Union Organizational Rights and the Concept of "Quasi-Public" Property

Recent developments granting labor interests access to management property for union organizational purposes raise doubts as to the continuing validity of traditional notions concerning property rights. In the context of labor relations, as well as in other situations such as the civil rights disputes so common to the contemporary scene, the courts and other decision making bodies are determining that the more the public or some portion thereof are invited to use property, the more the owner's traditional property rights become limited by the constitutional and statutory rights of the individuals granted such use. This article traces the development of union organizational rights involving property owned by quasi-public enterprises and considers the relevant constitutional rights, the statutory rights granted under the NLRA, and the body of case law which has developed from these sources. In considering such labor activities as solicitation, distribution, picketing, and public handbilling, the author analyzes distinctions between activities carried on by employee or nonemployee organizers, and appeals aimed at employees or at the general public. Likewise, he examines such elements as the relative necessity of access to particular types of property in specific factual settings, the relative necessity of particular types of communications in specific fact situations, discrimination on the part of employers in allowing the use of their property, and the reasonable demands of management to prevent interference with normal business operations. Further, the author gives consideration to the jurisdictional disputes between the NLRB and the various state courts. The author concludes that the traditional concepts of property rights which once sufficed to defend against intrusions by portions of the public can no longer remain intact. Some balancing of interests must be made in order to best guarantee all the rights of all the parties involved.

William B. Gould*

Some of the most subtle winds of change today in the law of labor-management relations relate to union organizational technique and what may be, through little fault of the unions, a diminished respect in this context for the claims of property ownership. Congress, of course, has somewhat hampered the exercise of organizational picketing rights through enactment of the Landrum-Griffin amendments[1] and, perhaps more importantly, would seem to have enlarged the public's antagonism toward conduct which seeks to enlist the wage earner as a union member in the bargaining unit and, at the same time, to have studiously avoided the difficult task of employee persuasion. An attempt to avoid criticism from the public and diminishing returns from other methods may impel organizers to rely more heavily than in the past on winning the wage earner's loyalties through the distribution of literature and influencing employee free choice through solicitation of membership; the desirable expression of this choice

*Member of the Michigan Bar. The viewpoints expressed in this article do not necessarily represent those of the NLRB or any of its members.

1. *E.g.*, Labor Management Relations Act (LMRA) § 8(b)(7)(C), added by § 704(c), 73 Stat. 544 (1959), 29 U.S.C. § 158(b) (Supp. V, 1964):

> It shall be an unfair labor practice for a labor organization or its agents:
>
> . . .
>
> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employer:
>
> . . .
>
> (C) where such picketing has been conducted without a petition under Section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, that when such a petition has been filed the Board shall forthwith, without regard to the provisions of Section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform services.

will be majority rule as translated by an NLRB election.[2]

All of this in turn will exercise a considerable, though not exclusive, impetus towards judicial reexamination of some of our more traditional notions regarding property ownership. The most dramatic collision between union organizational technique and management property rights takes place where management invites the public onto its property to do business. The list of such types of establishments is potentially long. Many of them, as will be seen below, are eliminated or severely limited in their application to this problem by the analysis employed.

Union solicitation and distribution comprise the primary object of attention in this discussion. While this emphasis should not distract us from other operations which will pose the conflicts similarly (*i.e.*, handbilling and picketing aimed at the public),[3] union activity directed at the workers, such as solicitation and distribution and perhaps public handbilling, should on most counts make the union's case an easier one. The first reason for this distinction is that picketing, the patrolling of an area with placard in hand, is something more than free speech. It exerts a more volatile influence on certain audiences;[4] and the Supreme Court has so held in language less qualified than that used here.[5] Thus the Court's recent decision protecting picketing in *NLRB v. Fruit Packers Local 760*,[6] while it strikes an important blow in defense of picketing and less disruptive forms of union organizing discussed herein as free speech, can be rationalized in terms of the *remote distance* of its secondary situs from the primary employer's plant where greater economic havoc might ensue as a result of the same conduct. The second reason for a distinction based on whether union activities are aimed at employees or at the public is the genuine need to get as near as possible to the employee's place of work; the comparative value here is a better

2. See NLRA § 9, 61 Stat. 143 (1947), as amended, 29 U.S.C. § 159 (1958), as amended, 29 U.S.C. § 159(c)(3) (Supp. V, 1964).

3. *But see* AFL v. Swing, 312 U.S. 321 (1941), wherein the Court noted that the "stranger" picketing unlawfully enjoined in that case was aimed at *employees*. Characterization of this kind of union conduct cannot be done in an "either/or" manner.

4. See Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 591–602 (1951).

5. Hughes v. Superior Court, 339 U.S. 460 (1950); *cf.* Mr. Justice Douglas' concurring opinion in Bakery Drivers Local v. Wohl, 315 U.S. 769, 775 (1942). The Court has reaffirmed this view most recently in Cox v. Louisiana, 85 Sup. Ct. 453, 464–65 (1965). Compare Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Thornhill v. Alabama, 310 U.S. 88 (1940).

6. 377 U.S. 58 (1964).

likelihood that the dispute remains identifiable in terms of the particular employer and that the campaign directly aims at those who must make the decision. A third factor argues in both directions; this involves customer annoyance and a consequent loss of sales for management. Public handbilling would be the most disruptive approach here. If the workers have variegated work schedules — which is very likely to be the case in some of the enterprises to be discussed — entanglement with customer mobility may be present. However, picketing, advertisement that it is, would still seem to prove the most bothersome.

On the other hand union organization, for a number of reasons, may not be entitled to share *any* of the inroads made recently on quasi-public property by the victims of racial discrimination. But such a distinction will be difficult to reason. In both *Thomas v. Collins*[7] and *Staub v. City of Baxley*,[8] the Court has held that union solicitation rights, albeit within certain limitations,[9] are protected by the first and fourteenth amendments. The Court has emphasized the broad sweep of protection accorded diverse petitioners in *NAACP v. Alabama*:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. . . . It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . *Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.*[10]

But the crucial hurdle here is private property, for it is the

7. 323 U.S. 516 (1945); *cf.* Hill v. Florida, 325 U.S. 538 (1945).

8. 355 U.S. 313 (1958).

9. In *Thomas* the Court stated the following:

> Once the Speaker goes further, however, and engages in conduct which amounts to more than the right of free discussion comprehends, as when he undertakes the collection of funds or securing subscriptions, he enters a realm where a reasonable registration or identification requirement may be imposed. In that context such solicitation would be quite different from the solicitation involved here. . . .

323 U.S. at 540. In *Staub* the Court stated that the solicitation right in question consisted solely of speaking to employees in their homes. The Court said, "For that reason we are not confronted with any question concerning the right of the city to regulate the pursuit of an occupation. . . ." 355 U.S. at 322 n.5 (citing *Thomas v. Collins*).

10. 357 U.S. 449, 460 (1958). (Emphasis added and citations omitted.)

location of employer property that has impelled the unions to operate thereon. Though subject to reasonable use in other areas of the law, curiously the concept of property rights has become a rallying cry in the field of labor law. The traditional notion would seem to be that the concept suffices as an absolute defense against those who would engage in union activity. That notion — like so many others held as doctrine by past generations — may well be under increasing attack.

I. THE STATUTORY FRAMEWORK FOR UNION ORGANIZATIONAL RIGHTS ON MANAGEMENT PROPERTY

More than 20 years ago the National Labor Relations Board set forth its ground rules to deal with the rights of *employees* to conduct self-organization activities on company property pursuant to Section 7 of the National Labor Relations Act.[11] In *Peyton Packing Co.*[12] the Board established these governing principles of law:

> The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.[13]

---

11. As amended, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958):
> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

12. 49 N.L.R.B. 828 (1943), *enforced*, 142 F.2d 1009 (5th Cir.), *cert. denied*, 323 U.S. 730 (1944).

13. *Id.* at 843–44.

In *Republic Aviation Corp. v. NLRB*[14] the Supreme Court followed this approach. In that case the Court was presented with the question of whether the rights of employees to pass out union "authorization" cards in the plant during nonworking time, to pass out union literature in the parking lot, and to wear union insignia at any time on company property, were protected under section 7 of the act. Moreover, the Court was asked to uphold the Board's presumption, as postulated in *Peyton Packing*, that employer prohibition of such activity was violative of section 8(a)(1)[15] without the discriminatory motive that this provision normally requires for the finding of an unfair labor practice. Mr. Justice Reed, writing for the Court, held this to be protected activity and ratified the Board's principle that impingement of such rights could be rationalized only by an employer's legitimate business interest in production and discipline. Normally the defense was to be limited to working time. But the special considerations of some enterprises (retail department stores was to become a noted one)[16] were permitted.

Subsequently, however, the *Republic* rationale was severely limited. In *NLRB v. Babcock & Wilcox Co.*[17] the Court made it clear that *nonemployee union organizers* stood on an entirely different footing from the employees involved in the former case. In *Babcock* the Court kept intact the application of *Republic* to employee rights[18] but restricted the rights of nonemployees to distribute literature to employees on company parking lots. Mr. Justice Reed, delivering the Court's opinion once again, stated:

> It is our judgment . . . that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution.[19]

---

14. 324 U.S. 793 (1945).

15. 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(1) (1958): "(a) It shall be an unfair labor practice for an employer: 1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . ."

16. Meier & Frank Co., 89 N.L.R.B. 1016 (1950); Goldblatt Bros., 77 N.L.R.B. 1262 (1948); J. L. Hudson Co., 67 N.L.R.B. 1403 (1946); May Dep't Stores Co., 59 N.L.R.B. 976 (1944), *aff'd*, 154 F.2d 533 (8th Cir. 1946); see Meier & Frank Co., *supra* at 1021 (dissenting opinion of Members Houston and Styles). Compare NLRB v. Great Atl. & Pac. Tea Co., 277 F.2d 759, 762–64 (5th Cir. 1960); Maxam Buffalo, Inc., 139 N.L.R.B. 1040 (1962); Marshall Field & Co., 34 N.L.R.B. 1 (1941).

17. 351 U.S. 105 (1956).

18. *Id.* at 113.

19. *Id.* at 112.

Thus two elements are relevant to the rights of nonemployees: 1) the existence of alternate channels of communication, and 2) the employer's discriminatory grant of permission to others. Whether the Court meant such "other distribution" to include management's own activity has never been entirely clear. This area and other important ones were further confused by the Court's next decision.

In *NLRB v. United Steelworkers*[20] the issue concerned whether the NLRA qualified in any way the right of an employer to engage in certain types of anti-union solicitation during working hours. The same activities, if engaged in by the employees, would have violated an otherwise valid no-solicitation rule and subjected the employees to possible discharge. The Court protested against the breadth of the question posed in the terms "regardless of the way in which the particular controversy arose."[21] To answer the case in this manner, the Court said, would show "indifference" to the Board's responsibility to observe diverse circumstances. The record of neither case indicated "that the employees, or the union on their behalf, requested the employer, himself engaging in anti-union solicitation, to make an exception to the rule for pro-union solicitation."[22] The Court noted the "clear anti-union bias of both employers," but refused to assume that such a request would be rejected "although it might well have been open to the Board to conclude as a matter of industrial experience"[23] that a request was futile. Thus, *Steelworkers* held that the failure by employees, as well as nonemployee organizers, to request permission could prove fatal to an unfair labor practice finding.

Secondly, the Court rebuked the Board for not finding whether the rule had "truly diminished the ability of the labor organizations involved to carry their messages to the employees."[24] Citing the *Babcock* rule of alternate communications as "highly relevant," the majority stated:

> [T]he Taft-Hartley Act [NLRA] does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it.[25]

20. 357 U.S. 357 (1958). Mr. Justice Frankfurter wrote for the majority; Mr. Chief Justice Warren dissented in part; Justices Black and Douglas dissented.

21. *Id.* at 362.

22. *Id.* at 363.

23. *Ibid.*

24. *Ibid.*

25. *Id.* at 364.

Thus, the Court said that mechanical answers would not avail, since where plant location, facilities, and other resources made union opportunities "at least as great as the employer's ability to promote the legally authorized expression of his anti-union views, there is no basis for invalidating these 'otherwise valid' rules."[26] The Court was careful to state that, in proper circumstances, an employer could commit an unfair labor practice by violating his own rule but that "there must be some basis, in the actualities of industrial relations, for such a finding."[27]

One immediate consequence of the Court's unconcealed hostility to per se findings of unfair labor practices by the NLRB in support of nonemployee organizers is that in order to require the employer to give the union an opportunity to answer, on plant property, an anti-union captive audience speech, an imbalance in communications must be demonstrated by the union.

In *May Dep't Stores Co.*[28] the Board held, in the face of *Babcock* and *Steelworkers*, that nonemployee organizers were entitled to access to company property in department stores to answer a captive audience address. The Board reasoned that the broad no-solicitation rule, to which department stores are entitled because of that business' peculiarities,[29] created the "imbalance" requisite to the *Babcock-Steelworkers* rationale. Insofar as unfair labor cases are concerned,[30] it would seem that the Board is foreclosed by *Steelworkers* from extending the *May* doctrine to the more normal establishment where no-solicitation rules cannot be promulgated during nonworking time. What the *May* case contributes to this discussion is, however, the great importance of contact between nonemployee organizers and employees. *May* articulately relates the union-employee interest in terms of access to private property:

---

26. *Ibid.*

27. *Ibid.*

28. 136 N.L.R.B. 797 (1962), *enforcement denied*, 316 F.2d 797 (6th Cir. 1963); *cf.* NLRB v. F. W. Woolworth Co., 214 F.2d 78 (6th Cir. 1954); NLRB v. American Tube Bending Co., 205 F.2d 45 (2d Cir. 1953); Montgomery Ward & Co., 145 N.L.R.B. 846 (1964), *enforced as modified*, 339 F.2d 889 (6th Cir. 1965); Bonwit Teller, Inc., 96 N.L.R.B. 608 (1951), *enforced as modified*, 197 F.2d 640 (2d Cir. 1952).

29. See note 16 *supra*.

30. The Board is not necessarily precluded from extending the *May* doctrine in representation cases. See NLRB v. Shirlington Supermarket, Inc., 224 F.2d 649 (4th Cir.), *cert. denied*, 350 U.S. 914 (1955); *cf.* Dal-Tex Optical Co., 137 N.L.R.B. 1782 (1962); Metropolitan Auto Parts Inc., 102 N.L.R.B. 1634, 1638 (1953) (concurring opinion of Chairman Herzog).

> The normal effectiveness of such channels stems not alone from the ability of a union to make contact with employees, away from their place of work, but also from the availability of normal opportunities to employees who have been contacted to discuss the matter with fellow employees at their place of work. The place of work is the one place where all employees involved are sure to be together. Thus it is the one place where they can all discuss with each other the advantages and disadvantages of organization, and lend each other support and encouragement. Such full discussion lies at the very heart of the organizational rights guaranteed by the Act, and is not to be restricted, except as the exigencies of production, discipline, and order demand. It is only where opportunities for such discussion are available, limited, of course, by the need to maintain production, order, and discipline, that the election procedures established in the Act can be expected to product [*sic*] the peaceful resolution of representation questions on the basis of a free and informed choice. Where such discussion is not allowed, the normal channels of communication become clogged and lose their effectiveness. In such circumstances, the balance in "opportunities for organizational communication" is destroyed by an employer's utilization of working time and place for its antiunion campaign.[31]

Thus the first basic principle in the resolution of this type of labor-management conflict is that employee contact with organizers is necessary for the purpose of discussion and free choice. A second basic principle recognizes the importance of the employee's work place as the focal point in the organizational struggle because of the inherent difficulties in the use of other possible meeting places. Addresses and telephone numbers are difficult to obtain. Employee homes are relevant only to meeting with a few key supporters at an early stage of the campaign. In many situations the distance of employee homes from a union hall — assuming one is available — makes this an undesirable meeting place. As the Board has recently said in a decision upholding employee rights to solicit on company property:

> Their place of work is the *one* location where employees are brought together on a daily basis. It is the *one* place where they clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.[32]

Thus the freedom of association enunciated in *NAACP v. Alabama*[33] is made pertinent to private property by *May*. The proposition that these statutory rights are inextricably linked with

31. 136 N.L.R.B. at 802.

32. Gale Prods., 142 N.L.R.B. 1246, 1249 (1963), *enforcement denied*, 337 F.2d 390 (7th Cir. 1964). (Emphasis added.)

33. 357 U.S. 449 (1958).

the protection of the Constitution has received approval by the Second Circuit in *NLRB v. United Aircraft Corp.*[34]

II. THE CONSTITUTIONAL ASPECTS OF RIGHTS TO QUASI-PUBLIC PROPERTY

The significance of private property to which the public has access has been the subject of much constitutional debate. In *Marsh v. Alabama*[35] the Supreme Court held that the right to distribute religious literature in the privately owned business or "regular shopping center" of a company town was constitutionally protected and, under such circumstances, superior to the property rights involved. Mr. Justice Black, writing for the majority, characterized the free speech involved in such literature as in a "preferred position" relative to the property owner. Citing *Republic*, the Court said that 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."[36] Through this analysis the presence of the elusive "state action," upon which the protection of the fourteenth amendment is dependent, was found.

The Court further categorized bridges, ferries and turnpikes as operations which have "essentially a public function" and are thus subject to state regulation. Refusing to accord citizens in a company town an inferior constitutional status because of legal title, the Court held that municipal or corporate interests notwithstanding,[37] the property in question was not sufficient to restrict these "fundamental liberties." The fact that *Marsh* involved a company town setting (which is referred to a number of times by the Court) points up the lack of alternative communications so important to the *Babcock* case. However, this fact does not seem to have been of primary importance. Indeed, Mr. Justice Reed, the author of *Babcock*, dissented in *Marsh* because of the apparent availability of nearby public property where the distribution could have been conducted safely.[38] At the same time the highly significant concurring opinion of Mr. Justice Frankfurter clearly contained more limited conclusions:

> Title to property as defined by State law controls property relations; it cannot control issues of civil liberties which arise precisely because a

34. 324 F.2d 128 (2d Cir. 1963), *cert. denied*, 376 U.S. 951 (1964).
35. 326 U.S. 501 (1946).
36. *Id.* at 506.
37. *Id.* at 507.
38. *Id.* at 513.

> company town is a town as well as a congeries of property relations. And similarly the technical distinctions on which a finding of "trespass" so often depends are too tenuous to control decision regarding the scope of the vital liberties guaranteed by the Constitution.[39]

Marsh is then the touchstone of departure for arguments supporting the exercise of labor union activity on property to which the public has access — "quasi-public" property.

Shelley v. Kraemer,[40] where the Court struck down state court enforcement of restrictive covenants in housing, emphasizes another element which was not spelled out in *Marsh*. *Shelley* holds that, at least for the purposes of that case, judicial enforcement can provide "state action" within the meaning of the fourteenth amendment. Thus both the quasi-public nature of the property in question and the state enforcement of a policy contrary to the union position justify constitutional and statutory regulation. However, no implication is intended that the Board and the courts should, in non-quasi-public cases arising under the National Labor Relations Act, emulate the obsequiousness to property rights evidenced in *Babcock* and *Steelworkers*. On the contrary, those cases should be distinguished away to the greatest extent possible. *May* is a good start in that direction. Moreover, state action may well tip the balance of communication away from the union in cases which *indirectly* involve public access property.[41] But the presence of quasi-public considerations strengthens the case for free speech. Furthermore, the Board will be on firmer ground, when departing from the *Babcock-Steelworkers* rationale, if their decisions are consistent with constitutional opinions.

Mr. Justice Douglas' concurring opinion in *Garner v. Louisiana*[42] accepts and indeed expands on the quasi-public rationale put forward in *Marsh*. In *Garner*, "sit-ins," protesting the racially discriminatory practices of certain retail store restaurants, were convicted under a breach of the peace statute. A majority of the Court set aside the conviction for lack of evidence. Mr. Justice Douglas, however, characterized the restaurants as "public facilities" where the "sit-ins" had a right to protest in an orderly

39. *Id.* at 511.

40. 334 U.S. 1 (1948).

41. See Montgomery Ward & Co., 150 N.L.R.B. No. 130, 2 LAB. REL. REP. (58 L.R.R.M.) 1268 (Jan. 29, 1965), wherein the Board held that the *May* doctrine was inapplicable to a department store with its no solicitation rule applicable to nonworking time only. Here, however, the locality prohibited the distribution of literature on public streets and thus precluded union activity at store entrances.

42. 368 U.S. 157, 176 (1961).

fashion. His concurring opinion analogizes the restaurant to those industries "affected with a public interest"[43] and theorizes that "a license to establish a restaurant is a license to establish a public facility and necessarily imports, in law, equality of use for all members of the public."[44]

Subsequently in *Bell v. Maryland*,[45] where a majority of the Court remanded the conviction of sit-ins because Maryland had passed a public accommodations statute after the prosecutions took place, Mr. Justice Douglas, now joined by Mr. Justice Goldberg in relevant part, reiterated his position taken in *Garner*:

> The property involved is not, however, a man's home or his yard or even his fields. Private property is involved, but it is property that is serving the public. As my Brother Goldberg says, it is a "civil" right, not a "social" right, with which we deal . . . . The problem with which we deal has no relation to opening or closing the door of one's home. The home of course is the essence of privacy, in no way dedicated to public use, in no way extending an invitation to the public. Some businesses, like the classical country store where the owner lives overhead or in the rear, make the store an extension, so to speak, of the home. But such is not this case. The facts of these sit-in cases have little resemblance to any institution of property which we customarily associate with privacy.[46]

In *Bell*, Justice Douglas has relied heavily on important modern developments involving separation of ownership and control in the corporation. The former's remoteness from the latter is well documented.[47] The opinion highlights the present day obstacles to the more fundamentalist analysis of property rights possible when ownership and control were one:

> It is said that ownership of property carries the right to use it in association with such people as the owner chooses. The corporate owners in these cases — the stockholders — are unidentified members of the public at large, who probably never saw these petitioners, who may never have frequented these restaurants. What personal rights of theirs would be vindicated by affirmance? . . . Who, in this situation, is the corporation?[48]

---

43. *Id.* at 183.

44. *Id.* at 184.

45. 378 U.S. 226 (1964). Compare Cox v. Louisiana, 85 Sup. Ct. 453 (1965); Fields v. South Carolina, 375 U.S. 44 (1963); Edwards v. South Carolina, 372 U.S. 229 (1963).

46. *Id.* at 252–53.

47. Justice Douglas cites the classic BERLE & MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932). See more recently BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION (1954); CROSLAND, THE FUTURE OF SOCIALISM (1956); MEANS, THE CORPORATE REVOLUTION IN AMERICA (1962).

48. 378 U.S. at 261–62.

The same question must be asked in the case of nonemployee union organizers.

Mr. Justice Goldberg, concurring in *Bell*, has interpreted *Marsh* and *Shelley* to stand for the proposition that a state may act improperly when it deprives individuals of their constitutional rights through "inaction" as well as affirmative action. Inaction is the same thing, according to Justice Goldberg, as a state statute authorizing the racial discrimination practiced in these cases:

> The decision of Maryland's highest court in sustaining these trespass convictions cannot be described as "neutral," for the decision is as affirmative in effect as if the State had enacted an unconstitutional law explicitly authorizing racial discrimination in places of public accommodation. A State, obligated under the Fourteenth Amendment to maintain a system of law in which Negroes are not denied protection in their claim to be treated as equal members of the community, may not use its criminal trespass laws to frustrate the constitutionally granted right. Nor, it should be added, may a State frustrate this right by legitimating a proprietor's attempt at self-help.[49]

Thus Justice Goldberg has written — once again with the concurrence of Justice Douglas — that Title II of the Civil Rights Act of 1964 is congressional legislation enacted pursuant to the fourteenth amendment in order to delineate more precisely the public-private dividing line.[50]

In *Bell* the dissenting opinion of Mr. Justice Black, with whom Justices Harlan and White concur, presents an argument very much at odds with *Marsh*. Both *Marsh* and *Shelley* are rationalized as cases where, "in reality" the authority exercised was identified with governmental functions. All of this is indeed curious for, as we have seen, the *Marsh* majority had considerably more to say and the author was none other than Justice Black. The severe reversal of thinking that has taken place in the mind of Justice Black is not difficult to see when one compares his "preferred position" analysis with the following quote in *Bell*:

> [P]etitioners would have us say that [the owner] Hooper's federal right must be cut down and he be compelled — though no statute said he must — to allow people to force their way into his restaurant and remain there over his protest. We cannot subscribe to such a mutilating, one-sided interpretation of federal guarantees, the very heart of which is equal treatment under law to all. *We must never forget that the Fourteenth Amendment protects "life, liberty, or property" of all people generally, not just some people's "life," some people's "liberty,"*

49. *Id.* at 311.

50. See the concurring opinions of Justices Douglas and Goldberg in Heart of Atlanta Motel, Inc. v. United States, 85 Sup. Ct. 348, 369, 375 (1964); Katzenbach v. McClung, 85 Sup. Ct. 377 (1964).

> *and some kinds of "property."*
>
> . . .
>
> . . . [*W*]*e believe that Section 1 of the Fourteenth Amendment does not bar Maryland from enforcing its trespass laws so long as it does so with impartiality.*[51]

This opinion, then, is in stark contrast to the tone of *Marsh*. The dissent is apparently bottomed upon the value of law and order and the threat that trespass poses to it. But, as Justice Goldberg points up by way of answer, this argument avoids the crucial question: in whose favor is law and order to be established?[52] The business invitation is to the public at large and yet in *Bell* the owner reneges on "impartiality" and as a consequence so does the state. While the constitutional framework for the rights that these sit-ins assert would appear to be favorable, it should be noted at this point that the demands pressed by the unions will diverge factually in two major respects.

First, the sit-ins are truly recipients of the business invitation. They come to buy the product that the owner sells and thus fulfill the very purpose for which his property is open. Not so the union organizer whose role as a customer may be only incidental at best. Of course, to the extent that the sit-ins knew — as surely most of them did — that they would not be served, they came to protest the existing order. In this respect they are much like the organizer. Indeed, the Douglas-Goldberg position finds this aspect of the sit-ins' presence to be the core of constitutional protection. So also does Mr. Justice Harlan — that is to say where management gives its "implied consent" — in his dissenting opinion in *Garner*.[53]

The second distinguishing characteristic of the union cause is the commercial element of unionism. If "solicitation" is involved, as the Board has defined it,[54] a commercial transaction is often contemplated. Though as a matter of practice many unions defer the payment of dues and initiation fees,[55] nevertheless the case for the union's exclusion seemingly is stronger to

51. 378 U.S. at 331–32, 342. (Emphasis added.)

52. *Id.* at 311–12; *cf.* Cooper v. Aaron, 358 U.S. 1 (1958).

53. Garner v. Louisiana, 368 U.S. 157, 185 (1961).

54. In Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615 (1962), the Board held that solicitation encompassed the distribution of union authorization cards and was thus permissible at any location in the plant *during* nonworking time. Distribution of literature, on the other hand, can be conducted only in nonworking areas during nonworking times because of the litter problem and its threat to plant discipline and production.

55. See Note, *Validity of Statutes and Ordinances Requiring Licensing of Union Organizers*, 70 HARV. L. REV. 1271 (1957).

the extent that authorization cards and consequent financial obligations on the part of employees are present in the campaign. These conclusions are the teachings of Supreme Court decisions concerning both labor unions[56] and other matters.[57] Of course it should be added that the unions' other "disadvantage" — persuasion of the *public* rather than *employees* — will not normally merge with the commercial element. When the union is concerned with informing the public, conduct which consists of financial solicitations is normally not involved. Thus the chance that both legal disadvantages — the public *and* commercial solicitation — would be raised in one case is improbable.

III. UNION USE OF MANAGEMENT PROPERTY IN THE QUASI-PUBLIC ENTERPRISE

One of the greatest puzzles contained in the *Babcock* rationale is its reliance on the ability of the unions to communicate with employees at their homes. As Mr. Justice Douglas emphasizes in *Bell*, the home is man's strongest refuge for privacy and property rights. Moreover, Mr. Justice Reed, the author of *Babcock*, was in other decisions[58] a guardian of statutes protecting the home owner's privacy vis-a-vis door-to-door distribution of literature. One wonders whether this state action, permissible or not, should influence a judicial analysis of the "imbalance" of organizational opportunities. In any event no one dissents from the idea that considerations of state action and quasi-public property disappear at a point something short of the individual's home.[59] One established guideline, in terms of the NLRA, is that the union may

56. Staub v. City of Baxley, 355 U.S. 313 (1958); Thomas v. Collins, 323 U.S. 516 (1945).

57. *Cf.* Valentine v. Chrestensen, 316 U.S. 52 (1942). *Compare* Breard v. Alexandria, 341 U.S. 622 (1951), *with* Martin v. City of Struthers, 319 U.S. 141 (1943).

58. Breard v. Alexandria, *supra* note 57; Martin v. City of Struthers, *supra* note 57.

59. *But see* NLRB v. Lake Superior Lumber Corp., 167 F.2d 147 (6th Cir. 1948); Joseph Bancroft & Sons Co., 140 N.L.R.B. 1288 (1963) (employees lived on company property adjoining plant making them inaccessible to union organizers). On the question of permission vis-a-vis risking conviction for trespass discussed in *Bancroft*, see Amalgamated Clothing Workers v. Wonderland Shopping Center, Inc., 370 Mich. 547, 122 N.W.2d 785 (1963), where the Michigan Supreme Court granted the petitioning union access through a declaratory judgment. Query, would state *inaction* in this context violate the fourteenth amendment? In this regard see 49 VA. L. REV. 1571 (1963). For a discussion of the obligation of a union to seek permission from the property owner, see paragraph accompanying note 117 *infra*.

not post union literature *on the plant property itself*.[60] Moreover, in *Bendix Corp.*[61] the Board held that even where an employer had permitted employees to use equipment in the past, his refusal to allow employees to use it for the reproduction of union literature was lawful. The employer's requirement that he control the "use" of his own equipment was "a reasonable one." In both cases the results reached are sensible. Property in each is of a more personal nature; union use does not seem essential; and there is a comparative risk of damage, in *Bendix*, to the property in dispute.

A. Speaking Halls

In *Hague v. CIO*[62] the Supreme Court invalidated an ordinance prohibiting, without a permit, assemblies in public buildings as well as public streets, highways and parks.[63] In *NLRB v. Stowe Spinning Co.*[64] the Court held that a company could be required to afford the union access to the company owned hall for the purpose of an organizational meeting. A hall is a considerably more difficult type of property to reach than the enterprise itself; it falls somewhere between the business and the employer's private home. This consideration may have prompted the severe caution exhibited by the Court in setting forth the problems presented as that of a "company-dominated North Carolina mill town" and thus unlike "the vast metropolitan centers where a number of halls are available within easy reach of prospective union members." Undoubtedly, therefore, a much stronger argument can be made here than in *Marsh* for limiting the holding to the company-town context.

Yet in the final analysis the Court's opinion seems to be premised upon the disparate treatment accorded the union. The cease and desist order requiring union access was framed conditionally upon disparate treatment in the future; disparate, that

60. See Caterpillar Tractor Co. v. NLRB, 230 F.2d 357 (7th Cir. 1956); *cf.* Ralph Wells & Co., Nos. 38-CA-6, 38-RC-1, Trial Examiner's Decision No. 495-64, Sept. 11, 1964.

61. 131 N.L.R.B. 599 (1961), *enforced as modified*, 299 F.2d 308 (6th Cir.), *cert. denied*, 371 U.S. 827 (1962).

62. 307 U.S. 496 (1939); *cf.* Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Largent v. Texas, 318 U.S. 418 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State (Town of Irvington), 308 U.S. 147 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938).

63. *Cf.* Kovacs v. Cooper, 336 U.S. 77, 98 (1949) (strong dissent of Black, J.). *But cf. id.* at 77 (Court's and concurring opinions).

64. 336 U.S. 226 (1949).

is to say, between the union and the remaining public to whom an invitation was extended for the owner's financial benefit. As the Court said:

> In this case . . . the Board did not find that the very denial of the hall was an unfair labor practice. It found that the refusal by these respondents was unreasonable because the hall had been given freely to others, and because no other halls were available for organization . . . . What the Board found, and all we are considering here, is discrimination.[65]

For another reason, unarticulated by the Court, discriminatory intent must loom larger in this case. Here the employer is unable to avail himself of the defenses which *Republic* provides — the limitation of organizational rights insofar as they interfere with production and discipline. In one sense the hall is difficult to reach; its distance from the plant allows the employer to assert his own constitutional right of privacy.[66] But that same distance eliminates the production and discipline defenses. One can concede that *Stowe* presents a company-town situation without which the Court might not have reached the question of discrimination. Nevertheless, the importance that the hall played there points up the analogy to be made to other public access enterprises which have come to be regarded as elemental to the more common community outside isolated rural areas.

In other contexts, property more directly related to the enterprise is the object of dispute. Despite the high values which the Board placed on the speaking hall in *Livingston Shirt Corp.*,[67] the hall does not contain significance in the organizational campaign. Indeed in *Joseph Bancroft & Sons Co.*,[68] where one was available, the Board overrode other property considerations in requiring union access to company owned homes leased by employees where their entry to and departure from the plant did not take them off company property:

> The Petitioner was not required to risk prosecution for trespass in order to assert its right to organize. Quite properly it wrote to the employer asking permission to enter upon company grounds in order to conduct its organizing activities. As previously noted, the Employer denied the request. Further, the fact relied on by the Regional Director that the no-distribution-of-literature rule was applied to all distributions and not only to those involving union matters cannot curtail the Petitioner's statutory rights. [Citing *Republic*] . . .[69]

---

65. *Id.* at 233.
66. See notes 57 & 58 *supra.*
67. 107 N.L.R.B. 400 (1953).
68. 140 N.L.R.B. 1288 (1963); see note 59 *supra.*
69. 140 N.L.R.B. at 1291.

B. STREETS AND THOROUGHFARES

In a number of cases[70] the Board has upheld the right of organizers to conduct their union activities on company owned streets. In *Marshall Field & Co.*[71] the Board held that employees "uniquely handicapped" by department store no-solicitation rules could have the benefit of nonemployee organizers on a company owned, adjacent street available to the public, used occasionally by both employees and customers. The Seventh Circuit, rejecting the Board's handicap in communication theory, nevertheless held that access here was properly required as "it does partake of the nature of a city street, even though owned by the company . . . ."[72] The Seventh Circuit, therefore, grounded its holding on either public access or the governmental function theory; the imbalance in communications emphasized in *Babcock* was not relied upon.

In *General Dynamics/Telecommunications*[73] a Board majority consisting of Chairman McCulloch and Members Rodgers and Leedom, made clear the limited scope to be given both *Marshall Field* and *Marsh* through Board interpretation. In *General Dynamics* the company owned a "public thoroughfare" adjacent to the plant which was used by the public. The incumbent union employees were permitted to pass out handbills on the street while similar rights were denied nonemployee organizers of the charging party. The Board held that disparity of treatment[74] for nonemployees and employees was lawful under *Babcock* and that under the doctrine of that case the complaining union had adequate channels of communication.

Applicability of the *Marsh* rationale, the Board admitted, was not "without persuasive content."[75] But the Board held that the *Babcock* case governed and had thus limited *Marsh* to its company town factual context. Member Brown, dissenting,[76] pointed out that *Babcock* concerned company property from which the

70. *E.g.*, United Aircraft Corp., 67 N.L.R.B. 594 (1946); Brown Shipbuilding Co., 66 N.L.R.B. 1047 (1946); *cf.* Bausch & Lomb Optical Co., 72 N.L.R.B. 1321 (1947).

71. 98 N.L.R.B. 88, *enforced as modified*, 200 F.2d 375 (7th Cir. 1952).

72. 200 F.2d at 380.

73. 137 N.L.R.B. 1725 (1962).

74. The employer was able to argue that there was no disparity between treatment accorded nonemployee organizers and the rest of the public. Management prohibited all "commercial" solicitation by outsiders on the thoroughfare. Thus it was asserted — and accepted by the Board majority — that no discriminatory *use* of property was involved.

75. 137 N.L.R.B. at 1729.

76. *Id.* at 1730. Member Fanning did not participate in this case; Member Jenkins was not appointed to the Board at this time.

public was excluded and asserted that "the Board Members unduly extend the reach of the *Babcock & Wilcox* decision in applying it to the present facts."[77] The dissent also argued that *Marsh* could not turn on the availability of communications theory[78] promulgated in *Babcock*. The latter argument is undoubtedly correct and becomes clear if one only traces Mr. Justice Reed's dissent in *Marsh* and in other cases where he continually propounded the theory which the Court eventually accepted in *Babcock*.[79] *Marsh* could not in any event be structured on availability, as petitioner there could have distributed literature on public property. Thus Member Brown's dissent, in terms of legal analysis, is the better view.

Babcock did not undertake to overrule *Marsh*. As the *General Dynamics* majority noted,[80] *Babcock* does not mention that case. Indeed a plausible argument can be advanced for its consistency with *Stowe*, and perhaps the *Marsh* case itself. This thesis proceeds upon the assumption that the above quoted portion of the *Babcock* holding is to be read conjunctively to say that disparate treatment *or* an imbalance in communications will permit the organizers to override the trespass laws. Implicit in Member Brown's *General Dynamics* dissent is the relative unrelated-to-the-enterprise nature of the thoroughfare. In this case it is even more difficult to exclude organizers, as was done in the *Babcock* parking lot, as a threat to the law and order (production and discipline in the words of the Board) of the plant. In *General Dynamics* the enterprise is more distant from the property upon which the union seeks to distribute literature. And surely these above mentioned employer defenses remain relevant to non-employee rights. Otherwise, why should "disparate" treatment require management to open plant property to organizers?

Since employees were permitted to distribute in *General Dynamics*, both discrimination *and* public access were present. (Even without the discrimination element the case comports with the Seventh Circuit's public access analysis in *Marshall Field*. Moreover, there is nothing in *Stowe* to indicate that the employer may discriminate against a union on the basis of the *use* to which property is put. In the recent Supreme Court decision of *Cox v. Louisiana*,[81] both the majority opinion and Mr. Justice Black in concurrence equated union picketing with racial protest demon-

77. *Id.* at 1731.
78. *Id.* at 1731 n.10.
79. See Marsh v. Alabama, 326 U.S. 501, 513 (1946).
80. 137 N.L.R.B. at 1730 n.8.
81. 85 Sup. Ct. 453, 464–65, 468 (1965).

strations, which included marching, parades, and singing. Because of the Government's past acquiescence in the former activity, prohibition of the latter would be discriminatory, according to the Court. Thus markedly different types of conduct or expression do not, in themselves, justify a restraint.) The thoroughfare in *General Dynamics* is not like the parking lot or other portions of the plant which employees have a statutory right to use. If anything, the employees' position in *General Dynamics* is more analogous to use of the hall in *Stowe*. To the extent that nonemployees and employees should be on a different footing, it would be preferable to give the former precedence and preclude employee rights on the alternate-channels-of-communications theory with a reverse twist to the effect that these employee rights can be exercised *inside* the plant pursuant to *Republic*, while nonemployees cannot so operate.

Accordingly, Member Brown's dissent would have been more persuasive if it had emphasized this discrimination element of the case and placed more reliance upon *Stowe*. However, the above mentioned *Stowe* dictum, differentiating that case from the metropolitan area situation, may have deterred the use of an opinion more vulnerable linguistically. Nevertheless, *Babcock* interprets *Stowe*, as does this analysis, on the basis of discrimination and not the company town.[82]

Finally, *General Dynamics* could have been properly grounded upon the public access theory alone. As noted above, both *Marsh* and *Marshall Field* provide ample support in this regard.

C. Retail Store Parking Lots

In *S. Klein Dep't Stores, Inc.*[83] the Board adopted a trial examiner's decision upholding the prohibition of union literature distribution under the protection of *Babcock & Wilcox, without mention of the public access distinction*. Here, of course, the employer's legitimate business interest becomes stronger because of potential interference with customer mobility and consequent annoyances to the same group. But the Board chose to keep this

82. NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 111 n.4 (1956); *cf.* GEM Int'l Inc., 137 N.L.R.B. 1343 (1962), *enforcement denied*, 321 F.2d 626 (8th Cir. 1963).

83. 149 N.L.R.B. No. 49, 57 L.R.R.M. 1321 (Nov. 5, 1964). Compare GEM Int'l Inc., *supra* note 82, where a union organizer was prevented from distributing material on the walk in front of a department store while organizers of another union were afforded access. The Board found that this, along with other employer conduct, violated § 8(a)(1) of the act.

case within the rules established by *Babcock* and thus avoided the very novel issues presented by (1) public access, and (2) disruption of the business relationship. Once again both *Marsh* and *Marshall Field* point to a conclusion antithetical to that which the Board reached.

An important state court decision involving retail parking lots is *People v. Goduto*.[84] In that case union representatives entered the parking lot used by both customers and employees for the "sole purpose" of distributing union leaflets and questionnaires to employees at the store. Though the main thrust of the opinion is directed at the question whether the state was precluded from asserting jurisdiction here by the doctrine of preemption — a problem to be discussed below — the Illinois Supreme Court indicated that in its view *Babcock* controlled the questions raised in *Goduto*:

> In these circumstances the court recognizes the property interest of the employer to be superior to the interest of the union in having a convenient means of communicating with employees. The notice or order of the employer is of little consequence, however, if it cannot be enforced.[85]

The retail establishment may, as in *Garner* and *Bell*, lend itself to the exercise of union activities.[86] However, as noted above, the potential disruption of the customer-employee relationship will normally outweigh union rights in public areas *inside* the establishment. In such situations the Board, by divided vote, has even refused to uphold the employee's right to *talk* to nonem-

84. 21 Ill. 2d 605, 174 N.E.2d 385, *cert. denied*, 368 U.S. 927 (1961). It should be pointed out that the Supreme Court has specifically reserved the question of conflict posed by union organizational rights and local trespass statutes and ordinances, in Amalgamated Meat Cutters v. Fairlawn Meats Inc., 353 U.S. 20 (1957).

85. 21 Ill. 2d at 610, 174 N.E.2d at 388.

86. See also Hood v. Stafford, 378 S.W.2d 766 (Tenn. 1964), wherein the Tennessee Supreme Court upheld an injunction against picketing on a retail parking lot by a nonemployee, which injunction was issued pursuant to a city ordinance which made it "unlawful for any person to entice or attempt to entice away from any business house anyone trading therein . . . , or to enter into any business house, or stand on the street or sidewalk in front of any business house, for the purpose of enticing anyone therefrom." *Id.* at 767. The Tennessee court's ruling appears to be erroneous for at least two reasons: (1) the breadth of the ordinance. See NLRB v. Fruit Packers, 377 U.S. 58 (1964). (2) lack of jurisdiction due to the preemption doctrine — both *Babcock* and § 8(b)(7), which regulates this type of picketing, support this conclusion. Indeed, in *Hood*, the Board actually had jurisdiction to issue the injunction in the form of a contested representation election. *Cf.* Liner v. Jafco, 375 U.S. 30 (1964).

ployee organizers.[87] On the other hand, the Fifth Circuit has held that employees in a retail supermarket have the right to talk among themselves *during working time* so as to obtain information necessary to the conduct of future union meetings.[88] In the supermarket it would seem that the public access concept, coupled with a less direct customer-employee relationship than prevails in department stores, should argue for the presence of organizers on company property for some portion of the employee's work shift.

D. Shopping Centers

As to union picketing on a privately owned shopping center, the California Supreme Court had this to say in *Schwartz-Torrance Inv. Corp. v. Bakery Workers*:

> ... [T]he countervailing interest which plaintiff endeavors to vindicate emanates from the exclusive possession and enjoyment of private property. Because of the public character of the shopping center, however, the impairment of plaintiff's interest must be largely theoretical. Plaintiff has fully opened his property to the public. . . . The shopping center affords unrestricted access between its parking lot and the public streets. The center constitutes a conglomeration of business enterprises designed to provide essential services to all members of the local community. . . .
>
> ...
>
> We conclude that the picketing in the present case cannot be adjudged in the terms of absolute property rights; it must be considered as part of the law of labor relations, and a balance cast between the opposing interests of the union and the lessor of the shopping center. The prohibition of the picketing would in substance deprive the union of the opportunity to conduct its picketing at the most effective point of persuasion: the place of the involved business. The interest of the union thus rests upon the solid substance of public policy and constitutional right; the interest of the plaintiff lies in the shadow cast by a property right worn thin by public usage.[89]

The California Supreme Court sensibly analyzes a number of factors peculiar to the shopping center and the debate between union and property rights. The first is that property rights in this

87. See Meier & Frank Co., 89 N.L.R.B. 1016 (1950), on the right of department store employees to talk to union organizers on company property. See especially the dissenting opinion of Members Houston and Styles, *id.* at 1022; *cf.* Flambeau Plastics Corp., 151 N.L.R.B. No. 70, 2 Lab. Rel. Rep. (58 L.R.R.M.) —— (March 16, 1965); Lexington Chain Co., 150 N.L.R.B. No. 126, 2 Lab. Rel. Rep. (58 L.R.R.M.) 1263 (Jan. 28, 1965).

88. NLRB v. Great Atl. & Pac. Tea Co., 277 F.2d 759 (5th Cir. 1960).

89. 394 P.2d 921, 924, 926, 40 Cal. Rptr. 233, 236, 238 (1964), *cert. denied*, 33 U.S.L. Week 3283 (U.S. March 2, 1965). As pointed out in note 84 *supra*, the Supreme Court has specifically reserved this question.

context must be viewed as a part of labor relations laws. This view is quite similar to the views expressed in Mr. Justice Frankfurter's concurring opinion in *Marsh*. The property right must be considered on its merits and not as a clarion call slogan designed to promote emotive reaction. Thus the employer's legitimate property interest in his right to make, for instance, advertising decisions can be rationalized as quite relevant to the firm's success. Here the court is correct in stating that the owner can suffer no "significant harm" through this limitation of a property right. If the owner can demonstrate probable or actual interference with the company's business success or — to relate back to *Republic* — its production and discipline, adjustments should be made. Such adjustments are discussed below.

The second factor peculiar to the shopping center is its "elemental" nature, the conglomeration of business interests present, to paraphrase the court, and the extreme dependence which the community must place upon it. Whether the union activity is solicitation, distribution, or picketing, it is important to bring focus upon a particular establishment. Both customers and employees would be difficult to reach at the common entrances through which everyone must proceed. A public sidewalk would normally suffice if the establishment were not located in such a center. Thus the utilization of private property becomes important.

Schwartz-Torrance also seeks to distinguish *Babcock*, as has been done here, on the ground that the parking lot in the latter case was not open to the public. Thus the court is able to conclude in *Schwartz-Torrance* that, in effect, the property in question is quasi-public and that as in *Marsh*, the owner's right is a "diluted" one. Fortunately the court does not seek to justify this conclusion on the basis of a "permissive use" or dedication to the public.

In *Breard v. Alexandria*[90] the Supreme Court, referring to *Marsh* and a companion case, said that "in neither case was there dedication to public use but it seems fair to say that the permissive use of the ways was considered equal to such dedication."[91] Most certainly no dedication, in this sense of the word, is found in *Stowe*. This concept of "permissive use" would seem applicable to shopping centers if viewed as analogous to a "public street or walk" which, although private property, is more accessible to the general public.[92] This is how the Michigan Supreme Court analyzed the problem in *Amalgamated Clothing Workers v. Won-*

90. 341 U.S. 622 (1951).
91. *Id.* at 643.
92. See note 83 *supra*.

derland Shopping Center, Inc.,[93] affirming, by virtue of a tie vote, a trial judge's characterization of shopping center property as quasi-public. In this case the Michigan Supreme Court,[94] without utilizing the *Breard* rationale, said that the "dedicated use" was that of a "modern public market place" in which the public's right to free speech (in this case union handbilling to the public) could not be denied. Here again, as in *Stowe*, there is an indication that a major, if not crucial, element in the holding exists in the "arbitrary" and discriminatory power to select who shall and shall not exercise their rights.[95]

However, it is dangerous to justify quasi-public use or "permissive use" in terms of dedication, as was done by the Michigan court.[96] This view must require the rather artificial conclusion that the owner is inviting an individual onto private property so that the customer can exercise free speech rights — especially such speech as protests the owner's own policies, be they segregation or anti-unionism, rather than "neutral" matter not directly related to him. The law will appear foolish if it implies such a dedication, for it is clear to anyone that the owner's motivations are purely those of business. To the extent that handbilling is tolerated or welcomed, one must view such a concession in the same light. Surely goodwill for the business is the basic consideration. Clearly under this approach union organizers will be excluded even where other groups are allowed to conduct their activity in the shopping center. It will be a rare property owner that envisages a union advertisement of a dispute with one of his lessees — upon whose profits he depends — as in his business interest. The same may be said of the lessee who operates the shopping center establishment itself.[97] If the law is to interpret this union activity as within dedication's penumbra, we should understand

93. 370 Mich. 547, 122 N.W.2d 785 (1963).

94. Strictly speaking there is no majority or dissenting opinion because of a tie vote, but reference to the concurring opinion of Justices Black and Smith is equated with a majority opinion since the vote's effect is to affirm the trial judge's opinion.

95. The court noted that the property owner's power to exclude was "undesirable not by law but by the *arbitrary* decision of the property owner . . . ." 370 Mich. at 570, 122 N.W.2d at 797. (Emphasis added.)

96. *Id.* at 565, 122 N.W.2d at 795.

97. In Nahas v. Local 905, Retail Clerks Ass'n, 144 Cal. App. 2d 808, 301 P.2d 932 (1956), a distinction between the right of an employer-tenant and that of the property owner to enjoin union conduct was employed. This distinction has been discussed in Note, 10 STAN. L. REV. 694 (1958); 73 HARV. L. REV. 1216 (1960). In *Schwartz-Torrance*, the California Supreme Court rejected the *Nahas* holding on this point.

that legal interpretation has been stretched to its outer limits. Thus, the dissenting opinion of Chief Justice Carr is able to score a very sound point on the *Wonderland* majority in emphasizing the property's business purpose.[98] The concept of "permissive use" as enunciated in *Breard* is somewhat preferable from the standpoint of reality.

Contrary to California and Michigan, the Wisconsin Supreme Court refrained from protecting union picketing[99] on a privately owned sidewalk in front of a shopping center establishment. The court indicated an interest in the physical characteristics of the center, to a precise degree, so as to establish guidelines for future litigants. Thus the case was dismissed for lack of evidence. At the same time the court said:

> [I]f the record before us clearly established that the property involved is a multistore shopping center, with sidewalks simulated so as to appear to be public in nature, we would have no difficulty in reaching a conclusion that the shopping-center owner must yield to the rights of freedom of speech and communication which attend peaceful picketing.[100]

The curious aspect of the decision consists in its apparent willingness to view activity on the sidewalk as more of an encroachment on property rights than activity in, perhaps, the parking lot. However, the converse is considerably more likely. Union activity in the parking lot can disrupt a function necessary to the employer's business. There is no comparable function on the sidewalk. Moreover, activity on the sidewalk more clearly relates to and identifies the employer involved. Consequently it would seem that the court has its priorities confused. Here the geographical location places the activity in question on a plane superior to all others. To envisage anything but a quasi-public use for a sidewalk on which the customer is invited to tread before entering the store is difficult. But possibly an employer desirous of avoiding adverse publicity might find the parking lot a preferable location for union activities. In the shopping center the business interference is directed at everyone; the sympathy of other employers engendered by irritations accorded *their* customers might enlist them as allies and increase his economic resistance to the union. This situation is a good example of the divergence that may often appear between what management

98. 370 Mich. at 553, 561–62, 122 N.W.2d at 788–89, 793.

99. Moreland Corp. v. Retail Store Employees, 16 Wis. 2d 499, 114 N.W.2d 876 (1962).

100. *Id.* at 505, 114 N.W.2d at 879.

sees as its business interests and the legitimate protection which the law affords.

In *Freeman v. Retail Clerks Union*[101] the Washington Supreme Court held that the question of trespass and union picketing in a shopping center was preempted by the National Labor Relations Act and that that court was without jurisdiction. Most important is the concurring opinion which accepted jurisdiction, and adopted the trial judge's five criteria for deciding such cases. The trial judge said that free speech rights could be exercised on private property when all or some of the following factors are present: (1) when the owner designs property for use by the general public in a manner so as to make it difficult or impossible to distinguish its physical characteristics from public property similarly so devoted; (2) the free speech in question is for the purpose of communication with people naturally upon the premises as a result "of the primary use to which the property is devoted"; (3) the communication would have been permitted if the property were public; (4) "interference with the owner's fundamental rights of privacy or personal use and occupancy is not involved as distinguished from control, and no direct pecuniary loss will result to the owner"; and (5) no alternate routes of communication as effective as the disputed one exists.[102] The last mentioned criterion directly challenges the *Babcock* rationale. However, the very nature of the center — a focal point for the whole community — and the fact that employees may be more likely to have homes which are most distant from this or any other one center argue for the *presumption* that there are no alternate means of communication.

Curiously the Board has never decided a case dealing with nonemployee organizers and their right to campaign in the shopping center. If the Board were to adopt the "unrelated to the enterprise" analysis advanced here in connection with the thoroughfare in *General Dynamics* and the hall in *Stowe*, union rights on shopping centers might prove to be tenuous. For clearly the shopping center is comparatively closely related to the enterprise. Functionally, this close relation exists for the parking lot; geographically, the same applies to the sidewalk. One can appreciate the brevity and general approach of Member Brown's dissent in *General Dynamics* if such were motivated by a concern to avoid this dilemma. Yet here it is possible to overcome such problems and the *Babcock* criteria, by directing attention to the

101. 58 Wash. 2d 426, 363 P.2d 803 (1961).
102. *Id.* at 432, 363 P.2d at 806.

existence of the owner's economic invitation. Once again, the public is not excluded from the area, but rather the area *seeks out* nonemployees. Arguably the economic invitation makes the shopping center situation a comparably stronger case for the union — especially because of the greater amount of time that the entire public, including the employees, spend there. The nature of the enterprise — stores for all the customers' needs — compels this type of use.

On the other hand, the argument on behalf of union rights in shopping centers has drawbacks. It is of course possible for the Board to find *Babcock* inapplicable on quasi-public grounds. Nevertheless, such a holding would highlight the very large extension grafted onto the solicitation case law. Although a possible by-product in those cases, even *General Dynamics* and *Stowe* do not reach the question of informing the public at large about a labor dispute. We have already noted the demonstrated hostility against such conduct. If a labor union could convince the Board that its activity is aimed solely or even primarily, at employers and not customers, it would be easier to decide in favor of the union. Of course, the answer to this factual question may not always be discernible.

Public handbilling would present squarely the *Marsh* issues and could well take the Board beyond that case because of the activity's potential and intentional impact on the owner. Unless the owner operates a religious institution, religious literature such as distributed in *Marsh* cannot invoke a comparable analysis. The petitioner in *Marsh* probably had no dispute as such with the objecting management.

The course that shopping center owners might follow is that of prohibiting handbilling of any kind in order to avoid the charge of discrimination, thereby avoiding the snares set by *Babcock*'s prohibition of disparate treatment. A court might be less willing to accuse the owner, as in *Wonderland*, of arbitrary action insofar as union activity is concerned. Here one must obtain guidelines from *Marsh*, for in that case discrimination was not considered by the Court. If we analogize the contemporary shopping center to *Marsh*'s business district, the question will begin to answer itself.

Clearly the owner's exclusion of religious literature could not stand. Consequently, the last hurdle under the assumption of a proper analogy is an equation of union literature and religious literature. *Thomas v. Collins*[103] indicates that the equation, in-

103. 323 U.S. 516 (1945).

sofar as it is devoid of commercial transactions, must be made. It is unlikely that this qualification would be pertinent to a shopping center case involving the public. As stated above, it is improbable that both legal disadvantages — a) the public and b) commercial solicitation — would be raised in one case.

But the argument could be made that the owner's business losses are analogous to the potential harm to the community inherent in commercial activity. In both instances the state seeks to protect people against unnecessary economic losses. This reasoning, then, would make the crucial question turn on whether the shopping center owner's losses can be viewed as potential injury to the community in this context. The merit in this proposition, if any, derives from the concept which is urged to support union rights. If the shopping center is a necessary element of existence for the community, the owner will say that the economic harm done to it is a harm to the public as a whole. It is submitted that this proposition should fail because of the constitutional and statutory support — mentioned above — for some form of limitation on property rights.

The Board, if it adheres to *General Dynamics*, should distinguish that case from the shopping center situation, because of the latter's economic importance, and thus hold that section 7 grants nonemployee organizers *some* rights of this type on private property. This view would, of course, lead to a reexamination and retreat from the Board's *Marsh* analysis. However, the benefits to be gained by such a retreat outweigh the implications of a confession of error. The shopping center continues to play a central role in American suburban life. The balancing of interests should give preference to section 7 and the first amendment.[104]

IV. JURISDICTION: NLRB AND THE STATE JUDICIARY

Decisions by both the Board and state courts in this area pose the issue of preemption — the question of when the federal government dominates or regulates a particular subject matter so as to exclude state jurisdiction. In *San Diego Bldg. Trades Council v. Garmon*[105] the Supreme Court held that "when an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of

104. Such balancing should be equally applicable, for constitutional purposes, to state inaction present in *Wonderland*. See note 59 *supra*.

105. 359 U.S. 236 (1959).

state interference with national policy is to be averted."[106] As far reaching as the "arguably" concept is, *Garmon* also preserves traditional state jurisdiction in cases where violence and threats to the public order are present. The difficulty here arises out of the ejection of union organizers from company property by state police and courts pursuant to local trespass laws. The issue was squarely presented in *People v. Goduto*.[107]

In *Goduto* the Illinois Supreme Court adjudged the rights of union organizers on a department store parking lot open to both employees and customers. The employer had informed the organizers that no such activity could be conducted without company permission. Nevertheless the organizers refused to leave, declaring that they had a legal right to be where they were. The court held that their subsequent arrest and conviction was proper under *Garmon* as "when a person refuses to leave . . . after he has been ordered to do so, a threat of violence becomes imminent."[108] The court reasoned that if the State had not intervened, the company would have had no recourse but self-help. Thus there was a danger of violence. But the court examined at further length *Garmon*'s explicit acceptance of primary jurisdiction, and noted the careful scrutiny to which state court records are subjected as to a finding of actual violence. The inexact standards of *Babcock* and the failure of the union to utilize Board processes permitted, in the court's opinion, avoidance of this very difficult point.

Implicit in *Goduto* is the assumption that the employer, on the basis of a promanagement legal analysis, will always seek to remove organizers from his property. *Babcock* may well encourage the judiciary to assist the employer in his interpretation. However, a failure to utilize Board processes does not provide the answer to *Goduto*. The same analysis could properly apply to an employee wrongfully discharged for protected activity. Moreover, one might ask why the organizer must risk state prosecution because the Board does not entertain petitions for declaratory judgments and advisory opinions of this sort.

Nevertheless it is possible to appreciate the Illinois court's conclusion, limited as it is by the framework of existing federal law. A significant distinction exists between employees and nonemployees insofar as this case is concerned. This is the control that the employer is able to exercise in regard to either group. In *Goduto* the employer is relatively helpless. The employer can-

106. *Id.* at 245.
107. 21 Ill. 2d 605, 174 N.E.2d 385, *cert. denied*, 368 U.S. 927 (1961).
108. *Id.* at 609, 174 N.E.2d at 387.

not trigger a section 8(a)(3) proceeding through discharge, as would be the case with employees and, more important, management requests will be without force of authority. Yet, as stated above, one of the best reasons for concurrence with the Illinois court is the vagueness of federal law. The employer's concern with noncustomers moving around on his property and the consequent risk of liability in regard to other invitees strengthens the court's position.

A way out of the *Goduto* dilemma would be articulated if the Board should clarify the principles applicable to nonemployees on public access property, such as in *Goduto*, without unnecessary qualifications. One qualification, to be discussed below, might buttress further the result reached in *Goduto*. On the other hand, a post *Goduto* development points up legal recourse for the employer under Board auspices rather than those of the states.

It is accepted that nonemployee conduct on company property that is tinged with violence is unlawful under section 8(b)(1)(A) of the act.[109] The Supreme Court has held that that provision does not extend to peaceful activity like picketing, as the Board once contended, but rather is restricted to "rough stuff" or violence.[110] However, the Court has limited that approach in *International Ladies' Garment Workers v. NLRB*,[111] in which the nonviolent execution of a contract between an employer and a minority union was held to violate that provision of the law. The Board has since made it clear in *General Motors Corp.*[112] that *ILGW* may be an impetus to application of section 8(b)(1)(A) to the *Goduto* type case. In *General Motors* the Board held that the union as well as the employer violated the act by maintaining in effect a contract restricting the solicitation rights of employees. The holding makes it arguable that the employer (or an employee, for that matter) in *Goduto* could obtain relief from the Board in certain fact situations.

The record of other state courts in this area is not encouraging. The Michigan Supreme Court, for instance, adopted the trial judge's notion that preemption difficulties in *Wonderland* were overcome through lack of a "labor dispute." In addition to *Babcock*, the union's dispute with this secondary employer would

109. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1958): "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . . ." *Cf.* National Organization Masters, 116 N.L.R.B. 1787 (1956).

110. NLRB v. Drivers Local Union, 362 U.S. 274 (1960).

111. 366 U.S. 731 (1961).

112. 147 N.L.R.B. No. 59, 56 L.R.R.M. 1241 (June 18, 1964).

lead to secondary-boycott and publicity-proviso problems posed in section 8(b)(4).[113] The court did not discuss these problems. The Washington Supreme Court held, without touching on *Babcock*, that both handbilling and picketing are "arguably" subject to section 8(b) provisions. The picketing in the California Supreme Court case of *Schwartz-Torrance* seems ideally suited, if one accepts the *Garmon* analysis, to Board processes under section 8(b)(7), which concerns organizational and recognition picketing. Yet the court bypassed the important jurisdiction question in its haste to rule on the free speech issue.

CONCLUSION

Jurisdiction — where NLRB interstate commerce standards are met[114] — should be in the hands of the Board. The Board, entrusted with this great responsibility, should undertake revision of the rules of *Babcock* where public access property is involved. This view does not intend to depreciate the role that state courts are obligated to pursue in cases involving violence. This responsibility remains regardless of whether the union or the owner is entitled to preference. As Mr. Justice Goldberg has said, the question is *not* law and order. The question is who is to be restrained in order to obtain it. This author ventures the guess that once the law is more certain in labor-management relations — as it is becoming in civil rights — violence and consequent state interference will diminish.

It should be emphasized that the Board decisions need not touch upon the constitutional issues involved. The Douglas-Goldberg rationale is not a prerequisite here because the Board is interpreting a statute, section 8(a)(1) of the NLRA. No adjudication is made in *the absence of a statute*; thus the basic constitutional issue need not be confronted. Presumably this fact will increase the chances of acceptance by Supreme Court Justices who might not accept the entire Douglas-Goldberg approach. This is not to say, of course, that the approach is without relevance and persuasiveness. This article has shown it to contain both attributes.

At least equally promising in this context is the freedom of association established by the Court in *NAACP v. Alabama*[115]

113. 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4) (Supp. V, 1964).

114. The states may assume jurisdiction where the Board's interstate commerce requirements are not met. See Labor-Management Reporting and Disclosure Act of 1959, § 701(a), 73 Stat. 541, 29 U.S.C. § 164(c) (Supp. V, 1964).

115. 357 U.S. 449 (1958).

and applied to private property by the Board in *May Dep't Stores Co.*[116] The potential benefit of this doctrine to employees is the crux of the union case. Moreover, the negligible property interest involved would hardly seem to detract from the free speech protection asserted in picketing. However, in this writer's opinion freedom of association occupies a slightly less vulnerable position.

At the same time, management has legitimate business interests which qualify the utilization of these new found rights. The law should obligate organizers to request permission to come onto the property in question. While this formal step should hardly be applicable to employees seeking to exercise their rights — though the Supreme Court's *Steelworkers* decision holds to the contrary[117] — the employer can rightfully be concerned with possible damage to the property or liability incurred as a result of the nonemployee strangers' presence. On the same theory, the owner should properly be allowed to insist on identification of the organizer — a kind of licensing. Certainly the union suffers no undue hardship, for their campaign is completely exposed at this point in any event.

Another proper limitation relates to the time during which organizers may be present. In regard to employee-oriented solicitation and distribution, a good case can be made for prohibiting union access during the rush hours so long as employees' work schedules do not converge to any large degree. A reasonable limitation seemingly could be made even where the union attempts to reach the public. The latter might be dependent upon economic injury to the employer that is demonstrably attributable to union conduct on private property. For, as the Court has said within the context of rights petitioned for on streets and sidewalks, "the rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time."[118]

116. 136 N.L.R.B. 797 (1962), *enforcement denied*, 316 F.2d 797 (6th Cir. 1963).

117. NLRB v. United Steelworkers, 357 U.S. 357, 363 (1958). See also Gimbel Bros., 147 N.L.R.B. No. 62, 56 L.R.R.M. 1287 (June 17, 1964); James Hotel Co., 142 N.L.R.B. 761 (1963). Compare Edmont Mfg., 139 N.L.R.B. 1528 (1962); Mayrath Co., 132 N.L.R.B. 1628 (1961), *enforcement granted*, 319 F.2d 424 (7th Cir. 1963) (employer must inform employees why he requests them to remove union insignia).

118. Cox v. Louisiana, 85 Sup. Ct. 453, 464 (1965); *cf.* Kovacs v. Cooper, 336 U.S. 77 (1949). Regarding union loud speakers in public areas, the Court said in *Kovacs*: "The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home

Moreover, the Board should limit the time during which campaigning is to take place to a reasonable time before a Board conducted election. Perhaps two months would be satisfactory. There is no reason why a union which loses the election should be entitled to engage in the same conduct until two months before a new election can be held.[119] Surely the property owner should not be subjected to undue harassment.

Furthermore, the property owner should be permitted reasonable restrictions in regard to the location of organizers. If privately owned sidewalks are available in the shopping center, for instance, it might be permissible to prohibit access to the parking lot where potential for disruption is greater. On the other hand, retail department stores or supermarket establishments would not have this alternate communications defense. But presumably where such establishments have parking areas on which the presence of organizers would pose particular hazards — such as those which place automobiles on several floors — the employer would be justified in carefully restricting mobility. All of these problems will require the Board's expertise in balancing and adjusting the various factors.

Finally of course, the application of the quasi-public analysis to different enterprises is of the utmost importance. It simply will not do to confuse the out worn "public interest" concept relied upon by Mr. Justice Douglas in *Garner* and *Bell* to make quasi-public synonymous with those industries which perform governmental functions — whatever they may be. For our purposes the same access rights applied to such establishments, despite their public utility nature, would raise new and troublesome problems in regard to the owner's legitimate business protection. Bridges are a good example in this regard. Moreover, the steel industry, for instance, is one which vitally affects the public interest. But does this have any relevance to the issues discussed here? This writer thinks not.

The really frightening aspect of the Douglas-Goldberg approach in this regard is the unnecessary judicial involvement in economic analysis. Mr. Justice Douglas is undoubtedly correct in taking judicial notice of the modern separation of ownership and

---

or on the street he is practically helpless to escape this interference with his privacy by loud speakers . . . ." *Id.* at 86–87. (Footnote omitted.)

119. See National Labor Relations Act § 9(c)(3), amended by 61 Stat. 144 (1947), as amended, 29 U.S.C. § 159(c)(3) (Supp. V, 1964), which prohibits a new election during the 12-month period after a "valid election" has been held. Thus in Hood v. Stafford, 378 S.W.2d 766 (Tenn. 1964), where the union lost a Board conducted election overwhelmingly and contested the election, the union's case should be without merit but for the continued litigation.

control and its implications for the assertion of property rights. But the attempt to rationalize these cases in terms of industries with governmental functions is ill-founded. Too great an expertise is required in observing an ever changing economy. Possibly the judicial incorporation of the economic philosophy that Mr. Justice Holmes so eloquently warned us to abandon would be resurrected.[120] For this reason the NLRB's solicitation law — with its sound balancing of the business interest — is the best framework through which this problem should be met.

120. See, *e.g.*, Hammer v. Dagenhart, 247 U.S. 251, 280 (1918) (dissenting opinion).