inside his multiple dwelling."\textsuperscript{65}

\textsuperscript{60.} \textit{Id.} at 508.

\textsuperscript{61.} The Supreme Court cited \textit{Marsh} in three civil rights cases in which Blacks were arrested for demonstrating in privately owned restaurants to protest segregation. \textit{See Bell v. Maryland}, 378 U.S. 226 (1964); \textit{Lombard v. Louisiana}, 373 U.S. 267 (1963); and \textit{Garner v. Louisiana}, 368 U.S. 157 (1961).


\textsuperscript{64.} 79 N.E.2d at 436.

\textsuperscript{65.} \textit{Id.} at 436-37. The New York Court of Appeals factually addressed the uncensored individual choice theory by stating that the owners polled all of the residents of the apartment complex and only 30 residents (out of 11,400 who responded) indicated a desire to be contacted by the Jehovah's Witnesses. The owners of the complex were willing to give the Jehovah's Witnesses permission to contact these 30 residents. \textit{Id.} at 434.
What the Court in *Watchtower* found inconceivable, the United States Supreme Court made the law of the land in *Food Employees Local 590 v. Logan Valley Plaza, Inc.* In 1968, the Supreme Court in *Logan Valley* upheld a union's right to picket a supermarket inside a shopping center (made up of multiple stores) on constitutional grounds, citing such similarities between the company town and the suburban shopping mall as roads, sidewalks, unrestricted access by the public and a business block. While the Court noted that the mall did not have the power to restrict the flow of information to the community as a whole, as in *Marsh*, they found this distinction not determinative of the issue of access to private property. Instead Justice Marshall, speaking for five justices, introduced the concept of the cordon sanitaire arguing that if access were not allowed, businesses could use shopping centers to insulate themselves from the protest of workers, consumers and minorities.

The concept of the public forum was also expanded during this same time period. While *Hague,* *Lovell,* and *Marsh* applied the concept of a public forum to streets and parks, or their functional equivalent, cases during this period applied the public forum doctrine to such non-traditional indoor areas as a school and a library. In *Tinker v. Des Moines Independent Community School District,* the Court upheld the right of students to wear arm-bands in school to protest the Vietnam War, finding that for this type of speech activity a school was an appropriate public forum. In *Brown v. Louisiana,* the Court found, by implication, that a library was a public forum for purposes of the appellant's silent protest. *Tinker* personifies the Court's strong commitment to freedom of speech. Justice Fortas speaking for the major-

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66. 391 U.S. 308.
67. Id. at 317-18.
68. Id. at 318.
69. Id. at 324-25.
70. 307 U.S. 496.
71. 303 U.S. 444.
74. The Court stated that "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate." 393 U.S. at 506.
76. Id. at 140-41.
77. 393 U.S. 503.
ity stated that "[f]reedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots." 78

Recognizing that the rights of free speech are not boundless the Court in Tinker stated that restriction of these rights would be justified if first amendment activities intruded on the work of the school or the rights of other students to be secure and left alone. 79 But the Court also stated that fear or apprehension of a disturbance is not enough to overcome the right of freedom of expression. 80 With the addition of Tinker and Brown the public forum concept was expanded in two ways. First, the public forum was extended to include enclosed areas that differed markedly from streets and parks. Second, the cases present a balancing test between rights of the intruder and the privacy rights of those intruded upon.

While the public forum concept was being expanded, Logan Valley's 81 expansion of Marsh 82 was being restricted. Four years after Logan Valley the Supreme Court in Lloyd Corp. v. Tanner, 83 denied Vietnam War protestors, seeking to distribute hand bills, access to a shopping mall. Lloyd narrowly construed the holding in Logan Valley, declaring that Marsh had only been applied to a shopping mall to the extent that the picketing on the private property was directly related to an establishment within the shopping center. 84 Thus, while picketing in Logan Valley was upheld because it was directed at an establishment within the mall, the protestors in Lloyd 85 were denied access because their protest was directed at the government, not at a store within the mall. Lloyd expanded this body of law by adding that it would be unwarranted to infringe on private interests if alternative avenues of communication existed. 86

78. Id. at 513.
79. Id. at 508.
80. Id.
81. 391 U.S. 308.
82. 326 U.S. 501.
83. 407 U.S. 551.
84. Id. at 560, 563 (citing 391 U.S. at 320 n.9).
85. 407 U.S. 551.
86. Id. at 567. The question as to what constitutes adequate alternative avenues of communication has received extensive analysis in a labor law context beginning with NLRB v. Babcock & Wilcox, Co. 351 U.S. 105 (1956). See also Giant Food Market, Inc. v. NLRB, 633 F.2d 18 (6th Cir. 1980) where the Court stated "[i]f reasonableness is a criterion for determining whether or not an alternative
The subtle distinction between *Logan Valley* and *Lloyd* was put to rest in *Hudgens*. *Hudgens* dealt with striking employees who sought access to a mall in order to picket their employers' retail outlet. While faced with facts similar to that of *Logan Valley*, the Court declared that *Lloyd* had overruled *Logan Valley* and that "the constitutional guarantee of free expression has no part to play in a case such as this."

*Hudgens* did not mean that those who sought access to private property, for purposes of communicating with citizens congregated therein, were without a legal remedy. The *Hudgens* Court merely replaced a statutory remedy for a constitutional one by finding that the National Labor Relations Act provided the basis for determining when private property must yield to greater interests. On remand the National Labor Relations Board declared that the owner of the shopping mall unlawfully interfered with employess who were picketing a store on the mall's premises.

The Supreme Court continued this trend of finding nonconstitutional justifications for allowing access to private property when in *Pruneyard Shopping Center v. Robins*, the Court upheld the right of students to distribute pamphlets and circulate petitions in a privately owned shopping center, based on a State of California Constitutional provision. The Court determined that neither the

means of communications exists, the union should not be forced to incur exorbitant or even heavy expenses." 633 F.2d at 24.

87. 391 U.S. 308.
88. 407 U.S. 551.
89. 424 U.S. 507.
90. Id. at 521.
92. 424 U.S. at 521.
93. Scott Hudgens and Local 315, Retail, Wholesale, and Department Store Union, 230 N.L.R.B. No. 73 (1977). In Seattle-First National Bank v. NLRB, 651 F.2d 1272 (9th Cir. 1980) the court enforced with only slight modifications a NLRB order which allowed picketing in the foyer in front of a restaurant on the 46th floor of an office building relying primarily upon *Hudgens*. For a further analysis of private property rights and the right to access under the National Labor Relations Act see O'Connor, *Accommodating Labor's Section 7 Rights to Picket, Solicit, and Distribute Literature on Quasi-Public Property With the Owners' Property Rights*, 32 MERCER L. REV. 769 (1981).
94. 100 S. Ct. 2035 (1980).
95. Id. at 2038.
96. The California Supreme Court in Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979) determined that Article I, Sec. 23 of the California Constitution, which guaranteed liberty of speech and
owner's federally protected property rights nor his first amendment rights are violated by the exercise of state protected rights of expression in a privately owned shopping mall. 97

Appellants in Cape Cod98 raised the issue of a constitutional right to enter a privately owned nursing home at a time when the Court had determined that a constitutional right of access did not apply to a shopping mall and that any right of access was to be determined on nonconstitutional grounds. While a nursing home and a shopping mall are dissimilar, appellant, by relying upon Marsh,99 had to overcome the fact that any interpretation of Marsh would be shaded by its recent application to shopping malls.

ANALYSIS

Plaintiffs contended that the isolation of nursing home residents and their dependency on nursing home personnel were sufficient reasons for invoking the constitutional protection afforded in Marsh.100 The court of appeals held that a right of access could not be justified on either a company town or alternative avenues of communications theory.101

In reaching this conclusion the Court applied Marsh,102 in a manner predicted by Justices Reed and Black, by comparing the physical features of a nursing home to that of the company town. Short of a company town it is unlikely that any set of physical features could match those of Marsh. This manner of assessing access rights to a nursing home overlooks five critical factors. First, the decision in Marsh was based on public forum and uncensored individual choice theories. In Marsh the description of characteristics which made up the company town advanced the public forum theory by stating that "[o]wnership 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 press, protected the exercise of those rights in a privately owned shopping center. 97. 100 S. Ct. at 2044. See also Note, California Expansion of First Amendment Does Not Infringe on Federally Protected Rights, 32 MERCER L. REV. 637 (1981).

98. 667 F.2d 238.
100. 667 F.2d at 240.
101. Id. at 241-42.
those who use it." Marsh suggests that a public forum depends upon the degree of public use rather than ownership. Later cases which found a public forum inside a school and a library further this interpretation. The court of appeals failed to analyze the nature of the facility, the degree to which it is used by outsiders, and the effect access would have on the work of the facility and the rights of residents to be secure and left alone. Instead, the Court relied on the fact that it is not "freely used" and it is "hardly a traditional public channel of communications." Neither of these descriptions address the degree to which the facility has been opened to the public or to other types of special interests and the effect access would have on the privacy of residents.

Secondly, the descriptive analysis in Marsh demonstrated that, in the name of private property, a cordon sanitaire had been created. The creation of a cordon sanitaire isolated the public from uncensored sources of information thus requiring a constitutional remedy. The First Circuit devoted an inordinant amount of attention to the analysis of the nursing home's physical characteristics but failed to answer the ultimate question of whether a cordon sanitaire has been created in a nursing home. The court's statement that the facts alleged "do not reflect this type of similarity to a typical town" states the obvious, but does not help determine whether the consequences of living in a nursing home are the same as living in a company town.

Thirdly, in relying on Lloyd and Hudgens to understand and to apply Marsh, the court failed to note that the controversy surrounding Marsh has resulted from its application to shopping malls. The shopping mall cases can be factually distinguished from the case at bar on the grounds that failure to confront a citizen in a shopping mall still leaves available all other public places to confront the same citizen, but failure to confront a citizen in a nursing home may leave no other point of confrontation.

Next, the court did not sufficiently analyze alternative means of communications in light of the circumstances likely to be encountered within a nursing home. According to a subcommittee re-

103. Id. at 506.
104. 667 F.2d at 240.
105. Id.
107. 667 F.2d at 240.
108. 407 U.S. 551.
port to a special United States Senate committee on aging and nursing home care:

The average nursing home patient in the United States is an 82-year old white woman, widowed, possessing no viable relationships except possibly with a collateral relative of approximately the same age. Few persons, if any, come to see her. She has approximately four chronic or crippling diseases and is probably suffering from some mental impairment. She cannot walk and she probably requires help in taking a bath, dressing and going to the bathroom. She takes large quantities of drugs. 1

The subcommittee also concluded that:

Nursing home residents are often abused, and this abuse has been well documented. It includes both physical and psychological mistreatment. Many of those persons subjected to abuse are afraid to report it to relatives or other outsiders for fear nursing home personnel will retaliate. Because of age, infirmity and fear, the typical nursing home patient is particularly vulnerable to mistreatment. 110

110. Comment, Nursing Home Access: Making the Patient Bill of Rights Work, 54 U. Det. J. Urb. L. 473 (1977) citing the Subcommittee on Long-Term Care of the Senate Special Comm. on Aging, Nursing Home Care in the United States: Failure in Public Policy Introductory Report, S. Rep. No. 93-1420 93d Cong., 2d Sess. 16 (1974). The General Accounting Office reports that the nursing home population has become increasingly more dependent in recent years as evidenced by the fact that in 1973-74 23.5% of nursing home residents were rated as being capable of independently performing six functions, bathing, dressing, toileting, transferring, continence and eating while only 9.6% of residents were able to perform these functions in 1977. U.S. Gen. Accounting Office, Preliminary Findings on Patient Characteristics and State Medicaid Expenditures for Nursing Home Care, 2-3 (1982).

111. Id. at 474. A more recent and quite exhaustive study of conditions in nursing homes concludes that:

[T]he indifference, neglect, and physical abuse of patients continues: infirm old people are left lying for hours in their own excrement; severely scalded or even drowned in presumably attended bathtubs; illegally restrained in ‘geriatric chairs’ or attacked, sometimes suffering broken limbs, by nursing home employees. Although the overall quality of nursing homes improved substantially in the preceding decade, there were still, in the United States in 1978, nursing homes with green meat and maggots in the kitchen, narcotics in unlocked cabinets, and disconnected sprinklers in nonfire-resistant structures. The increasingly small proportion of truly horrible nursing homes may be less distressing in the aggregate, though, than the quality of life in the thousands that meet the minimal public standards of adequacy. In these, residents live out the last of their days in an enclosed society without privacy, dignity, or pleasure,
The Supreme Court has recently held, in *Blum v. Yaretsky*,\(^{112}\) that Medicare and Medicaid payments were not sufficient to create state action in a decision by a nursing home to reassign a patient.\(^ {113}\) Justice Brennan, in his dissent to this decision, stated that for nursing home patients, "the totality of their social network is the nursing home community. Within that environment, the nursing home operator is the immediate authority, the provider of food, clothing, shelter, and health care, and, in every significant respect, the functional equivalent of a state."\(^ {114}\) Given these descriptions of the conditions present in nursing homes, the court of appeals may have overly relied upon the use of the telephone or the mail as adequate alternative means of communication short of access. While Justice Brennan did not address the issue of abuse by nursing home operators in his dissent, he recognized the total control which the operator of a nursing home has over his patients. It is this total control which breeds the abuses cited above.

Finally, while the Court did indicate that the nursing home received no government funds,\(^ {115}\) it is not clear whether this was meant to include the non-receipt of medicare\(^ {116}\) and medicaid reimbursement for the care and treatment of patients.\(^ {117}\) If such reimbursements were received the nursing home\(^ {118}\) would be subject to the "patient's bill of rights"\(^ {119}\) as promulgated by the Department of Health, Education and Welfare in 1974 and 1976. This bill of rights requires that patients in nursing homes which receive

subsisting on minimally palatable diets, multiple sedatives, and large doses of television—eventually dying . . .


112. 102 S. Ct. 2777 (1982).

113. Id. at 2786.


115. 667 F.2d at 240.


117. Id. at §§ 1396a-1396i.

118. The Federal government divides nursing homes into three categories, skilled nursing facilities, intermediate care facilities, and custodial care facilities, according to the level of medical care provided in the facility. Of the three categories only custodial care facilities do not provide any nursing care and are not eligible for medicare or medicaid reimbursements. Approximately 82% of all nursing home beds are in skilled or intermediate care facilities. Comment, supra note 110, at 475. Plaintiffs in *Cape Cod* did allege that residents of the nursing homes received medical treatment at the nursing home, 667 F.2d at 240, but it is not clear as to whether this refers only to the fact that physicians had access to the nursing home or that the home itself provided nursing or physician care.

medical care, be given the right to outside representation of their choice\textsuperscript{120} and
have a right to meet, associate and communicate privately with
persons of their choice.\textsuperscript{121} These regulatory rights may create an
enforceable right of access independent of constitutional rights as
in the case of the statutory right in \textit{Hudgens}\textsuperscript{122} and the state con-
stitutional right in \textit{Pruneyard}.\textsuperscript{123} If these rights apply the Court
should have considered them in its opinion. If these rights do not
apply, because no such reimbursements were received, the Court
should have noted this as well, as this fact affects the more general
application of \textit{Cape Cod}\textsuperscript{124} to other nursing home suits.

Other alternatives exist to resolve the issue of access to nurs-
ing homes short of the confused\textsuperscript{125} constitutional arguments which
result from the application of \textit{Marsh}\textsuperscript{126} and its progeny. The owner
of the apartment complex in \textit{Watchtower}\textsuperscript{127} sought to resolve this
conflict by polling residents of the complex and by allowing access
to all those residents who indicated a desire to hear the outsider’s

\begin{itemize}
\item[120.] 42 C.F.R. § 442.311(d)(2) (1981).
\item[121.] \textit{Id.} at (i)(1). The regulation states: “Freedom of Association and Corre-
spondence. Each resident must be allowed to - (1) communicate, associate and
meet privately with individuals of his choice, unless this infringes on the rights of
another resident.”
\item[122.] The regulations also require that “Each resident must be (1) encouraged and
assisted to exercise his rights as a resident of the ICF (intermediate care facility)
and as a citizen.” \textit{Id.} at (d)(1). These same rights are applied to skilled nursing
facilities through 42 C.F.R. § 405.1121(k)(11) (1981). While the Federal regula-
tions only apply to skilled nursing and intermediate care facilities, as a conse-
quence of their receipt of medicare and medicaid funds, North Carolina has ex-
tended these rights to all nursing homes defined as: “an institution . . . which is
advertised, announced or maintained for the express or implied purpose of pro-
viding nursing or convalescent care for three or more persons unrelated to the
licensee.” N.C. GEN. STAT. § 130-9(e)(2)(1981). The North Carolina Bill of Pa-
tient’s Rights includes the right to “associate and communicate privately and
without restriction with persons and groups of his own choice on his own or their
\item[123.] 424 U.S. 507.
\item[124.] 100 S. Ct. 2035.
\item[125.] 667 F.2d 238.
\item[126.] Comment, \textit{supra} note 110, at 498-99. \textit{See} also Justice Powell’s concur-
ing opinion in \textit{Hudgens} in which he states that the law in this area has been
“less than clear.” \textit{Hudgens} v. NLRB, 424 U.S. at 523 (1976) (Powell, J.,
concurring).
\item[127.] 326 U.S. 501.
\item[128.] 297 N.Y. 339, 79 N.E.2d 433.
\end{itemize}
message. A polling solution was also used by the Wayne County Circuit Court (Michigan) to resolve the issue of access in a nursing home by a federally funded group which provided older Americans with counseling. The court ordered that the nursing home be open for purposes of surveying patient attitudes, and the results indicated that a large number of residents desired to meet with the outsiders. This fact provided the foundation for a stipulated settlement allowing access.

Professor Victor Schwartz has proposed that resolution of this conflict can be found within the common law tort privilege of necessity. This privilege allowed an individual whose life or property was threatened to protect those interests by entering on to another's land. Schwartz contends that this privilege could attach to those who sought access to another's land in order to communicate ideas if no alternative means of communications existed, if the individual was furthering the public interest rather than an individual interest, and if the intrusion is as limited as possible to satisfy the intruder's purpose. A request by the plaintiffs in Cape Cod to give a semiannual presentation of the services they offer in the recreation room of a nursing home, would likely satisfy all three of Professor Schwartz's requirements.

CONCLUSION

In 1968, Marsh became the basis for allowing access to shopping malls in order to exercise first amendment freedoms. This extension of Marsh was later repudiated. Nursing homes and migrant labor camps represent the next controversy in which Marsh has become the focal point for those that are seeking access to private property.

The question of whether Marsh applies to nursing homes de-
pends upon the test to be used to determine its application. Ac-
cording to Justices Reed and Black, in order for *Marsh* to apply, a
company town test has to be satisfied. This test requires that the
plaintiff demonstrate that the property to which access is sought
resemble a company town. Factors to be satisfied include: struc-
tural similarities to a town (i.e., streets, sewers, business block),
free public access, and performance of municipal services (i.e., po-
lice, fire, utilities). The application of this test results in decisions
in conformance with every Supreme Court decision which applied
*Marsh*, with the exception of the repudiated decision in *Logan
Valley*.\(^{138}\) The First Circuit applied this test in *Cape Cod*\(^{139}\) and
concluded, consistent with this test, that *Marsh* could not be used
as a basis for seeking access to a nursing home.

A second test, which is also consistent with every past Su-
preme Court decision which applied *Marsh*\(^{140}\) with the exception of
*Logan Valley*,\(^ {141}\) requires that both a public forum and a cordon
sanitaire be present to apply *Marsh*. This test would require that a
public forum be determined by the type and degree of public and
resident use of the facility, the intrusion on the operation of the
home and the intrusion on the rights of other residents to be left
alone. This test would also require that a cordon sanitaire\(^ {142}\) be
present. This fact would be determined by whether the owner of
private property had the power to restrict the flow of information
to the community as a whole. The application of this test to shop-
ping malls results in a decision which is consistent with *Hudg-
ens*.\(^ {143}\) While the shopping mall may satisfy the public forum por-
tion of the test, it cannot satisfy the cordon sanitaire requirement
as the owner of a mall does not have the authority to restrict the
flow of information to the community as a whole. If this test is
applied to a nursing home, the result reached in *Cape Cod*\(^ {144}\) may
be different depending upon the use of the facility, the effect ac-
cess would have on the operation of the facility, and the nature of
the owner's authority to restrict information.

In the alternative, the practitioner must recognize that *Marsh*
is not currently favored in the law and that other means of achiev-

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138. 391 U.S. 308.
139. 667 F.2d 238.
140. 326 U.S. 501.
141. 391 U.S. 308.
142. See supra note 19.
143. 424 U.S. 507.
144. 667 F.2d 238.
ing access to nursing homes will be necessary. *Cape Cod* represents a very tentative opinion in its analysis of nonconstitutional alternatives to justify access, and it is this area of the law which requires the greatest need of expansion if this access is to be granted. Federal and state regulations and statutes, which are commonly referred to as residents' or patients' "bill of rights" might ultimately provide the legal foundation for an outsider's right of access to a nursing home.

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