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PICKETING IN SHOPPING CENTERS

MORRIS FORKOSCH*

The commercial use of private property which intentionally results in increased accessibility to the general public transforms the nature for the property from purely private to quasi-public. Neither the right to picket, as an exercise of free speech, nor a private property owner's right to prevent trespassory invasions of his property is clearly established with respect to labor picketing. The recent and controversial case of *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*¹ further muddied the picketing-free speech versus property rights waters with respect to shopping centers. The case must be understood and discussed in light of exactly what it decides and why, as well as what it leaves untouched and undecided.

I.

The factual situation is not complex and it may be graphically illustrated as follows: first draw a large circle and place an "L" upon its circumference, thereby denoting Logan's privately-owned shopping area; then place a "W" in the center to denote Weis' parcel of privately-owned property upon which it built a supermarket; outside the circle place a "U" for the Union; finally, with an arrow connect the U to W with the shaft going through L.

This simple diagram illustrates the basic fact situation, who is involved and why. It shows that to get at W's employees to proselytize during working hours U had to cross the L property line; that L might, in practical effect, be caught in the middle; that thereby L's investment might become threatened because other businesses might be afraid to buy or lease into a dogfight; that indirect pressure could thus be exerted upon L to pressure W to settle.²

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¹391 U.S. 308 (1968). The majority opinion was written by Justice Marshall, who also spoke for Chief Justice Warren and Justices Brennan, Fortas and Stewart. Justice Douglas concurred separately and Justices Black, Harlan and White each dissented separately.

²This is not the argument urged by either Logan or Weis. The Union's contention was that if the state injunction were to be upheld so that picketing could only take place outside the shopping center, it would be very difficult for the Union to limit the effect of the picketing solely to Weis. Justice Marshall recognized this argument with the remark that the Union could conceivably find itself

The actual facts as disclosed in the opinion demonstrate that Logan developed a shopping center complex adjacent to the intersection of a heavily traveled highway. This complex, which included extensive parking areas between the stores, was isolated from the highway and the intersecting road except for five entrances. Within the complex, all of the property was owned by lessor Logan except for the property that had been sold to Weis and upon which Weis had erected its supermarket and parcel pickup area.

Weis opened for business on December 8, 1965, with a wholly non-union staff of employees, and a few days later posted a sign on the exterior of its building prohibiting trespassing or soliciting by anyone other than its employees on its parcel pickup area or parking lot. On December 17th members of the Union began picketing Weis.³ Their signs stated Weis was anti-union and its employees were not receiving union wages or other union benefits. The pickets varied between 4 and 13, averaging around 6, and the picketing "was carried out almost entirely in the parcel pickup area and that portion of the parking lot immediately adjacent thereto."⁴ The Court noted that the picketing was peaceful at all times and unaccompanied by either threats or violence. Additionally, a footnote in the opinion disclosed that the Union did not challenge that portion of the injunction preventing the pickets "from blocking access by anyone to respondents' premises, making any threats or using any violence against customers, employees, and suppliers of Weis, and physically interfering with the performance by Weis employees . . ."⁵ After the picketing had continued for ten days, Logan and Weis jointly instituted an equity action on the sole ground that the Union's conduct constituted

charged with conducting an illegal secondary boycott based upon common situs picketing limitations. 391 U.S. at 323 n.12.

See *e.g.*, *Honolulu Typographical Local 37 v. NLRB*, 401 F.2d 952 (D.C. Cir. 1968) in which the union, while involved in a dispute with employer-newspaper, picketed five advertisers which were located in a privately owned shopping center. The action of the union in picketing at the entrance to the shopping center was held to be an unlawful secondary boycott under § 8 (b) (4) (ii) (B) of the Wagner Act.

³These pickets were not Weis employees but the employees of Weis' competitors; a fact which Justice Marshall correctly decides is unimportant. 391 U.S. at 315.

⁴*Id.* at 311.

⁵*Id.* at 312 n.4. What Justice Marshall means is that after the issuance of the injunction, the picketing became peaceful and remained peaceful. He later seizes upon this fact and the fact that the "non-speech" aspects of the picketing, such as patrolling, did not disclose any significant interference with the use of the mall by the public or Logan or Weis. Therefore, concluded the Justice, the trespass prohibition in effect barred all speech within the shopping center. *Id.* at 323.

a trespass on their property. The *ex parte* injunction thus obtained prevented the Union from picketing and trespassing upon Weis' store-room and parcel pickup area, and separately from picketing and trespassing upon Logan's parking area and all entrances and exits leading to said parking area. The effect of this injunction was to stop all picketing within the shopping center and to restrict it to areas outside the shopping center and along the highways; the Union so picketed and also distributed handbills asking the public not to patronize Weis.⁶

II.

On this statement of the facts Mr. Justice Marshall ultimately determined that the question facing the court was "whether Pennsylvania's generally valid rules against trespass to private property can be applied in these circumstance to bar petitioners [Union] from the Weis and Logan premises."⁷ His answer was no, and the main thrust of, and support for, his reasoning centered upon the analogy of this shopping center to a public or business area of a municipality. First, however, it may be advantageous to give the negative aspect of the opinion; that is, what the case did not concern itself with, and then analyze the opinion for what was actually decided and why.

The case did not undertake to decide either of the Union's first two contentions: that the state court was powerless to act because of the National Labor Relation Board's exclusive jurisdiction; and that section 7 of the Federal Labor Act protected the picketing activity as a concerted activity for mutual aid or protection.⁸ The Court refused to do so because the Union had not argued these points below

⁶The Union contested the injunction at an evidentiary hearing, lost and then carried its appeals through the state courts to the United States Supreme Court. A question arises as to whether the result would have been different if only Weis had sought the injunction or if only Logan had sought the injunction, or if each had sued independently of the other. *See, e.g.,* Nahas v. Retail Clerks Local 905, 144 Cal. App. 2d 808, 301 P.2d 932 (Dist. Ct. App. 1956) (only the tenant sought an injunction and it was denied as there was no exclusive possession of areas other than tenant's building); Spohrer v. Cohen, 3 Misc. 2d 248, 149 N.Y.S.2d 493 (Sup. Ct. 1956) (by implication) (the shopping center owner was successful in gaining an injunction). *But see* Schwartz-Torrance Inv. Corp. v. Bakery Workers' Union Local 31, 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964), *cert. denied*, 380 U.S. 906 (1965), where on a fact situation similar to *Logan Valley*, the California supreme court rejected the inference that a tenant could not succeed without the aid of the center owner. This writer is of the view that the United States Supreme Court would not alter its ruling if only the owner sued or if two independent suits were brought.

⁷391 U.S. at 315.

⁸*Id.* at 309 n.1.

and therefore the lower court had had no opportunity to consider the pre-emption issue raised by these contentions.⁹ Furthermore, the question whether the state court's order, which continued the temporary injunction after an evidentiary hearing, was to be characterized as permanent or temporary, was one with which the Court did not concern itself because it was characterized as final for purposes of review.¹⁰ Furthermore, because the picketing was directed specifically at patrons of the Weis market located within the shopping center and the manner in which that particular market was being operated, the Court did not pass on the separate question of whether Logan's property rights could justify the injunction against picketing which was not directly related in its purpose to the use to which the shopping center property was being put,¹¹ *i.e.*, what may be termed constitutional property rights versus third-party labor picketing¹² rights which do not interfere with the former.¹³

Mr. Justice Marshall further delimited the holding by refusing to consider whether an injunction would have been upheld if limited solely to preventing picketing carried on in the parcel pickup area, for, as he notes, the injunction issued was so broad "that by its terms [it] clearly prohibits entry onto the entire mall premises to picket. . . [A]nd no limiting construction has been placed on it by the Pennsylvania courts."¹⁴ In other words, the majority does not decide what

⁹*Id.* at 314 n.7. Insofar as Justice Marshall's reference is concerned, if the Pennsylvania courts had issued an injunction because of violations of state judicial or statutory requirements which conflict with the federal labor statutory rights to unionize and proselytize, there would have been such a federal-state conflict as would permit pre-emption to overthrow the injunction. The state injunction, however, by-passed this aspect and limited itself to a trespassing basis.

¹⁰*Id.* at 312 n.5. *See also*, M. FORKOSCH, A TREATISE ON LABOR LAW § 216 (2d ed. 1965).

¹¹In other words, the unexpressed analogy is, for example, to a department store which has independently owned businesses operating within it pursuant to a leasing arrangement. For a discussion of this type of situation see note 64 *infra*.

Put differently, if the Union's picketing had been directed against Logan or its property a different question might have been presented. This leads to an intriguing thought: Weis was the only property owner, all others being lessees; would identical picketing against Weis, if a lessee instead of an owner of the property, now be "directly related in its purpose to the use to which the shopping center property was being put?" To this writer the answer should be no, as this factual change does not, in theory, insulate the employer from the picketing, and direct harm, if any, to Logan would be identical. It is common knowledge that shopping center leases are for long terms, and the practical effect is to make these lessees analogous to owners.

¹²The issue is free speech, whether or not it is private or collective and whether or not it is for private benefit. *But see* *Traux v. Raich*, 239 U.S. 33 (1915).

¹³*See, e.g.*, subdivision VIII *infra*.

¹⁴391 U.S. at 322 n.11.

effect a narrow and limited injunction would have entailed but instead places the case in the factual context of a complete prohibition on all picketing and handbill distributing.¹⁵ Thus, the conflict becomes one of prohibiting picketing within the totality of the shopping center even though factually there was a conflict only in the area of the Weis market.

III.

Mr. Justice Marshall opens his opinion with the statement that "the question [is] whether peaceful picketing of a business enterprise located within a shopping center can be enjoined on the ground that it constitutes an unconsented invasion of the property rights of the owners of the land on which the center is situated."¹⁶ It is suggested that this formulation is too broad and somewhat ambiguous.

For example, the picketing is said to be "of," not around, or in the neighborhood of, or limited to one part of Weis' supermarket. One implication of this preposition permits it to be equated with "solely," or "exclusively," so as to infer that the picketing did not have any effect upon Logan or others. Moreover, the words "located within" do not disclose that the picketed supermarket, though not legally connected with Logan, the owner of the center (save undoubtedly by the usual forms of agreements to maintain the center, etc.), nevertheless was in such an unbreakable geographical proximity to it that for practical (picketing) purposes they were inextricably intertwined. Finally, the formulation of the question permits the implication that the pickets are conceivably being enjoined solely by Weis although the reason immediately given relates only to Logan's property rights.¹⁷

¹⁵Justice Black's dissenting opinion chides the majority on this point because the injunction's decretal paragraphs separately enjoin Logan and Weis and these "separately designated sections . . . are easily divisible." 391 U.S. at 329 n.2.

¹⁶*Id.* at 309.

¹⁷Justice Marshall's formulation, as quoted, refers to the injunction of a trespass on the property "of the owners of the land on which the center is situated." Both Weis and Logan owned their land, albeit Weis had an island surrounded by Logan. Still, Justice Marshall speaks of "owners" as plural, although he might be forgiven for this where a corporation is involved, but then uses the preposition "on" in connection with "the center." While "land" might well become "lands" to disclose both property owners, and "on" thereby able to refer to both, still, with "land" so used, "on" should have become "in" so as to restrict the question to Weis. As used, therefore, ambiguity is present and this writer construes the question as reasoning solely on the basis of Logan's property rights. Factually, of course, the injunction is a double one, and the description given so discloses, with both Weis' and Logan's own property rights being made the basis for the injunction against the trespasses.

What all this means is that one must adhere to the necessity of limiting a decision to its facts (and their implications), and that the language in the opinion should be read so as to separate dicta from holding. Nevertheless, the question propounded at the opening of this division must be read in conjunction with Mr. Justice Marshall's later formulation given in the opening paragraph of the preceding division, which he then answered by the analogy to the public or business area of a municipality.

It is this later question and answer which are of interest now, for there can be no doubt that ordinarily an admittedly open public area in a city or town where business establishments are found, cannot be roped off by the refusal of a license for the exercise of public and publicly-protected constitutional rights. Mr. Justice Marshall seizes upon this to generalize and starts "from the premise that peaceful picketing carried on in a location open generally to the public is . . . protected by the First Amendment."¹⁸ But he must bring the Logan Valley center into this premise.

Mr. Justice Marshall therefore discusses *Marsh v. Alabama*¹⁹ in which the distribution of religious tracts had been prevented by the refusal of a license for this purpose. The United States Supreme Court reversed the enforcement of a trespass statute as the factual situation disclosed that the private, wholly-owned, company town and its shopping district in practical effect were no different from, "and there is nothing to distinguish them from any other town and shopping center"²⁰ except the fact that the title to the property belongs to a private corporation."²¹ The path of reasoning that is pursued is substantially as follows: publicly owned business district streets and sidewalks are open to and belong to the general public; privately owned business district streets and sidewalks are open to all and are used by the general public; privately owned driveways and sidewalks within an enclosed shopping center are used by a significant portion of the general public. Thus, he reaches the conclusion that "[t]he

¹⁸391 U.S. at 313. This premise is, to this writer, too broad for the facts of the case. Such a description—"a location open generally to the public"—may apply more aptly to a *Marsh v. Alabama* type situation.

¹⁹326 U.S. 501 (1946).

²⁰Nowhere in the *Logan Valley* opinion is the term shopping district or shopping center used so as to equate it with the same term as used in *Marsh*, and properly so. As the term was used by Justice Black in *Marsh*, it described any busy place or block whether found in a village, town or city; these identical words mean something else in *Logan Valley*. As we are dealing with concepts and ideas, rather than the words that represent them, the difference noted is crucial.

²¹391 U.S. at 317, quoting from, *Marsh v. Alabama*, 326 U.S. 501, 503 (1946).

similarities between the business block in *Marsh* and the shopping center in the present case are striking. . . .²² [The basis for this is that] the general public has unrestricted access to the mall property. The shopping center here is clearly the functional equivalent of the business district . . . involved in *Marsh*.²³

While, therefore, the ownership of private property traditionally and normally carries with it the right to exclude those members of the general public who seek to use the premises in a manner contrary to the wishes of its owners, this could not apply here "because the shopping center serves as the community business block 'and is freely accessible and open to the people in the area and those passing through.' . . ."²⁴ If it is not ordinarily open to the public then access to it and for the purpose of exercising first amendment rights may be denied altogether.²⁵ In other words, the use to which the property is actually put is determinative of this constitutional question, even though *Logan*, *Weis*, and *Pennsylvania* could still make reasonable regulations governing the exercise of first amendment rights on their property. For example, picketing in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from the *Logan* or *Weis* property, or "with the intent of interfering with, obstructing, or impeding the administration"²⁶ of the business, or where it will unduly interfere with the normal use of the public property by other members of the public with an equal right of access to it, can be regulated. However, none of these cases is applicable as *Pennsylvania's* injunction prohibited *all* picketing. Thus there was no occasion to consider the extent to which *Logan* and *Weis* (and *Pennsylvania*) are entitled to limit the location and manner of the picketing or the number of pickets within the mall in order to prevent interference with either access to the market building or vehicular

²²Justice Marshall thus takes *Marsh*, which involved a "business district" within a company town, and reduces this "business district" to a "business block" and then equates the business block with the *Logan Valley* shopping center.

²³391 U.S. at 317-18.

²⁴*Id.* at 319, quoting from, *Marsh v. Alabama*, 326 U.S. 501, 508 (1946). Justice Black, in his dissent, objects to this formulation of the fact, *i.e.*, freely accessible and open to the public, by drawing a distinction between the public in general and customers.

²⁵See note 46 *infra* and accompanying text.

²⁶391 U.S. at 320, quoting from, *Cox v. Louisiana*, 379 U.S. 559 (1965). Here the equation of the mall is with "public property," so that anyone desiring to enter must be admitted, although "use" now in effect restricts the public to the general use for shopping center purposes and, as Justice Marshall next illustrates, reasonable license requirements for parades along city streets are upheld so as to limit interference therewith, 391 U.S. at 321.

use of the parcel pickup area and parking lot.²⁷ This therefore led Mr. Justice Marshall to the conclusion that the Pennsylvania court's restraints substantially hinder the communication of the idea which the Union sought to express to Weis's customers.

What about a Logan justification for the injunction, excluding Weis's reasons and support? Mr. Justice Marshall rejects any such justification in two ways, first by an appeal to the consequences of the rise of the shopping center, and then by an appeal to the *Marsh* rationale. Thus he refers to the economic development of the United States in the last 20 years which reinforces the court's opinion of the correctness of the approach taken in *Marsh*; the statistics which show the movement of population from cities to suburbs, and the rise of the shopping center with its 37 per cent share of the total retail sales in this country and Canada as of 1966. Mr. Justice Marshall concludes that any other holding would have "substantial consequences for workers seeking to challenge substandard working conditions, consumers protesting shoddy or overpriced merchandise, and minority groups seeking nondiscriminatory hiring policies. . . ."²⁸ The consequence of a contrary ruling would permit suburban businesses to do what downtown city ones could not: namely, "immunize themselves from similar criticism by creating a *cordon sanitaire* of parking lots around their stores"²⁹ To enforce the reasoning, reference is again directed to the *Marsh* holding that ownership and absolute dominion do not always equate, for when the owner opens up his property for use by the public his private property rights are circumscribed by the public's statutory and constitutional rights.³⁰ Thus, Mr. Justice Marshall repeats his earlier view that since the center is the functional equivalent of a business block, then for free speech purposes it is to be treated in a like manner.³¹

It must be noted that Weis and Logan are not treated alike by Mr. Justice Marshall in his reasoning and his conclusion. The Weis injunction was denounced on the basis of the "how" of the picketing,

²⁷*Id.* at 321. Justice Marshall footnoted the fact that uncontested portions of the injunction did accomplish precisely such a regulation of the picketing. The argument by Logan and Weis that the injunction permitted outside picketing and was therefore a permissible regulation, and not a prohibition, was countered by the answer that a "regulation" would permit a degree of effective picketing, but that the distance between the supermarket and the pickets was too great. *Id.* at 321-22.

²⁸*Id.* at 324.

²⁹*Id.* at 325.

³⁰326 U.S. at 506.

³¹391 U.S. at 325.

that is, the picketing permitted outside the center and along the highway was physically dangerous, inefficient, and insufficient, and might conceivably also carry over into a violation of the federal secondary boycott rules. The Logan injunction was rejected because of the "why" of the picketing, that is, otherwise workers could not challenge substandard working conditions, consumers could not inveigh against shoddy merchandise, and concerned persons could not seek nondiscriminatory hiring, because the *cordon sanitaire* would prevent this.

IV.

Mr. Justice Douglas' concurring opinion takes the view that while the Logan property cannot be equated with the *Marsh* company town, still it has been opened to public uses and the concepts of private property should not be used "to avoid this [picketing] incidence of carrying on a public business"³² when the public activity is constitutionally protected. He also agrees that picketing involves free speech, and his conclusion is that the state court is "surely capable of fashioning a decree" within such constitutional limitations.

V.

The dissenters' three opinions may be understood by leaving that of Mr. Justice Harlan for a separate discussion and analyzing the "Black-White" complementary views. Although not articulated in this fashion, these Justices treat the Weis and Logan injunctions separately, and also in conjunction; additionally they base their approach first, on the ordinary inviolability of private property save where valid exceptions have been constitutionally formulated, statutorily, or by judicial decision, and second, on the premise that there is little resemblance between the shopping center involved in this case and the property involved in *Marsh*.

The Weis injunction is first defended by these Justices on the basis of established private property concepts. Mr. Justice Black's statement of the Weis operations makes it clear to him that, as the supermarkets must now operate and function, their "pickup zones are as much a part of these stores as the inside counters where customers select their goods or the check-out and bagging sections where the goods are paid for."³³ On this basis, therefore, permitting any picketing or handbill distributing could now be logically extended

³²*Id.* at 326.

³³*Id.* at 328.

so that "[i]t would be just as sensible for this Court to allow the pickets to stand on³⁴ the check-out counters, thus interfering with customers who wish to pay for their goods, as it is to approve picketing in the pickup zone which interferes with customers' loading of their cars."³⁵

Mr. Justice White asseverates this fear and goes even farther: "I am fearful that the Court's decision today will be a license for pickets to leave the public streets and carry out their activities on private property, as long as they are not obstructive."³⁶ It is because of these extension fears³⁷ that Mr. Justice Black at the very least, desires that the wholly severable part of the injunction aimed at the pickup zone be affirmed,³⁸ and it is this same fear that causes Mr. Justice White to deny "that when the owner of private property invites the public to do business with him he impliedly dedicates his property for other uses as well."³⁹

The Logan injunction, and apparently that of Weis, is defended by Mr. Justice Black on additional grounds, *i.e.*, Logan's also comes under private property grounds as did Weis', but now a fifth amendment approach is included. He excoriates the majority because their support for the Union means that it can come onto Logan's property for the purpose of picketing and refuse to leave when asked despite trespass laws. This, in effect, deprives Logan of his property without just compensation; therefore, he urges, that if the Court is going to arrogate to itself the power to act as the Government's agent, then the fifth amendment requires it to award just compensation to Weis.

The Logan injunction conceptually necessitates that *Marsh* be considered.⁴⁰ If the Weis pickup zone could ever be considered dedicated to the public or to pickets, then, of course *Marsh* would here be involved, but according to Mr. Justice Black, "I cannot conceive how such a pickup zone, even by the wildest stretching of *Marsh v. Alabama* . . . could ever be so considered dedicated to the public or to

³⁴The word "at" would, in all probability, better express the Justice's meaning.

³⁵391 U.S. at 329.

³⁶*Id.* at 339.

³⁷One may, of course, suggest that forty years ago Holmes answered such an approach by writing, "It is the usual last resort of constitutional arguments to point out shortcomings of this sort." *Buck v. Bell*, 274 U.S. 200, 208 (1927).

³⁸391 U.S. at 329. Justice Black terms the Weis portion of the injunction the really important part of the injunction because, as the majority opinion admits, the picketing occurred almost exclusively in this area.

³⁹*Id.* at 339.

⁴⁰Weis steps into Logan's shoes at this point to assert his claims against the picketing. If Logan did not object, then Weis could not have urged the same arguments as Logan had urged. See note 7 *supra*.

pickets.”⁴¹ Mr. Justice White agrees, for his dissent is limited to the majority’s connection between the shopping center complex and the *Marsh* company town.

Mr. Justice Black rejects any *Marsh* analogy because it “was never intended to apply to this kind of situation.”⁴² That case “dealt with the very special situation of a company-owned town”⁴³ which “for all practical purposes had been turned into a town”⁴⁴ indistinguishable from any other town in Alabama. Thus he points out that there are no homes in the shopping center, no sewage disposal plant, post office or policemen, and only two stores on the property when the injunction was issued. The majority’s erroneous misreading and distorted use of *Marsh* so as to reduce its plural factual requirements of a “town” to but the one of a business district is, according to the Justice, a judicial extension which finds no justification in the Constitution. And, finally, the majority’s reliance on the invitation concept (i.e., Logan and Weis invited the public into the shopping center, in effect opened the area to the public use, and therefore permitted the *Marsh* application) is “contrary to common sense.” He points out that “customers” were so invited, not “the whole public,” for these latter were:

no more wanted there than they would be invited to park free at a pay parking lot. Is a store owner or are several owners together less entitled to have a parking lot set aside for customers than other property owners? To hold that store owners are compelled by law to supply picketing areas for pickets to drive store customers away is to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country. And of course picketing, that is patrolling, is not free speech and not protected as such. (Citations omitted.) These pickets do have a constitutional right to speak about Weis’ refusal to hire union labor, but they do not have a constitutional right to compel Weis to furnish them a place to do so on its property.⁴⁵

Mr. Justice White’s approach in all this is fundamentally the same as Mr. Justice Black’s, but he also argues that even if the Logan Valley Shopping Center could be said to have some aspects of “public” property “it is nevertheless true that some public property is available

⁴¹391 U.S. at 328.

⁴²*Id.* at 330.

⁴³*Id.*

⁴⁴*Id.* at 331.

⁴⁵*Id.* at 332-33. Justice White later goes into greater detail to show the limited nature of the “invitation” extended by Logan, Weis and the other commercial establishments. *Id.* at 338.

for some uses and not for others; some public property is neither designed nor dedicated for use by pickets or for other communicative activities."⁴⁶

Mr. Justice White then urges some hypotheticals, *e.g.*, that while only labor picketing was now being upheld, the rationale

would also compel the shopping center to permit picketing on its property for other communicative purposes, whether the subject matter concerned a particular business establishment or not. Nonobstructive handbilling for religious purposes, political campaigning, protests against government policies the Court would apparently place of these activities carried out on Logan's property within the protection of the First Amendment, although the activities may have no connection whatsoever with the views of the Plaza's occupants or with the conduct of their businesses.⁴⁷

He was also concerned as to any future "line between 'shopping centers' and other business establishments which have sidewalks or parking on their own property. . . ."⁴⁸

Mr. Justice White's concluding remarks in effect limit the first amendment's reach to only official interference with speech and not to a situation when the owner of private property invites the public to do business with him. In *Marsh* "the State was deemed to have devolved upon the company the task of carrying out municipal functions,"⁴⁹ *i.e.*, the company was an agent of the state and therefore official interference with speech occurred, whereas here the alleged "streets" in Logan Valley Plaza were not like public streets. He feels that a different case would be presented if Congress permitted picketing on private property, *e.g.*, "either to further the national labor policy under the Commerce Clause or to implement and enforce the First Amendment. . . ."⁵⁰

VII.

The dissent by Mr. Justice Harlan pointed up the loophole which the majority would not take so as to avoid the first amendment holding. He felt that the pre-emption ground, *i.e.*, that the Pennsylvania courts had strayed into the area reserved for initial decision by the National Labor Relations Board might have been used so that the supremacy clause, and not the first amendment, would have applied.

⁴⁶*Id.*

⁴⁷391 U.S. at 339.

⁴⁸*Id.* See text accompanying note 36 *supra*.

⁴⁹*Id.* at 340.

⁵⁰*Id.*

However, as the Union did not raise this question, and the state courts did not discuss it, Mr. Justice Harlan concluded that the court had no jurisdiction to consider it. Mr. Justice Harlan devoted one paragraph to the free speech issue. He felt it was not an appropriate question to decide as "we can take notice that this is an area in which Congress has enacted detailed legislation and has set up an administrative agency to resolve such disputes in the first instance."⁵¹ Thus the court should have dismissed the writ as "improvidently granted." This would not be unfair to the Union as it was its own fault in failing to raise the pre-emption question.⁵² In effect, Mr. Justice Marshall did not disagree with the conclusion. If the state court had "relied on the purpose of the picketing and held it to be illegal, substantial questions of pre-emption under the federal labor laws would have been presented."⁵³

VIII.

There are several aspects of *Logan Valley* which may be examined with profit. There is no question that restrictive labor practices do exist in the supermarket industry,⁵⁴ and that without some governmental intervention analogous to that given in the 1930's by the Wagner Act to labor, organization here would be hampered, if not prevented. Mr. Justice Harlan advocated that the governments' chosen agency should act; this writer agrees. Just because the Union failed to argue pre-emption does not require the Court to review a bad case for only bad law can result.

For example, *Marsh* is justified on its facts, *i.e.*, a true company town to which the state had in effect delegated its powers; a delegation of a part of a state's powers to a huge interstate bus terminal⁵⁵ or to a world's fair⁵⁶ is likewise justified. In all these situations there is a dedication of otherwise semi-private or quasi-public property to a public use, and in effect the property is not limited to any particular group either expressly or impliedly. Thus, a public bus terminal welcomes the general public to its commercial concessions to shop,

⁵¹*Id.* at 336.

⁵²*Id.* at 237. Justice Harlan also commented: "For the establishment by this Court of a rigid constitutional rule in a field where Congress has attempted to strike a delicate balance between competing economic forces, and in circumstances where we cannot know how the controversy would be settled by Congress' chosen instrument, may also have a considerable disruptive effect." *Id.* at 337.

⁵³391 U.S. at 314 n.7.

⁵⁴See *H. NORTHRUP, RESTRICTIVE LABOR PRACTICES IN THE SUPERMARKET INDUSTRY* (1967).

⁵⁵*Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).

⁵⁶*Farmer v. Moses*, 232 F. Supp. 154 (S.D.N.Y. 1964).

and the concessionaires pay a rental which envisages not only a profit from the bus users but also from non-users. Likewise, a commercial fair welcomes all, and its entrepreneurial aspects are present even though the public interest and welfare are separately served. But a shopping center cannot be equated with such an embracing public interest or, as the dissent points out, with a *Marsh* company town. And in *Wolin v. Port of New York Authority*,⁵⁷ the United States Court of Appeals for the Second Circuit agreed that while "a uniform and absolute prohibition"⁵⁸ upon the exercise of first amendment rights could not be defended where only leaflets were involved, on the ground that littering would occur, still, there remained "the problem whether picketing, marches, placards and similar modes of communication are afforded comparable respect under the Constitution."⁵⁹

To illustrate further, one state's high court has upheld the use of ordinary card tables on a public street so as to distribute political literature;⁶⁰ nevertheless, *Wolin* refuses to permit these under all circumstances.⁶¹ Thus there are limits even in a situation far more "public" than in *Logan Valley*. While Mr. Justice Marshall did not reject reasonable limitations, he argued that the state court's absolute prohibition there made it unnecessary "to consider the extent to which respondents are entitled to limit the location and manner of the picketing or the number of pickets within the mall in order to prevent interference with either access to the market building or vehicular use of the parcel pickup area and parking lot."⁶² In other words, according to Mr. Justice Harlan, the Union's error was in failing to urge pre-emption, according to Mr. Justice Marshall the error of

⁵⁷392 F.2d 83 (2d Cir.), cert. denied, 393 U.S. 940 (1968).

⁵⁸*Id.* at 91.

⁵⁹*Id.* at 92. The Second Circuit felt that the regulations issued by the terminal manager were "an excessive delegation [by the bi-state Authority] of unfettered discretion placed in [his] power . . . and that therefore they are unconstitutional." *Id.* at 93. The court therefore upheld the *nisi prius* direction that the Manager promulgate new regulations carefully drawn to control the conduct of plaintiff and similar groups within the building. No one can question the legitimate public interest in maintaining a free flow of traffic in the Terminal, in avoiding excessive disruption of normal activities there, in ensuring the convenience and movement of passengers and vehicles. To meet this need, the relevant authority, whether municipal or otherwise, may prescribe "rules of order" for the use of the premises. The character of the place, including the number of persons passing through at different times and the enclosed design of the forum, will affect the degree of restriction tolerable under the Constitution. *Id.*

⁶⁰*People v. Katz*, 21 N.Y.2d 132, 233 N.E.2d 845, 286 N.Y.S.2d 839 (1967).

⁶¹See note 59 *supra*.

⁶²391 U.S. at 321.

Logan Valley was in obtaining too broad an injunction. If this is true then, as a matter of practice, the attorneys for Logan Valley could easily re-apply for a narrower, and yet sufficiently-broad injunction which, if proper findings of fact were made, could prevent effective picketing. Put differently, Mr. Justice Marshall and the majority have permitted a degree of state action which Mr. Justice Harlan, through the supremacy clause, would have foreclosed. Whether the Union has won a pyrrhic victory is a question not yet resolved.

There is another aspect of *Logan Valley* which is deserving of attention, namely, the concept of a business affected with a public interest.⁶³ In his short concurrence Mr. Justice Douglas refers to the Plaza as "a public business" and Mr. Justice Marshall's final paragraph quotes from *Marsh*: "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."⁶⁴ Neither Justice goes so far as to say that Logan Valley is "a business affected with a public interest" in the tradition of *The Granger Cases*⁶⁵ and *Nebbia v. New York*,⁶⁶ but for all practical purposes they do utilize this concept *vis-à-vis* the first amendment. Restated, under the traditional approach, a business so effected was subject to a degree of governmental control as to certain of its otherwise private entrepreneurial rights. Under the present approach, a retail business which is held to be a "public" one, *i.e.*, its property is dedicated to and/or used by the public, is now required to permit handbill distribution, picketing, etc., although these are subject to reasonable (private or governmental) regulation.

If this reasoning is accepted, then when is a retail business not a public one? Almost by definition, at least in this country, every such business seeks public support, is "dedicated to the public" because it could not otherwise exist. How any retail business could seek such support without writing to, inviting, encouraging, and even "pulling in" customers is beyond this writer. Every retail business⁶⁷ opens its "property" in some degree to the public, dedicates it to them in a fashion, and is therefore affected by what they do, and so the only insulation a small businessman has against the fears expressed by Justices Black and White ultimately depends upon the interpretation

⁶³See M. FORKOSCH, CONSTITUTIONAL LAW § 393 (1963).

⁶⁴391 U.S. at 325; quoting from, *Marsh v. Alabama*, 326 U.S. 501, 506 (1946).

⁶⁵94 U.S. 113 (1876).

⁶⁶291 U.S. 502 (1934).

⁶⁷See, *e.g.*, *International Union of Electrical Workers Local 761 v. NLRB*, 366 U.S. 667 (1961), for an example of the Supreme Court's limitation on the Board's "reserved gate" policy with respect to non-retail businesses in labor disputes.

of five Justices in determining the reasonableness of the particular union activity.⁶⁸

For example, since 1890 the United States Supreme Court has, on due process grounds, checked "reasonableness" in administrative rate-making,⁶⁹ and at least since 1940 has so examined picketing as an extension of free speech.⁷⁰ Federal and state legislation in this latter area has occurred and has been judicially accepted or rejected in whole or in part.⁷¹ To an unprecedented degree, over the past four decades, the judiciary has favored personal and individual rights⁷² under constitutional clauses, which in effect means that governmental and/or other rights have generally diminished. Perhaps this is why Mr. Justice Black felt some award of just compensation should be made; although in the light of history, politics, economics, sociology, and practical considerations, the legislatures and the judiciary have been doing this indirectly, if not directly, ever since the birth of the republic.⁷³ What is required is a continuing accommodation on the part of government and all participants, for otherwise the rigidity engenders insoluble tensions which eventually break through.

Perhaps this is the answer to *Logan Valley*, namely, that the legislature (federal or state) should determine this policy. It is the government which licenses, permits, and authorizes such a complex and therefore has a degree of continuing jurisdiction. This does not necessarily require that a legislature compel a shopping center to open its gates and its entire area to all picketing, as the question of a proper state or federal policy enters.⁷⁴ For example, in *Logan Valley* it was the supermarket, not the center, which was the Union's target,

⁶⁸A union's peaceful "consumer picketing," directed to informing the public that a product sold by a retailer is the subject of a dispute by this (or another) union with the product's manufacturer has been upheld. *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58 (1964); see also *NLRB v. Servette, Inc.*, 377 U.S. 46 (1964); *Minneapolis House Furnishing Co.*, 132 N.L.R.B. 40 (1961).

Separately, a consumer organization's peaceful picketing to compel a retailer to hire Negroes has been upheld as a "labor dispute." *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938). *Contra*, *Huges v. Superior Court*, 339 U.S. 460 (1950), aff'g 32 Cal. 2d 850, 198 P.2d 885 (1948).

Logan Valley's holding thus permits at least all this type of activity and, perhaps, political activity, even though Justice Marshall rejected present consideration of decisions in this area because "none of these cases is applicable to the present case."

⁶⁹*E.g.*, *Chicago, Milwaukee & St. P. Ry. v. Minnesota*, 134 U.S. 418, 458 (1890).

⁷⁰*Thornhill v. Alabama*, 310 U.S. 88 (1940).

⁷¹See M. FORKOSCH, A TREATISE ON LABOR LAW ch. XI (2d ed. 1965).

⁷²See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

⁷³See, e.g., *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 496 (1837).

⁷⁴See M. FORKOSCH, A TREATISE ON LABOR LAW § 259 (2d ed. 1965).

so that by analogy to either the primary-secondary "signalling" type of picketing,⁷⁵ or to the ambulatory and common situs and ally and unity of interest doctrines,⁷⁶ one may see that pragmatic accommodations have occurred.

IX.

Conclusions as to the repercussions of *Logan Valley* are logically available, but policy does not necessarily follow logic. Nevertheless, from the fact that of the *Logan Valley* majority of six (Mr. Justice Douglas concurring separately) only Mr. Chief Justice Warren is retiring at the end of the 1968 term,⁷⁷ one may superficially assume that a majority of at least five will continue to support the holding on its facts, even if not agreeing with every implication of Mr. Justice Marshall's language. This, however, does not square with Mr. Justice Douglas's concurrence for his language says that where the property is "opened . . . to public uses," and the center's business and the picketing of the retailer are "directly related," then he would reject an absolute prohibition on all union picketing. However, the Justice in effect would uphold a state court which, within constitutional limitations, is capable of fashioning a decree. In other words a numbers game may not be possible, so that any new Justice may really be a deciding vote.

Regardless, it is possible that the Court will uphold geographical (the "where") restrictions, designed to prevent even peaceful union activity anywhere in the shopping center's area⁷⁸ except that which is contiguous to or directly or immediately related to the object of the activity (of course if the center itself is such an object a different question arises).⁷⁹ This does not deal with the "why" of the picketing⁸⁰ for then a different question might conceivably involve even the supermarkets.

Separately from the aspect of union picketing is the question of non-union groups. For example, Mr. Justice Marshall's language em-

⁷⁵NLRB v. Denver Building & Const. Trades Council, 341 U.S. 675 (1951); see also, International Bhd. of Elec. Workers v. NLRB, 341 U.S. 694 (1951); United Bhd. of Carpenters v. NLRB, 341 U.S. 707 (1951).

⁷⁶See M. FORKOSCH, A TREATISE ON LABOR LAW 440-449 (2d ed. 1965).

⁷⁷This article was written prior to the resignation of Mr. Justice Fortas. Editors note.

⁷⁸The fears of Justices Black and White are not discussed because there is little doubt that the otherwise valid trespass laws would be upheld—although one may seriously question this conclusion.

⁷⁹Justice Marshall refused to pass on these questions because they were not raised by the record.

⁸⁰See subdivision III *supra*.

phasizes the ideas sought to be conveyed by the Union, but he specifically includes, as purveyors of other ideas, groups of consumers protesting shoddy merchandise, or minorities protesting discriminatory hiring practices.⁸¹ One may argue that his wording creates an umbilical cord between the various protest groups mentioned and Weis. However, such a viable connection does not ordinarily exist, *e.g.*, an anti-Vietnam group, a religious body attempting to proselytize, the Red Cross, and either Weis or Logan or both. Therefore, it may be concluded, *Logan Valley* is limited, is not to be expanded, and is really a labor, not a civil rights or free speech decision even though drawing upon these for a rationale.

Assuming either a limitation or a nonlimitation upon the groups, *i.e.*, the "who" of picketing, then are demonstrations, *i.e.*, the "how," to be permitted? That is, can only traditional foot-sign picketing occur? If, for example, Logan Valley has opened its center to the public and is the functional equivalent of a business block, then one step more should permit a card table to be used. As *Wolin* points out, the Supreme Court has not yet specifically determined how far first amendment communication rights extend beyond handbill distributing. Thus, even if handbill distributing is limited to unions, consumers, and minorities connected to Weis as already indicated why not permit a table for this purpose? This appears to be acceptable under Mr. Justice Marshall's approach. But even so, can the handbill tradition permit the modern-day demonstration, or any of its variations? It is opined that *Logan Valley* does not go as far as *Marsh*, although using *Marsh's* reasoning, and that a complete dedication to the public has not been found. As a consequence, a limited or quasi-public use is upheld, not a generalized one, and only when there is some economic or analogous connection between the pickets and a business or shopping center will a degree of demonstration be allowed.

⁸¹391 U.S. at 324.

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