Federal Labor Rights and Access to Private Property: The NLRB and the Right to Exclude

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Federal Labor Rights and Access to Private Property: The NLRB and the Right to Exclude

Dianne Avery†

Conflicts between property rights and federal labor rights have long been a source of controversy and litigation for employers and unions. In its 1986 Fairmont Hotel decision, the National Labor Relations Board reformulated its approach to resolving access disputes. In the following year, as the Board applied the Fairmont “balancing” test to a wide range of new situations, many troublesome substantive and procedural issues were revealed. By the fall of 1988, in Jean Country, the Board had signaled a retreat from a mechanistic approach to the Fairmont test, but had failed, nevertheless, to undertake a thorough reexamination of its premises. Nor did the Board consider the interrelationship of its access cases with preemption doctrine, state labor laws, and state constitutional rights of free speech. The consequence is a body of contradictory rules and procedures which significantly limit the collective rights of workers and suggest the need for a fundamental restructuring of the laws governing access disputes.

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INTRODUCTION

In 1982, three Teamsters officials were threatened with arrest when they attempted to distribute union handbills to guests entering the luxurious San Francisco landmark, the Fairmont Hotel. The hotel did not quarrel with the content of the handbill, which urged the public not to patronize the Fairmont so long as it did business with a particular non-union baker whose wages were below the Teamsters’ area standards. Rather the hotel objected to the location of the handbilling, on the “privately owned” driveway next to the “privately owned” steps leading to the main entrance of the hotel. When a hotel security official ordered the union officers to move to the public sidewalk, they found that they could not reach hotel customers and abandoned their handbilling entirely. Nevertheless, believing that the National Labor Relations Act (“NLRA”)\(^1\) gave them a right to engage in peaceful handbilling at the

hotel's "privately owned" entrance, the union filed an unfair labor practice charge with the National Labor Relations Board. Thus began the access dispute that, more than four years later, resulted in the Board's *Fairmont Hotel* decision.\(^2\)

The Teamsters lost the decision before the Board. The Board concluded that the Fairmont Hotel's interests in its private entranceway were, on balance, more significant than the union's statutory rights to communicate information regarding its labor dispute. The decision reveals the Board's attitude toward the value of property rights and federal rights of employees. But *Fairmont* has more important implications. The decision effectively broke a logjam of unresolved property access cases that had been pending before the Board for a number of years.

The Board used *Fairmont* as an opportunity to articulate a new test for resolving access disputes, a test that explicitly repudiated principles asserted in several 1979 Board decisions\(^4\) and affirmed assumptions expressed, though in dictum, by the Supreme Court in its 1978 decision of *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*.\(^5\) The Board and the Supreme Court, in attempting to weigh "rights" in access disputes, have created an analytical framework that incorporates assumptions about social and market relations, and the appropriate roles of workers and property owners. These assumptions, however, skew the debate about access: the right answers are given to the wrong questions.

The *Fairmont* test analyzed access disputes by weighing property rights of employers against federal statutory rights of employees.\(^6\) If the property rights outweighed the statutory rights, the Board could deny access without considering whether the persons exercising section 7 rights had reasonable alternative means of communication.\(^7\) In *Fairmont*, the Board suggested how property rights should be valued and affirmed the notion that there is a hierarchy of section 7 rights. The consequence was a test that tended to value more highly the property rights of employers, while devaluing the statutory rights of employees.

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3. In one instance, the delay between a property access dispute and Board decision was over nine years. *See Schwab Foods, Inc.*, 284 N.L.R.B. No. 120, 125 L.R.R.M. 1225 (1987), *enforced*, 129 L.R.R.M. 2601 (7th Cir. 1988).

4. For a discussion of these principles, see *infra* text accompanying notes 19-23.

5. 436 U.S. 180.

6. The federal statutory rights in question are those granted under § 7 of the NLRA, namely that "[e]mployees 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." 29 U.S.C. § 157 (1982).

After Fairmont, the Board decided fifteen "Fairmont" cases in less than a year. These fifteen cases reveal the difficulties that the Board experienced in attempting to apply the new Fairmont test to a myriad of factual circumstances involving different types of property and statutory rights. Each of the Board members deciding the post-Fairmont cases adopted a different, idiosyncratic approach to Fairmont's "balancing" of property rights and section 7 rights. Fairmont created far more problems than it solved. What was presented in Fairmont as a fair and objective method of resolving access disputes has turned out, not surprisingly, to be subjective and indeterminate. The problems posed by the access cases are not readily amenable to per se rules or further refinements of the factors to be considered in a "balancing" test. Moreover, the inordinate delays of the Board in deciding the Fairmont cases essentially determined the outcome of the access disputes because, even when the access claim was meritorious, access delayed was, for all practical purposes, access denied.

The present "balancing" of section 7 rights and property rights in the Fairmont cases serves only to defeat the policies of the federal labor laws in an increasing number of employment contexts. In a period when many employers are relocating their businesses in suburbs, shopping malls, urban arcades, or industrial parks, the section 7 rights of employees are often defeated by private property. The Board, the federal courts, and ultimately the Supreme Court, must confront the contradictions inherent in their analyses of property rights and section 7 rights. Otherwise, the Act's policies of encouraging union organization and collective bargaining will continue to be undermined by lawful corporate decisions to invest in physical space and barriers that insulate company employees and customers from labor activity.

In Part I of this Article, I discuss the Fairmont decision, its factual and legal context, and the doctrinal significance of its new test for accommodating property rights and federal labor rights. In applying this new test to the facts of the Fairmont dispute, however, the Board incorporates class-based assumptions about the uses of property and the risks of labor activity. The end result is a rule with "corollaries," not explicitly acknowledged by the Board, which legitimate the continued use of property interests to control the assertion of employees' rights.

In Part II, I analyze the "progeny" of Fairmont—the Board decisions issued in 1987 and 1988 that involved application of the new Fairmont test to access disputes. First, I discuss the effects of delays in Board unfair labor practice proceedings on the fifteen 1987 Fairmont cases. Access disputes, like discharge cases, may not be amenable to fair resolution

8. See cases listed infra note 77.
under existing Board procedures and practices, even when they are expeditiously pursued. But the data on the 1987 *Fairmont* cases indicates that these access cases present a particularly egregious example of the current failings of Board processes.

I then explore the contradictory and confusing analysis in the post-*Fairmont* cases created by the fact that each of the 1987 Board Members adopted an idiosyncratic version of the *Fairmont* test. *Fairmont* and eleven of the fifteen 1987 post-*Fairmont* cases deal with access disputes involving retail or service facilities. I use these retail/service facility cases to demonstrate both the analytical incoherence of the Board's new *Fairmont* test and its reliance on a largely unexamined scheme of social values. In dicta in *Fairmont*, the Board reasoned that access rights depend, in part, on whether a retail facility is a single, free-standing store or is located in a large shopping mall. I illustrate that this dichotomy between the single store and the large shopping mall, which the Board adopted from free speech cases, is inapposite in cases dealing with federal statutory labor rights. Then, proceeding through the various categories of retail/service facilities, I show how the Board has struggled to make its own doctrine—the *Fairmont* test and “large shopping mall/single store” rules—fit with its ideas about the importance of protecting an employer's investment in the accouterments of class and status.

The next Section of Part II deals with the Board's acceptance in *Fairmont* of the notion that section 7 rights can be ordered in a hierarchy according to the Board's valuation of the importance of each right. In discussing four categories of section 7 rights—(1) primary economic activity, (2) union organizing, (3) unfair labor practice activity, and (4) area standards activity—I show how the Board, in the 1987 *Fairmont* cases, has evaluated these section 7 rights in specialized work environments, as well as in retail and service facilities. I argue that the Board's ideas about the hierarchy of section 7 rights—ideas consistent with Supreme Court holdings and dictum—do not necessarily reflect the value that unions and employees place on federal labor law protection of various types of communicative activity. The Board's approach to a hierarchy of labor rights imposes significant burdens on unions.

In the final Section of Part II, I discuss the significance of the Board's 1988 decision, *Jean Country*,\(^\text{10}\) which overruled part of the *Fairmont* test. In *Jean Country*, the Board attempted to simplify the *Fairmont* test and make it more responsive to union needs for effective means of communication regarding labor disputes. I demonstrate, however, that *Jean Country* fails to alter *Fairmont*'s indeterminate balancing approach in access disputes. Consequently, *Jean Country* is only a clarification of *Fairmont*, not a reworking of its fundamental principles.

\(^{10}\) 291 N.L.R.B. No. 4, 129 L.R.R.M. (BNA) 1201.
In Part III, I discuss the relationship between the Fairmont cases and doctrinal developments in federal labor preemption, state anti-injunction statutes, and state constitutional rights of free speech. The Board’s decisions in the Fairmont disputes have far-reaching implications for state court adjudication of labor trespass disputes. The incoherent body of Board law regarding access rights can only compound the confusion for state courts required to deal with complex questions of federal preemption. Furthermore, a few states have labor statutes and constitutional provisions that are more protective of peaceful labor activity on private property than is federal law under the Fairmont test. The result is a contested terrain of jurisdiction and legal rules that underscores the need for uniform labor access rights.

Finally, in Part IV, I use my critique of the Fairmont cases to show how the Board has enhanced property rights by refusing to recognize a statutory right of access in many circumstances. I suggest that the legal construct of “trespass to land” is used in these access disputes, not to protect businesses from threats to possessory interests in land, but to protect businesses from loss of goodwill and from interruptions in service or production. In conclusion, I criticize the conception of property rights that denies unions the ability to reach their audiences in face-to-face communication at the pedestrian entrances to each workplace.

I

THE FAIRMONT HOTEL DECISION

A. The Context: Prior Decisions and Contemporary Politics

In Fairmont, the Board attempted to simplify the federal law governing access disputes by providing a reinterpretation of the Supreme Court’s analysis in NLRB v. Babcock & Wilcox Co. In Babcock, the Supreme Court articulated the Board’s mandate: “to accommodate” employees’ statutory rights under the Act with employers’ property rights with “as little destruction of one as is consistent with the maintenance of the other.” Babcock held that an employer does not violate the Act when it refuses to permit nonemployee union organizers to distribute union literature in the parking lot of the employer’s plant, unless the union has no other reasonable means of communicating with the employees. The Board’s varied readings of Babcock, however, in more than thirty years of Board decisions “accommodating” section 7 rights and

12. Id. at 112.
13. [A]n 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.

Id.
property rights, casts doubt on the wisdom and utility of the original Babcock formulation.

Babcock also played a key role in the development of federal labor preemption doctrine in trespass disputes. In its Sears decision, the Supreme Court for the first time permitted state courts to assert jurisdiction over peaceful trespassory labor picketing which was arguably subject to the exclusive primary jurisdiction of the Board. In doctrinal terms, Sears marked a significant change in the Supreme Court's analysis of federal labor law preemption. In practical terms, the decision opened the way for increased use of state court injunctions to regulate peaceful labor activity on private property.

As important as the doctrinal and practical consequences of Sears, however, were the stated and unstated assumptions underlying the Court's analysis that reaffirmed the primacy of property rights when they conflict with section 7 rights under the Act. In Sears, the Court in dictum asserted that "while there are unquestionably examples of trespassory union activity in which the question whether it is protected is fairly debatable, experience under the Act teaches that such situations are rare and that a trespass is far more likely to be unprotected than protected." At least for the first few years after Sears, however, the Board tended to permit nonemployee access to private property in a variety of circumstances.

Beginning in 1979, several key Board decisions found section 8(a)(1) violations of the Act when property owners denied nonemployee union representatives access to property for picketing or handbilling. For example, in Giant Food Markets, the Board found that nonemployees con-

15. See infra text accompanying notes 289-98.
16. See Sears, 436 U.S. at 211 (Blackmun, J., concurring); id. at 231-32 (Brennan, J., dissenting).
17. Id. at 205.
18. See generally Note, Accommodating Nonemployees: NLRA Protection of Concerted Union Conduct in the Wake of Sears, 29 CATH. U.L. REV. 185 (1979) (discussing Board decisions, both before and after Sears, in which nonemployee access to private property for picketing, handbilling, or solicitation was found to be protected section 7 activity). The Board's willingness to protect peaceful trespassory collective activity in the immediate post-Sears period was a cause of concern to some management attorneys. See, for example, the observation of one commentator that "a narrow exception to the general rule of nonaccess has been eroded by the Board and applied to areas not contemplated by the courts. It has been construed by the Board to justify every conceivable form of nonemployee access." Spelfogel, Private Property Picketing, 33 LAB. L.J. 659, 667 (1982).
ducting area standards picketing on the sidewalk of a supermarket were engaged in protected activity.\textsuperscript{21} In that case, the supermarket and an adjoining discount store were surrounded by a parking lot on property owned by a third party. After \textit{Giant Food}, the Board found in several cases that employers violated section 8(a)(1) of the Act by denying non-employees access to private property for purposes of peaceful picketing or handbilling.\textsuperscript{22} In concluding that there was, in effect, a statutory "right of access" that outweighed the employer's "right to exclude," the Board was applying the \textit{Babcock} balancing test. Thus, in the immediate aftermath of \textit{Sears}, the Board interpreted the \textit{Babcock} test expansively to permit nonemployee access to property for peaceful section 7 communicative activity where other means of communication were not practicable or effective. The result, for a short time, was to "open the doors" to employers' property and to allow unions to reach employees and consumers in face-to-face encounters at the entrances to the workplace.\textsuperscript{23}

When the Board's 1979 access decisions came before the circuit courts, however, it became clear that the Board's view of the proper accommodation between property rights and section 7 rights would not easily survive appellate review.\textsuperscript{24} This tension between expansive Board decisions and more restrictive court decisions regarding permissible statutory incursions on property rights had its roots in \textit{Babcock} and became evident as Board access orders were denied enforcement over the years.\textsuperscript{25}


\textsuperscript{22} In \textit{Seattle-First National Bank}, the Board ordered the owner of a fifty-story office building to permit union picketing and handbilling in the foyer at the entrance to a restaurant on the forty-sixth floor. 243 N.L.R.B. 898 (1979), \textit{remanded for modification}, 651 F.2d 1272 (9th Cir. 1980), \textit{as modified}, 258 N.L.R.B. 1222 (1981). In another case the Board found that the owner of a freestanding store violated 8(a)(1) by excluding union representatives attempting to engage in organizational handbilling at the store's employee entrance which was located below the street level. Hutzler Bros., 241 N.L.R.B. 914 (1979), \textit{enforcement denied}, 630 F.2d 1012 (4th Cir. 1980). Finally, in 1982, in \textit{Montgomery Ward}, striking employees of a manufacturer of sporting goods attempted to promote a consumer boycott of the "struck products" by handbilling at the entrances to a "single structure" department store "on its own city block." 265 N.L.R.B. at 62. Finding that the union had no reasonable alternative means of reaching consumers, the Board ordered the retailer to permit the union to engage in handbilling on the premises. \textit{Id.} at 70.

\textsuperscript{23} In \textit{Babcock}, the Supreme Court asserted that it is "not a problem of always open or always closed doors for union organization on company property." 351 U.S. at 112.


\textsuperscript{25} See discussion of cases in Note, supra note 18, at 199-213. \textit{See also} Note, \textit{NLRB Orders Granting Unions Access to Company Property}, \textit{68 Cornell L. Rev.} 895, 905, 913 (1983) (comment-
The problem of inconsistent Board decisions, the conflicts between the Board and the courts, and the impact of the Sears dicta have contributed to the confusion and uncertainty surrounding the legal resolution of access disputes. The burdens of the unsettled state of the law have fallen most heavily on unions and employees who have, sometimes for years, been improperly denied access to private property for the purposes of engaging in protected collective action.

In 1986, Fairmont reversed the trend of the 1979 Board decisions, by making it more difficult to establish rights of access under section 7. In this respect the Board was moving in the direction of "rarely" granting nonemployees access to private property. Indeed, in an ironic twist on the process of administrative lawmaking, the Board relied on the Sears dicta about the trend of prior Board access cases as if it were law controlling what the Board should do in the future. Thus, Sears became a self-fulfilling prophecy.

But Sears only facilitated the choices that the 1986 Board would have been likely to make in any event. By this time the Board consisted entirely of Reagan appointees.\textsuperscript{26} By the beginning of Reagan's second

\textsuperscript{26} Donald L. Dotson became the twelfth Chairman of the NLRB on March 8, 1983. His five-year term expired on December 16, 1987, at which time he left the Board. After receiving his law degree in 1968 from Wake Forest University, Dotson worked as an attorney in the Winston-Salem Regional Office of the NLRB. From 1973 to 1981 he was a corporate attorney in private industry, working as labor counsel first for Westinghouse, then Western Electric, and finally for Wheeling-Pittsburgh Corporation. Dotson came to the Board from a prior appointment in the Reagan Administration: from 1981 to 1983, he served as Assistant Secretary of Labor for Labor Management Relations. See 1988 Federal Staff Directory 1006.

Wilford W. Johansen became a Member of the Board on May 28, 1985, to fill the remainder of a term that expired on August 27, 1988. President Reagan reappointed Johansen for a second term in July of 1988. Johansen received his law degree in 1957 from George Washington University Law School, after which he began a career as an attorney for the NLRB. In 1971 he became Regional Director of Region 21 in Los Angeles. In 1984 Johansen served for six months as Acting General Counsel of the Board, his first Reagan appointment before becoming a Board Member. See id. at 1057.

On July 1, 1985, Marshall B. Babson became a Member of the Board for a term expiring on December 16, 1989. Babson graduated from Columbia Law School in 1975 and spent his legal career as a management attorney in private practice, including a two year stint with Littler, Mendelson, Falstiff & Tichy of San Francisco. Just before coming to the Board, Babson was a partner with the firm of Wiggin & Dana in New Haven, Connecticut. Babson planned to return to private practice when he left the Board in the summer of 1988, before his term expired. See id. at 954.

James M. Stephens became a Member of the Board on October 16, 1985, for a five-year term expiring August 27, 1990. Stephens graduated from Case Western Reserve University in 1971, clerked for Judge Leo A. Jackson of the Ohio Court of Appeals until 1973, and then entered private practice as an associate in an Akron, Ohio firm for several years. In 1977, Stephens entered government work as Associate Minority Labor Counsel to the House Committee on Education and Labor. From 1981 until his Board appointment, he served as Labor Counsel to the Senate Committee on Labor and Human Resources. On January 7, 1988, President Reagan named Stephens as Chairman of the NLRB, to fill the post left vacant by Dotson's departure. See id. at 1166.
term in office, Chairman Dotson's openly expressed pro-management, anti-union biases were coming under attack by groups representing a broad spectrum of political and economic interests, including labor, management, and the government. For a Board that has always been political, even while purporting to be a neutral administrative body of "experts," its politics were beginning to get in the way of its ability to function.

Moreover, President Reagan's failure to fill vacant Board seats expeditiously meant that for long periods of time the Board had only three or four members rather than the full complement of five. These vacancies contributed to the backlog of cases, not only because the work load for each member increased, but also because the Board postponed decisions on significant cases until the entire Board could review them. By February 1984, the backlog of Board cases had increased to a peak of 1,647 unfair labor practice and representation cases. The agency previously considered one of the most fair and efficient in Washington came to be perceived by many as the victim of excessive politicization and bureaucratization. Consequently, the Board became the object of in-

27. Dotson's views were expressed both in his Board decisions and frequent dissents, as well as his public comments on the speaking circuit.


30. See Gregory, supra note 29, at 41-42.

creased congressional oversight. The *Fairmont* decision must, therefore, be placed within this context of Board politics and bureaucratic backlog, as well as the context of doctrinal developments in the law. *Fairmont* and the 1987 *Fairmont* decisions are representative of, and in fact are part of, the internal and external problems currently facing the Board.

The *Fairmont* dispute presented the Board with an opportunity to deal decisively with a class of cases that had consistently proved to be troublesome. A number of access disputes were awaiting Board decision, and the *Fairmont* case was to provide the model of analysis for deciding the subsequent cases. Of all the access cases then before the Board, *Fairmont* presented some of the most compelling arguments for denial of access. It also revealed the links between the Board’s conceptions of property rights and its assumptions about the privileges of class, wealth, and status.

**B. The Dispute: The Teamsters, Bakers of Paris, and the Fairmont Hotel**

The dispute in the *Fairmont* case arose on September 28, 1982, when three Teamsters Union officers began distributing handbills at the steps of the main entrance to the Fairmont Hotel in San Francisco. The Teamsters were then involved in a dispute with a local nonunion bakery—Bakers of Paris—whose goods were purchased by the Fairmont Hotel. The Teamsters were not attempting to organize employees at Bakers of Paris, or at the hotel, whose employees were already represented by several unions. Rather, the union was protesting the substandard wages and working conditions of the Bakers of Paris employees and delivery drivers, which threatened to undermine the union’s area standards. The union handbilling campaign was directed at consumers, requesting them not to patronize the Fairmont Hotel and its restaurants until the hotel stopped buying goods from Bakers of Paris.

The union’s area standards publicity, aside from the location of the

33. Speaking at the July 13, 1988, congressional hearing, Rep. Barney Frank (D-Mass.) “declared that the failure of the board to carry out its mandate is ‘one of the most conspicuous failures of this administration.’” *Id.*

34. See cases cited infra note 77.

35. See infra text accompanying notes 77-86.

36. The union had previously picketed the bakery’s place of business. See 282 N.L.R.B. No. 27, ALJ Decision, JD-(SF)-138-83, slip op. at 3 (June 21, 1983).

37. The handbill read as follows:
handbilling on Fairmont Hotel property, was "clearly" protected section 7 activity. The question before the Board was whether the handbilling was protected at that location—at the "private" main entrance to the Fairmont Hotel. But this was not just ordinary private property. The Administrative Law Judge ("ALJ") described the hotel as a "large and lavish" hotel located in "an affluent section" of San Francisco. By agreement of the parties, the ALJ included within the file that was forwarded to the Board three photographs of the main entrance to the hotel.

The photographs assisted the Board in describing the entrance to this "luxury" hotel. The Board wrote that the Teamsters Union officers distributed handbills "at the elaborate main entrance at the front of the hotel." The hotel's "privately owned steps are connected to a privately owned, semicircular driveway which in turn is connected to the public sidewalk and street." The public sidewalk is about twenty feet from the steps, and a "large canopy over the driveway, extending from

TO THE PUBLIC
PLEASE DO NOT PATRONIZE
THIS RESTAURANT-HOTEL

We are asking your cooperation to help us in a labor dispute. This restaurant-hotel uses bakery products produced and delivered by a non-union bakery, called Bakers of Paris. Its products are manufactured and delivered under non-union conditions.

We need the support of our community to get the message across to all employers that the public will not accept substandard operations in San Francisco.

You can help us by telling the manager of this restaurant-hotel that you will patronize him again when he does business with fair employers who pay union wages and conditions.

Thank you,
TEAMSTERS LOCAL 484

Id. at 7.
38. 282 N.L.R.B. No. 27, slip op. at 12, 123 L.R.R.M. (BNA) at 1260 (citing Sears, 436 U.S. at 206 n.42); id. at 16 n.2, 123 L.R.R.M. (BNA) at 1261 n.2 (Stephens, concurring) ("[n]o one contends that, apart from the controversy over location, the Union was not within its rights in handbilling the Fairmont as a distributor of the bakery's products").

The General Counsel had argued and the ALJ had concluded that the handbilling, directed at a secondary employer, fell within the "publicity proviso" to § 8(b)(4) of the NLRA, 29 U.S.C. § 158(b)(4) (1982), and was, therefore, not prohibited by the Act. ALJ Decision, JD-(SF)-138-83, slip op. at 10-11. The Fairmont Hotel handbilling technically fell within the 8(b)(4) publicity proviso, because the hotel and its restaurants were "distributors" of goods produced by Bakers of Paris with whom the union had its primary dispute. See DeBartolo Corp. v. NLRB ("DeBartolo I"), 463 U.S. 147 (1983); cf. DeBartolo v. Florida Gulf Coast Bldg. & Constr. Trades Council ("DeBartolo II"), 108 S. Ct. 1392, 1401, 1403 (1988) ("[t]he proviso may thus be read [not as an 'exception' to § 8(b)(4), but as a 'clarification' that § 8(b)(4) does not ban] nonpicketing publicity, including appeals to customers of a retailer as they approach the store, urging a complete boycott of the retailer because he handles products produced by nonunion shops").

39. ALJ Decision, JD-(SF)-138-83, slip op. at 3.
40. See Joint Exhibits 2-4, id. at 4-A, 5-A, 6.
41. 282 N.L.R.B. No. 27, slip op. at 2 n.2.
42. Id. at 2, 123 L.R.R.M. (BNA) at 1257.
43. Id.
the steps toward the sidewalk, protects the guests entering or leaving the hotel from the elements." The union officers were stationed at the steps near the taxi cab stand, where people would leave the vehicles in which they arrived and enter the hotel. Employees and suppliers used a different entrance on another street.

The handbilling was conducted peacefully at the hotel's steps for about ten or fifteen minutes before the hotel's assistant chief of security threatened the union representatives with arrest for trespass if they did not move off the hotel's property. The ALJ described the handbillers' behavior as follows: "At no time did they enter the hotel building. As various persons entered or exited the hotel, the union representatives tendered a handbill to them and said 'Good morning,' or 'would you like one of these.'" The union representatives were asked to move, however, because of the hotel's belief that "permitting such activity in the area would exacerbate problems of congestion and theft of luggage in the area, litter the hotel's formal lobby, disturb the hotel's guests, and disrupt the hotel's decorum." In response to the arrest threat, the union officers moved to the public sidewalk, but abandoned that location in less than an hour because "most of the vehicles entering the hotel's driveway did not stop at the sidewalk." The union subsequently brought 8(a)(1) charges against the hotel for interference with protected section 7 activity. The ALJ, in his decision of June 21, 1983, concluded that the hotel had not violated section 8(a)(1). The General Counsel filed exceptions, and the hotel filed cross-exceptions. Nearly three and one-half years later, the Board issued its decision affirming the ALJ's decision and dismissing the complaint.

The Board used Fairmont to set forth an analytical framework for deciding access disputes. Drawing primarily upon the Supreme Court cases of Babcock, Hudgens v. NLRB, and Sears, the Board designed the Fairmont test to change the analytical focus of its earlier Giant Food decision. In Giant Food the Board found that union area standards picketing and handbilling on private property outside a supermarket was protected section 7 activity and the owner's use of trespass laws to inter-

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44. Id. at 3, 123 L.R.R.M. (BNA) at 1258.
45. ALJ Decision, JD-(SF)-138-83, slip op. at 7.
46. 282 N.L.R.B. No. 27, slip op. at 3, 123 L.R.R.M. (BNA) at 1258.
47. Id.
48. On several occasions during March and April of 1983, union representatives were permitted to distribute handbills at the steps of the Fairmont Hotel where they had previously been excluded. The hotel "tolerated this activity due to the pending litigation before the Board." Although this handbilling apparently was conducted without disruption to the hotel's business, the ALJ noted that these "visits" to the hotel's "premises" did "not affect the legal issues as framed by the parties on September 28th." ALJ Decision, JD-(SF)-138-83, slip op. at 8.
fere with that activity violated section 8(a)(1). To reach that result, the Board focused on the union's lack of reasonable alternative means of communication if it were excluded from the private property. The Board emphasized the problems of identifying the target audience—the consumers of a specific store—in a two-store center surrounded by a parking lot, as well as the problems of safety and dilution of the message if picketing were at the public sidewalk. Thus, the Board's Giant Food analysis made the argument for granting of access compelling.

The Fairmont Board, however, was clearly displeased with the outcome produced by the straightforward application of the Babcock test to the facts in Giant Food. In particular, the Board found that "Giant's deferral . . . to a test of available 'reasonable' alternatives suggests that a union engaging in area-standards activity would inevitably find it easier to establish its right to access than a union engaged in organizing activity." This is because the target audience is comprised not of employees but store customers who are not readily identifiable until the moment they enter the store. The Board argued that in light of the inferior status of area standards activity in the hierarchy of section 7 rights, such a consequence was unacceptable to the Board and was "clearly not envisioned" by the Supreme Court and at least one court of appeals. The Board went on to note that "[i]ndeed, if the Board were to focus primarily on the availability of alternative means, there is a substantial risk that relatively strong claims of private property rights would be required to yield to relatively weak claims of Section 7 rights."

In Fairmont the Board stated that in disputes involving a conflict between property rights and section 7 rights, "it is the Board's task first to weigh the relative strength of each party's claim." The Board assumed that it would be able to determine from the factual evidence presented in any particular case whether "the property owner's claim is a strong one" or a "tenuous one." Factors the Board would consider in determining the "relative strength or weakness" of the asserted property right "[include], but are not limited to, the use to which the property in question is put; the restrictions, if any, that are imposed on public access to the property or to the facility located on the property; and the size and

51. 241 N.L.R.B. at 729.
52. Although Fairmont in effect overrules Giant Food, the Board insisted in Fairmont that "[w]e do not pass here on the conclusion reached by the Board in Giant Food." 282 N.L.R.B. No. 27, slip op. at 8 n.16, 123 L.R.R.M. (BNA) at 1259 n.16.
53. Id. at 8, 123 L.R.R.M. (BNA) at 1259.
54. Id. at 10-11 & n.19, 123 L.R.R.M. at 1260 & n.19 (citing Giant Food v. NLRB, 633 F.2d at 24).
55. Id. at 10, 123 L.R.R.M. (BNA) at 1260.
56. Id.
57. Id.
The next step in the Board’s *Fairmont* analysis was to assess “the relative strength or weakness of a claim of section 7 rights.” The factors to be considered in evaluating the section 7 rights “include, but are not limited to, the nature of the right asserted, the purpose for which it is being asserted, the employer that is the target of the activity, the relationship of the situs to the target, the intended audience of the activity, and possibly, the manner in which the right is being asserted.”

Finally, after the initial assessments of the strengths and weaknesses of the two competing claims are completed, the results are compared. If the property owner’s claim is a strong one, while the Section 7 right at issue is clearly a less compelling one, the property right will prevail. If the property claim is a tenuous one, and the Section 7 right is clearly more compelling, then the Section 7 right will prevail. Only in those cases where the respective claims are relatively equal in strength will effective alternative means of communication become determinative.

The *Fairmont* test thus considered “reasonable alternative means of communication” only if the first step—weighing and “balancing” of property and section 7 rights—did not prove conclusive.

The *Fairmont* Board then applied its new “test” by first evaluating the strength of the Fairmont Hotel property claim. The language of the Board’s analysis and the characteristics of the hotel that the Board highlighted are revealing. The discussion of the law mirrors the earlier description, in the findings of fact, of the hotel’s main entrance and the hotel owner’s asserted reasons for excluding the union representatives. The Board observed that the Fairmont is “a large luxury hotel” and the union was attempting to distribute handbills in “the privately owned area in front of the main hotel entrance, beyond which is the hotel’s formal lobby.” Furthermore, the hotel “maintains an atmosphere of formality and decorum in these locations” and this entrance area is “generally open only to the patrons of the hotel.” By contrast, “[a]ll employees and suppliers are required to use other designated entrances.”

The Board acknowledged that the hotel “is large and, therefore, has a substantial clientele which condition dilutes to some degree the ‘pri-
vateness' of the entrance area." Nevertheless, this diluted "private-
ness" was "more than offset by other factors." The Board provided
several examples of these factors. First, the hotel, though it had been
picketed before, had apparently not previously "permitted anyone to
handbill or picket on its private property." Second, the hotel had
a valid interest in minimizing congestion, litter, and the possibility of
theft of luggage in the private area in front of the hotel's main entrance.
The presence of outsiders distributing handbills in this area is inconsis-
tent with these interests and would tend to disturb the hotel's guests en-
tering or leaving through this entrance and to disrupt the hotel's
decorum.

Third, and related to these "valid" interests was the hotel's "valid inter-
est in limiting its tort liability" because "innkeepers are frequently held
to a higher standard of care for their guests than many other employers
offering public facilities." "In sum," the Board found that the hotel's
property interests in the private driveway entrance to its hotel were so
"substantial" that they "far outweigh the section 7 rights asserted by the
Union," which were not at the "'core of the purpose for which the
NLRA was enacted.'"

But added into the balance were factors relating to the hotel's class-
based exclusivity. Words such as "luxury," "formality," "atmosphere,"
and "decorum" are descriptive, but they also connote status based on a
hierarchy of wealth and social position. The Board's language depicts a
world where those who serve not only know their place—their status in
the hierarchy—but also know which entrances are "designated" solely
for their use. The union officers were aptly described as "outsiders" at
the main entrance to the hotel. The term "outsiders" here has a double
meaning—outside their class and outside their primary employment rela-
tionship. But if the union officials had walked around the corner of the
hotel to the entrance for employees and suppliers, they would have only
been "outsiders" in the latter sense, because the back entrance (or the
public streets and sidewalks) is where they supposedly belonged.

The Board found the union's asserted section 7 rights to be weak in
comparison to the Fairmont Hotel's strong property rights. The union
handbillers were denied access despite the fact that, as the ALJ found,
the union representatives were "peaceful," "courteous to members of the

66. Id.
67. Id.
68. Id.
69. Id.
70. Id. at 11-12, 123 L.R.R.M. (BNA) at 1260 (emphasis added).
71. Id. 12-13 n.23, 123 L.R.R.M. (BNA) at 1260-61 n.23 (quoting Sears, 436 U.S. at 206 n.42).
72. Id. at 11, 123 L.R.R.M. (BNA) at 1260.
73. See the very different analysis of property rights when the access dispute concerns the
employee entrance to a hotel, discussed infra Section II.C.2.e, pp. 195-97.
public,” and “did not create actual security or other problems.” Furthermore, since the union’s area standards dispute was with a bakery, the Board argued that the union had “no primary dispute, not even an area-standards one,” with the Fairmont Hotel. Thus, although the hotel distributed the bakery’s goods to the ultimate consumers, the Board disregarded the economic relationship between the producer, the distributor, and the consumer. Since Fairmont, the Board has rarely permitted access to private property for purposes of area standards handbilling or picketing even in cases where the property rights were characterized as relatively weak.

The property analysis in Fairmont, however, suggests that even persons exercising very strong section 7 rights could be excluded from the “private” front entranceway of luxury facilities. Moreover, the assertion of federal statutory labor rights of employees may depend on whether unions are seeking access to the private property of a seedy, run-down, low-class budget motel or of a formal, decorous, high-class luxury hotel. Undoubtedly, there are many property owners as well as unions and employees who would be dismayed at such an outcome.

II
THE PROGENY OF FAIRMONT HOTEL

A. Introduction: The Problems of Delay

After a six-month hiatus following Fairmont, the Board issued fifteen “Fairmont decisions” within eight months. This flurry of Board

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74. ALJ Decision, JD-(SF)-138-83, slip op. at 9. The ALJ found, however, that “permitting non-employees to distribute handbills on [the hotel’s] outside property would create potential security or other hazardous conditions.” Id. (emphasis added). The only “security or other hazardous” condition which the ALJ specified was concern about possible theft of guests’ luggage and the hotel’s attendant tort liability. Id. The ALJ did note, however, that “[o]n at least one occasion, other than when the Union was distributing handbills, luggage was stolen from this area.” ALJ Decision, JD-(SF)-138-83, slip op. at 10.

75. 282 N.L.R.B. No. 27, slip op. at 13, 123 L.R.R.M. (BNA) at 1261.

76. See infra Section II.D.4, pp. 203-04; see also Haas & Cox, Section 7 Update: Balancing Employer Rights vs. Statutory Rights: Where is the Balance Today?, 4 LAB. LAW. 151, 173 (1988); cf. Polly Drummond Thriftway, 292 N.L.R.B. No. 44, 130 L.R.R.M. (BNA) 1188 (1989) (permitting access for area standards picketing where employer had no property right in common area under terms of lease agreement).

77. The term “Fairmont decision” is used here to mean those 1987 decisions in which the Board analyzed property and § 7 rights under its Fairmont test to determine whether denial of access to private property for those engaged in protected § 7 activity is an unfair labor practice under § 8(a)(1). The 1987 Fairmont decisions are listed in chronological order, according to date of issuance:

United Supermarkets, 283 N.L.R.B. No. 130, 125 L.R.R.M. (BNA) 1069 (Apr. 30);
Browning’s Foodland, 284 N.L.R.B. No. 104, 125 L.R.R.M. (BNA) 1264 (July 13);
Schwab Foods, Inc., 284 N.L.R.B. No. 120, 125 L.R.R.M. (BNA) 1225 (July 17), enforced, 129 L.R.R.M. (BNA) 2601 (7th Cir. 1988);
Greyhound Lines, 284 N.L.R.B. No. 123, 125 L.R.R.M. (BNA) 1266 (July 20);
activity resolved a number of property/section 7 disputes that had occurred between December of 1977 and December of 1984. As Table I shows, on average, these cases took about six years and eleven months to go from the initial dispute, through the filing of an unfair labor practice charge, the issuance of a complaint, the hearing, the issuance of an administrative law judge's decision, to, finally, the issuance of a Board decision.  

An inordinate delay in processing disputes over access has significant consequences for employees and unions. In many cases of picketing or handbilling during a primary strike, during collective bargaining, or in response to an employer unfair labor practice, a union's need for access


Until addressing Jean Country in September 1988, the Board decided only one more Fairmont-type case. On March 25, 1988, the Board denied a union access to the interior hallway of an office building for purposes of picketing a dental clinic whose employees were on strike. See 40-41 Realty Assocs., Inc., 288 N.L.R.B. No. 23, 128 L.R.R.M. (BNA) 1001 (1988).

Two other access cases, which did not rely on Fairmont, involved the rights of nonemployee union organizers to solicit off-duty employees in employer-operated cafeterias that were open to the public. The organizers in both cases were using the restaurant facilities as patrons, and their behavior was orderly and nondisruptive. In finding that the employers violated § 8(a)(1) by threatening to arrest the organizers and discriminating against them solely on the basis of their union activity, the Board followed a line of cases dealing with public restaurants. The Board was careful to note that they did not view "the majority position in Fairmont . . . as conflicting with this analysis." See Montgomery Ward & Co., 288 N.L.R.B. No. 20, slip op. at 5-6, n.8 (1988); Baptist Medical Sys., 288 N.L.R.B. No. 97, slip op. at 2-3, n.3 (1988).

78. Of the 15 1987 post-Fairmont cases discussed here, the median, Providence Hospital, took about seven years and five months (2717 days) from dispute to Board decision. Because Board decisions are not self-enforcing, the Board may have to petition a federal court of appeals for an enforcement order. See NLRA § 10(e), 29 U.S.C. § 160(e) (1982). Also, "[a]ny person aggrieved by a final order of the Board," may obtain appellate review from the court of appeals. See NLRA § 10(f), 29 U.S.C. § 160(f) (1982). In 1980, this stage of enforcement and review added an average of sixteen months (485 days) to an already lengthy process. Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA, 96 HARV. L. REV. 1769, 1796-97 (1983). There is also the possibility that a party may petition the United States Supreme Court for a writ of certiorari.

Tables I and II are patterned after Professor Weiler's Table III. Id. at 1796. The format is used here to invite comparison of the data.
to private property will be keyed to specific events that the union and employees cannot control. Once the critical event or period has passed, the access dispute becomes moot. Organizing drives that are delayed lose momentum, particularly where unions have scarce resources to devote to a number of different workplace sites. Area standards picketing and handbilling are often directed at either new establishments, which are hiring nonunion employees at wages below the union’s area standards, or at employers who are having nonunion construction work done at that location or at other sites belonging to the employer. In either case, once the new workforce is hired or the new construction is completed, the impetus for area standards pressure disappears.

Thus, time is of the essence for unions asserting access privileges to exercise section 7 rights. The Board procedures in the Fairmont disputes, however, were slow at all stages, particularly in light of the important federal statutory rights that were at stake. Table II illustrates the length of delay between the Board procedures. Unions appear to have been swift and sophisticated in asserting interference with section 7 rights: in most of the fifteen disputes examined here, unions filed section 8(a)(1) unfair labor practice charges within one or two weeks of the dispute. Occasionally the unfair labor practice charge was filed the same day or within a day or two of the dispute, indicating, perhaps, that the union anticipated denial of access to private property. The time between the filing of the section 8(a)(1) charge and the issuance of a complaint ranged from two months to eight-and-a-half months. The average delay between an unfair labor practice charge and complaint was 120 days. In a number of the Fairmont disputes, then, the union very likely no longer needed access by the time the complaint was issued.

The delay between the filing of the unfair labor practice charge and the issuance of a complaint in the Fairmont cases was over two and one-half times the 1980 average. The average delay between the Fairmont case complaint and hearing was one-half month shorter than the 1980 average, but the average delay between the hearing and the decision of

79. The statute of limitations for filing an unfair labor practice charge is six months. See NLRA § 10(b), 29 U.S.C. § 160(b) (1982).
80. In all of the Fairmont decisions, unions, not individual employees or groups of employees, filed the § 8(a)(1) charges.
81. The 1987 Fairmont decisions discussed here only provide information about disputes that culminated in Board decisions. In 1980, around the time when most of the Fairmont disputes occurred, over 80% of all the unfair labor practice charges filed in regional offices were settled, withdrawn, or administratively dismissed without issuance of formal complaints. Of the disputes that resulted in formal complaints, a majority were settled before the administrative hearing stage. See Weiler, supra note 78, at 1797. The fifteen cases reviewed here undoubtedly represent only a small fraction of the actual disputes over access to private property to exercise § 7 rights.
82. In 1980, the average delay between the filing of an unfair labor practice charge and the issuance of a formal complaint was a month and a half (46 days). See id. at 1796, Table III.
TABLE I: PROCEDURES IN FAIRMONT HOTEL AND THE 1987 FAIRMONT CASES

<table>
<thead>
<tr>
<th>Case</th>
<th>Access Dispute*</th>
<th>ULP Charge**</th>
<th>Filing of Complaint+</th>
<th>Close of Hearing</th>
<th>ALJ Decision</th>
<th>Board Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>United Supermarkets</td>
<td>8/10/79</td>
<td></td>
<td></td>
<td>6/25/80</td>
<td>9/18/80</td>
<td>4/30/87</td>
</tr>
<tr>
<td>Browning's Foodland</td>
<td>3/17/80</td>
<td>3/19/80</td>
<td>4/18/80</td>
<td>10/2/80</td>
<td>2/11/81</td>
<td>7/13/87</td>
</tr>
<tr>
<td>Schwab Foods</td>
<td>12/15/77</td>
<td>12/20/77</td>
<td>5/31/78</td>
<td>1/18/79</td>
<td>9/28/79</td>
<td>7/17/87</td>
</tr>
<tr>
<td>Greyhound Lines</td>
<td>7/3/80</td>
<td></td>
<td></td>
<td>5/6/81</td>
<td>9/2/81</td>
<td>7/20/87</td>
</tr>
<tr>
<td>Skaggs Co.</td>
<td>11/17/79</td>
<td></td>
<td>5/30/80</td>
<td>3/5/81</td>
<td>9/17/81</td>
<td>8/19/87</td>
</tr>
<tr>
<td>Sisters Chicken &amp; Biscuits</td>
<td>7/20/81</td>
<td></td>
<td>9/4/81</td>
<td>6/30/82</td>
<td>10/18/82</td>
<td>9/15/87</td>
</tr>
<tr>
<td>Emery Realty</td>
<td>6/6/84</td>
<td>6/22/84</td>
<td>9/13/84</td>
<td>11/8/84</td>
<td>4/18/85</td>
<td>9/30/87</td>
</tr>
<tr>
<td>Pizza Crust</td>
<td>12/14/84</td>
<td>12/24/84</td>
<td>3/14/85</td>
<td>4/4/85</td>
<td>12/6/85</td>
<td>9/30/87</td>
</tr>
<tr>
<td>Homart Dev.</td>
<td>3/21/81</td>
<td>4/2/81</td>
<td>7/21/81</td>
<td>2/23/82</td>
<td>8/13/82</td>
<td>10/15/87</td>
</tr>
<tr>
<td>Center Street Mkt.</td>
<td>11/9/81</td>
<td>10/15/81</td>
<td>3/12/82</td>
<td>8/5/82</td>
<td>9/10/82</td>
<td>10/15/87</td>
</tr>
</tbody>
</table>

* Date of first relevant denial of access to private property.
** Date of filing of first charge related to access dispute. In some cases, charges were amended at a later date.
+ Time of filing of initial complaint or a consolidated complaint.
++ The charge filed was based in part on activity occurring prior to the relevant access dispute.

the ALJ was over two months longer than the 1980 average. The extraordinarily lengthy delays between the ALJ's decision and the decision of the Board in these cases are inexplicable and unjustifiable. Table II shows that the Board took on average 2046 days—over five and one-half years—to decide the 1987 Fairmont cases. This is over fifteen times longer than the 1980 average of 133 days reported by Professor Weiler. On July 21, 1987, the House Government Operations Subcommittee on Employment and Housing criticized the Board for its eight-year delay in issuing a decision in one of the post-Fairmont cases. Apparently, over a

83. In the 1987 Fairmont decisions, the average delay between the filing of the complaint and the close of the hearing was about four and a half months (136 days); the longest delay was 299 days; and the shortest delay was 12 days. (Data for two cases—United Supermarkets and Greyhound Lines—was unavailable.) In 1980 the average delay between the filing of the complaint and the close of the hearing for all ULP cases was approximately five months (155 days). See id. Between the close of the hearing and ALJ decision, the average delay for a post-Fairmont case was over seven months (221 days); the longest delay was 482 days; the shortest delay was 36 days. In 1980, the average delay between the close of the hearing and the ALJ decision for all ULP cases was again about five months (158 days). Id.

84. Id.

85. See Analysis, LAB. REL. REP. (BNA) No. 125, at 53, 56 (Aug. 3, 1987). The case was Schwab Foods, which the Board took 2849 days to decide. The Board, at its most expeditious, took one year and nine months (663 days) to issue the Pizza Crust decision which, ironically, was the post-
period of years, these access cases accumulated with the backlog of Board cases in Washington, D.C., where they languished in limbo, awaiting the moment in 1986 when the elucidating formulas of the Board's *Fairmont* test should free them from their stasis.

With *Fairmont* in hand, the Board made quick work of the access cases, issuing several decisions a month in the last half of 1987. Neither the outcomes nor the analyses of the fifteen 1987 *Fairmont* decisions, however, have warranted the long wait for their arrival. Technically, property rights prevailed over section 7 rights in nine out of the fifteen cases. In the remaining six cases, the Board found that the employers had committed an unfair labor practice in denying employees, or sometimes nonemployee union representatives, access to their property. In the six cases where the employer improperly denied access to unions, the Board ordered the employer to cease and desist from prohibiting access, and to post notices for sixty days announcing its violation of the Act and its agreement not to deny the access specified by the Board. Such remedies, coming six, seven, eight, or even nine or more years after the disputes, were virtually worthless. Although access was formally granted in six cases, and denied in nine, delay in remedy meant that access was substantively denied in virtually all fifteen of the *Fairmont* cases.

Although the Board was especially dilatory in its handling of these access disputes, matters would not have been helped much if Board processes had been expeditious—one or two years rather than six or

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*Fairmont* case with the greatest number of other unfair labor practice issues. Such Board delay continues: on December 20, 1988, the Board issued a decision granting access in a trespass dispute that occurred on October 7, 1980—a delay of over eight years. See Butterfield Theaters, 292 N.L.R.B. No. 8, 130 L.R.R.M. (BNA) 1113.

86. Property rights prevailed in *Browning's Foodland, Greyhound, Smitty's Super Market, Providence, Skaggs, Sisters Chicken, L & L Shop Rite, Homart,* and SCNO Barge Lines.

87. In some cases, the companies asserting property rights were lessees or managers of the property. In *Hudgens v. NLRB,* the Supreme Court suggested that it "may or may not be relevant in striking the proper balance" between § 7 rights and property rights that "the property interests impinged upon" are "not those of the employer against whom the § 7 activity was directed, but of another." 424 U.S. 507, 522 (1976). In his concurrence in *Scott Hudgens,* Chairman Fanning argued that whether the property right is "vested in the employer against whom the protected activity was directed" or "a third party, matters from the standpoint of those asserting the statutory right, little . . . , and from the standpoint of the property right holder who chooses to become a lessor not much, if any, more." 230 N.L.R.B. 414, 416 (1977).

The Board recently has made clear that the nature of the lease also helps determine the importance of the employer's property right. See Polly Drummond Thriftway, 292 N.L.R.B. No. 44, slip op. at 5, 130 L.R.R.M. (BNA) at 1189 (according to the lease, the subtenant lacked the requisite "control" of the common sidewalk in front of the subtenant's store to assert a "right to exclude anyone").

88. The only exception was *L & L Shop Rite,* where the local police, at the direction of the county prosecutor, refused to arrest informational picketers and handbillers in the parking lot of a small shopping center. 285 N.L.R.B. No. 122, slip op. at 5-6, 126 L.R.R.M. (BNA) at 1153. Access, however, was ultimately denied by the Board. See infra note 259 for a discussion of *L & L Shop Rite.*
seven. Board procedures simply are not designed to produce quick, straightforward answers to the question that access disputes pose: does the property owner violate section 8(a)(1) by denying access to private property to persons asserting section 7 rights? While some of the asserted violations of the Act by unions—such as secondary boycotts or unlawful recognitional or organizational picketing—receive priority Board handling under statutory mandate because of the important property and economic rights involved,\(^8^9\) violations of employee rights under section 7 are not entitled to similar expedited treatment.

Furthermore, under section 10(l) of the Act, the Board is \textit{required} to obtain injunctive relief from the federal district courts to protect employers from the adverse economic consequences of unlawful secondary boycotts or organizational/recognitional picketing.\(^9^0\) Under section 10(j) the Board is \textit{permitted}, but not required, to seek “appropriate temporary relief” from the federal district courts after any other unfair labor prac-

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90. \textit{Id.}
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Such section 10(j) injunctions, however, are rarely sought to protect section 7 rights of employees from employer interference under section 8(a). For example, the Board has been reluctant to use the 10(j) injunction to protect the jobs of employees discharged during union organizing campaigns, even in the most egregious circumstances. Preserving the status quo during unfair labor practice proceedings has meant protecting the employer's absolute right to discharge her at-will employees. Likewise, in access cases, preserving the status quo has meant protecting the property owner's absolute right to exclude others from her private property, regardless of the extent to which that property may have lost its private character.

Assuming for the moment that the problem of slow and cumbersome Board procedures could be overcome, either within the existing statutory framework or through legislative reform, we are still left with the problem of making the final decision—permitting or denying access. For this task of substantive decisionmaking, \textit{Fairmont} was intended not as a per se rule, but as a set of problem-solving techniques to be applied to each new factual situation. Presumably, the \textit{Fairmont} "test" would gain legitimacy and predictive power as factually similar cases decided under its formula began to fall into readily identifiable "patterns." The \textit{Fairmont} test was well suited to the traditional Board process of case by case adjudication.

As the first fifteen post-\textit{Fairmont} decisions illustrate, however, the Board that created the \textit{Fairmont} formula was not able to apply it in a clear and consistent fashion. Because it was an important decision, \textit{Fairmont} was decided by the full Board, which at the time consisted of four members: Chairman Donald L. Dotson, and Members Marshall B. Babson, Wilford W. Johansen, and James M. Stephens. Decisions in all of the 1987 post-\textit{Fairmont} cases were delegated, according to usual Board procedures, to three-member panels of the Board. Chairman Dotson was on the panel for all but two of the 1987 \textit{Fairmont} decisions—the last two in December of 1987—and the rest of the panel always consisted of members who had decided \textit{Fairmont}.

Since the Board members who devised the \textit{Fairmont} test were the

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92. \textit{See} Weiler, \textit{supra} note 78, at 1799-801.
93. \textit{See}, e.g., Silverman v. 40-41 Realty, 668 F.2d 678, 682 (2d Cir. 1982).
94. The Board now views Jean Country's reformulation of \textit{Fairmont} as a key to this analytical process of finding "patterns" in access cases. Jean Country, 291 N.L.R.B. No. 4, slip op. at 10, 129 L.R.R.M. (BNA) at 1205; \textit{see infra} Section II.E, pp. 205-08.
95. Although the full Board consists of five members, during much of the Reagan presidency the Board had one or more vacancies, a fact which has contributed to its backlog of cases. \textit{See supra} text accompanying note 30. All \textit{Fairmont} Board members were appointed by President Reagan. \textit{See supra} note 26.
same members who applied it to these fifteen new factual situations in 1987, the extent of disagreement among them about how to "weigh" property rights and section 7 rights is quite remarkable. Although there are only three decisions in which there are dissents, six of the decisions have concurrences, and virtually all of the decisions, including those that are unanimous, have footnotes in which the Board members each assert their very different views on how the Fairmont test should be applied to the facts of the case before the Board. They did strive for consensus, at least in outcome. But each Board member's insistence on his own version of the Fairmont analysis was a little like the blind men trying to describe an elephant on the basis of having touched but one portion of it—the tail, an ear, the trunk. Somewhere in all of this, they missed the elephant. And, in the process, they have shown the Fairmont test to be an unwieldy instrument that poorly serves the federal policies of protecting collective action of workers.

The effects of the "footnote wars" in inhibiting exercise of protected section 7 rights cannot be ignored. After Fairmont, regional offices of the Board had to decide whether to issue a complaint under the confusing Fairmont test with its ambiguous burdens of proof. The General Counsel could not be sure what was required to make a case against an employer stand up at the hearing level. Furthermore, ALJs had to conduct hearings and decide access disputes not knowing which member's Fairmont standard was the correct one to apply. The Board's 1988 decision in Jean Country, apparently intended to correct some of these problems failed to alter the inherent ambiguities of Fairmont's "balancing" approach.

The Fairmont Board members disagreed on all aspects of the Fairmont test: the initial weight to be accorded property rights and section 7 rights, and the relevance of "reasonable alternative methods of communication." The simple fact remains that whenever property rights are asserted in an 8(a)(1) dispute before the Board, section 7 rights are sacrificed, either because delay in remedy makes their recognition meaningless, or because the rights are not viewed as sufficiently important to warrant the privilege of access. Thus, to maintain property rights, the Board consistently undermines section 7 rights.

97. Chairman Dotson dissented in two of these decisions: Schwab Foods and Pizza Crust. Member Johansen dissented in SCNO Barge Lines.

98. The Fairmont decisions demonstrate how Board expertise operates within a framework of contradictory legal theories and assumptions. As Karl Klare has argued, "labor rights theories are ambiguous and internally contradictory and cannot provide coherent, principled answers to the most significant legal problems. In this respect, labor law theory is but a paradigm of the theoretical difficulties of liberal legalism which possesses no coherent theory of rights." Klare, Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law, 4 INDUS. REL. L.J. 450, 478 (1981).

99. 291 N.L.R.B. No. 4, 129 L.R.R.M. (BNA) 1201; see infra Section II.E, pp. 205-08.
B. Assessing Property Rights: The Footnote Wars

The *Fairmont* standard calls for an initial assessment of the relative strengths and weaknesses of the property rights and section 7 rights involved in the access dispute. If the property right is "a strong one, while the section 7 right at issue is clearly . . . less compelling," that is the end of the matter.\(^{100}\) There is no section 8(a)(1) violation and the property owner is free to deny access. If the property claim is "tenuous," and the section 7 right "clearly more compelling," then the section 7 right "prevails" and the property owner has violated 8(a)(1).\(^{101}\) If, however, the two competing rights are "relatively equal," only then does the Board consider whether the factor of the employee's or union's "effective alternative means of communication" tips the scale either way.\(^{102}\) At least in theory, when property rights and statutory rights are in balance, a finding of no alternative means of communication leads to granting of access.

There are a number of analytical problems with the Board's "formula." It is not clear whether the strength or weakness of the "property right" is to be measured on some sort of objective, absolute scale, or whether it is to be measured "relative" to the context of the specific access dispute and the federal labor policy that defines the claimed section 7 right. The Board seems to assume that it is applying a test that is objective and universal. But factors that "may affect" the strength or weakness of the property right may also be valued subjectively.

The Board is attempting, in this first stage of its analysis, to rationalize either intrusion on private property or denial of access to private property on the basis of subjective factors that are created and assigned arbitrary value by the decisionmaker. Thus, the "privateness" of any particular type of property—the "strength" of the property claim—is indeterminate, and can be manipulated to justify either the granting or denying of access in any particular claim. The initial evaluation of the strength of the property right often determines both the analysis and the outcome. Under the Board's plurality view of the *Fairmont* standard, consideration of "reasonable alternative means of communication" should occur only when property rights and section 7 rights are relatively equal.

The footnotes, and in one case, a dissent, in seven of the 1987 post-*Fairmont* decisions, demonstrate the difficulty which the Board members experienced in making an initial assessment of the strength of the property right.\(^{103}\) In these seven decisions, Chairman Dotson found that the

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100. *Fairmont*, 282 N.L.R.B. No. 27, slip op. at 10, 123 L.R.R.M. (BNA) at 1260.
101. *Id.*
102. *Id., overruled by Jean Country*, 291 N.L.R.B. No. 4, slip op. at 3 n.2, 129 L.R.R.M. (BNA) at 1203 n.2 (ruling that the Board must always consider alternative means of communication in access cases).
103. *See Browning's Foodland*, 284 N.L.R.B. No. 104, slip op. at 4-5 n.4, 125 L.R.R.M. (BNA)
property right either outweighed or was "less attenuated" than the section 7 right, thus eliminating the need to consider reasonable alternative means of communication. Generally, Member Babson disagreed with Dotson's initial property assessment, and argued that the property right was relatively equal to the section 7 right, thus requiring analysis of reasonable alternative means of communication. In contrast, Member Johansen did "not evaluate the [section] 7 claim apart from the factor of reasonable alternative means of communication. Rather, he view[ed] this factor as significant in assessing the strength of the [section] 7 claim." Member Stephens, adopting a position somewhat similar to Johansen's, announced in his *Fairmont* concurrence that he was

not ready to embrace an access rights test under which [the Board] would be barred from inquiring into the availability of reasonably effective alternative means of communication with the target audience unless [they] found that the "property rights" at issue were of relatively equal strength with Section 7 rights implicated in the activity on the affected property.105

What emerged in the post-*Fairmont* decisions, then, were at least two, possibly three, distinctly different access tests: (1) Dotson and Babson evaluated and "weighed" the property and section 7 claims separately. They only considered reasonable alternative means of communication if the two asserted rights were relatively equal. (2) Johansen always considered reasonable alternative means of communication in assessing the strength or weakness of the section 7 claim before he determined the relative weight to assign to the property right and the section 7 right. (3) Stephens' approach was similar to Johansen's, in that it would require "consideration of alternative means of communication regardless of how one assesses the relative weights of particular property rights and Section 7 rights."106 Thus, Stephens argued, in cases in which "the two categories of rights" are not "exactly in equipoise," the Board


104. *Browning's*, 284 N.L.R.B. No. 104, slip op. at 4-5 n.4, 125 L.R.R.M. (BNA) at 1265-66 n.4; see also *Schwab*, 284 N.L.R.B. No. 120, slip op. at 9 n.20, 125 L.R.R.M. (BNA) at 1228 n.20; *Greyhound*, 284 N.L.R.B. No. 123, slip op. at 5-6 n.5, 125 L.R.R.M. (BNA) at 1267-68 n.5; *Smitty's*, 284 N.L.R.B. No. 128, slip op. at 5-6 n.4, 125 L.R.R.M. (BNA) at 1269-70 n.4; *L & L*, 285 N.L.R.B. No. 122, slip op. at 8-9 n.4, 126 L.R.R.M. (BNA) at 1154 n.4.


“still might find it desirable to factor into the ‘accommodation’ analysis the existence vel non of reasonable means of communicating with the target audience.”

Reasonable alternative means of communication, consequently, tended to become the central focus of Stephens’ analysis rather than, as in Johansen’s analysis, just a factor in determining the section 7 rights.

The Dotson-Babson test was the most mechanical, and seemingly the most objective and arithmetic. Nevertheless, in six of the nine post-Fairmont cases which both Dotson and Babson heard, they disagreed on the initial weight to be assigned to the property right. In five of these cases, Dotson found that the property right outweighed the section 7 right, obviating any need to consider reasonable alternative means of communication. Babson found the property right and section 7 right relatively equal, thus mandating consideration of reasonable alternative means of communication. In one case, Schwab Foods, Babson and Dotson were diametrically opposed in their assessments of the competing claims.

Thus, despite the fact that Dotson and Babson were the only two members of the Board in 1987 who clearly agreed on the same definition of the Fairmont test, in two out of every three times they applied the test to the same fact pattern during that year, they initially assigned different weights to the competing property and section 7 claims. So much for the objective test.

Johansen’s version of the Fairmont test was the most sensitive to federal labor policy because he always considered the significance of the union’s or employees’ reasonable alternative means of communication in determining the nature and strength of the section 7 claims. In this sense, Johansen’s analysis of the competing claims was initially more comprehensive and more contextual than the Dotson-Babson test. Johansen also was unwilling to place unrealistic and unreasonable burdens on a union’s ability to establish the lack of alternative means of communication.

He did, however, expect the General Counsel to present substantial evidence to prove the unavailability of reasonable alternative


108. See *Browning’s*, 284 N.L.R.B. No. 104, slip op. at 44 n.4, 125 L.R.R.M. (BNA) at 1265 n.4; *Smitty’s*, 284 N.L.R.B. No. 128, slip op. at 5 n.4, 125 L.R.R.M. (BNA) at 1270 n.4; *Skaggs*, 285 N.L.R.B. No. 62, slip op. at 4-5 n.1, 126 L.R.R.M. (BNA) at 1151 n.1; *L & L*, 285 N.L.R.B. No. 122, slip op. at 8-9 n.4, 126 L.R.R.M. (BNA) at 1154 n.4; *Homari*, 286 N.L.R.B. No. 72, slip op. at 7-8 n.12, 126 L.R.R.M. (BNA) at 1247 n.12.

109. Babson believed the § 7 right outweighed the property right. See 284 N.L.R.B. No. 120, slip op. at 9 n.20, 125 L.R.R.M. (BNA) at 1228 n.20. Dotson argued that the property right outweighed the § 7 right. See *id.*, slip op. at 12-13, 125 L.R.R.M. (BNA) at 1229 (Dotson, dissenting). Consistent with their version of the Fairmont test, both members did not consider reasonable alternative means of communication in analyzing the competing rights in Schwab Foods.

means of communication, a burden which the General Counsel failed to meet in over half the post-Fairmont cases.\(^{111}\)

The centrality of reasonable alternative means of communication to Stephens' version of the Fairmont test also appeared to be more responsive to federal statutory policies than the Dotson-Babson test. But his test also placed a high burden on unions. Stephens believed his version was most faithful to the Supreme Court's analysis in Babcock,\(^{112}\) and,

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\(^{111}\) The General Counsel failed to meet the burden of proving a lack of reasonable alternative means of communication in eight post-Fairmont cases. See Browning's, 284 N.L.R.B. No. 104, slip op. at 6, 125 L.R.R.M. (BNA) at 1266; Greyhound, 284 N.L.R.B. No. 123, slip op. at 6, 125 L.R.R.M. (BNA) at 1268; Smitty's, 284 N.L.R.B. No. 128, slip op. at 6 n.4, 125 L.R.R.M. (BNA) at 1270 n.4; Providence Hosp., 285 N.L.R.B. No. 52, slip op. at 7-8, 126 L.R.R.M. 1145, 1145; Skaggs, 285 N.L.R.B. No. 62, slip op. at 5 n.3, 126 L.R.R.M. (BNA) at 1151 n.3; L & L, 285 N.L.R.B. No. 122, slip op. at 10, 126 L.R.R.M. (BNA) at 1155; Homart, 286 N.L.R.B. No. 72, slip op. at 8-9, 126 L.R.R.M. (BNA) at 1247; SCNO, 287 N.L.R.B. No. 29, slip op. at 12, 127 L.R.R.M. (BNA) at 1085.

It should be noted that in every one of the 1987 Fairmont Board cases under consideration here, the Regional Director issued the complaint and the General Counsel prosecuted the case on the basis of pre-Fairmont law. Likewise, in each case, the ALJ applied pre-Fairmont law in making evidentiary rulings at the hearing and in reaching a decision. In a number of these cases, the ALJs wrote lengthy opinions analyzing the law of access as they understood it. Because the Board adopted a "new" test (or tests) in Fairmont, they basically disregarded the legal analysis, though not the findings of fact, in the ALJ decisions. This retroactive application of the Fairmont analysis, while clearly necessary given the long delays that had already occurred, certainly left much to be desired in terms of fairness to the interests of the parties, particularly the unions. It is too early to speculate on whether the outcomes in these types of access cases will be different if all parties are aware of the evidentiary burdens and legal arguments which can make or break a case under the Fairmont test and its 1988 reformulation in Jean Country.

\(^{112}\) See, e.g., Fairmont, 282 N.L.R.B. No. 27, slip op. at 15, 123 L.R.R.M. (BNA) at 1261 (Stephens, concurring); Homart, 286 N.L.R.B. No. 72, slip op. at 11, 126 L.R.R.M. (BNA) at 1247 (Stephens, concurring). Stephens certainly felt strongly about the correctness of his own version of Fairmont: in nearly half of the post-Fairmont decisions in which he was on the three-member panel, he wrote separate concurring opinions referring to his Fairmont concurrence. Stephens was on the panel in ten of the post-Fairmont cases, and wrote separate concurrences in four of these. See Greyhound, 284 N.L.R.B. No. 123, slip op. at 8, 125 L.R.R.M. (BNA) at 1268 (Stephens, concurring); Skaggs, 285 N.L.R.B. No. 62, slip op. at 7, 126 L.R.R.M. (BNA) at 1151 (Stephens, concurring); Homart, 286 N.L.R.B. No. 72, slip op. at 11, 126 L.R.R.M. (BNA) at 1247 (Stephens, concurring); Center Street Mkt., 286 N.L.R.B. No. 73, slip op. at 10, 126 L.R.R.M. (BNA) 1212, 1214 (Stephens, concurring).

In nearly all the remaining cases where he joined the majority opinion, he articulated, in footnotes, his disagreement with the majority's test and his reasons for believing that his own version of the test had been satisfied. See United Supermarkets, 283 N.L.R.B. No. 130, slip op. at 8 n.6, 125 L.R.R.M. (BNA) 1069, 1072 n.6; Providence, 285 N.L.R.B. No. 52, slip op. at 8 n.6, 126 L.R.R.M. (BNA) at 1147 n.6; Emery Realty, 286 N.L.R.B. No. 32, slip op. at 10 n.15, 126 L.R.R.M. (BNA) 1241, 1244 n.15; enforced, 130 L.R.R.M. (BNA) 2154 (6th Cir. 1988); SCNO, 287 N.L.R.B. No. 29, slip op. at 4 n.9, 127 L.R.R.M. (BNA) at 1082 n.9; Gladders, 287 N.L.R.B. No. 30, slip op. at 3 n.6, 127 L.R.R.M. (BNA) at 1089 n.6.

In only one case did Stephens not feel compelled to express his distinct views on Fairmont, and that case, Pizza Crust, was one in which the majority (but not the dissent), decided the Fairmont test did not apply at all. See Pizza Crust Co., 286 N.L.R.B. No. 45, 129 L.R.R.M. (BNA) 1281, enforced, 862 F.2d 49 (3d Cir. 1988).
indeed, it may have been. When the General Counsel must meet an extremely high burden to establish a union’s lack of reasonable alternative means of communication, the outcomes, with few exceptions, will be overly protective of property rights. In the three cases decided in Babcock, the statutory policy arguments for access had seemed quite compelling to the Board, yet the Court found that the unions had reasonable alternative means of communication and denied access.113

Dotson and Babson seemed to assume that they could weigh or value the asserted property right by considering it independently of the statutory right. In effect, therefore, they treat the property right as if it is a disembodied form, clearly discernible and quantifiable without comparison to other rights. Even the three factors that “may affect” the strength or weakness of the property right—the use of the property, the restrictions on public access, and its size and location114—relate to the union’s or employees’ reasons for choosing that property as a situs for communication. The property’s use, accessibility, size, and location are factors relevant to a consideration of a union’s reasonable alternative means of communication, not just the “weight” of the property right.

Though the Board formally invoked the factors of use, accessibility, size, and location of the property to evaluate the strength of the property right, they used other criteria as well. In the cases that deal with access to retail and service facilities, these other criteria are primarily related to wealth, social class, and status—the extent to which the property owner has created an environment with an ambience of luxury, comfort, and exclusivity. In fact, it appears that, at least for Chairman Dotson, a property’s snob appeal can become determinative of its “strength,” despite other characteristics of the property that would otherwise make it a weak property claim under the Fairmont test.115

In many of these cases, however, the Board’s decision to grant access turns, not on the strength of the property right, but on whether the section 7 right is deemed sufficiently important to warrant intrusion on private property. This judgment involves the Board in analysis of the appropriate means and ends of collective action which, in its narrow and

113. In Babcock, the Court noted

In each of these cases the employer refused to permit distribution of union literature by nonemployee union organizers on company-owned parking lots. The National Labor Relations Board, in separate and unrelated proceedings, found in each case that it was unreasonably difficult for the union organizer to reach the employees off company property and held that, in refusing the unions access to parking lots, the employers had unreasonably impeded their employees’ right to self-organization in violation of § 8(a)(1) of the National Labor Relations Act.

NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 106 (1956). The Court concluded that the Act “does not require that the employer permit the use of its facilities for organization when other means are readily available.” Id. at 114.

114. Fairmont, 282 N.L.R.B. No. 27, slip op. at 9, 123 L.R.R.M. (BNA) at 1259-60.

115. See infra text accompanying notes 211-14.
limited focus, is similar to the legal analysis employed by some judges in a number of significant late nineteenth and early twentieth century tort and antitrust labor cases.\[^{116}\] The analysis dampens and limits the allowed avenues of collective action, and it is presented without acknowledgment of its underlying assumptions.\[^{117}\]

C. Retail and Service Facilities Cases

1. The "Large Shopping Mall Rule" and the "Single Store Rule"

In *Fairmont*, the Board, relying on its analysis of several Supreme Court cases dealing with the problem of "accommodating" property rights and section 7 rights, provided two descriptions of property rights claims in the retail setting—one strong and one weak. Although these descriptions are nothing more than examples, they reveal the Board's method of analysis and are later referred to, indeed *relied on*, in some of the post-*Fairmont* decisions, as if they are statements of rules. I will thus refer to these two examples as Rule # 1—"The Large Shopping Mall Rule"—and Rule # 2—"The Single Store Rule."

The Board noted in *Fairmont*, that

the mandate in *Babcock* "to accommodate" [property rights and section 7 rights] with "as little destruction of one as is consistent with the maintenance of the other" implicitly recognizes that the claim of a party to one or the other of these rights will have varying degrees of strength depending on the facts of the particular case.\[^{118}\]

The Board then proceeded to describe two rules of thumb that illustrate the way in which property claims of owners of retail facilities should be weighed or measured.

The two *Fairmont* "rules" are:

[Rule # 1—The Large Shopping Mall Rule]

For example, the owner of a large shopping mall who allows the general public to utilize his property without substantial limitation may well have a heavy burden to bear in seeking selectively to exclude pickets who are engaged in an economic strike against their employer who is a tenant in the mall. In such a case, the strength of the mall owner's claim that private property rights are being violated may be undercut by the fact that heretofore virtually no one had been excluded.

[Rule # 2—The Single Store Rule]

\[^{116}\] See Avery, *Images of Violence in Labor Jurisprudence: The Regulation of Picketing and Boycotts, 1894-1921*, 37 *BUFFALO L. REV.* 1 (1988/89) (discussing the assumptions by some judges, during the decades spanning the turn of the century, that unions may legally engage in collective activity for individualistic, egoistic, and economic goals, but not for broad-based, communitarian, altruistic goals).

\[^{117}\] See J. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983) (discussing the significance in American labor jurisprudence of the values and assumptions regarding the status of workers, the role of managerial control, and the importance of maintaining productivity).

\[^{118}\] 282 N.L.R.B. No. 27, slip op. at 8, 123 L.R.R.M. (BNA) at 1259.
On the other hand, a single store surrounded by its own parking lot provided exclusively for the convenience of customers will have a significantly more compelling property right claim.\footnote{119. \textit{Id.} at 8-9, 123 L.R.R.M. (BNA) at 1259. For evidence of the persistence of these “rules,” even after the \textit{Jean Country} reformulation of \textit{Fairmont}, see \textit{Mountain Country Food Store}, 292 N.L.R.B. No. 100, slip op. at 5, 130 L.R.R.M. (BNA) 1329, 1330 (1989).}

In these rules, the \textit{Fairmont} Board suggested that there is an inherent distinction between a large shopping mall and a single store for purposes of evaluating the strength of the property claim. The \textit{Fairmont} rules incorrectly and inappropriately draw on Supreme Court free speech cases that distinguished between the shopping mall and the single store. For a brief period, the Court had held that under the first amendment a single store is more “private” than a large shopping mall, and the single-store owner’s claim to “privacy” is stronger than the mall owner’s.\footnote{120. \textit{See infra} text accompanying notes 138-57.}

This constitutional analysis has confused and clouded a number of the Board access decisions before and after \textit{Fairmont}. \textit{Fairmont} reaffirmed the centrality of these \textit{constitutional} distinctions to the “weighing” of competing \textit{statutory} rights and property claims.

The genesis of these two “rules” is in the Supreme Court cases of \textit{Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc.},\footnote{121. 391 U.S. 308 (1968).} \textit{Central Hardware Co. v. NLRB},\footnote{122. 407 U.S. 539 (1972).} \textit{Lloyd v. Tanner},\footnote{123. 407 U.S. 551 (1972).} and \textit{Hudgens v. NLRB}.\footnote{124. 424 U.S. 507 (1976).} The Supreme Court in \textit{NLRB v. Babcock & Wilcox Co.} acknowledged that the Board had found that the “place of work” was “so much more effective a place for communication of information;”\footnote{125. 351 U.S. 105, 108 (1956).} nevertheless, the Board had “failed to make a distinction between rules of law applicable to employees and those applicable to nonemployees.”\footnote{126. \textit{Id.} at 113.} In \textit{Babcock}, nonemployee union organizers wanted to distribute union literature to employees in the parking lot of a large factory. Although “[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others,” the Court found that the record failed to show that the employees were “beyond the reach of reasonable union efforts to communicate with them.”\footnote{127. \textit{Id.} at 113.} Long before \textit{Fairmont}, the Board had treated Bab-
cock as placing an exceptionally high burden on the General Counsel and unions to prove, essentially, that no other means of communication with employees existed.\textsuperscript{128} Alternatives that were less safe, less convenient, less effective, and more expensive than communicating on the employer's property were nonetheless "reasonable alternatives."

The Babcock Court had announced that "[t]his is not a problem of always open or always closed doors for union organization on company property."\textsuperscript{129} Nevertheless, except for situations where employees were "isolated from normal contacts,"\textsuperscript{130} such as employees living in remote lumber camps\textsuperscript{131} or in company towns,\textsuperscript{132} the Babcock rule has meant that "the door" is nearly "always closed" for union organizers seeking access to an employer's private property for the purpose of communicating with employees.

In effectively closing that door, however, the Babcock Court failed to analyze the employer's property interests which were at stake, other than to note that property rights are preserved by the same government that grants organizational rights to employees.\textsuperscript{133} This implicit invocation of the fifth and fourteenth amendments facilitated the Court's conclusion that the Act "does not require that the employer permit the use of its facilities for organization when other means are readily available."\textsuperscript{134} Nevertheless, the Constitution is not a total bar to government regulation that places burdens on property rights, for it is only when "regulation goes too far" that "it will be recognized as a taking."\textsuperscript{135} The question that the Babcock Court should have, but did not, ask is why should an employer's assertion of rights based on bare title to land place burdens on the statutory rights of employees to organize. Property rights, including the right to exclude, are not absolute. The New Jersey Supreme Court has observed in a slightly different context dealing with a criminal trespass case: "Property rights serve human values. . . . Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law."\textsuperscript{136}

The Babcock "accommodation," which falls heavily on the side of


\textsuperscript{129} 351 U.S. at 112.

\textsuperscript{130} \textit{Id.} at 111.

\textsuperscript{131} \textit{See, e.g.,} NLRB v. Lake Superior Lumber Corp., 167 F.2d 147 (6th Cir. 1948); \textit{see also} Note, \textit{supra} note 18, at 199-201 (discussing Board treatment of union access rights to "live-in employee facilities").

\textsuperscript{132} \textit{See, e.g.,} NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949).

\textsuperscript{133} 351 U.S. at 112.

\textsuperscript{134} \textit{Id.} at 114.


protecting the employer's right to exclude, has remained the general rule for cases of nonemployee union organizers seeking access to private parking lots and entranceways surrounding businesses, factories, and industrial parks.\textsuperscript{137} Other, quite different, considerations have come into play in cases where employees and nonemployees have sought access to private property surrounding retail facilities for purposes of picketing, handbilling, or soliciting union membership. The labor law doctrine dealing with access to shopping malls and store parking lots developed in the shadow of the Supreme Court's short-lived recognition of a first amendment right of access to shopping malls, at least for purposes of speech "directly related in its purpose to the use to which the shopping center property was being put."\textsuperscript{138} For eight years, labor access disputes involving retail facilities were decided under a first amendment analysis rather than a Babcock statutory analysis.

The 1968 Supreme Court case of \textit{Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza Inc.},\textsuperscript{139} relied on the first and fourteenth amendments to protect the rights of nonemployee union members to engage in peaceful area standards picketing\textsuperscript{140} in the private parking lot and parcel pick-up zone of a supermarket in a large shopping center. The shopping center owner and the supermarket obtained an ex parte order enjoining the picketers from picketing and trespassing on the Logan Valley Plaza's private property.\textsuperscript{141} The Court found that the shopping center served as a "community business block" which was the "functional equivalent of the business district" of a company town.\textsuperscript{142}

This analogy to a company town brought Logan Valley within the scope of \textit{Marsh v. Alabama}.	extsuperscript{143} In \textit{Marsh} a Jehovah's Witness was arrested under Alabama's criminal trespass law for distributing religious literature on the sidewalks of the business district of a company town owned by a private corporation. The Supreme Court reversed Marsh's

\textsuperscript{137} Employer restrictions on employee self-organization on the employer's property, on the other hand, is prohibited "unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 (1945).

\textsuperscript{138} Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 320 n.9 (1968).

\textsuperscript{139} 391 U.S. 308.

\textsuperscript{140} The union was arguably engaged in either "informational" or "area standards" picketing, or possibly "organizational" picketing, but the question of whether the picketing was a protected § 7 collective activity was not before the Court. See id. at 309-10 n.1. The picketers carried signs that stated that the supermarket, which had just opened, "was nonunion and that its employees were not receiving union wages or other union benefits." Id. at 311.

\textsuperscript{141} The question whether state court jurisdiction to enjoin the union's trespass was preempted by the exclusive jurisdiction of the NLRA over the subject matter was not addressed. Id. Justice Harlan argued that the "pre-emption ground would plainly [have been] a preferable basis for decision." Id. at 333 (Harlan, J. dissenting). He recognized, however, that the preemption question was not properly before the Court. Id. at 336 (Harlan, J., dissenting).

\textsuperscript{142} Id. at 318-19.

\textsuperscript{143} 326 U.S. 501 (1946).
trespass conviction on the grounds that she had been exercising first amendment rights that could not be infringed by a private corporation whose property had assumed the public function and character of a municipality. The Marsh Court noted that “the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.”

The basis for the Board’s Fairmont distinction, in dictum, between the strength of property rights in shopping center cases versus single-store cases follows from the first amendment Marsh “community business block” analysis that the Court adopted in Logan Valley. Having taken this functionalist approach in Logan Valley, the Supreme Court had little choice but to acknowledge, several years later in the case of Central Hardware Co. v. NLRB, the logical limits of the Marsh/Logan Valley first amendment analysis.

In Central Hardware, nonemployee union organizers engaged in union solicitation activities in the open parking lot surrounding a single free-standing store. Although the parking lot was generally open to the public, the store owner enforced a general rule against solicitation on its property by ordering the union organizers to leave the premises. The union, in turn, filed a section 8(a)(1) charge claiming that the denial of access to the store parking lot interfered with the store employees' section 7 rights. Both the Board and the court of appeals agreed that the “character and use” of the store parking lot was unlike the parking lot surrounding the industrial plant in Babcock. Thus rejecting a Babcock analysis, the Board instead relied on Logan Valley to order the store to permit access to the union organizers. The Board’s theory was that the owner had “diluted his property interest by opening his property to the general public for his own economic advantage.”

The Supreme Court held that Logan Valley constitutional arguments did not apply in the situation of a single, free-standing store and remanded the case to the court of appeals for consideration under the principles of Babcock.

The Supreme Court clearly demonstrated its unease with the broad first amendment implications of Logan Valley in another shopping center access dispute, Lloyd v. Tanner, which was decided at the same time as

144. Id. at 503.
146. Id. at 542.
147. Id. at 546 n.4 (quoting Brief for the NLRB at 20).
148. 407 U.S. 551 (1972). Lloyd held that a shopping mall owner, who enforced a no-distribution rule, did not violate the first amendment rights of persons attempting to distribute antwar handbills in mall walkways, because, unlike Logan Valley, the handbilling was unrelated to the commercial purposes of the mall and the handbillers had other reasonable methods of communicating
Central Hardware, but did not involve union activity or claims to federal statutory rights. Lloyd represented the Court’s refusal to extend Logan Valley’s first amendment protection of speech in a private shopping mall to noncommercial speech unrelated to the mall’s purposes. Furthermore, Central Hardware represented the Court’s refusal to “cut Logan Valley entirely away from its roots in Marsh.”

While a large shopping center has many public characteristics of a “business block” of a municipality, a single free-standing store does not serve a similar public function. Thus, although the store parking lot may be, in effect, “open to the public,” the Court noted that the same could be said about “almost every retail and service establishment in the country, regardless of size or location.”

A property owner’s general invitation to the public to enter a free-standing retail or service facility, for the purpose of doing business there, did not therefore alter the “long-settled rights of private property protected by the Fifth and Fourteenth Amendments.” Furthermore, as Justice Powell noted in Lloyd:

In terms of being open to the public, there are differences only of degree—not of principle—between a free-standing store and one located in a shopping center, between a small store and a large one, between a single store with some malls and open areas designed to attract customers and Lloyd Center with its elaborate malls and interior landscaping.

Thus, Logan Valley and Central Hardware created the constitutional distinction between a large shopping center and a free-standing store.

The constitutional significance of the degree of difference between the shopping center that is the functional equivalent of a “community business block” and the free-standing retail facility was short-lived. In the 1976 case of Hudgens v. NLRB, the Supreme Court overruled Logan Valley and laid to rest the possibility of any federal constitutional right of free speech in private shopping centers and malls. In the labor area, however, Hudgens recognized that striking employees or union organizers might have a statutory right of access to retail facilities under the principles of Babcock.

In Hudgens, four striking warehouse employees picketed their employer, Butler Shoes, in front of one of its retail outlets in a large, en-
closed shopping mall. When the general manager of the mall threatened to have the picketers arrested for criminal trespass, they left the mall. The union responded by filing section 8(a)(1) charges with the Board, which eventually ordered the mall owner (found to be “an employer” under the Act) to cease and desist from denying access to the picketers.

The outcome in Hudgens, however, remained unresolved through a tortuous process of litigation, which the Supreme Court described as “a history of shifting positions on the part of the litigants, . . . in short, of considerable confusion, engendered at least in part by decisions of this Court that intervened during the course of the litigation.” Having determined that “the constitutional guarantee of free expression has no part to play in a case such as this,” the Supreme Court remanded the case to the Board for consideration under the Babcock criteria for accommodating conflicts between employees’ section 7 rights and employers’ property rights “‘with as little destruction of one as is consistent with the maintenance of the other.’”

The Court acknowledged that the “primary responsibility for making this accommodation must rest with the Board in the first instance.” Nevertheless, the Court, in remanding the case to the Board, suggested three aspects of the Hudgens case which distinguished it from Central Hardware and Babcock and which “may or may not be relevant in striking the proper balance” between conflicting section 7 rights and property rights. Whereas both Central Hardware and Babcock involved “organizational activity carried on by nonemployees on the employers’ property,” Hudgens involved (1) “lawful economic strike activity,” (2) carried on by the shopping center tenant’s “employees (albeit not employees of its shopping center store), not by outsiders,” and (3) affecting the property interests, not “of the employer against whom the section 7 activity was directed, but of another.”

The Supreme Court was thus suggesting that the Board consider whether these factors—the identity of the persons asserting the section 7

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155. Hudgens, 424 U.S. at 512. The Board and the court of appeals had initially relied on the Supreme Court’s Logan Valley analysis of a first amendment right of access to find a violation of the NLRA. The Court of Appeals for the Fifth Circuit first remanded the case to the Board for reconsideration in light of the 1972 Supreme Court decisions in Lloyd and Central Hardware. Id. at 510. On remand, an ALJ concluded that the mall owner had violated the Act by excluding the picketers from the mall. The ALJ “ostensibly” applied the Babcock criteria, as required by Central Hardware, but also relied on Logan Valley for “a realistic view of the facts.” Id. at 511. As the case then proceeded back up through the Board, the court of appeals, and, eventually, oral argument before the Supreme Court, additional theories were advanced, including the argument that Republic Aviation controlled the case. See id. at 510-12.

156. Id. at 521.
157. Id. (quoting Babcock, 351 U.S. at 112).
158. Id. at 522.
159. Id.
160. Id.
right, their relationship to the targeted employer, and the identity of the affected property owner—might be relevant in applying Babcock to an admittedly different factual situation. On remand, the Board, in the Scott Hudgens decision,161 applied the Babcock criteria and considered the implications of the Supreme Court's three suggested distinctions between Babcock and Hudgens. The Board found, again, that the section 7 rights of the picketing warehouse employees had been violated when the mall owner threatened them with arrest for trespass.

The Supreme Court's decision in Hudgens was, however, an explicit rejection of the analytical framework of Logan Valley that distinguished large private shopping centers from free-standing retail facilities on the basis of the former's functional equivalence to a municipal "business block." In other words, for purposes of statutory analysis of access disputes under the Act, there should be no difference, a priori, between a large shopping mall and a free-standing store. Hudgens disposed of the public/private distinction between the mall and the single store for purposes of first amendment access questions and statutory access questions. But Fairmont continues to cling to the old constitutional dichotomy.

2. Applying the Fairmont Test

In evaluating the nature and strength of property rights of retail facilities in the post-Fairmont decisions, some Board members started and ended their analysis with the large shopping mall/single-store rules. When this occurred, the use of the "rules" avoided the necessity of any real analysis of property rights. Thus, the "rules" served as a convenient analytical fiction that facilitated the section 7/property rights accommodation. In other cases, however, where mechanical application of the "rules" would have led to outcomes the Board wanted to avoid, the Board turned to other factors to alter the significance and impact of the rules. It becomes clear, then, that the Board itself did not always put much stock in its two property "rules of thumb" in the retail cases, but used them for convenience and for instrumental reasons. But far more important for the Board's analysis is the evaluation of the section 7 activity. If the Board believes that access is important because the section 7 right is very significant, or that access is unwarranted because the section 7 right is insignificant, the shopping mall/single-store property rules collapse and a very different analytical framework emerges.162

a. The Single Store

Two of the 1987 Fairmont decisions involved single free-standing stores, but the property interests in each were evaluated differently. In

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162. See infra Section II.D, pp. 198-204.
Sisters Chicken & Biscuits, members of a construction union attempted to distribute handbills outside the doorways of three Sisters fast food restaurants. The handbillers were protesting the restaurant corporation’s use of nonunion contractors to build and remodel its restaurants. Although no construction or remodeling work was underway at the three targeted restaurants, Sisters had engaged a nonunion contractor to build a new restaurant in the area. When the restaurant management ordered the handbillers off the restaurant property, the union quickly abandoned handbilling at street entrances as ineffective and filed an 8(a)(1) charge. The Board dismissed the unfair labor practice charge, finding that the property interests outweighed the right to engage in area standards handbilling.

Evaluating the property right, the Board noted that each of the Sisters restaurants was “a single facility surrounded by its own parking lot provided for the convenience of its customers.” The restaurants had drive-through service and private off-street parking for customers wanting table service. Interestingly, the Board found that the use of the property for “fast food restaurant service” did not give rise to “any particular privacy concerns” as did the free-standing hotel in Fairmont. This assertion is presented without further analysis, but its meaning is apparent. Free-standing luxury hotels, perhaps even free-standing luxury restaurants, are more “private” than fast-food chains. Only the affluent and wealthy, the appropriately dressed, the high class patron is really “invited” and welcome at the former; the general public—regardless of social class—is “invited” to the latter. The Board made this explicit in its statement that there was “no evidence” that Sisters “places any limitations on general public access to its restaurant entrances for customer purposes.” If this was so, why did the Board find that Sisters was asserting “a substantial property interest in limiting the use to which its property was put”?

Other than the single-store rule, the only explanation given for the property owner’s “substantial” and “compelling” property claim was that there was “no evidence” that Sisters “has ever permitted handbilling, picketing, or any other nonconsumer, nonemployee activity on its private premises.” If there had been evidence of a discriminatory denial of access, the analysis of the dispute would have been completely

164. Id. at 4, 126 L.R.R.M. (BNA) at 1149.
165. Id.
166. Id.
167. Id.
168. Id. The “single-store rule” apparently still has relevance for the Board where free-standing facilities are surrounded by parking areas for the “exclusive use” of patrons, and where the employer enforces rules against solicitation and loitering. See Butterfield Theaters, 292 N.L.R.B. No. 8, slip op. at 9, 130 L.R.R.M. (BNA) 1113, 1115 (1988).
different. Babcock and Republic Aviation support the principle that the employer cannot open her property for nonunion solicitation or distribution of materials and deny similar access for employees or nonemployees engaged in section 7 activities.\footnote{Babcock, 351 U.S. at 112; Republic Aviation, 324 U.S. at 805. In Jean Country, the Board noted that ["w]e of course continue to adhere to the distinct analytical view that a denial of access for Sec. 7 activity may constitute unlawful disparate treatment where, by rule or practice, a property owner permits similar activity in similar, relevant circumstances." 291 N.L.R.B. No. 4, slip op. at 4 n.3, 129 L.R.R.M. (BNA) 1201, 1203 n.3 (1988). The Sixth Circuit affirmed this principle in Emery Realty v. NLRB, 130 L.R.R.M. 2154, 2157 (1988). See also D’Alessandro’s Inc., 292 N.L.R.B. No. 27, 130 L.R.R.M. (BNA) 1089 (1988) (access for informational picketing granted where property owner had previously permitted a wide range of similar activities).}

In many cases, the first step in the section 8(a)(1) analysis of an access dispute should be to determine whether the employer has denied access for protected section 7 activity on a discriminatory basis. If the employer has treated section 7 activity different from other similar activity, then the Board should find an 8(a)(1) violation, regardless of the nature and strength of the property rights and section 7 rights or the existence of alternative means of communication. If there is no evidence of employer discrimination in denial of access, then, and only then, should a Babcock accommodation question be raised.

Evidence of nondiscrimination is, therefore, not evidence that goes toward the issue of the nature and strength of the property right. Nondiscrimination merely places the case within a different analytical framework. Where the property owner has behaved neutrally in denying access uniformly to all "outsiders," the access dispute must be decided on the basis of other evidence and criteria. Even to begin to engage in the Babcock accommodation as proposed in Fairmont, it must be assumed that discrimination is not an issue, either because there was no evidence presented of discrimination or because the property owner introduced evidence of strict enforcement of a nondiscriminatory no-access rule.

The Board’s unanimous conclusion in Sisters that the restaurant’s property right was “substantial,” and that the “compelling property right claim clearly outweighs the Union’s claimed Section 7 right” is mystifying. Unlike the Fairmont Hotel, the restaurant asserted no privacy concerns such as high-class ambience or other limitations on access to the general public. Lack of evidence of discriminatory granting of access for other groups engaged in handbilling, by definition, should not be relevant to the determination of the strength of the property right. Furthermore, status as a single store surrounded by a parking lot is a distinction of a (now defunct) “constitutional dimension” that should be totally irrelevant to the statutory analysis.

The result in Sisters can only be explained in terms of the Board’s
reluctance to permit area standards handbilling on private property.\textsuperscript{170} The Board noted that the union's section 7 right was "essentially the same as the section 7 right asserted in \textit{Fairmont}."\textsuperscript{171} The Board considers this type of section 7 activity to be "of limited significance and 'not at the core purpose for which the NLRA was enacted.'"\textsuperscript{172}

The relevance of the Board's single-store rule in its analysis of competing property and statutory rights became clearer in the \textit{Schwab Foods} decision. \textit{Schwab} involved a union engaged in an economic strike brought on by a breakdown in contract negotiations with a supermarket owner.\textsuperscript{173} The bargaining unit consisted of the employees of one store—the Mooresville store. The striking employees and union representatives engaged in strike-related activity at the Mooresville store and at three other nonunionized Schwab stores in the area. The access disputes, however, involved only two stores: the Mooresville store, which was part of a two-store center,\textsuperscript{174} and the Martinsville store, a free-standing store.

The Board disagreed on the relative strength of the property and section 7 claims in the Martinsville dispute.\textsuperscript{175} At Martinsville, the store, the parking lot, and the land at the parking lot entrances were owned by Schwab Foods. Several striking Mooresville employees and union representatives patrolled with picket signs on private property next to the entrance and exit to the store's parking lot. Within a short time the pickets were warned by police in a patrol car not to obstruct traffic. Minutes later, a person identifying himself as the chief of police threatened them with arrest if they did not move to the closest public sidewalk, which was across the street. The pickets moved across the street, where they "found 'there wasn't anybody walking down the street' and they just were not effective at all and left."\textsuperscript{176} Subsequently, attorneys for the city and the union entered into an agreement allowing the union's pickets to patrol a private area "running along the lower edge of the parking lot" which was "defined" as a public "easement," although there was no public sidewalk

\textsuperscript{170} Cf. \textit{Butterfield}, 292 N.L.R.B. No. 8, slip op. at 9, 130 L.R.R.M. (BNA) at 1115 (permitting access to a free-standing cinema where the § 7 right was the "core" right of primary economic activity).

\textsuperscript{171} \textit{Sisters}, 285 N.L.R.B. No. 105, slip op. at 4, 126 L.R.R.M. (BNA) at 1149.

\textsuperscript{172} \textit{Id.} at 5, 126 L.R.R.M. (BNA) at 1149 (citation omitted).

\textsuperscript{173} In addition to resolving the access dispute, the Board found that the employee violated §§ 8(a)(1) and 8(a)(5) by engaging in surface bargaining. In context, the 1977 access dispute was but a part of the employer's long history of hostility to unions. Schwab Foods, Inc., 284 N.L.R.B. No. 120, slip op. at 1-2 n.2, 125 L.R.R.M. (BNA) 1225, 1226 n.2 (1987), enforced, 129 L.R.R.M. (BNA) 2601 (7th Cir. 1988). For earlier history of the parties, see Schwab Foods, 197 N.L.R.B. 1068 (1972); Schwab Foods, 233 N.L.R.B. 394 (1976).

\textsuperscript{174} The description of the strike at the Mooresville store and the Board's analysis of it are discussed \textit{infra} in text accompanying notes 188-94.

\textsuperscript{175} This part of the Board's \textit{Schwab} decision provoked a strong dissent by Chairman Dotson. 284 N.L.R.B. No. 120, slip op. at 12, 125 L.R.R.M. (BNA) at 1229 (Dotson, dissenting).

\textsuperscript{176} 284 N.L.R.B. No. 120, slip op. at 7, 125 L.R.R.M. (BNA) at 1227.
Members Johansen and Babson affirmed the ALJ's finding of an 8(a)(1) violation in the Martinsville access dispute. The majority acknowledged the Fairmont rule that "a single store surrounded by its private parking lot has a more compelling property right claim than the owner of a large shopping mall." The Board found, "[n]evertheless," that "on balance" this property claim was "not stronger than the significant section 7 right exercised by the striking employees in picketing at Martinsville." The factors which made up this "nevertheless" in the majority's property analysis were that (1) the store had "issued a general invitation to the public to enter its parking lot and patronize its store," (2) "no restrictions were placed on public access to the property," (3) the property claim "concerns an area far removed from the store entrance," and (4) there was "no evidence of safety or other problems associated with the Union's activity at the entrance to the parking lot."

In Chairman Dotson's dissenting analysis of the strength of the property claim, he first referred to the Fairmont single-store "rule," noting that "in Fairmont . . . the Board found a single store surrounded by its private parking lot presents a particularly strong property right." Dotson stated: "the property right in question at Martinsville is just the type referred to in Fairmont." He then concluded that Schwab Foods "was attempting to preserve a substantial private property right when it prohibited patrolling by the pickets at Martinsville." Because Dotson found the section 7 interest "attenuated" and the property right "substantial," he would have dismissed the section 8(a)(1) complaint.

While Dotson could avoid any real analysis of the property claim by appealing to the Fairmont single-store rule, the Board majority had to engage in a more substantive analysis to show why the single-store rule did not apply to this case. But its analysis still does not provide insight into what distinguishes this single store from other single stores. The first two factors—a general invitation to the public to patronize the store, and an absence of restrictions on access—do not distinguish this store from any other retail or service facility, whether it be a single store, a restaurant, a hotel, or a shopping mall. Retail and service facilities must invite the "general public" as patrons and facilitate access to do

177. Id. at 7 n.11, 125 L.R.R.M. (BNA) at 1227 n.11.
178. Id. at 10, 125 L.R.R.M. (BNA) at 1228.
179. Id.
180. Id.
181. Id. at 30, 125 L.R.R.M. (BNA) at 1235 (Dotson, dissenting). The Board, of course, presented its single-store/shopping mall rules as dictum, not doctrine.
182. Id.
183. Id.
184. Id. at 30-31, 125 L.R.R.M. (BNA) at 1235.
business. 185

The final factor—the lack of evidence of "safety or other problems" with the picketing at the entrance to the store parking lot—does not contribute much to an analysis of the store's right to exclude for trespass, but is rather an observation about the conduct of the picketing. No matter where the picketing occurs, whether on private or public property, if safety is a problem, the state can intervene to restrain picketing that is violent, blocks ingress and egress, or harasses customers. 186 The employer does not need to rely on the laws of trespass. The fact that picketing could be safely conducted at the parking lot entrances means that the only way the property owner could remove the pickets from that location was to rely on trespass—the right to exclude based on bare title alone. The Board members did not take their analysis that far because it would have forced them to confront the fact that the right to exclude, conceived as an absolute right, is the property right they are protecting in cases where they find a "strong" or "compelling" property interest.

An intriguing factor used to find that the Martinsville store had asserted a "relatively limited" property interest was that the property claim concerned "an area far removed from the store entrance." 187 The majority offered a novel notion that an owner's property rights are diluted at the perimeter of the property and grow stronger closer to the actual entrance to the enclosed building that houses the retail facility. If the right to exclude because of title or possession is an absolute, the right should not depend on how close to the building the trespass occurs. This was essentially the position taken by the property owner in Schwab Foods.

The Board's analysis indicates they might have evaluated the property right differently if the picketing had occurred at the store entrance, as in Sisters, rather than at the periphery of the parking lot. What the union wants, of course, is to picket or handbill at the entranceway to the target store, whether that entrance is on a public sidewalk or hundreds of feet from the nearest public sidewalk. Picketing or handbilling at vehicular entrances, aside from safety considerations, is never as effective as face-to-face encounters with pedestrians as they enter a store.

185. Although being "open to the public" does not make such facilities into "public forums" for federal first amendment purposes, the privilege of engaging in interstate and intrastate commerce carries with it certain limitations on the right to exclude. See, e.g., Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964). For example, the Supreme Court has recently upheld the constitutionality of a New York City law which makes it unlawful for private clubs that, in effect, serve business and commercial purposes to deny membership to persons on the basis of sex, race, or religion. The principle that even the most "private" facilities cannot deny access on a discriminatory basis when they engage in commercial functions illustrates the "public" responsibilities, and loss of "private" control, which the state can impose on the privilege of access to the commercial market. See New York State Club Ass'n v. City of New York, 108 S. Ct. 2225 (1988).

186. See infra text accompanying notes 327-29.

187. Schwab Foods, 284 N.L.R.B. No. 120, slip op. at 10, 125 L.R.R.M. (BNA) at 1228.
The union pickets at the Martinsville store, however, had chosen a location for their picketing that was not very "intrusive," since they had not moved very far onto private property. But the picketing was also not "intrusive" because it was not likely to be very effective so "far removed" from the store entrance. The Board here has offered a corollary to its single-store "rule" which devalues an otherwise "compelling" property right in a case where the "intrusion" onto the property is de minimis and has limited economic effect. If valuation of economic impact is the reason for the corollary, then it becomes clear that the Board here would approve the use of trespass laws to insulate employers from the potentially harmful economic consequences of disputes with unions, but not the ones that are relatively harmless. In the end, the owner of the single, free-standing store wins because the Board's "corollary" to its single-store property "rule" protects what the owner, for economic reasons, most wants to protect—the customer and employee pedestrian entrances. But the business owner's ability to protect the pedestrian entrance may depend on the fortuity of her owning and operating a single, free-standing store surrounded by a large, private parking lot. When the context of the access dispute moves to a multi-store setting, the owner's ability to assert property rights to protect economic interests decreases, but not completely, as the following cases indicate.

b. The Two-Store Center

Schwab Foods also analyzed the access dispute in a two-store setting. Several striking Mooresville employees, accompanied by nonemployee union supporters, began to picket and handbill in the vestibule and walkway area at the entrance to the Mooresville supermarket. A store vice president called the police and threatened to have the pickets arrested if they did not move their activity to the parking lot entrances. After the police arrived and threatened to arrest the pickets, they moved to the parking lot entrances, where they continued their picketing and handbilling without further incident. Subsequently, the union filed an 8(a)(1) unfair labor practice charge, and both the ALJ and the Board found that the employees' section 7 rights had been violated.

The entrance area to Schwab's Mooresville store, as well as the parking lot, was "shared" with an adjoining drugstore, and the entire facility was leased from a "disinterested third party." The customers and employees entered the Schwab supermarket, which was open twenty-four hours a day, through this common vestibule. Schwab Foods used the canopy-covered walkway, which ran along the front of the adjoining stores, for vending machines, "extra" shopping carts, and "bulky sea-
sonal merchandise.” 189

The Board majority in Schwab Foods, after some analysis of the company’s property claim, found that it was “a relatively weak one.” 190 The Board quoted the Fairmont single-store and shopping mall “rules” first, as their primary authority for finding a “relatively weak” property interest, and then proceeded to support their analysis with a list of additional factors. These factors were: (1) the supermarket had “invited the general public to patronize its store,” (2) the common vestibule/walkway, shared with the adjoining drugstore, was not limited to customers of the supermarket, but was “open to virtually anyone,” (3) access to the common parking lot was not “restricted in any way,” and (4) the pickets “did not pose a significant impediment to persons seeking to enter and leave the stores.” 191 Thus, in view of the “unrestricted access” and “dilution” of property rights because of the “presence of the adjoining business,” the property rights were relatively weak. 192 However, it is precisely because ingress and egress was not blocked that the store resorted to property rights—the trespass laws and the police—to exclude the pickets. The “compelling” property right asserted was nothing more than the absolute right to exclude because of the store’s possessor interest in the property.

Chairman Dotson, in dissent, argued that the company was “asserting a compelling property right in limiting the use to which its property was put.” 193 To reach this conclusion, he characterized the facts in a very different fashion, emphasizing problems of congestion at the store entrance. Dotson’s concern that the store be able to maintain its normal “atmosphere” is even more troubling than his misplaced and mistaken concern about the entranceway being physically blocked. Presumably the normal “atmosphere”—without pickets or handbillers, without striking employees, without a labor dispute—is most conducive to the relaxed, inviting shopping environment the store has attempted to create. What Dotson was trying to protect was the store’s ambience, just as the Board protected the “decorum” of the Fairmont Hotel entranceway.

The notion that a specially created atmosphere is a substantial property right appears implicitly in several post-Fairmont decisions. It is true that atmosphere, ambience, and decorum are created out of a property owner’s expenditures for real estate, location, building materials, architecture, landscape design, advertising, fixtures, furnishings, and service and security personnel, and the like. Such “investment” in creating an environment that is inviting and pleasing to customers and employees in

189. Id.
190. Id. at 8, 125 L.R.R.M. (BNA) at 1228.
191. Id.
192. Id.
193. Id. at 29, 125 L.R.R.M. (BNA) at 1234.
the retail and service sector, or to clients and employees in the business sector, is clearly valuable to the retail store or business owner. Physical damage to fixtures, furnishings, the landscape, and the other physical assets that make up the "atmosphere" is damage to the owner's property. But it is important to ask how union handbilling and picketing, otherwise legal under the Act, actually harm or destroy the property owner's investment in atmosphere and decorum. Is the law simply vindicating the property owner's interest in having "the right people" around?

Employers do not assert trespass laws to protect the "atmosphere" from physical harm. Other tort and criminal laws adequately protect employers against damage to their physical property. An employer's concern about economic harm to her business interests due to the effects of handbilling or picketing is certainly the primary reason she asserts trespass laws. But the Board has undercut federal labor policy by permitting employers to assert bare title to land as a means of avoiding the economic consequences of unionism. It is for this reason, presumably, that Babcock required an "accommodation" of the competing property and statutory interests, so that trivial or insignificant property interests would not defeat important statutory rights.

Business owners will use trespass laws to avoid otherwise legitimate economic harm when union picketers or handbillers come onto their private property, regardless of the trespassers' impact on the "atmosphere." So why has the property owners' creation of an ambience or atmosphere become so important in these access disputes? The Board apparently believes that a special ambience means a stronger property right. An atmosphere of exclusivity thus enhances the employer's ability to exclude protected section 7 union activity under the Fairmont test. Ambience is important not only because it is good for business, but also because it strengthens the trespass claim. Ambience adds weight to the right to exclude and makes it more difficult for unions to gain access.

Additional investment in "atmosphere," then, may be viewed as investment in a union-free environment. The property owner with property plus "atmosphere" has greater assurances of avoiding the intrusion of pickets and handbillers if a dispute comes before the Board. The Board's deference to "atmosphere," however, creates an analytical distinction between property claims apparently based on class and wealth. It may be, too, that the Board's inclination to protect "atmosphere" is a mirror of the property owner's sentiment about unions. The harm caused by union or employee picketing at a place like the Fairmont Hotel entrance is not in the economic harm of turning hotel customers away because they wish to join the union's cause. Indeed, it is highly unlikely

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194. See discussion of federal labor preemption and the Sears case, infra Section III.A, pp. 208-18.
that many of the patrons of the hotel will be sympathetic to the union's cause. But the harm is that the existence of "labor trouble"—face-to-face confrontations with working people and their labor problems—will be distasteful or discomfiting to hotel patrons, and will drive them away. In a sense, unions can turn class and anti-union bias to their advantage: they can impose economic harm indirectly, by affecting the "atmosphere," in cases where direct appeals to union sympathy or solidarity might not work.

The Board has, on the basis of underlying class assumptions, chosen to protect symbols of social status at the expense of federal statutory rights. Such assumptions conflict with the democratic, egalitarian aspirations of the federal labor statute, and its expressed purpose of re-dressing the "inequality of bargaining power" between employees and employers. Nevertheless, Babcock granted special deference to the formal property entitlements of the owner of land. And the Fairmont gloss on the Babcock analysis explicitly recognizes accouterments of wealth, class, and status that can be associated with and created through the ownership of land. The message of Fairmont and the post-Fairmont decisions is that if the property owner highly values a union-free environment, she will invest in exclusivity.

c. The Small-to-Medium-Sized Mall

In access cases involving small shopping centers, the Board continued to have problems consistently applying the Fairmont test. Five of the 1987 Fairmont decisions dealt with shopping malls ranging in size from four stores to twenty stores. In all of these cases the Board found, consistent with the Fairmont shopping mall "rule," that the property owner had "retained only a very limited property right claim" to the area in dispute, usually at the store entranceway or in the parking lot. But there was not always complete agreement among the Board members as to how weak this property claim was. In four of the five decisions, Chairman Dotson found that the property right outweighed the section 7 right, thus eliminating the need to consider alternative means of communication, whereas Member Babson found the competing claims relatively equal in strength, thus requiring consideration of alternative means of communication.

United Supermarkets was the one decision where the Board members agreed on the relative strengths of the property and section 7 rights,

and was the only decision of this group of five cases in which an 8(a)(1) violation was found and union access granted as a remedy. *United Supermarkets* involved unfair labor practice picketing by two employees who had been discharged, allegedly for union activity. The two discharged employees, wearing picket signs and accompanied by two union representatives, walked up and down the sidewalk in front of the supermarket. The store called the police, and the four pickets were arrested, prosecuted, and ultimately acquitted of criminal trespass.

The Board characterized the store owner's property rights in *United Supermarkets* much as it did in the four subsequent small to medium-sized mall cases and the two-store cases. After quoting the *Fairmont* "accommodation" formula and the *Fairmont* single-store/shopping mall rules, the Board noted that the case involved a "small shopping center which the general public is invited to patronize." The customer parking lot, which was shared with the other stores in the shopping center, provided "ready access from the adjacent public streets," and there were "no restrictions on access through these entrances." The Board found that it was "apparent" that the sidewalk in front of the supermarket was "open to virtually anyone and certainly to customers of any of the merchants at the shopping center." The supermarket's property rights in its sidewalk were thus limited by the fact that "access to the sidewalk" was "so unrestricted" and it was "commonly used by persons who [were] not customers, employees, or suppliers of the supermarket." These themes, or refrains, were repeated, nearly verbatim, in the analyses of the remaining small-to-medium mall cases.

Thus, the most one can say in summarizing the small sized shopping mall cases is that the store owner's property right, consistent with the *Fairmont* "rules," was considered relatively weak. But the weight assigned to the property right and the burdens placed before the General Counsel depended on the individual perspective of the Board member deciding the case. Even in cases where the General Counsel argued that

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197. While it delayed in settling the access dispute, the Board did decide the issues surrounding the employees' discharge. In a decision five years earlier, it found that the employer did commit unfair labor practices in discharging one of these two employees for union activity and for refusing to bargain with the union after it was certified. See *United Supermarkets*, 261 N.L.R.B. 1291 (1982).

198. See supra text accompanying notes 188-92.

199. *United Supermarkets*, 283 N.L.R.B. No. 130, slip op. at 4-5, 125 L.R.R.M. (BNA) at 1071.

200. *Id.* at 5, 125 L.R.R.M. (BNA) at 1071.

201. *Id.* Because the Board unanimously found the property right weak and the § 7 right quite strong, it was "unnecessary to consider the availability of reasonable alternative means by which the Union could have communicated its message to its intended audience." *Id.* at 7, 125 L.R.R.M. (BNA) at 1072.

202. See Browning's, 284 N.L.R.B. No. 104, slip op. at 4 n.4, 125 L.R.R.M. (BNA) at 1265 n.4; Smitty's, 284 N.L.R.B. No. 128, slip op. at 5 n.4, 125 L.R.R.M. (BNA) at 1269 n.4; Skaggs, 285 N.L.R.B. No. 62, slip op. at 5 n.1, 126 L.R.R.M. (BNA) at 1151 n.1; L & L, 285 N.L.R.B. No. 122, slip op. at 7-8, 126 L.R.R.M. (BNA) at 1154.
the property rights were weak and the section 7 claims very strong, the Board could disagree and require proof of (virtually complete) lack of reasonable alternative means of communication before granting access.

In the seven cases dealing with two-store centers and small shopping malls, access depended on the Board finding a section 7 right which it considered important and worth protecting. The Board granted access for exercise of section 7 rights that they found compelling, such as the unfair labor practice picketing in United Supermarkets and the primary strike activity in Schwab Foods. The four cases in which access was denied involved informational or area standards picketing, generally by nonemployees.\footnote{203} Even where the private property rights are weakest, in that most “public” of spaces, the small suburban shopping center, the communication rights of unions and employees may not be found as significant as the right to exclude. The Board has thus succeeded in completing the task it denied it began in the Fairmont decision: it has rejected and discredited the analysis and conclusions of its 1979 decision, Giant Food Markets.\footnote{204} Given the difficulty of proving that a union lacks “reasonable alternative means of communication,” it is unlikely that the Board will often permit area standards activity on private property.

d. The Mega-Mall

The future of effective area standards picketing and handbilling in the face of the “malling” of America seems to have been finally determined by one of the last Board shopping mall decisions—in a case dealing with a mega-mall. In Homart Development Co., the Board analyzed the property interests of the Fiesta Mall in Mesa, Arizona. It is a prototypical mega-mall—a massive building housing the department store involved in the case, three other large department stores, and 135 smaller tenants, surrounded by a privately owned two-level parking area. The corporation that developed, owned, and maintained the mall also owned and operated “at least 50 shopping malls throughout the United States.”\footnote{205} A plumbers’ union objected to the substandard wage scale paid by nonunion subcontractors working at the construction site of a new Diamond’s department store being built at another location. To take their area standards dispute to the public, the union initiated a consumer boycott of Diamond department stores through a handbilling

\footnote{203. See cases cited supra note 202. For discussion of the place of area standards picketing in the “hierarchy” of § 7 rights, see infra Section II.D.4, pp. 203-04.}

\footnote{204. The Board stated in Fairmont that “[w]e do not pass here on the conclusion reached by the Board in Giant Food,” 241 N.L.R.B. 727 (1979), which granted area standards pickets access to the private sidewalk in front of a supermarket in a two-store shopping center. 282 N.L.R.B. No. 27, at 8 n.16, 123 L.R.R.M. (BNA) at 1259 n.16.}

\footnote{205. Homart, ALJ Decision, JD-(SF)-195-82, slip. op. at 6.}
campaign directed at the customers of their stores located in six metropolitan Phoenix shopping malls.

At the Fiesta Mall, nonemployee union representatives distributed handbills on the mall sidewalk several feet from the outside entrance to Diamond's department store. The handbills requested "the public" not to patronize Diamond's because it "was building a store using construction companies which paid substandard wages." Within a few minutes after the handbilling began, a mall security guard informed the union representatives that they "could not be handing out handbills" at that location because they were "on private property." He directed them toward a mall entrance at the road surrounding the periphery of the mall property, and they left. For over a month, the union continued handbilling (or, more accurately, "carbilling") on the median strip at one of the vehicular entrances to the Fiesta Mall. At this point the police forced them to abandon this location because they were "'creating an act of entrapment' of the motorists." Because the union considered the other vehicular entrances too dangerous or ineffective, and did not want to risk "a trespass lawsuit" by reentering the mall property, they abandoned their handbilling at the Fiesta Mall and filed an 8(a)(1) charge.

The Board dismissed the complaint. But Chairman Dotson and Member Babson once again disagreed on the relative strength of the property right, as well as the section 7 right. Babson found that the property claim was "not a strong one." His analysis of the property claim was consistent with his analysis in other shopping center cases:

The Fiesta Mall is large and open to the general public 7 days a week. Although marked as "private property," restriction to use of the mall, its walkways, and parking lot is limited. Both the parking lot and the sidewalk in front of the mall are open to virtually anyone, and certainly they are open to customers of any of the 139 businesses at the mall.

Dotson, on the other hand, focused on the ways in which the mall had attempted to maintain its exclusivity by strictly enforcing rules and regulations prohibiting "all individuals and organizations from coming on its property (either inside or outside) to distribute literature for any type of activity or stated purpose." The no-distribution rule was maintained by the mall owner "to promote and provide a conducive

207. Id. at 5, 126 L.R.R.M. (BNA) at 1246.
208. Id. at 5-6, 126 L.R.R.M. (BNA) at 1246.
209. The Board quoted the Fairmont single-store/shopping mall rules, acknowledged their disagreement regarding the relative weight of the competing property and statutory claims, and then, "assuming the relative equality of these interests," proceeded to analyze the reasonable alternative means of communication. Id. at 7-8, 126 L.R.R.M. (BNA) at 1246-47.
210. Id. at 8 n.12, 126 L.R.R.M. (BNA) at 1246-47 n.12.
211. Id. at 7 n.12, 126 L.R.R.M. (BNA) at 1246 n.12.
shopping environment."212 Again, the mall owner’s investment in an exclusive “atmosphere” emerges as a relevant factor in the evaluation of the property right. Dotson wrote, “although the mall is large, having 139 stores and a parking lot accommodating 15,000 cars daily, the [mall owner] ensures ‘a very pleasant environment’ by protecting potential customers from solicitation and distribution of literature unrelated to the sale of merchandise by its retail tenants.”213 Dotson concluded that, although the mall was open “to the general public,” the mall owner was “asserting a substantial property interest in limiting the use to which its private property was put.”214

The rules which a property owner establishes for the comprehensive exclusion of classes of persons or types of activities should not affect the Board’s decision about whether persons engaged in federally protected activity should be excluded as well. Under Dotson’s analysis, property owners who want to insulate themselves from union activity now have strong incentives to adopt and enforce broad rules prohibiting solicitation and distribution. As long as the rules are applied in a nondiscriminatory fashion, they strengthen the argument that the property owner is protecting a “substantial” property right—its environment, its ambience, its pleasant atmosphere.

Dotson characterized the mega-mall as more “private” than small shopping centers because of the owner’s control of the environment and imposition of rules. Clearly the Fairmont “rules of thumb” lost their utility for Dotson when he changed the focus from size to “atmosphere.” Ironically, the giant private suburban malls that serve as a social and commercial substitute for the public urban retail center—the old “down-town”—are successful, to a great degree, because they can exclude that part of the public “real” world that is not conducive to a “pleasant” shopping, socializing atmosphere.215 But in order to be able to exclude unions along with the “undesirables”—street vendors, panhandlers, the homeless, sidewalk preachers, and the like—the mall must exclude some groups they might want to include for purposes of civic virtue, such as the Girl Scouts, the League of Women Voters, and the Veterans of Foreign Wars. Under the Board’s analysis, if the mall owner allows, or has

212. Id.
213. Id. at 7-8 n.12, 126 L.R.R.M. (BNA) at 1246-47 n.12.
214. Id.
215. As historian Kenneth Jackson has noted:

In reality, even the largest malls are almost the opposite of downtown areas because they are self-contained and because they impose a uniformity of tastes and interests. They cater exclusively to middle-class tastes and contain no unsavory bars or pornography shops, no threatening-looking characters, no litter, no rain, and no excessive heat or cold. . . . [T]heir emphasis on cleanliness and safety is symptomatic of a very lopsided view of urban culture.

at one time allowed, charitable solicitations or distributions, the strength of its property claim is greatly diminished, even apart from the issue of discrimination against union activity. This principle is demonstrated in another post-Fairmont case dealing with access to an urban arcade.

e. The Urban Arcade

In Emery Realty the Board granted nonemployee union organizers access to a private urban arcade.\footnote{216} Emery owned and operated the Carew Tower, a complex in downtown Cincinnati containing a forty-seven-story office building, retail and service shops, and a hotel employing about 300 employees who were not unionized. The hotel employees' entrance was recessed about six feet off the main lobby or "arcade" of the complex. The arcade itself, lined with store fronts, was a city block in length with numerous entrances from stores, the public streets, and a public skywalk system connecting some of the downtown buildings. The arcade was used by employees, tenants, and customers of the Carew Tower complex, but was also used by pedestrians "simply as a convenient passageway to other buildings."\footnote{217} Three representatives of a hotel employees union attempted to handbill at the employee entrance to the hotel, but left minutes later when private security guards informed them that soliciting was not permitted and that they would be arrested for trespass if they refused to leave.\footnote{218}

In "assessing the relative strength" of the Emery's property claim, the Board noted that the arcade was open "to the public generally," with no restrictions on access.\footnote{219} In fact, access was permitted "7 days a week, 24 hours a day . . . even when the arcade stores and shops [were] closed for business."\footnote{220} Access was permitted without restriction to "those who are merely pedestrians who simply want to use the arcade as a cut-through between streets."\footnote{221} Thus, the interior store arcade was, in most respects, functionally indistinguishable from a public street. Because of the pedestrian "cut-through" and the lack of access restrictions or hours, the arcade was, technically, even more open to the general public than a shopping mall. Indeed, the Board did not rely on or even refer


\footnote{217} Id. at 2, 126 L.R.R.M. (BNA) at 1241.

\footnote{218} Several days later, during a second attempt to distribute organizational handbills at the hotel employees' entrance, the union organizers were confronted by security guards, the Emery's building superintendent, and two police officers, and again threatened with arrest for trespass. Id. at 3-4, 126 L.R.R.M. (BNA) at 1242.

\footnote{219} Id. at 4, 126 L.R.R.M. (BNA) at 1242.

\footnote{220} Id. at 4 n.4, 126 L.R.R.M. (BNA) at 1242 n.4. The Board acknowledged that Emery "does close the arcade for a short period of time during one night each year as a means to preserve its status as owner." Id.

\footnote{221} Id. at 4, 126 L.R.R.M. (BNA) at 1242.
to the *Fairmont* shopping center "rule" in finding that the owner's property interest in the arcade was "relatively weak."222

Nevertheless, despite the arcade's openness and function as a "cut-through," the owner did attempt to exercise certain control over its use that would have been typical in a large shopping mall. Shortly after the union's attempted handbilling, Emery Realty instituted a rule forbidding charitable solicitations. Emery had "in the past permitted solicitations in the arcade by various social service organizations," and continued to permit "Christmas displays on the arcade floor."223 The patrolling of private security guards, and the (belated) imposition of a no-solicitation, no-distribution rule which the guards enforced, made the arcade more "mall-like" and less like a public pedestrian thoroughfare. But the lack of evidence that past charitable solicitation had caused "any interference with Emery's property rights" or "interfered in any way with the normal use of the arcade" undercut its claim to a protectible interest in its atmosphere, or ambience.224 Thus, although the arcade was, in many respects, an urban analog of the suburban shopping center, the Board did not make that comparison. Instead it stressed the arcade's "low degree of 'privateness'" due to the owner's failure to consistently maintain an atmosphere of exclusivity.225

The Board concluded that the section 7 right outweighed the property right. It found that the property owner's interest in the arcade area near the hotel employees' entrance was "relatively weak,"226 and the union's section 7 interest in organizational solicitation—one of the interests "at the 'very core'" of the NLRA—was "quite a strong one."227 Since the two rights were not relatively equal, the Board, applying *Emery Realty*, did not consider the union's reasonable alternative means of communication to be determinative. Yet, as an additional theory to support their access order, the Board also found that the union had no reasonable alternative means of communication with the hotel employees.228

The willingness of the Board to permit access in *Emery Realty* thus

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222. Id. at 7, 126 L.R.R.M. (BNA) at 1243.
223. Id. at 4-5, 126 L.R.R.M. (BNA) at 1242.
224. Id. at 5, 126 L.R.R.M. (BNA) at 1242.
225. Id. at 4-5, 126 L.R.R.M. (BNA) at 1242. The Board also noted that, unlike the economic relationship in the *Fairmont* case, Emery Realty, the hotel's lessor, had an "economic interest in the business success of the employer with whom the Union [had] its primary dispute." Id. at 5, 126 L.R.R.M. (BNA) at 1242. While Emery's economic relationship with the hotel was quite direct, and indeed the lease price may have been tied to the hotel's profits, this analysis ignores the indirect economic benefit—through lower prices—which the Fairmont Hotel undoubtedly received from doing business with a baker whose delivery truck drivers were nonunionized. See supra text accompanying notes 36-37.
226. 286 N.L.R.B. No. 32, slip op. at 7, 126 L.R.R.M. (BNA) at 1243.
227. Id. at 5, 126 L.R.R.M. (BNA) at 1242.
228. It was this finding which "salvaged" the Board's *Fairmont* analysis from being found defective by the Sixth Circuit. See *Emery Realty v. NLRB*, 130 L.R.R.M. (BNA) 2154, 2159 (1988).
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depended on a unique configuration of weak property rights, strong section 7 rights, and demonstrated lack of reasonable alternatives of communication. The arcade was more accessible to the public than the Fiesta Mall in Homart Development. And Emery had only recently attempted to impose no-solicitation rules. Also the section 7 activity concerned “core” rights of organization rather than the peripheral rights of protecting area wage scales.229

But the absence of injury to “ambience” appears to have played a significant role in the result. The union “stayed in its place” in every sense of the phrase. The Board stressed that the union had confined its handbilling activity to a small, recessed area “directly in front of the employees’ entrance to the Hotel, which was reserved solely for their use and which was also the only entrance the Hotel employees were supposed to use.”230 Therefore, the handbilling occurred “completely off the arcade itself.”231 There were no allegations that the handbilling “interfered in any way with the normal operation of the arcade,” nor any “evidence of complaints, by merchants, customers, or even pedestrians regarding the handbilling.”232 In fact, the handbilling was “in such proximity to the targeted employer’s employees that the Union could not have more carefully restricted its handbilling activities so as to be able to reach the intended audience while not disturbing others.”233

The Board thus assumes that union activity on “public” types of private property is acceptable as long as the “public” does not have to be “disturbed” by what is going on. If the union “interferes” with customers and merchants, the case begins to look very different. Area standards consumer boycotts “interferes” with the “normal operation” of the arcade, because their purpose—to encourage people not to buy certain products or from certain merchants—runs counter to the purpose of the arcade—which is to encourage consumerism. But organizational activity directed exclusively at employees and confined to the separate employees’ entrance—the equivalent of the servants’ or service entrance to a mansion—does not “disturb” others. The physical segregation and isolation of the labor activity from the other commercial activity of the mall confines the labor “disturbance” to the laborers.

229. For discussion of the hierarchy of section 7 rights, see infra text accompanying notes 234-40.
230. 286 N.L.R.B. No. 32, slip op. at 6, 126 L.R.R.M. (BNA) at 1243.
231. Id.
232. Id. The implication is that if someone was bothered by the handbilling, regardless of why they were bothered, the argument for denying access would be greater. This creates an almost irresistible incentive for merchants and customers to complain, particularly if their real reasons are antiumion hostility.
233. Id. (emphasis added).
D. The "Hierarchy" of Section 7 Rights

The *Fairmont* test requires an evaluation of the "strength or weakness" of the asserted section 7 right.\(^{234}\) The Supreme Court in *Hudgens* endorsed the concept of a "spectrum" of section 7 rights (and property rights) when it stated that the "locus of the accommodation of section 7 rights and the private property rights . . . may fall at different points along the spectrum depending on the nature and strength of the respective section 7 rights and property rights asserted in any given context."\(^{235}\) The Court has suggested that some section 7 rights are more significant than others in that they are closer to the "core" purposes for which the Act was passed.\(^{236}\) For example, in dictum in *Sears*, the Court suggested that "the right to organize is the very core of the purpose for which the NLRA was enacted."\(^{237}\) On the other hand, the Court observed, "[a]rea standards picketing . . . has only recently been recognized as a § 7 right."\(^{238}\) The Court asserted that because area standards picketing does not have a "vital link to the employees located on the employer's property," the "argument" for protecting it is "less compelling than that for trespassory organizational solicitation."\(^{239}\) The Supreme Court has also recognized primary economic strike activity as a "core" purpose of the Act.\(^{240}\)

In *Hudgens*, the Court noted that "the primary responsibility for making [the] accommodation [between section 7 rights and property rights] must rest with the Board in the first instance."\(^{241}\) Nevertheless the *Fairmont* Board deferred to the Supreme Court dictum in *Sears* about how the accommodation should be made, rather than making the accommodation "in the first instance." Consequently, the Board avoided altogether any serious analysis of either the concept of a hierarchy of statutory rights or the criteria for ranking such rights.

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\(^{234}\) See *Fairmont*, 282 N.L.R.B. No. 27, slip op. at 9-10, 123 L.R.R.M. (BNA) at 1259-60; see discussion *supra* text accompanying notes 59-60.


\(^{236}\) Implicit in the Supreme Court's analysis of competing property and statutory rights was the notion that there is a hierarchy of § 7 rights. See, e.g. *id.*


\(^{238}\) *Id.*

\(^{239}\) *Id.* In one of the post-*Fairmont* cases, Dotson took this "argument" one step further by asserting that the interests of area standards pickets are "adverse" to the employees of the target employer. See *Browning's*, 284 N.L.R.B. No. 104, slip op. at 4 n.4, 125 L.R.R.M. (BNA) at 1265 n.4.


\(^{241}\) 424 U.S. at 522.
1. Primary Economic Activity

In line with its Scott Hudgens decision, the Board has generally protected peaceful primary strike activity on private property shared by two or more employers, regardless of whether the activity was engaged in by employees or nonemployees, and without distinctions between picketing and handbilling. Shopping centers, large and small, and office buildings which are "generally open to the public," create problems of identifying customers and employees of the target employer unless access is granted. Moving the pickets and handbillers to the periphery of the property will often not be a reasonable alternative means of reaching the audience, because at a distance from the target employer the message is diluted and neutral employers are enmeshed in the dispute. When a single-employer facility is involved, however, the Board has rarely granted access, regardless of whether the facility is generally open to the public. Given the absence of the problem of enmeshing neutrals, as well as the presence of a clearly identifiable audience, the burden of proving no reasonable alternative means of communication will be extremely high.

The post-Fairmont decision of Providence Hospital demonstrates the difficulties of gaining access in the single-facility context for primary economic activity of employees. In Providence Hospital off-duty nurses picketing during contract negotiations with the hospital were denied access to the sidewalk leading to the hospital's main entrance. The Board found that the hospital's property right "in its hospital and surrounding grounds, which it does not share with any other enterprise, is at least as strong as that of a luxury hotel or a single retail store surrounded by its own parking lot." The picketers were engaged in "primary economic activity" which involved "a core Section 7 right." Nevertheless, the Board found the General Counsel had not met her burden of proving that requiring the pickets to stand in an isolated, dangerous area, along a busy highway entrance to the hospital, denied them reasonable alternative means of communication with their audience of hospital patients and

242. Scott Hudgens, 230 N.L.R.B. 414 (1977) (Board decision on remand of Hudgens, 424 U.S. 507). In Scott Hudgens, the Board noted that economic strike activity "deserves at least equal deference" with organizational picketing. Id. at 416.


246. Id.
employees.247

In sum, even the strongest of section 7 rights—economic picketing by employees—will rarely be "stronger" than the property rights of the occupant of a single-employer facility. Proving the absence of reasonable alternative means of communication will be difficult, if not impossible. Thus, the fortuity that two or more employers share facilities on a single piece of property can result in protected rights of access for primary economic activity of employees. The occupant of the single-employer facility, regardless of whether she "shares" her property rights with co-owners, a landlord, or a mortgagee, can surround her property with a "cordon sanitaire"248 and reasonably expect the Board to respect it even when "core" section 7 rights are at stake.

The consequence is a rule that preserves the autonomy of the solo entrepreneur and elevates her private property to a preferred status, as if her property is the last bastion of rugged individualism and is therefore worthy of distinctive treatment. On the other hand, when developers aggregate individual employers into shopping centers, industrial parks, and office complexes, the individual interests and identities of the employers are subsumed by the shared commercial enterprise. The "private" property interests may be diluted and devalued as a cost of each employer's decision to share property and points of access.

2. Union Organizing Activity

Nonemployee union organizing is also a "core" section 7 right, but as the Supreme Court noted in Sears, "the interests being protected by according limited-access rights to nonemployee union organizers are not those of the organizers but of the employees located on the employer's property."249 Because the organizers are exercising derivative rights, not rights of their own, they are often characterized as "outsiders" or "strangers" to the employer and the employees.250 This has justified a general

247. Id. Nonetheless, the hospital was required to permit the employees to handbill on the sidewalk in front of the hospital because the hospital's rules discriminated against union solicitation on its property. See id. at 8-10, 126 L.R.R.M. (BNA) at 1147.


249. 436 U.S. at 206 n.42 (citing NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956)).

250. The concept of union organizers as "outsiders" to the employment relationship begins to collapse in the face of different views of their role under the Act. First, many union organizers are also "employees" who are protected under the Act regardless of whether they are "employees of a particular employer." NLRA § 2(3), 29 U.S.C. § 152(3) (1982). Second, the Supreme Court has recognized that employees may engage in broad-based collective action "for mutual aid or protection" of employees in general. See Eastex, Inc. v. NLRB, 437 U.S. 556, 564-68 (1978). Finally, the structure and substance of the Act makes unions quasi-public institutions that are carrying out important functions regulated by federal statute and consonant with federal labor policy. The ambiguities of the public/private nature of union organizations have been explored in Klare, The Public/Private Distinction in Labor Law, 130 U. PA. L. REV. 1358 (1982).
rule of protecting the employer’s right to exclude union organizers unless there are no other reasonable means of communication.251

Generally, off-duty employees have more favorable access rights for organizing purposes than the Babcock nonemployee organizers. The technical distinction between the two groups of organizers is that off-duty employees are still employees, and therefore, cannot be trespassers on the employer’s property. In property terms, the off-duty employees are licensees, whose license has been expanded by Board doctrine. Indeed, in 1976, in Tri-County Medical Center,252 the Board adopted a broad access rule for off-duty employees which states that, “except when justified for business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.”253

In his dissent in one of the 1987 post-Fairmont cases, Pizza Crust Co., Chairman Dotson argued that the Fairmont test should be extended to an access dispute involving employees on workers compensation leave.254 The employees attempted to distribute union literature to co-workers in the parking lot of a factory. Applying Fairmont in such circumstances would generally result in a denial of access. The Board majority, however, adopted the position that its Tri-County test, not the Fairmont balancing test, should be applied when employers interfere with access rights of their off-duty employees, regardless of the reasons the employees are “off-duty.”255

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251. Two of the 1987 Fairmont cases—SCNO and Gladders—demonstrate how difficult it may be under the Fairmont analysis for union organizers to prove they lack reasonable alternative means of communication, even in isolated work environments. The cases involved union requests for access to river barges and towboats for the purposes of union organizing. In Gladders, the Board found that the barge company had violated § 8(a)(1) by denying the union both access and a mailing list of employees. G.W. Gladders Towing, 287 N.L.R.B. No. 30, 127 L.R.R.M. (BNA) 1088. In SCNO, however, the Board found that although the company denied the union access, it had not violated § 8(a)(1) because it provided the union with a list of the names and home addresses of its employees who lived in twelve states. SCNO Barge Lines, 287 N.L.R.B. No. 29, 127 L.R.R.M. (BNA) 1081, enforced sub nom. National Maritime Union v. NLRB, 867 F.2d 767 (2d Cir. 1989). Because the union failed to use all conceivable means of communication made possible by the mailing lists, they did not satisfy the high burden of proof imposed by the Board. Member Johansen wrote a strong dissent in SCNO demonstrating the unreasonableness of the Fairmont analysis and burdens of proving lack of alternative means of communication in this factual context. See id., slip op. at 14, 127 L.R.R.M. (BNA) at 1085 (Johansen, dissenting).


253. Id. at 1089.


255. Pizza Crust, slip op. at 2 n.1, 129 L.R.R.M. (BNA) at 1282 n.1. In dissent in Pizza Crust, Chairman Dotson expressed his continuing dissatisfaction with the Tri-County rule, and argued that the Fairmont test should be used to analyze the access rights of off-duty employees who are not “active” employees. Id. at 4, 129 L.R.R.M. (BNA) at 1283. Dotson argued that he would overrule Tri-County and return to the Board rule in GTE Lenkurt, 204 N.L.R.B. 921 (1973). Id. at 4, n.1, 129 L.R.R.M. (BNA) at 1283 n.1; see also Orange Memorial Hosp. Corp., 285 N.L.R.B. No. 136, 126 L.R.R.M. (BNA) 1200 (1987) (Dotson, dissenting). The Third Circuit has strongly rejected
3. Unfair Labor Practice Activity

Unfair labor practice picketing and handbilling were not discussed in Sears or Hudgens, but the Board has turned to other court authority for the proposition that protesting employer unfair labor practices is a significant section 7 right. The strength of the right to engage in unfair labor practice picketing, by employees and nonemployees alike, is such that it should generally outweigh the property right in situations involving multi-employer establishments that are generally open to the public, such as the eight-store shopping center in United Supermarkets. Under the Fairmont test, the balancing would not necessarily require an evaluation of the reasonable alternative means of communication.

But the Greyhound Lines decision demonstrates the difficulty with making assumptions about how the Board will evaluate property rights. In Greyhound, the Board found that the bus company had not violated the Act by denying access to union organizers attempting to picket and handbill at the entrance to a Burger King restaurant located in the bus terminal. The union had recognitional and organizational objectives, but was also protesting Burger King's unfair labor practices. The Greyhound bus terminal was a multi-employer facility generally open to the public. Nevertheless, the Board found a relatively strong property right, at least as strong as the section 7 right to engage in unfair labor practice picketing, and the existence of alternative means of communication resulted in denial of access. The fact that the picketing inside the bus terminal was conducted by nonemployee union organizers may have been a key element in the Board's analysis, although off-duty employees were participating in the overall picketing campaign at the terminal. Once again, the "insider/outside" distinction appears to have affected evaluation of the accommodation between property rights and section 7 rights.

Access to free-standing facilities, even if they are open to the general public, is not likely to be protected despite the Board's recognition of the importance of unfair labor practice protests. In such cases, the Board gives great weight to the property rights and places a high burden of proof on the issue of alternative means of communication. Conse-
sequently, employers with the financial ability to invest in free-standing facilities surrounded by land barriers may effectively insulate themselves from many of the effects of handbilling and picketing brought on by employer unfair labor practices, economic strikes, or union organizing drives.

4. Area Standards Activity

In the 1987 Fairmont cases, the Board consistently refused to use section 8(a)(1) to protect the rights of employees or union representatives engaged in area standards picketing or handbilling on private property. The Board adopted this view even where the property right was weak, such as in the shopping centers "generally open to the public" which selectively permit access to nonunion groups for charitable and commercial purposes. Indeed, six out of the fifteen 1987 post-Fairmont access disputes involved area standards or informational activity, and access was denied in all six of these cases. 259

In the area standards cases involving free-standing single facilities, the property right easily outweighed the section 7 right. 260 In the shopping center cases, however, there was more disagreement about the initial valuation of the property right, and the existence of alternative means of communication often determined rights of access. In light of the contradictory analysis in these cases, it is difficult to predict when the Board will require a property owner to permit trespassory picketing or handbilling for purely informational or area standards purposes. This conclusion has significant consequences for the future of unions.

Although the Supreme Court in Sears hypothesized that area stan-

L.R.R.M. (BNA) 1113 (1988). But see also the Second Circuit's imposition of an exceptionally difficult burden of proof in its enforcement of one of the post-Fairmont cases dealing with access of union organizers to river barges in National Maritime Union v. NLRB, 867 F.2d 767 (2d Cir. 1989).


One of these cases, L & L, arguably involved mixed motives of informational and recognition/organizational purposes. The Board majority accepted the union's announced disclaimer of interest in organizing the employer, and identified the § 7, activity as an "informational campaign to protest alleged antiunion activities and to promote a consumer boycott." See L & L, 285 N.L.R.B. No. 122, slip op. at 12, 126 L.R.R.M. (BNA) at 1155 (Babson, concurring). Member Babson, however, disagreed with the Board majority's use of "descriptive rather than analytical terminology" to evaluate the § 7 rights. Id. at 15, 126 L.R.R.M. (BNA) at 1156. In Babson's view, "it is apparent that the Union's picketing and handbilling constitute a form of recognition or organizational activity." Id. The effect, of course, of the Board majority's refusal to acknowledge the alternative motive of the picketing was to assure that the § 7 right asserted was placed at the lowest position in the "hierarchy" of § 7 rights.

dards picketing is low on the hierarchy of section 7 rights, this may not correspond to the way unions view area standards and informational picketing and handbilling. Currently area standards picketing may be more important to unions than organizational and economic picketing. Union organizing drives are extremely difficult, expensive, and often unsuccessful due, among other reasons, to well financed and sophisticated employer use of consultants in anti-union campaigns. Primary economic strike activity is now much less frequent than in the past, especially in industries such as textiles which are threatened by competition with nonunion and foreign producers. Area standards picketing may now be one of the most valuable, and least costly, methods that unions have to protect their bargaining gains and to build public awareness of the benefits of unionism. Such policy considerations have not played a role in the Board analysis of this section 7 right. Consequently, due to the ability of increasing numbers of employers to insulate their facilities with property barriers and property rules, the Board has assured that this "recent" section 7 right has only a small role to play in modern labor relations.

260. 436 U.S. at 206 n.42.
261. For example, the United Food and Commercial Workers Local 880 are "regularly picketing" 19 retail food establishments in northeast Ohio as part of "a comprehensive million-dollar campaign aimed at non-union stores, an effort that also includes prime time television and radio spots, newspaper ads, and union-sponsored billboards." See UFCW Picketing at Non-Union Stores, LAB. REL. REP. (BNA) No. 129, at 112 (Sept. 26, 1988).
263. On February 24, 1988, the Bureau of Labor Statistics reported that "[a]ll measures of major work stoppages were at record low levels during 1987.... Only 46 major work stoppages—strikes and lockouts involving 1,000 or more workers and lasting at least one full day or shift—were recorded for 1987, the lowest number since BLS began the data series in 1947." Measures of Strikes and Lockouts, LAB. REL. REP. (BNA) No. 127, at 313 (Mar. 7, 1988). In 1987, there were no work stoppages in "textiles and textile mill products industries," and the largest work stoppage involved public school teachers in Chicago. Id.
264. In Montgomery Ward & Co., the ALJ found that "consumer-directed product boycott picketing and area standards picketing are Section 7 rights of equal nature and strength" and that "consumer-directed product boycott picketing, organizational activity, and primary economic activity are also Section 7 rights of equal nature and strength." 265 N.L.R.B. 60, Decision of ALJ, at 66 (1982). The Board, however, found it "unnecessary to consider," and did "not adopt" the ALJ's "extensive analysis and his resultant findings" that these § 7 rights are "of equal nature and strength." Id. at 60.
E. "Reasonable Alternative Means of Communication":
The Jean Country Postscript to Fairmont

In September of 1988, in Jean Country, the Board "overruled" Fairmont to the extent that it had expressed "the plurality view that consideration of the alternative means factor must sometimes be excluded from [its] determination of whether and to what extent property rights should yield to the exercise of Sec. 7 rights." The Board acknowledged that in the post-Fairmont cases, "individual Board members differed over interpretation and application of the Fairmont test." Therefore, the Board decided to "re-evaluate" the factor of alternative means of communication in light of its "experience in applying the Fairmont test." The Board concluded that "the availability of reasonable alternative means is a factor that must be considered in every access case."

In Jean Country, nonemployee union organizers picketed a nonunion clothing store in a large shopping mall. The union's purpose was to inform store patrons that the store's clerks were not represented by the union. Within an hour after the picketing commenced, the mall operator and the store manager called the police who threatened the pickets with arrest for criminal trespass if they did not move to the public roads surrounding the mall property. The pickets departed and filed section 8(a)(1) charges. The Board found an 8(a)(1) violation and ordered access.

On its face, the Jean Country decision suggests that the Board has undertaken a substantial revision of the Fairmont test. The Fairmont/Jean Country hybrid, however, does not change the Board's fundamental analytical framework for deciding access cases—the weighing and balancing of property rights and section 7 rights. Jean Country merely restores the factor of reasonable alternative means of communication as a potentially significant element of the analysis in all access cases. The

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268. Id., slip op. at 3 n.2, 129 L.R.R.M. (BNA) at 1203 n.2. By the time Jean Country was decided, the only remaining members of the Fairmont "plurality" were Stephens (now Chairman of the Board) and Johansen. After nearly two years of footnotes, concurrences, and dissents, Stephens and Johansen "won," in part, by default. Their views about alternative means of communication were, at last, accepted by the two new Board members—Mary Miller Cracraft and John Higgins—who joined in the unanimous Jean Country decision.
269. Id. at 2, 129 L.R.R.M. (BNA) at 1202.
270. Id. at 2-3, 129 L.R.R.M. (BNA) at 1202.
271. Id. at 3, 129 L.R.R.M. (BNA) at 1203. The Sixth Circuit has approved the Board's Jean Country clarification of Fairmont, holding that "the Fairmont Hotel standard erroneously subordinates the issue of reasonable alternative means of access to other factors." Emery Realty v. NLRB, 130 L.R.R.M. (BNA) 2154, 2158 (1988). Contra, NLRB v. Schwab Foods, 129 L.R.R.M. (BNA) 2601 (7th Cir. 1988) (a pre-Jean Country decision approving the Fairmont Board's consideration of reasonable alternative means of communication only when property rights and § 7 rights are relatively equal).
presence or absence of a union's reasonable alternative means of communication will no longer be just a tie-breaker when property rights and section 7 rights are relatively equal. In this respect, the Board returns the Fairmont test to its analytical roots in Babcock and Hudgens.\textsuperscript{272}

For the moment, Jean Country appears to be a change without a difference. In most of the 1987 Fairmont cases, a majority of the Board members on each panel considered the factor of reasonable alternative means of communication in their analysis of the access dispute.\textsuperscript{273} Thus, if we were to apply Jean Country retroactively to most of the 1987 post-Fairmont cases, it is unlikely that the outcomes would change.

Jean Country retains the heart of Fairmont's approach to valuing property and section 7 rights. In effect, the Board in Jean Country uses the "large shopping mall" rule and a class-based analysis of the employer's property interests to find that the property right is "quite weak." Jean Country was one of 106 stores in the Cross Country Shopping Center in Yonkers, New York. Unlike the enclosed and very exclusive Fiesta Mall in Homart, the Yonkers mall was "open-air" and its invitation to the public was "broad." The mall's smaller stores, including the Jean Country store, were arranged in aisles separated by sidewalks and central areas of "grass, shrubbery, and trees" which created "the appearance of a public street but without the problems of parking and traffic."\textsuperscript{276} Large parking areas surrounded the mall, and it was accessible to public transportation. In addition, the mall permitted its parking lots to be used for annual charity and arts and crafts fairs. Furthermore, despite the mall manager's asserted reliance on no-solicitation and no-picketing rules to deny the union access, no such rules or regulations were submitted into evidence. In sum, the Board characterized the mall's size and physical appearance, its openness and accessibility to the public, as "quasi-public traits" which tended to "lessen the private nature of the property."\textsuperscript{277}

The Board in Jean Country also affirmed the concept of a hierarchy of section 7 rights. Although the picketing had organizational and recognition objectives, the Board found that it fell within the protection of the publicity proviso of section 8(b)(7). The union's picketing had

\textsuperscript{272} See 291 N.L.R.B. No. 4, slip op. at 7-8, 129 L.R.R.M. (BNA) at 1203-04.
\textsuperscript{273} In Jean Country, the Board notes that "the great number of cases decided under Fairmont involved a finding by at least a majority of the Board panel that one right asserted did not clearly outweigh the other. It was therefore necessary to examine the availability of reasonable alternative means in those cases." Id. at 3 n.2, 129 L.R.R.M. (BNA) at 1203 n.2.
\textsuperscript{274} Id. at 19, 129 L.R.R.M. (BNA) at 1208.
\textsuperscript{275} Id. at 17, 129 L.R.R.M. (BNA) at 1207.
\textsuperscript{276} Id.
\textsuperscript{277} Id.
\textsuperscript{278} The union was attempting to organize the Jean Country store clerks and had demanded that the employer recognize the union. The Board found that the union's picket signs "truthfully
multiple objectives—obtaining recognition of the union, organizing the employees, informing the store patrons and the general public of the store's nonunion status, and protecting the union's area wage standards. The Board, though, found that the "immediate goal" of the picketing was "to persuade potential customers not to patronize the Jean Country store." The fact that the picketing occurred at the situs of the primary dispute—the store the union hoped to organize—and was "limited in manner, peaceful, and unobstructive" neither "diminished" nor "substantially enhanced" the strength of the section 7 right.

The Board concluded that the union's asserted section 7 right was "not on the stronger end of the 'spectrum' of section 7 rights," but it was "a right that is certainly worthy of protection against substantial impairment."

Under the Fairmont test, the Board could have concluded that the section 7 right was slightly stronger than the property right and required the employer to permit the union access to its property. Or the Board could have found the two rights "relatively equal" and turned to an examination of the union's reasonable alternative means of communication to resolve the dispute. Either way, the outcome under the old Fairmont test would have been the same as the outcome in Jean Country. The Board's consideration of alternative means of communication in Jean Country echoes the evaluation of the "quasi-public" character of the asserted property right. The Board found that requiring the union to use the public property at the mall's periphery—one-quarter mile from the store—would be unreasonable. The Board stressed the "substantial dilution of the effectiveness of the union's message" in light of the "sheer physical distance" between the mall entrance and the target store, the "large number of other stores," and the "great number of people, coming

advised the public that... Jean Country was a nonunion employer, and there [was] no evidence that it had an effect of inducing a cessation of deliveries or other services." Id. at 19, 129 L.R.R.M. (BNA) at 1208.

Regardless of whether employees or nonemployees are involved, when the object of the union activity is organizational or recognitional, the distinction between handbilling and picketing becomes critical. See NLRA § 8(b)(7), 29 U.S.C. § 158(b)(7) (1982). Organizational or recognitional picketing is protected activity as long as it does not violate the prohibitions of section 8(b)(7), whereas there is no statutory bar to organizational/recognitional handbilling (unless, it has a "signal" effect like picketing). See Sears, 436 U.S. at 225 n.9 (Brennan, J., dissenting); L & L Shop Rite, 285 N.L.R.B. No. 122, slip op. at 16 n.6, 126 L.R.R.M. (BNA) 1151, 1156 n.6 (1987) (Babson, concurring) (arguing that "recognitional picketing and handbilling [does] not violate Section 8 of the Act," and that it "is protected under Sections 7 and 13 of the Act"). Nonetheless, regardless of its location—whether it is trespassory or not—picketing that violates § 8(b)(7) can be enjoined by a federal district court upon application of the Board. See NLRA § 10(l), 29 U.S.C. § 160(l) (1982); see also Modjeska, Recognition Picketing Under the NLRA, 35 U. FLA. L. REV. 633 (1983).

279. The union represented retail clerk employees in other stores in the mall, including clothing stores in direct competition with Jean Country.
280. 291 N.L.R.B. No. 4, slip op. at 29, 129 L.R.R.M. (BNA) at 1208.
281. Id. at 20, 129 L.R.R.M. (BNA) at 1208.
282. Id.
on the property at eight different entrances.” These factors made it almost impossible for the union to identify its audience—the Jean Country patrons—but also risked enmeshing neutrals in the union's dispute with the store. The Board noted, furthermore, that in analyzing alternative means of communication, “it will be the exceptional case where the use of newspapers, radio, and television will be feasible alternatives to direct contact.” In conclusion, the Board found that “there was in fact no method of communicating the Union’s message effectively other than entry onto the [mall’s] property.” Thus the argument for granting access became compelling.

It is, perhaps, too early to tell where the Jean Country gloss on the Fairmont test may lead. While consideration of a union’s reasonable alternative means of communication promises to be more sensitive to a union's needs to reach its audience of consumers or employees, this may not always prove to be the case. The Board made it “clear” that “a union's own definition of the audience it seeks to reach through the activity in question will not necessarily control the analysis of what other means of communication constitute reasonable alternatives.” The Board also seems determined to continue relegating area standards activity to a low status in the hierarchy of section 7 rights. Jean Country may thus be only a postscript to the Fairmont case which confirms Fairmont’s balancing approach to labor and property rights.

III

FEDERAL LABOR POLICY AND ACCESS TO PRIVATE PROPERTY UNDER STATE LAW:

THE CONTESTED TERRAIN

A. Sears and Federal Preemption

Fairmont and its progeny will have far-reaching implications for federal labor policy. When labor trespass cases come before state courts, the union or employee defendants may assert the affirmative defense of federal preemption of state court jurisdiction. At that time, state courts must rely on the Board’s Fairmont/Jean Country cases as a critical ele-
ment in the analysis of the defense of federal preemption—an analysis which will involve complex doctrinal and policy issues of federal labor law.

The supremacy clause requires that state property rights yield to federal rights under the Act when the two conflict. Congress failed to provide any statutory guidelines in the Act to aid courts in deciding federal labor preemption cases; nor did Congress explicitly discuss preemption in legislative debates. Thus, in the resolution of conflicts between state and federal jurisdiction, procedures, and substantive laws, the Supreme Court has been called upon to render this “penumbral area ... progressively clear only by the course of litigation.”

In the 1978 preemption case of Sears, the Supreme Court held that, under certain circumstances, state courts could assert jurisdiction over peaceful trespassory labor activity that was arguably subject to the jurisdiction of the Board. In doctrinal terms, the Sears decision was a significant erosion of the Garmon doctrine that had, for almost twenty years, determined the preemption analysis of cases involving potential

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The attractiveness of individual employee lawsuits to recover damages for work-related economic injuries has given rise to a third category of preemption cases: “301 preemption”: preemption of state law claims which are “substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract,” and which are thus exclusively subject to federal contractual law arising under § 301 of the Labor Management Relations Act. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220 (1985); see also Lingle v. Norge Div. of Magic Chef, Inc., 108 S. Ct. 1877 (1988); IBEW v. Hechler, 481 U.S. 851 (1987).


Only the Garmon doctrine preemption analysis was relevant to the competing state law and federal statutory claims discussed in Sears. Sears, 436 U.S. at 199-200, n.30. It has been argued that the Court might have reached a different result if the policy implications of Machinists preemption had been considered. See, e.g., Comment, Picketing and the Expanding Role of the State Labor Injunction, 11 TEX. TECH L. REV. 779, 810-11 (1980).
conflicts between the NLRB and state tribunals. Garmon established two principles for accommodating state law to the federal labor law. First, Garmon stated that states must forego jurisdiction over activity that is clearly protected by section 7 of the NLRA or clearly prohibited as an unfair labor practice by section 8 of the NLRA.

The second Garmon preemption principle set forth a “sweeping prophylactic rule”. "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 Board if the danger of state interference with national policy is to be averted." But Garmon also recognized two "exceptions" to this broad principle of preemption where (1) "the activity regulated was a merely peripheral concern" of the Act, or (2) "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Court] could not infer that Congress had deprived the States of the power to act."

The Garmon principles did not easily resolve all of the preemption disputes that came before the Court. Over the years, new exceptions were carved out of the Garmon doctrine. Nevertheless, until the Sears
decision, the Supreme Court, in its analysis of labor preemption, showed particular concern that states not regulate federally protected conduct.\(^{297}\) Sears, however, abandoned overprotection of employees' federal statutory rights in favor of overprotection of property owners' rights. In the process, as Justice Brennan argued, the Court created the "certain prospect of state-court interference that may seriously erode § 7’s protections of labor activities."\(^{298}\)

The dispute in Sears arose when a union learned that remodeling work at a Sears store was being done by carpenters who had not been dispatched from the district hiring hall. Union representatives subsequently began to picket the Sears store. The pickets, who were "peaceful and orderly," initially walked on the sidewalks next to the store and a short distance into the large rectangular parking lot that surrounded the store.\(^{299}\) The store security manager demanded that the pickets leave Sears property. When the pickets refused to move, Sears obtained a temporary restraining order, ex parte, from the superior court of California. The order enjoined the pickets from continuing their activity on Sears private property.

In response to the court order, the union "promptly removed the pickets to the public sidewalks" which were at the periphery of the Sears parking area.\(^{300}\) Within two weeks, the union abandoned this location because they concluded that the picketing was "too far removed from the store to be effective."\(^{301}\) After a hearing on the merits of the trespass dispute, the court entered a preliminary injunction, which was affirmed by a California court of appeal, despite the union’s preemption arguments.\(^{302}\) The California Supreme Court, however, applied the Garmon guidelines and reversed the court of appeal on preemption grounds.\(^{303}\) The Supreme Court granted certiorari in order to decide, for the first time "[s]ince the Wagner Act was passed in 1935, . . . whether, or under what circumstances, a state court has power to enforce local trespass laws against a union's peaceful picketing."\(^{304}\)

Because the picketing in Sears was both arguably protected and ar-

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297. See, e.g., Farmer, 430 U.S. at 302.
299. Id. at 182.
300. Id. at 183.
301. Id. at 183 n.2.
302. The court of appeal held that the union's continuing trespass was within the exception to the Garmon doctrine for conduct which "touched" interests "deeply rooted in local feeling and responsibility." Id. at 183.
303. 17 Cal. 3d 893, 901-02, 553 P.2d 603, 610, 132 Cal. Rptr. 443, 450 (1976). The California Supreme Court concluded that the picketing was both arguably protected and arguably prohibited under the Act, and that its "trespassory character" was "merely a factor which the National Labor Relations Board would consider in determining whether or not it was in fact protected." Id.
304. Sears, 436 U.S. at 184.
guably prohibited under the Act, the Sears Court declared that their analysis concerned only the second analytical principle of Garmon. The Court plurality307 seemed confident that the Sears holding did not alter the first Garmon principle that state courts are preempted from jurisdiction over conduct that is clearly protected or prohibited under the Act. The Court acknowledged that “[c]onsiderations of federal supremacy . . . are implicated to a greater extent when labor-related activity is protected than when it is prohibited.” Nevertheless, one of the consequences of the analysis in Sears and the Fairmont cases is that it will rarely be “clear” that trespassory picketing or handbilling is protected under the Act.

305. The union could have brought charges under § 8(a)(1) that the company’s demand that the pickets leave the property interfered with their § 7 rights to engage in area standards or recognitional picketing. Sears, on the other hand, could have brought charges under § 8(b)(4)(D) that the picketing was either an unlawful work-assignment dispute or for recognition purposes in violation of § 8(b)(7)(C). Yet neither Sears nor the union brought unfair labor practice charges before the Board. Justice Stevens described the union’s failure to bring an 8(a)(1) charge as “intransigence” which, in effect, left Sears with “only three options: permit the pickets to remain on its property; forcefully evict the pickets; or seek the protection of the State’s trespass laws.” Id. at 202.

306. Id. at 203.


308. 436 U.S. at 200. The Court noted that concurrent state and NLRB jurisdiction over conduct prohibited by federal law would not be objectionable “[a]part from notions of ‘primary jurisdiction,’” but “state-court interference with conduct actually protected by the Act” would raise a “constitutional objection.” Id. at 199. Partly because of the different constitutional and statutory considerations involved in determining whether “arguably” protected or “arguably” prohibited conduct is preempted, the Court reviewed the two “branches” separately. Under the prohibited branch of analysis, the Court applied the Farmer exception to the Garmon doctrine to reach its result in Sears.

This Article is primarily concerned with the problem of state regulation of activity protected under § 7 of the NLRA. Thus, the prohibited branch of Sears will be summarized here, but will not be analyzed further.

According to the Sears articulation of Farmer, in cases dealing with “local interests” two factors “warrant a departure” from the general rule of preemption of state jurisdiction over arguably prohibited activity: first, when there is “a significant state interest in protecting the citizen from the challenged conduct,” and, second, when, despite the fact that the tort occurred during a labor dispute, state jurisdiction over the tort action entails “little risk of interference with the regulatory jurisdiction of the Labor Board.” Id. at 196. To determine this second factor, the state court must inquire whether “the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not presented to the Board.” Id. at 197. The Supreme Court concluded that the Sears dispute involved a significant state interest—protection of property rights—and that adjudication of the trespass action would pose little risk of interference with Board regulation of prohibited conduct. The question in state court would focus solely on the location of the conduct, and the question before the Board would focus solely on whether the conduct had a prohibited objective under the Act. Id. at 198.

But under the protected branch of analysis, the Court adopted an approach that was a complete break with the Garmon doctrine. Although the Court attempted to minimize the significance of its new preemption analysis of arguably protected trespassory picketing, Justice Brennan asserted the “this Court’s departure from Garmon creates a great risk that protected picketing will be enjoined.” Id. at 228 (Brennan, J., dissenting).
Under *Sears*, the state court must first determine whether or not the trespassory conduct is actually protected under the Act. If the conduct is *clearly* protected, state jurisdiction is preempted, and if it is *clearly* unprotected, the state court may proceed. If the trespassory conduct is only *arguably* protected, however, the state court must apply the appropriate *Sears* preemption analysis for arguably protected trespassory conduct. This analysis involves a “three-step process.” The court must inquire: (1) “whether the employer had a ‘reasonable opportunity’ to force a Board determination” of the protected status of the conduct; (2) if the employer had no such acceptable means, whether, in light of the court’s assessment of the likelihood that the trespassory conduct might be protected by section 7, “there is a substantial likelihood that [the court’s] adjudication will be incompatible with national labor policy”; and (3) whether “the anomaly of denying an employer a remedy outweighs the risk of erroneous determinations by the state courts.” In effect, the second “step” of the *Sears* preemption analysis will require the state court to review recent Board decisions to speculate about how the Board would be likely to resolve the property/section 7 dispute.

*Sears* has significantly expanded the scope of state court jurisdiction over peaceful labor activity that occurs on private property. Ironically, although the dissenters in *Sears* were concerned with property owners’ use of equitable remedies to defeat federal statutory rights, the *Fairmont* cases suggest that the use of criminal trespass laws may be as

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309. *Id.* at 199-208.

310. *Id.* at 235 (Brennan, J., dissenting). In the aftermath of *Sears*, when a union or employees engage in trespassory picketing or handbilling that is clearly or arguably protected under § 7 of the Act, they may not necessarily have an opportunity to file an 8(a)(1) charge and bring the issue before the Board. In dictum in two footnotes in *Sears*, the Court asserted that a property owner’s demand that union trespassers leave is a sufficient basis for the filing of an 8(a)(1) charge of interference with § 7 rights, and that such a demand “would have been required as a matter of federal law” for the property owner to “avoid a valid claim of pre-emption.” *See id.* at 207 nn.43-44. This issue—whether a property owner’s demand to leave private property constituted “interference” with § 7 rights—had not been resolved at the time of the dispute in *Sears*.

Presumably, as a matter of federal preemption law, such a demand would be required as a condition precedent to the invocation of criminal trespass laws as well. However, the property owner’s act of filing for injunctive relief alone does not violate § 8(a)(1). Clyde Taylor Co. 127 N.L.R.B. 103 (1960). After *Sears*, the property owner who wants to preserve the potential benefits of state jurisdiction in the face of a preemption challenge will always demand that trespassers leave the property before taking any other action, such as obtaining a temporary restraining order or having the trespassers arrested.

311. 436 U.S. at 235, 236 (Brennan, J., dissenting).

312. For the three dissenting Justices in *Sears*, this possibility brought to mind the “historic abuses of the labor injunction” that convinced Congress to create a “centralized expert agency to administer the Act.” *Id.* at 218 (Brennan, J., dissenting). State courts have expressed the view that the effect of *Sears* was to expand the scope of state court jurisdiction in labor disputes. *See*, e.g., *Brown Jug, Inc. v. International Bhd. of Teamsters Local 959*, 688 P.2d 932, 935 (Alaska 1984); *Shirley v. Retail Store Employees, Local 782*, 225 Kan. 470, 474, 592 P.2d 433, 436 (1979).

313. To the dissenters, *Sears* illustrated the folly of ignoring the “lessons of history” which showed that the Supreme Court’s “efforts in the area of labor law pre-emption have been largely
effective as injunctive relief in barring union activity on private property. With a cooperative police force and district attorney, criminal processes are certainly less costly to the property owner. The criminalization of conduct that is either clearly or arguably protected by federal statutory law obviously raises constitutional concerns that were not fully appreciated by the Supreme Court in Sears. Even the threat of arrest on criminal trespass charges may inhibit the exercise of federally protected rights of workers and union representatives.\textsuperscript{314}

In his concurrence in Sears, Justice Powell was concerned about the "danger of violence" in trespassory picketing if state court remedies were preempted until the General Counsel determined whether the facts warranted a complaint on the unfair labor practice charges.\textsuperscript{315} Under the Act, the General Counsel cannot obtain injunctive relief from the federal courts until a Board complaint is issued.\textsuperscript{316} After an 8(a)(1) charge is filed, Powell observed, "nothing is likely to happen 'in a timely fashion,' directed to developing durable principles to ensure that local tribunals not be in a position to restrain protected conduct." 436 U.S. at 222.

314. The use of criminal laws and procedures to stop union collective action has an even more ancient history than the labor injunction. \textit{See generally M. Turner, THE EARLY AMERICAN LABOR CONSPIRACY CASES, THEIR PLACE IN LABOR LAW: A REINTERPRETATION} (1967). Indeed, if Justice Brennan were to write his Sears dissent today, he could add a reference to the early use of the criminal conspiracy doctrine to his recitation of the historical abuses of the labor injunction.

315. The well-advised union engaging in collective activity on private property will file a § 8(a)(1) charge with the Board as soon as the property owner makes a demand that they leave. But the preemptive effect of the filing of an unfair labor practice charge on the jurisdiction of a state court was not determined in Sears. Justice Brennan noted in his dissent that "[t]he Court assiduously avoids holding that resort to the Board will oust a state court's jurisdiction and is divided on this question." Sears, 436 U.S. at 233; \textit{see also id. n.14}. In his concurrence in Sears, Justice Blackmun asserted that "the logical corollary of the Court's reasoning is that if the union does file a charge . . . and continues to process the charge expeditiously, state-court jurisdiction is pre-empted until such time as the General Counsel declines to issue a complaint or the Board . . . rules against the union and holds the picketing to be unprotected." \textit{Id.} at 209. "Similarly," Blackmun argued, the filing of an 8(a)(1) charge would stay "any pending injunctive or damages suit brought by the employer" until it is determined by the General Counsel or the Board "that the picketing is not protected by § 7." \textit{Id.} On the other hand, Justice Powell believed that "the realities of the situation" made it necessary for states to retain jurisdiction over trespassory picketing at least until the General Counsel decided to issue a complaint. Sears, 436 U.S. at 212-14.

It is not clear from Powell's concurring opinion whether issuance of a complaint would automatically preempt state court jurisdiction. He seemed to suggest that state courts might retain jurisdiction until the Board obtains temporary injunctive relief under section 10(j) of the Act. \textit{See Sears}, 436 U.S. at 214.

In light of the Board's reluctance to seek 10(j) injunctions in 8(a)(1) cases, access disputes may fall under concurrent state and Board jurisdiction until the 8(a)(1) case is resolved by the Board or court of appeals, and the state court finally holds that its jurisdiction has been preempted. The \textit{Giant Food} litigation demonstrates the federalism problems created by the concurrent state and Board jurisdiction that may exist as a consequence of the Sears analysis. See Giant Food Mktgs., Inc., 241 N.L.R.B. 727 (1979), \textit{enforcement denied}, 633 F.2d 18 (6th Cir. 1980); Wiggins & Co. v. Retail Clerks Union Local 1557, 595 S.W.2d 802 (Tenn. 1980); \textit{see also Comment, supra note 21}.

316. Section 10(j) of the NLRA reads: "The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court within any district wherein the
... and it may take weeks for the General Counsel to decide to issue a complaint."\(^{3}\) In the meantime, Powell continued, the "no-man's land" prevents all recourse to the courts, and is an open invitation to self-help.\(^{3}\) Justice Powell was "unwilling to believe that Congress intended, by its silence in the Act, to create a situation where there is no forum to which the parties may turn for orderly interim relief in the face of a potentially explosive situation."\(^{3}\)

The experience with the 1987 *Fairmont* cases indicates that the length of delay between the filing of an 8(a)(1) charge and the issuance of a complaint is likely to be measured in months, not weeks as Powell suggested.\(^{3}\) Powell's concern about the length of delay was not misplaced; if anything, he greatly underestimated the slowness of Board processes. But his concern about the likelihood that delay would lead to violence was questionable, particularly in a case in which, as Blackmun observed, "there was no hint of such a problem,"\(^{3}\) as well as in a "generic situation" in which, as Brennan observed, "there is no realistic possibility of violence."\(^{3}\) Blackmun noted that he could "not see what 'danger of violence' remains in such a situation, any more than for a business that fronts upon a public sidewalk."\(^{3}\)

The *Fairmont* cases bear out the views of Brennan and Blackmun, not the fears of Powell.\(^{3}\) The manner in which the picketing and unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order." 29 U.S.C. § 1600 (1982). Given the continued uncertain status of federal rights of access in labor disputes under the *Fairmont* analysis, the federal courts may not be receptive to 10(j) injunction petitions in trespass cases. See, e.g., Silverman v. 40-41 Realty Assocs. Inc., 668 F.2d 678, 680-81 (2d Cir. 1982) (vacating temporary injunction in case involving interior picketing in office building corridor). But see Eisenberg v. Holland Rantos Co., 583 F.2d 100 (3d Cir. 1978) (enforcing temporary injunction and affirming district court's 90-day limitation on injunctive relief for employer's refusal to allow employee access to manufacturing facility).

\(^{317}\) Sears, 436 U.S. at 212-13.
\(^{318}\) Id.
\(^{319}\) Id. Powell argued that the state courts "should have the authority to protect the public and private interests by granting preliminary relief" because "trespass upon private property by pickets, to a greater degree than isolated trespass, is usually organized, sustained, and sometimes obstructive—without initial violence—of the target business and annoying to members of the public who wish to patronize that business. The "danger of violence" is inherent in many—though certainly not all—situations of sustained trespassory picketing. One cannot predict whether or when it may occur, or its degree.

\(^{320}\) Id. at 212-13.

\(^{321}\) For the 1987 *Fairmont* cases for which filing and complaint dates are available, the shortest time between charge and complaint was one month in Browning's Foodland, 284 N.L.R.B. No. 104, 125 L.R.R.M. (BNA) 1264 (1987). Several cases took three to four months, and one, Providence Hospital, 285 N.L.R.B. No. 52, 126 L.R.R.M. 1145 (1987), took eight months. *Fairmont* took about seven weeks. See *supra* Table II, p. 166.

\(^{322}\) Id. at 233 n.14 (Brennan, J., dissenting).

\(^{323}\) Id. at 210 n.* (Blackmun, J., concurring).

\(^{324}\) Justice Stevens wrote for the plurality that failure to allow the option of state court juris-
handbilling was conducted in Fairmont and the post-Fairmont cases shared an important characteristic: in virtually every one of these fourteen cases that involved entry onto private property by employees or union representatives, the handbilling or picketing was peaceful, orderly, and nondisruptive. Litigated Board cases are hardly a fair sampling of access disputes. Nevertheless, the dire view of the Sears plurality, that trespassory picketing may lead to violence, has little basis.

There is a good explanation for the overall courteous and mannerly behavior of the pickets in these labor disputes. In most of the retail cases, and even in the organizing cases, the goal of the union has been to persuade its audience to support the union's cause by joining a consumer boycott, or to consider joining the union. To a great extent, this is a public relations problem. Particularly in the retail context, the unions have attempted to understand their market of middle-class consumers and to design and conduct their informational campaigns to appeal to that target audience. In some of the Fairmont cases, the pickets and handbillers were instructed on appropriate clothing to wear, where to stand, what to say and what not to say to store customers and managers. The pickets and handbillers were described as courteous, polite, deferential, and unobtrusive. When asked to leave the private property, usually by managers or security guards threatening them with arrest, the union representatives departed promptly and quietly and moved to areas at the periphery of the private property or abandoned their activity entirely.

It is, indeed, because the pickets and handbillers were peaceful and nonobstructive that the property owners had to turn to trespass laws to force them to leave. Federal labor preemption does not prevent state intervention and jurisdiction over mass picketing, violence, threats of violence, or obstruction of ingress and egress to property. In addition, "violent tortious conduct on a picket line is prohibited by section


326. See, e.g., Homart Dev., 286 N.L.R.B. No. 72, slip op. at 4, 126 L.R.R.M. (BNA) 1244, 1245 (1987) (handbillers "were to dress appropriately," and to "station themselves as close as possible to the outside entrances to the . . . stores," and "not interfere with customer ingress or egress").

Thus, the Board and states have concurrent jurisdiction over such tortious or criminal conduct. Furthermore, in cases where the pickets and handbillers are striking employees, the employer has recourse to discharge or discipline for "acts of trespass or violence against the employer's property." But Sears and most of the Fairmont cases involved nonemployee access to private property, in which event discharge and discipline was not an option for the property owner/employer.

If the pickets and handbillers were not engaged in recognitional or secondary picketing in violation of sections 8(b)(4) or 8(b)(7) of the Act, Board jurisdiction was not a possibility. Furthermore, as the Court in Sears argued, even if these unfair labor practice provisions of the Act could be invoked by the property owner, the Board would address only the issue of whether the picketing was conducted for prohibited purposes, not whether it was protected at that particular location. What the property owners wanted was to have the pickets and handbills removed as quickly and cheaply as possible. While the injunction served well as a mechanism to enforce trespass laws in Sears, the criminal trespass laws appear now to be the method of choice for property owners.

In Fairmont and in ten of the 1987 post-Fairmont trespass cases, the pickets or handbillers were threatened with arrest. In several cases security guards or officers requested the union representatives to leave

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328. Sears, 436 U.S. at 220 (Brennan, J., dissenting).
329. NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 255 (1939). Fansteel held that employees who engage in a "sit-down" strike—"who illegally take and hold possession of [their employer's] property"—are not protected under §7 of the Act, and their "trespass or violence against the employer's property," is "cause" for discharge under §10(c) of the Act. Id. at 252, 255.
331. Sears, 436 U.S. at 198. The only way the Board can determine the issue of the federally protected status of picketing on private property is for the union to file an 8(a)(1) charge of interference with protected concerted activity. After Sears, in the absence of an 8(a)(1) charge, the state court can proceed to determine, in effect, the accommodation of §7 rights and property rights in the process of its preemption analysis. Sears bridged the "no-man's land" of jurisdiction over peaceful trespassory picketing by permitting state court adjudication, when Board adjudication is not available, or not swift enough to protect asserted property rights. See id. at 209, 211 (Blackmun, J., concurring).
the property. In some of the cases involving threats of arrest, the police actually were called in and the pickets and handbillers were arrested, charged, and in one case prosecuted to an acquittal. In only one case did the property owner obtain a temporary restraining order from a state court.

The risk to these property owners from peaceful picketing was, in fact, nothing other than the risk of economic harm they would suffer if their store or business entrances were on public sidewalks. But the risks to employees and union representatives for engaging in arguably protected activity were the “personal jeopardy or apprehension” of arrest threats, actual arrests by police officers, and even criminal prosecutions, including the permanent stigma of arrest or conviction records. It is thus through the employer’s “pugnacious tactic” of using the “highly coercive” criminal trespass laws that the property-based right to exclude has taken on a new meaning in labor relations. Union representatives and employees are excluded from private property in this manner not because their behavior is actually “criminal,” but because it is economically harmful. The Board and the courts cannot for long ignore the inconsistency between the federal policy of protecting peaceful collective labor activity as a means of imposing economic harm on employers and the employers’ use of state criminal trespass laws or injunctive relief to prohibit that same activity.

B. Sears II and State Anti-Injunction Laws

In Sears the Supreme Court believed its new preemption rule solved the problem of the “jurisdictional hiatus” that faced property owners searching for a legal remedy for trespassory labor picketing. When the Sears case was remanded to the California Supreme Court, however, the injunction order of the lower court was reversed. The Sears corpora-

333. See Providence, 285 N.L.R.B. No. 52, slip op. at 4, 126 L.R.R.M. at 1146 (security director of hospital); Emery, 286 N.L.R.B. No. 32, slip op. at 3, 126 L.R.R.M. (BNA) at 1242 (security guards); Homari, 286 N.L.R.B. No. 72, slip op. at 5, 126 L.R.R.M. (BNA) at 1246 (security guard).

334. See United Supermarkets, 283 N.L.R.B. No. 130, ALJ Decision JD-(SF)-290-80, slip op. at 3 (prosecution of picketers to acquittal). But see L & L, 285 N.L.R.B. No. 122, ALJ Decision JD-(MI)-375-81, slip op. at 5 (county prosecutor’s office agreed with union not to prosecute picketers for criminal trespass).

335. See Browning’s, 284 N.L.R.B. No. 104, 125 L.R.R.M. (BNA) 1264. The Maryland county court ultimately issued a permanent injunction enjoining picketing “at or in front of” the store’s “place of business” defined in the order as the store, its sidewalks, and its parking lot. Id., slip op. at 3, 125 L.R.R.M. (BNA) at 1265.

336. United, 283 N.L.R.B. No. 130, ALJ Decision, JD-(SF)-290-80, slip op. at 9.

337. Id.

338. 436 U.S. at 203.

tion, in the end, was denied an equitable remedy, not because of preemption, but because of California’s Moscone Act—an anti-injunction statute limiting the equity jurisdiction of California courts in labor disputes.

The court in Sears II noted that earlier California decisions had “established the legality of union picketing on private sidewalks outside a store as a matter of state labor law.” Since the “interest of the landowner was but a ‘thin’ and ‘technical interest,’ . . . an injunction against such picketing could not be deemed essential to prevent a substantial impairment of property rights.” Justice Tobriner summarized the effect and policy of the Moscone Act as they related to the Sears dispute:

[T]he sidewalk outside a retail store has become the traditional and accepted place where unions may, by peaceful picketing, present to the public their views respecting a labor dispute with that store. . . . In such context the location of the store whether it is on the main street of the downtown section of the metropolitan area, in a suburban shopping center or in a parking lot, does not make any difference. Peaceful picketing outside the store, involving neither fraud, violence, breach of the peace, nor interference with access or egress, is not subject to the injunction jurisdiction of the courts.

Thus, after Sears and Sears II, union access to private property for purposes of peaceful picketing or handbilling will depend, in part, on whether the state in which the access dispute occurs has an anti-injunction law designed, like California’s Moscone Act, to limit state regulation of peaceful labor activity. In effect, such statutes create a privilege of access under state law that may be broader than access privileges available under the Board’s Fairmont/Jean Country test. State labor laws designed to limit equity jurisdiction of state courts may also be interpreted to limit application of state criminal trespass laws to labor disputes.

341. Sears II, 25 Cal. 3d at 328, 599 P.2d at 684, 158 Cal. Rptr. at 378.
342. Id. at 329, 599 P.2d at 684, 158 Cal. Rptr. at 378 (citations omitted).
343. Id. at 332-33, 599 P.2d at 687, 158 Cal. Rptr. at 381. In his dissent in Sears II, however, Justice Richardson described the property owner’s rights as far more than “thin” or “technical.” Rather, he wrote, “a private store owner enjoys a federal constitutional right to reasonable protection from such trespassory invasions.” Id. at 336, 599 P.2d at 689, 158 Cal. Rptr. at 383 (emphasis in original). This federal right had been confirmed in Sears when the Court asserted that trespassory picketing “would be unprotected in most instances.” Id. at 337, 599 P.2d at 689, 158 Cal. Rptr. at 383 (quoting Sears, 436 U.S. at 206) (emphasis by Richardson, J.). Justice Richardson reasoned that the “federal principle” protecting property from trespass “is solidly founded upon the private property rights of the store owner, which rights derive not from any capricious or evanescent state statute or administrative ruling, but rather upon the rock solid footing of the Fifth and Fourteenth Amendments to the United States Constitution.” Id. at 337, 599 P.2d at 690, 158 Cal. Rptr. at 383-84. This substantive due process analysis was later rejected by the Supreme Court in PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), discussed infra Section III.C, pp. 220-23.
344. In a footnote in Sears II, the California Supreme Court asserted that “union activity which
The diversity of limitations that state labor laws may impose on both public and private remedies for peaceful trespassory labor activity creates a confusing bundle of access privileges that vary from state to state. Although most states have for many years had anti-injunction statutes modeled after the federal Norris-LaGuardia Act, even states with similar statutes will not necessarily interpret them in the same way. Nor should they be expected to, as the task of framing a uniform body of federal labor rights and remedies is for Congress, the Board, and the federal courts, not the states. Adding to the confusion is the possibility, in several jurisdictions, that rights of free speech arising under state constitutions may protect union access to private property that is functionally "public," such as shopping malls.

C. PruneYard and State Constitutional Rights

In the same year that the California Supreme Court, in Sears II, denied property owners the use of state equitable remedies against peaceful trespassory picketing, it also decided the case of Robins v. PruneYard Shopping Center. The court held in PruneYard that the California constitution protects "speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." The is authorized by state labor law constitutes an exception to the criminal trespass statutes." 25 Cal. 3d at 330 n.9, 599 P.2d at 685 n.9, 158 Cal. Rptr. at 379 n.9. The Court argued that "[a]s a specific statute regulating labor disputes, section 527.3 [the Moscone Act] would prevail over the earlier and more general criminal trespass laws [Cal. Penal Code § 602]." 447 U.S. 74 (1980).

owner of the PruneYard had denied high school students access to his twenty-one-acre shopping center for the purpose of soliciting signatures to a petition opposing a United Nations resolution against “Zionism.” When the California Supreme Court held that the students had a state constitutional right of access to his “private” shopping center, the owner of the PruneYard appealed to the United States Supreme Court, challenging California’s interpretation of its constitution on first, fifth, and fourteenth amendment grounds.

In its argument before the Supreme Court, PruneYard asserted that “a right to exclude others underlies the Fifth Amendment guarantee against the taking of property without just compensation and the Fourteenth Amendment guarantee against the deprivation of property without due process of law.” Justice Rehnquist agreed that “the right to exclude others” is “one of the essential sticks in the bundle of property rights.” Nevertheless, he continued, “not every destruction or injury to property by governmental action has been held to be a ‘taking’ in the constitutional sense.”

The constitutional question was whether California’s expansive interpretation of its constitution placed “public burdens” on the mall owner which “in all fairness and justice, should be borne by the public as a whole.” To answer this question required analysis of “such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment backed expectations.” Under the PruneYard facts, the Court asserted, California’s state constitutional protection of free-speech rights in the shopping center “clearly does not amount to an unconstitutional infringement of . . . property rights under the Taking Clause.” Justice Rehnquist observed that “[t]here is nothing to suggest that preventing [PruneYard] from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center.” Noting that “[n]either property rights nor contract rights are absolute,” the Court held that there was “little merit to [PruneYard’s] argument that they have been denied their property without due process of law.”

One commentator has aptly observed that Justice Rehnquist’s “opinion in PruneYard presages a reassertion of state power, with all of its diversity, in an area [labor relations] previously viewed as exclusively

350. Id.
351. Id. (citations omitted).
352. Id. at 83 (citations omitted).
353. Id.
354. Id.
355. Id.
356. Id. at 84 (citations omitted).
Although it is true that Hudgens, Sears, Sears II, and Prune Yard together seem to point toward expansion of state's rights "in this clash between the federal and state governments for hegemony," to conceive of the cases as being about state versus federal rights misses the point. As another commentator, James Atleson, has noted, there are "other interests at stake," which go "back to Justice Holmes." Atleson was referring to the dissent in Vegelahn v. Guntner, in which Holmes wrote, "[o]ne of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return." In effect, it is a "battle" between the rights of employers, supposedly protected by property rules under state law, and the rights of employees, supposedly protected by federal law.

The problem is that the battle lines have become blurred. The NLRB—the federal agency created to protect employees' rights—has become instead the protector of private property as an absolute right. And some states, such as California, have shown a greater willingness to sacrifice "thin" and "technical" property rights to protect the substantive employment rights of its workers and the constitutional rights of its citizens. But the overall trend seems quite clear. Unions, frustrated with the Board's access decisions and the delays in Board processes, are unlikely to turn to the Board for protection of section 7 activity on private property. Nor can they expect much help from the states. Outside of California, the highest courts of only a handful of states have created limited state constitutional rights of access to private shopping malls or university campuses for purposes of speech or petitioning. Constitutional rights of access to shopping malls for purposes of speech have been denied by the highest courts of five states. It is not state's rights, or

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358. Id.
361. See Atleson, supra note 359.
federal rights, but employers' property rights that, with few exceptions, have prevailed up to now.

IV
A "Right to Exclude" Versus a "Right of Access"

*Fairmont Hotel* and its progeny are important for the role they will play as access disputes shift from the arena of Board jurisdiction to state court jurisdiction. In applying the *Sears* preemption analysis to cases involving arguably protected trespassory activity, state court judges are unlikely to appreciate the ambiguities of the Board's *Fairmont* decisions, even with the "clarification" provided by *Jean Country*. State judges will, however, have a sense that the Board has denied access more often than not, as the *Sears* Court predicted. This perception will in turn lead state judges to the conclusion that there is little risk of conflict with federal labor law if the state court assumes jurisdiction over the trespassory labor activity.

Employers will thus have strong legal incentives to use injunctions or criminal trespass laws to exclude nonemployees engaged in labor picketing and handbilling on their private property. The *Sears* preemption analysis encourages state court jurisdiction. And, in the event of Board jurisdiction, unions face an ambiguous body of Board law and onerous procedural delays. As a result, the legal framework overwhelmingly favors the employer's interests in avoiding economic harm. It is foreseeable that there will be hundreds of access disputes in the future unless unions abandon attempts at face-to-face communication with employees and consumers on private property, an unlikely scenario. Because long Board delays and unfavorable substantive labor law make recourse to the federal agency futile, unions may forego filing section 8(a)(1) charges, even for interference with "clearly" protected section 7 activity. Regardless of whether 8(a)(1) charges are filed in the gray area of "arguably" protected section 7 activity, unions may find that in a few jurisdictions, such as California, they may have greater access rights under state law than under federal law. Unions can certainly do no worse in the state forum given the present framework of contradictory Board decisions and lengthy decisionmaking processes.

Of course, access in any particular case may ultimately depend on whether the Board or a state court resolves the dispute. If the state court initially assumes jurisdiction, rights of access will depend on court treat-

708 (1981); Jacobs v. Major, 139 Wis. 2d 492, 407 N.W.2d 832 (1987); *see also* Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 485 A.2d 1 (Pa. Super. 1984) (denying access to a shopping mall to disseminate campaign information and collect signatures, and distinguishing the shopping mall from the private university in *Commonwealth v. Tate*, 495 Pa. 158, 432 A.2d 1382, which was treated as a public forum).
ment of the preemption question and of other state laws that affect labor and property rights generally. Since the practical effect of Sears and Fairmont/Jean Country will be that many labor access disputes will be under state court jurisdiction, inconsistent state laws will produce conflicting outcomes across the nation.

The prospect of conflicting rules of access is as clear as it is troubling. At the very least, it may be time for the Supreme Court to reconsider Sears in light of the words written by Justice Harlan in his concurrence to Garmon nearly thirty years ago:

The threshold question in every labor pre-emption case is whether the conduct with respect to which a State has sought to act is, or may fairly be regarded as, federally protected activity. Because conflict is the touchstone of pre-emption, such activity is obviously beyond the reach of all state power.

For the moment, the Board must develop a more coherent body of federal labor law dealing with the conflict between property rights and statutory rights. Ultimately, this may mean that the Board and the courts will have to reject the Babcock “accommodation” principles. The Board's Fairmont decisions, and the Supreme Court cases such as Babcock, Hudgens, and Sears, that have contributed to the analytical framework of the Fairmont balancing test, have elevated the employer's “right to exclude” over the employee's statutory “right of access.”

The “puzzling” dictum in the Sears case has been confirmed: the property


365. 359 U.S. at 250.

366. Although in Hohfeldian terms the “right” of access would be described as a “privilege” in opposition to the property owner’s “right” to exclude, I have purposefully rejected that terminology. See Hohfeld, Some Fundamental Legal Conceptions as Applied in Legal Reasoning, 23 YALE L. J. 16 (1913). Hohfeld's “right/privilege” distinction implies too much about whose interests are more important and more worthy of legal protection. Assigning the labels—“right” or “privilege”—can become a way of determining outcomes without examining the underlying contextual relationships and social policies. This point becomes clearer if we ask whether unions, asserting statutory “rights” of employees, have a “right” of access and the employer has a “privilege” to exclude. See generally Singer, The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld, 1982 Wis. L. REV. 975; see also Klare, supra note 250, at 1366-71.

367. One ALJ noted his puzzlement with the following dictum in Sears: “For while there are unquestionably examples of trespassory union activity in which the question whether it is protected is fairly debatable, experience under the Act teaches that such situations are rare and that a trespass is far more likely to be unprotected than protected.” See United Supermarkets, 283 N.L.R.B. No. 130, ALJ Decision JD-(SF)-290-80, slip op. at 7 n.16 (quoting Sears, 436 U.S. at 205).
owner nearly always "wins" in these access disputes, unless, perhaps, state law limits the right to exclude through state labor laws or constitutional protections of speech. The property owner wins because she can quickly obtain injunctive relief, or threaten arrest, or call the police, or have security guards remove the "trespassers." Unions have no mechanism to gain access in a timely fashion. Once excluded, the union either needs a court order to reenter, which may take years, or individuals must take the risk that the state will not prosecute them under criminal trespass laws or hold them in contempt of court for violating an injunction.

The current Board law privileges property rights at the expense of labor communication. The *Fairmont* test has "corollaries" which create categories of privileged market relations that are dependent on wealth and status. These corollaries create property "plus"—an enhanced "right to exclude" labor activity for certain individual entrepreneurs and enterprises that share land and facilities. Thus, the single employer can acquire property *plus* by investing in sufficient physical land to insulate the pedestrian entrances to her single facility from public byways. Employers who share facilities acquire property *plus* by investing in certain forms of "goodwill"—in "luxury" surroundings, off-street parking, private sidewalks, security guards, separate employee entrances, and rules of exclusion. The corollaries also reveal class-based concerns that people who are engaged in union activity on private property are potentially more dangerous, more violent, more disruptive, and less trustworthy than the consumers, suppliers, and employees who are "invited" on to the property.

The Board, in effect, is using possessory interests in land, and the civil and criminal laws of trespass, to protect the employer's investment in an intangible form of property—her goodwill. The goodwill of a business is certainly a valuable property right. Business goodwill is en-

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368. Justice Marshall noted the dire consequences of protecting the use of wealth by excluding unwanted speech from "private" property which is "open to the public" in his dissent in *Lloyd*:

> Only the wealthy may find effective communication possible unless we adhere to *Marsh* v. *Alabama* and continue to hold that "[t]he 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."


369. The Board in *Fairmont* relied on the Supreme Court's property/§ 7 analysis in *Sears* which was, in part, predicated on assumptions about the potential for violence in trespassory picketing. See supra text accompanying notes 315-19. The Board also expressed concern that allowing union handbillers in the "private area in front of the hotel's main entrance" would raise "the possibility of theft of luggage," and also "disturb the hotel's guests ... and ... disrupt the hotel's decorum." *Fairmont*, 282 N.L.R.B. No. 27, slip op. at 11, 123 L.R.R.M. (BNA) at 1260.

hanced, in part, by investment in a luxurious, pleasant, exclusive environment. But the Board has made these particular kinds of investments in goodwill even more valuable to some employers by including freedom from union "disturbances" as one of the legally protectible incidents of owning such property. It is obvious, however, that many employers, whose facilities happen to have entrances located on public sidewalks, cannot likewise use civil and criminal trespass laws to enhance their goodwill. This is true regardless of how luxurious, or exclusive, the interior space of the facility may be. The public sidewalk brings to the doors of such employer's facility the "public," without distinction between the union representative, the Jehovah's Witness, the customer, the bill collector, or the employee. Beyond the employer's control, the public sidewalk becomes the only place where union representatives know, for a certainty, that they can legally picket and handbill. In effect, rights of unions to communicate with employees, suppliers, and consumers are no greater, and indeed, may be much less than the rights of the public at large.  

It is irrelevant whether Board and court attitudes about wealth, class, and status are based on genuinely held beliefs or cultural stereotypes. The point is that these assumptions have become an integral part of the legal analysis of conflicts between property rights and section 7 rights. The result is a series of distinctions that benefit "desirable" property owners and burden "undesired" types of collective labor activity. The legal rules create incentives for employers to adopt and enforce broad exclusive rules and to make certain types of investments in land, capital, and operating expenses that create barriers to union communication with the audiences they need to reach and should be able to reach on a "face-to-face" basis.  

The Board created a test of property rights in the Fairmont cases which suggests that property rights inhere in the land, and in the owner of the land, and not in a conception of the relationships between peo-


372. In his dissent to SCNO Barge Lines, Member Johansen noted that "[b]oth the Board and the courts have recognized face-to-face contact as an essential element of effective union organizing." See 287 N.L.R.B. No. 29, slip op. at 17 n.6, 127 L.R.R.M. (BNA) at 1086 n.6; see also Johansen’s discussion of the importance of face-to-face confrontation for pickets during an economic strike. 40-41 Realty Assocs., 288 N.L.R.B. No. 23, slip op. at 17, 128 L.R.R.M. (BNA) at 1006 (Johansen, dissenting).
The Fairmont/Jean Country test assumes that a property right can be measured, or weighed, assigned a value, and then compared to a statutory right, which has been likewise measured, valued, and placed in a “hierarchy” of statutory rights. What is missing in the Board’s analysis of access disputes is a conception of the complete social and economic interaction which occurs when a property owner uses land in a productive, commercial capacity. Thus, Fairmont and its progeny reveal how union access to private property for communicative labor activity has failed to keep pace with the expanded protection of marketplaces through property rules. In attempting to “balance” private property rights with federal labor rights, the Board and the Supreme Court have been reluctant to impose, uniformly, the burdens, risks, and potential benefits of modern collective labor relations on employers engaged in interstate commerce.

373. Jeremy Bentham wrote:

Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing, which we are said to possess, in consequence of the relation in which we stand towards it. There is no image, no painting, no visible trait, which can express the relation that constitutes property. It is not material, it is metaphysical; it is a mere conception of the mind.