Consumer Picketing After Lechmere, Inc. v. NLRB: The Phenomenon of "Impulse Buying"

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NOTES

CONSUMER PICKETING AFTER LECHMERE, INC. v. NLRB: THE PHENOMENON OF "IMPULSE BUYING"

Section 7 of the National Labor Relations (Wagner) Act (NLRA) grants an employee the right to establish or affiliate with a labor organization. Furthermore, the rights guaranteed by Section 7 are protected by Section 8(a)(1) of the NLRA, which defines as an unfair labor practice any interference, restraint or coercion by an employer in the exercise of rights guaranteed under Section 7. Although Section 7 rights do not expressly grant a union access to private property, the United States Supreme Court identified grounds upon which union representatives would be permitted to engage in union activities on private property in NLRB v. Babcock & Wilcox Co. The availability of this right, though not absolute, can be essential during an organizing campaign when it may be necessary for nonemployee union organizers to communicate with targeted employees, or when a union's strategy entails communication with consumers through the distribution of handbills and literature or by picketing. Accommodation of nonemployee union representatives' activities.

1. 29 U.S.C. § 157 (1988). In particular, Section 7 provides: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

Id.


3. 351 U.S. 105, 112-14 (1956). The Court stated that when nonemployee union members' reasonable attempts to communicate with employees are made ineffective by the inaccessibility of the employees, an employer's right to exclude the nonemployee union members from private property must yield to the extent necessary for the communication of the information. Id. at 113.

rights, however, must be achieved while observing an employer's property rights, and there should be "as little destruction of one as is consistent with the maintenance of the other." Thus, with the "accommodation" approach set forth in Babcock & Wilcox, the Court fostered a balancing test to be administered by the National Labor Relations Board (NLRB or the Board) when adjudicating unfair labor practice cases. The Board's objective in such instances is to evaluate equitably all competing property and statutory interests of the respective parties. Fulfilling this objective has generated considerable litigation, particularly before the NLRB.

Over the years, courts have defined what constitutes picketing and what its essential elements are. For instance, merely holding placards and patrolling an area does not constitute picketing absent exigent circumstances. See Florian Bartosic & Roger C. Hartley, Labor Relations Law in the Private Sector 229 (2d ed. 1986) [hereinafter Bartosic & Hartley, 1986 ed.]. Rather, the pickets must confront employees, suppliers, or consumers in some manner. Id.; see, e.g., Chicago Typographical Union No. 16 (Alden Press, Inc.), 151 N.L.R.B. 1666 (1965) (holding that carrying placards through a shopping center constituted publicity and not picketing). Courts and the NLRB have, however, found picketing to have occurred in situations where the pickets simply placed signs up and left them, without actually patrolling. See, e.g., Local 182, Int'l Bhd. of Teamsters, 135 N.L.R.B. 851 (1962) (involving pickets who placed signs in a snow bank and sat in automobiles to protect themselves from the cold), enforced, 314 F.2d 53 (2d Cir. 1963).

Furthermore, in NLRB v. United Furniture Workers, 337 F.2d 936 (2d Cir. 1964), the United States Court of Appeals for the Second Circuit formulated a test to determine whether the conduct of a union entailed the necessary confrontation to constitute picketing. That is, courts should ask whether the presence of the union representatives who posted their signs and then sat in automobiles "was intended to and did have substantially the same significance for persons entering the employer's premises as if [the union representatives] had remained with the signs." Id. at 940; see also BARTOSIC & HARTLEY, 1986 ed., supra, at 229. According to the National Labor Relations Board, "[t]he important feature of picketing appears to be the posting . . . at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer's business." Lumber & Sawmill Workers Local Union No. 2797, 156 N.L.R.B. 388, 394 (1965).

7. Id.
8. See, e.g., Dillard's, Inc., 305 N.L.R.B. 1102, 1103 (1992) (involving a handbilling campaign outside the entrances of a retail store); JMB Properties Co., 305 N.L.R.B. 978, 979 (1991) (upholding a property owner's right to prohibit peaceful handbilling at the interior mall entrance of a retail store); Makro, Inc., 305 N.L.R.B. 663, 667-68 (1991) (granting the union access to picket on private property at the store's entrance and exit); Oakland Mall, Ltd., 304 N.L.R.B. 832 (1991) (upholding the rights of a union to handbill at store entrances on private property); Sears, Roebuck & Co., 304 N.L.R.B. 58, 60 (1991) (permitting a union to picket and handbill in front of auto centers); Wegmans Food Mkts., Inc., 300 N.L.R.B. 868, 869-71 (1990) (involving informational handbilling by the union on private property open to the public); Sparks Nugget, Inc., 298 N.L.R.B. 524, 534 (1990) (ordering an employer to allow picketing and handbilling at the rear customer entrance to a hotel and casino—private property open to the public), enforcement granted in part and denied.
Recently, in *Lechmere, Inc. v. NLRB,* the United States Supreme Court addressed—for the sixth time in thirty-five years—the issue of employer private property rights as they vie against the rights of nonem-


ployee union organizers. In rejecting the findings of both the NLRB and the United States Court of Appeals for the First Circuit, the *Lechmere* majority held that store employees were accessible to nonemployee union representatives outside of the employer’s property and that the employer did not, therefore, commit an unfair labor practice by barring union organizers from its property. In its decision, the Court did not address the issue of “impulse buying” on the part of consumers, and failed to distinguish the grounds upon which a union’s right of access to consumers may be granted. The Court did, however, promulgate a calculus to be applied in all cases involving union access to private property; that is, an employer can lawfully exclude union organizers from its property as long as the target audience is deemed to otherwise be accessible to union representatives without violating the private property rights of the employer.

*Lechmere* arose out of an attempted organizing campaign by Local 919 of the United Food and Commercial Workers Union, which sought to organize the retail store employees of Lechmere, Inc. Lechmere owned and operated a retail store located in the Lechmere Shopping Plaza in Newington, Connecticut. Lechmere also owned part of the plaza’s parking lot, a section of which was designated as the employees’ parking lot. Union representatives entered the parking lot and placed handbills on the windshields of cars parked in the employees’ section. Lechmere prohibited this solicitation, removed the handbills that had been distributed.

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10. *Id.* at 842; *see also* Roger C. Hartley, The Supreme Court’s 1991-92 Labor and Employment Law Term, Speech to the Section on Labor and Employment Law, American Bar Association (Aug. 10-12, 1992), in 140 Lab. Rel. Rep. (BNA) 528, 529 (Aug. 24, 1992) (“*Lechmere v. NLRB* represents the Supreme Court’s sixth effort in thirty-five years to accommodate the interests of property owners seeking trespass protection with workers’ competing interest in obtaining information regarding the benefits of self-organization.”).
14. Impulse buying is defined as “[a]n act of purchasing, made on the spur-of-the-moment, impelled by some thing or happening in a store.” IRVING J. SHAPIRO, DICTIONARY OF MARKETING TERMS 125 (4th ed. 1981). Specific forms of impulse buying include: planned impulse buying; pure impulse buying; reminder impulse buying; and suggestion impulse buying. *Id.; see also infra* notes 168-79 and accompanying text.
15. *See infra* text accompanying notes 168-79 for a complete discussion of impulse buying; *see supra* note 4 and accompanying text for a discussion of the necessity and permissibility of union access to private property.
17. *Id.* at 843.
18. *Id.*
19. *Id.* at 844.
20. *Id.*
uted by the union, and denied the union organizers access to the lot on several subsequent occasions.\textsuperscript{21} The union representatives then relocated themselves on a public strip of land adjacent to the parking lot and continued their organizing efforts by distributing handbills, picketing, and recording license plate numbers of cars parked in the employee area of the lot.\textsuperscript{22}

The union filed an unfair labor practice charge with the Board, alleging that Lechmere violated the NLRA by barring the nonemployee organizers from its property.\textsuperscript{23} An administrative law judge found that the union organizers were entitled to access to the parking lot,\textsuperscript{24} relying on the precedent established in the Board's previous decision in \textit{Fairmont Hotel Co.} \textsuperscript{25} The administrative law judge recommended, \textit{inter alia}, that Lechmere cease disallowing union representatives access to its parking lot for handbilling and organizing purposes.\textsuperscript{26} The Board affirmed the

\begin{itemize}
\item \textsuperscript{21} \textit{Id.}
\item \textsuperscript{22} \textit{Id.} Through their efforts, the union representatives were able to directly contact approximately 20\% of the nonsupervisory employees and sent out four mailings to the employees. However, these efforts only resulted in one signed union authorization card. \textit{Id.}
\item \textsuperscript{23} \textit{Id.; see also infra notes 41-48 and accompanying text (discussing the NLRA).}
\item \textsuperscript{24} Lechmere, Inc., 295 N.L.R.B. 92, 98-100 (1989), \textit{review denied, enforced}, 914 F.2d 313 (1st Cir. 1990), \textit{rev'd}, 112 S. Ct. 841 (1992). In ordering Lechmere to grant the union access, the administrative law judge found a violation of Section 8(a)(1) of the NLRA. \textit{Id.} at 100. Under Section 8(a)(1), an unfair labor practice is considered to exist if an employer "interferes with, restrains, or coerces employees in the exercise of the rights guaranteed" in Section 7. 29 U.S.C. § 158(a)(1) (1988).
\item \textsuperscript{25} 282 N.L.R.B. 139 (1986), overruled by \textit{Jean Country}, 291 N.L.R.B. 11 (1988). \textit{Fairmont Hotel} set forth a framework for resolving conflicts between the private property rights of employers and the rights enumerated in Section 7 of the NLRA. \textit{Id.} at 141-43. Under \textit{Fairmont Hotel}, the relative strength of each party's claim must be weighed. \textit{Id.} at 142. Accordingly, a strong claim by an employer would prevail over a less compelling statutory right, yet a tenuous property right must give way to a statutory right that clearly is more compelling. \textit{Id.} Only when the respective claims of each party were relatively equal in strength would alternative means of communicating with employees be determinative. \textit{Id.}
\item \textsuperscript{26} \textit{Lechmere}, 295 N.L.R.B. at 100. The administrative law judge applied the criteria set forth in \textit{Fairmont Hotel}, in which the Board identified its task as weighing the relative strength of each party's claim and allowing the stronger claim to prevail. \textit{Id.} at 98-100.
\item The union also alleged that Lechmere violated Section 8(a)(1) of the NLRA by installing a revolving video-tape camera on the roof of the store. \textit{Id.} at 98. The administrative law judge did not, however, find that such a violation had taken place. \textit{Id.} at 99-100. Rather, the administrative law judge ruled that "[a]n employer may photograph or videotape certain activities outside his plant without violating the Act where he can establish a legitimate purpose for this activity." \textit{Id.} at 99; see Russell Sportswear Corp., 197 N.L.R.B. 1116 (1972), \textit{enforcement denied sub nom.} S.W. Noggle Co. v. NLRB, 478 F.2d 1144 (8th Cir. 1973). \textit{But see Sparks Nugget, Inc.,} 298 N.L.R.B. 524, 534 (1988) (holding that the employer engaged in unlawful surveillance of the union activities of employees and others by photographing those activities), \textit{enforcement granted in part and denied in part}, 968 F.2d 991 (9th Cir. 1992).
\end{itemize}
decision of the administrative law judge upon review, but invoked a different standard applying to cases involving access to private property.27 The Board's decision relied upon the balancing test set forth in Jean Country,28 and was subsequently enforced by the United States Court of Appeals for the First Circuit.29

The United States Supreme Court reversed the First Circuit's decision.30 The majority, relying on the plain terms of the NLRA, reiterated the holding in Babcock & Wilcox that an employer normally cannot be compelled to allow nonemployee union organizers on its property.31 The Court reasoned that Section 7 only protects nonemployee union organizers when the inaccessibility of employees makes reasonable attempts to communicate with them through usual channels ineffective.32 The majority asserted that the facts of the case did not justify invoking the rare exception to the general rule, and thereby sustained the employers' private property rights.33 The Court reversed the Board's factual finding that the union did not have reasonable effective means of commu-

27. Lechmere, 295 N.L.R.B. at 92.
28. 291 N.L.R.B. 11 (1988). The Board set forth a detailed analytical approach that assessed three factors: "the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted." Id. at 14. The Board considered the availability of a reasonably effective alternative means of exercising the Section 7 right as a third significant factor. Id. Hence, the Board overruled Fairmont Hotel to the extent that it allowed for the reasonable alternative factor to be considered only when the property rights involved are relatively equal to the statutory rights asserted by the union. Id. at 11.
29. Lechmere, Inc. v. NLRB, 914 F.2d 313 (1st Cir. 1990), rev'd, 112 S. Ct. 841 (1992). The First Circuit determined that the "adjudicatory task" in this situation is satisfied by arriving at a fair balance between the Section 7 rights of employees and the property rights of employers "with as little destruction of one as is consistent with the maintenance of the other." Id. at 318 (quoting Hudgens v. NLRB, 424 U.S. 507, 521 (1976) (quoting NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956))). Writing for the majority, Judge Selya endorsed the Jean Country analytical approach as "a useful analytic model for resolution of access-to-property cases." Id. at 321. While endorsing Jean Country, the judge also declared that "the Board's chosen decisional model is entitled to judicial respect." Id. at 318. According to Judge Selya, the "crux of the dispute" was the availability of reasonable alternative means of communication, which were lacking in Lechmere. Id. at 322.

Judge Torruella argued strenuously in dissent that reliance on the Jean Country approach had distorted the majority's analysis of alternative means of communication. See id. at 326-28 (Torruella, J., dissenting). He asserted that the similarities in the factual circumstances of Lechmere and Babcock & Wilcox demanded a finding that the union could have communicated its message by other means. Id.

32. Lechmere, 112 S. Ct. at 845. Justice Thomas delivered the majority opinion, in which Chief Justice Rehnquist, Justice O'Connor, Justice Scalia, Justice Kennedy and Justice Souter joined. Id. at 843.
33. Id. at 850.
nicated with employees, and held that the Board erred in reaching its conclusion that Lechmere had committed an unfair labor practice.\(^3\)

Justice White, in dissent,\(^4\) argued that the Board correctly made an "accommodation" of the competing Section 7 interests and the private property interests under the Babcock & Wilcox and Hudgens v. NLRB\(^5\) rulings.\(^6\) Moreover, the dissent argued that there are cases in which access to private property must be granted under Section 7 and that this access should not be limited solely to instances when reasonable alternative access is infeasible.\(^7\) Rather, Justice White asserted that under previous cases, the Court viewed reasonable alternative means as "an important factor in finding the least destructive accommodation between § 7 and property rights."\(^8\) Finally, Justice White argued that the Court failed to give proper deference to the Board's interpretation of Section 7.\(^9\)

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3. Id.
4. Id. at 850-54 (White, J., dissenting). Justice Blackmun joined Justice White's dissent. Id. Justice Stevens dissented separately for reasons similar to those of Justice White, however, he did not join Justice White's opinion "to the extent that it suggest[ed] that the Babcock case was incorrectly decided." Id. at 854 (Stevens, J., dissenting). Rather, according to Justice Stevens, the Court's "central holding" in Babcock & Wilcox was both correct and in accordance with the modern legal principle of granting deference to administrative agencies. Id.
6. See Lechmere, 112 S. Ct. at 850-52 (White, J., dissenting). The Babcock & Wilcox accommodation approach involved a two pronged test whereby an employer "may validly post his property against nonemployee ... [access] if [1] reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and [2] if the employer's notice or order does not discriminate against the union." NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956). The Hudgens calculus stated that the point of accommodation "may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context," and the Board was responsible for making the decision. Hudgens, 230 N.L.R.B. 414, 415 (1977) (quoting Hudgens, 424 U.S. at 522).
8. Lechmere, 112 S. Ct. at 853 (White, J., dissenting). According to Justice White, the Court failed to follow the standards set forth in the cases following Babcock & Wilcox regarding statutory construction by courts and agencies. Id. Moreover, the Court's rejection of both the Board's interpretation of the accommodation principle and the Jean Country analysis "is at odds with modern concepts of deference to an administrative agency charged with administering a statute." Id. at 852. Congress has recognized the importance of organized labor and delegated to the Board the authority over how Section 7 rights and private property rights were to be accommodated under the NLRA. Id. at 853. Therefore, according to Justice White, "a court should not substitute its own judgment for a reasonable construction by the Board." Id. Cf. Rust v. Sullivan, 111 S. Ct. 1759 (1991) (holding that an agency's construction of the statute is not considered an abuse of discretion if it is a
This Note first examines the origin and ensuing evolution of the National Labor Relations Act and Section 7 rights. It then considers the interpretations of the National Labor Relations Board and the Supreme Court regarding Section 7 rights in cases involving union access to private property, and analyzes the Supreme Court's application of the accommodation approach. Next, this Note analyzes the Supreme Court's decision in *Lechmere, Inc. v. NLRB*, focusing on the prospective application of the *Lechmere* calculus to cases of consumer picketing and handbilling where the union is not engaged in organizational activity. This Note examines the extent to which the rules set forth in *Lechmere* apply to the issue of consumer handbilling and picketing, exploring in detail the impact of "impulse buying" as a factor in evaluating such cases. Finally, this Note concludes that the dynamics of communicating to consumers are far different from union organizational activities and communications targeted at a finite group of employees. Since the *Lechmere* calculus will be applied to future cases involving union access to market customers, the Court must recognize the validity of impulse buying and its impact upon union access rights.

I. *THE EVOLUTION OF JUDICIAL INTERPRETATION REGARDING UNION ACCESS TO PRIVATE PROPERTY*

A. *Creation and Evolution of the National Labor Relations Act*

In 1935, the United States Congress enacted the Wagner Act, otherwise known as the National Labor Relations Act (NLRA). Since then, the NLRA has remained the "cornerstone of federal labor relations policy." Section 7 of the Act was designed, *inter alia*, to guarantee employ-
ees the right to join labor unions, bargain collectively, and engage in other concerted activity. Furthermore, the Act created the National Labor Relations Board (the Board), which was authorized to prevent and remedy unfair labor practices and conduct representation elections among employees.

In the years following the enactment of the NLRA, the strength and number of unions grew at a rapid pace. The focus of national labor policy shifted toward guaranteeing employees both the right to engage in, and the right to refrain from engaging in, concerted activities originally protected by Section 7. In furtherance of this goal, Congress, in 1947, enacted the Taft-Hartley Act, officially cited as the Labor-Management Relations Act (LMRA). The LMRA engendered a number of signifi-
cant changes, perhaps the most important of which allowed suits to be brought by or against unions.48

B. The Supreme Court, the NLRB and Section 7 Rights

The Supreme Court first visited the question of an employer's right to deny nonemployee union organizers access to its property in *NLRB v. Babcock & Wilcox Co.*49 In that case, union organizers attempted to exercise their Section 7 rights, and the Board found that, by denying the union organizers limited access to distribute union literature on company-owned parking lots, the employer had unlawfully interfered with the employees' right to self-organization.50 The United States Court of Appeals for the Fifth Circuit denied the Board's petition for enforcement.51 The Supreme Court, however, limited the Fifth Circuit's ruling that private property interests always override the employees' interest in receiving information about self-organization from union organizers on company property.52

The Supreme Court adopted a two-pronged test that allowed an employer to refuse nonemployees access to his property if: (1) the union could effectively reach employees with its message through reasonable communication efforts; and (2) the refusal of access did not discriminate against the nonemployee union representatives.53 Given the particular

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49. 351 U.S. 105 (1956).

50. *Id.* at 107-08. The demographics of the situation help to explain the importance of union access to the company parking lot. Babcock & Wilcox was located in a community of some 21,000 people. Approximately 40 of the employees lived in town and the remaining employees lived within a 30 mile radius. Over ninety percent of Babcock & Wilcox's 500 employees drove to work in private automobiles and parked on a company lot that adjoined the manufacturing plant area. *Id.* at 106-07.

51. *Id.* at 108.


53. *See id.* at 112. The fundamental issue involved in this accommodation approach was whether or not the union could effectively communicate with company employees outside of company property. Only in those cases where the union could not effectively reach employees away from company property could the Board compel an employer to
facts of the case, the Court determined that usual methods of imparting information were available to the union. Despite the fact that some employees resided up to thirty miles away from the manufacturing plant, the Court nevertheless found them to be within reasonable reach. Therefore, the Court held that the employer met the two-pronged test and was not required to allow the union use of its private property for organizational activities.

C. Babcock & Wilcox's Progeny

In cases following Babcock & Wilcox, the Board and courts generally denied unions access to company property, since unions were considered to be able to communicate effectively with employees without having to trespass. An exception did exist, however, in the unusual situations where employees lived and worked on company property.

In Hudgens v. NLRB the Supreme Court invoked its Babcock & Wilcox precedent set forth twenty years earlier. Hudgens involved peaceful primary economic picketing by striking union warehouse employees...
who picketed their employer's shoe store, located inside a suburban shopping mall.\textsuperscript{61} An administrative law judge, the Board, and the United States Court of Appeals for the Fifth Circuit all reached the conclusion that Hudgens, the owner of the shopping center at issue, had committed an unfair labor practice by excluding the picketers.\textsuperscript{62} The Supreme Court remanded the case, directing that the National Labor Relations Act was the only criteria to be considered in determining the case.\textsuperscript{63} The Court thereby reminded the Board of its responsibility to seek a proper accommodation between the property rights of the mall owner and the Section 7 rights of the employees.\textsuperscript{64} Aware that in making such an accommodation the facts of each case play a vital role, the Court stated that the point of accommodation "may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and pri-

handbilling or other means, undertaken on premises "occupied exclusively by a primary employer." \textit{Bartosic \& Hartley, 1986 ed., supra} note 4, at 243. The object of primary picketing is to interfere with the normal operations of the employer's business. \textit{Id.} Furthermore, the Supreme Court has held picketing by a union to be lawful when designed to "induce both the primary employees to strike and the employees of customers and suppliers not to cross a picket line at the primary employer's premises." \textit{Id.} at 240; see \textit{Local 761, Int'l Bhd. of Elect., Radio \& Mach. Workers v. NLRB}, 366 U.S. 667 (1961); NLRB v. International Rice Milling Co., 341 U.S. 665 (1951). Primary picketing should be contrasted with secondary picketing, in which the activities of a union occur on premises occupied exclusively by a secondary employer. \textit{Bartosic \& Hartley, 1986 ed., supra} note 4, at 243. Basically, "[s]econdary activity is the use of economic coercion by a union against an employer or other person with which it does not directly have a labor dispute to further its objects in a dispute with another employer, thus resulting in the extension of the dispute beyond the immediate parties." \textit{Id.} at 238. Such activity is considered unlawful if the union's object is to pressure the secondary employer into severing business ties with the primary employer "by persuading secondary employees to strike or to refuse to handle goods produced by, or destined for, the primary employer." \textit{Id.} at 243.

\textit{Hudgens}, 424 U.S. at 507. In fact, until removed, the employees picketed directly in front of the employer's store entrance inside the mall and also picketed the employer's downtown warehouse where they worked. \textit{Id.}

\textit{Id.} at 510-11. While agreeing with the underlying findings of the administrative law judge, the Board did depart from the judge's reasoning. The Board concluded that the existence of an alternative means of communication with the customers and employees of the Butler shoe store was immaterial, since the pickets were within the scope of Hudgens's invitation to members of the public to do business at the shopping center. \textit{Id.} at 511. The court of appeals enforced the Board's cease-and-desist order against Hudgens, however, on the basis of yet another theory involving an acknowledgment of the pickets' Section 7 rights and an evaluation of the competing constitutional and property right considerations addressed in \textit{Lloyd Corp. v. Tanner}, 407 U.S. 551 (1972). \textit{Hudgens}, 424 U.S. at 511-12.

\textit{Hudgens}, 424 U.S. at 523. The judgment was vacated by the Court, which found that "the rights and liabilities of the parties in this case [were] dependent exclusively upon the National Labor Relations Act." \textit{Id.} at 521. The case was remanded to the Court of Appeals, with directions to remand the case to the Board so that the case could be considered under the specific criteria delineated by the Court. \textit{Id.} at 523.

\textit{Id.} at 522.
vate property rights asserted in any given context." As a result, the Board must make the ultimate decision in reaching an accommodation.

On remand, with the instructions from the Supreme Court, the Board again found an unfair labor practice. The Board held that the mall owner's interference with the picketing violated the NLRA on the basis that there would exist no reasonable alternative means of communication with the intended audience if the strikers were denied access to the mall premises. In support of its holding, the Board found that requiring the strikers to relocate to the entrances of the mall would greatly attenuate the message, thereby making it less meaningful. Furthermore, factors such as the mall being open to the public and the existence of a broad invitation to enter the mall property without having a specific intent to buy weighed in favor of allowing union access. The Board clearly asserted that employers would not successfully insulate themselves from union activities simply by moving their stores into private malls.

The Court reemphasized the threshold nature of inquiries into alternative means of communication in Sears, Roebuck & Co. v. San Diego County District Council of Carpenters. There, the Court held that non-employee union organizers would not be allowed to gain access to property unless they could show that no other reasonable means of communicating their message to the employees was available. Without such

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65. Id.; see also Gorman, supra note 53.
68. Id. at 414-15. The absence of a reasonable alternative means of communication was the primary reason that the intended audience of the pickets' was not considered a specific group generally accessible by means other than entry onto the property. Peter J. Ford, The NLRB, Jean Country, And Access To Private Property: A Reasonable Alternative to Reasonable Alternative Means of Communication Under Fairmont Hotel, 13 Geo. Mason U. L. Rev. 683, 689 (1991). The Board identified the pickets' intended audience as comprising two distinct groups:

   (1) those members of the buying public who might, when seeing Butler's [shoe store] window display inside the Mall, think of doing business with that one employer, and (2) the employees at the Butler store. Although the nonstriking employees at the Butler store were obviously a clearly defined group, the potential customers (the more important component of the intended audience) became established as such only when individual shoppers decide to enter the store.

70. See Ford, supra note 68, at 689-90.
73. Id. at 205.
a showing, a court would not need to consider balancing the competing rights.\textsuperscript{74}

\textit{Giant Food Markets, Inc.}\textsuperscript{75} expounded upon one facet observed by the Board as being instrumental in its \textit{Hudgens} remand decision.\textsuperscript{76} The \textit{Giant Food} case emerged after a store operated by Allied Food Markets was closed and its unionized workforce terminated.\textsuperscript{77} Giant Food reopened a retail food store with a nonunion workforce in the space formerly occupied by Allied Foods.\textsuperscript{78} The union picketed and handbilled, urging the public to boycott the store because the Giant Food employees had no union representation and were receiving substandard wages and benefits.\textsuperscript{79} The union refused a request to vacate the property, so the property owners obtained a temporary restraining order limiting the union's access to the property.\textsuperscript{80} After issuance of the temporary restraining order, however, the union resumed picketing and handbilling at entrances and exits to the shopping center just outside the property line.\textsuperscript{81}

Again the Board was required to weigh a number of factors in making its determination and, as in \textit{Hudgens}, the Board found in \textit{Giant Food} that union access should be granted.\textsuperscript{82} There were several reasons for finding in favor of union access.\textsuperscript{83} First, the property involved was shared by at least one other business.\textsuperscript{84} More important, however, was the fact that the union's principal intended audience was potential customers, "who become readily identifiable only when they decide to enter the store, which may be on impulse when they see an advertisement in the window."\textsuperscript{85} As such, any means of communication other than direct access to the employer's property could not be considered reasonable in light of

\begin{thebibliography}{85}
\bibitem{74} The Court reasoned that such a threshold was appropriate because "any right [that nonemployee organizers] may have to solicit on an employer's property is a derivative of the right of that employer's employees to exercise their organization rights effectively." \textit{Id.} at 206 n.42.
\bibitem{75} 241 N.L.R.B. 727 (1979), \textit{enforcement denied}, 633 F.2d 18 (6th Cir. 1980).
\bibitem{76} \textit{Id.} at 728. The Board considered the availability of reasonable alternative means of communication with the intended audience of the pickets as a factor when making its determination. \textit{Id.} at 728-29.
\bibitem{77} \textit{Id.} at 727, 731.
\bibitem{78} \textit{Id.} at 727. Upon reopening, Giant Food did not employ any of the former Allied employees. \textit{Id.}
\bibitem{79} \textit{Id.} The union's picketing and handbilling activities took place on the sidewalk directly in front of the Giant Food store. \textit{Id.} None of the pickets was a Giant employee, although several were former Allied Food employees. \textit{Id.}
\bibitem{80} \textit{Id.} at 731.
\bibitem{81} \textit{Id.}
\bibitem{82} \textit{Id.} at 727.
\bibitem{83} \textit{Id.}
\bibitem{84} \textit{Id.}
\bibitem{85} \textit{Id.} at 728.
\end{thebibliography}
its possible ineffectiveness. Therefore, the Board again found that requiring picketing and handbilling to be conducted on public property at parking lot entrances approximately 250 feet away from the store entrances too greatly dilutes the union's message and thereby reduces its meaning.

Jean Country and Brook Shopping Centers, Inc. arose nearly ten years after the Board's decision in Hudgens. During that time frame, a number of cases had come before the Board in which it attempted to balance private property rights with unions' rights to undertake their activities. The Board used the Jean Country decision to implement a definitive policy with respect to competing rights in access cases and thereby returned to the asserted principles of both Babcock & Wilcox and Hudgens.

Jean Country involved a retail clothing store owned and operated by a tenant in a shopping mall. The shopping mall included two large department stores and over one hundred smaller specialty stores generally clustered together and grouped in aisles in the middle of the mall. In the center of one of the aisles was located the public entrance to the Jean Country store. The challenged activity involved picketing by non-employee union representatives at the entrance to the Jean Country store inside the mall. The union representatives carried signs aimed at informing the public that the store employees were not represented by the

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86. Id. at 729; see Ford, supra note 68, at 690-91.
87. Giant Food, 241 N.L.R.B. at 729. It was argued that the message would be diluted because (a) another business is on the same property, and (b) the motorists entering the parking lot from the public road would be more concerned with their safety than with observing the union's message by reading a picket or receiving a handbill. Id. at 729.
89. See, e.g., Fairmont Hotel Co., 282 N.L.R.B. 139 (1986), overruled by Jean Country, 291 N.L.R.B. 11 (1988). In Fairmont Hotel, a plurality of the Board interpreted the holding to mean that if the property claim asserted outweighed the Section 7 claim asserted, or vice versa, it would not be necessary to evaluate alternative means of communications, since no balancing of competing claims would have to be undertaken. Id. at 141-43. This applied only when the competing claims were analyzed independently of the reasonable alternative means of communication factor. Id. However, in Jean Country, the Board subsequently overruled the Fairmont Hotel plurality's view that the alternative means of communication factor must at times be excluded from the Board's determination of whether and how far property rights should yield to the exercise of Section 7 rights. Jean Country, 291 N.L.R.B. at 11.
90. Jean Country, 291 N.L.R.B. at 11; see Ford, supra note 68, at 697; see also supra note 37 and accompanying text.
92. Id.
93. Id.
94. Id. at 11.
union and therefore, customers should not patronize Jean Country. The union's goal was to persuade customers to shop at other stores in the mall whose employees were represented by the union. The attempted picketing resulted in the mall owner and Jean Country having the police remove the pickets from the premises.

In the Jean Country ruling, the Board again changed its standard for access cases. Based upon Supreme Court precedents, the Board declared that in all access cases, the degree to which Section 7 rights are impaired through denial of access should be balanced against the degree to which private property rights are impaired if access is granted. In addition, the availability of reasonable alternative means of communication was to be considered "especially significant" in this balancing process.

Under the new analysis, the Board found the organizational picketing of the union designed to discourage customers from shopping at Jean Country to be within the protection of Section 7 rights, although admittedly on the weaker end of the "spectrum" of Section 7 rights. In so finding, the Board examined the possibility of the union reaching customers in a nontrespassory manner. This alternative, however, was quickly dismissed by the Board. The Board considered it unreasonable to require the union to undertake a mass media campaign, particularly since the union would thereby incur great costs and its message would be removed from the "situs." Moreover, according to the Board, the union

95. Id. at 15.
96. Id.
97. Id.
98. Id. at 13-14.
99. Id. at 14. The Board applied this approach to a number of cases after Jean Country. See, e.g., Target Stores, 300 N.L.R.B. 964 (1990) (holding that a lessee in a shopping mall had a weaker property interest due to lack of notice restricting access and finding that other means of communication would impose too great a danger or result in the dilution of the union's message); Wegmans Food Mkts., Inc., 300 N.L.R.B. 868, 869-71 (1990) (applying the Jean Country balancing approach and holding that the supermarket, located in a strip mall, had a weaker property interest because of the public accessibility, the fact that the supermarket previously permitted political campaigning on the property, and the fact that picket signs would be dangerous and ineffectual).
101. Id. at 17, 18.
102. Id. at 18.
103. Id. at 18-19.
104. Id. at 18 n.18. Specifically, the Board declared that "it will be an exceptional case where mass media constitute reasonable alternatives." Id. Delivering the union's message via mass media, i.e., television, radio, newspapers, or mass mailings, removes the message from the situs of the labor dispute and, as a result, potential customers approaching the store may not be aware of the union's efforts. Id.
message could not be conveyed from the public entrances of the mall. This alternative would not only vitiate the union message, but would also not allow the union effectively to reach "impulse" shoppers. Thus, the only way for the union to identify and communicate with potential customers would be to picket closer to the store. The Board ruling entitled the union representatives to picket in the mall. In so ruling, the Board determined that the private property rights would not be meaningfully impaired and, in addition, that the union's Section 7 right would be protected by allowing entry onto mall property.

Through January 1, 1991, the Board decided twenty-six cases in which the Jean Country analytical approach was applied. In a majority of these cases, the Board determined that the impracticability of alternative means of communication outweighed the private property interests and

105. Id. at 18. The Board expressed concern that mall patrons may, on exposure to the union's activities, presume the entire shopping center to be involved in a labor dispute and therefore turn away. Id. The Board also considered the large number of stores in the mall and the "distinct likelihood of confusion [on the part of consumers] concerning which store had been identified on the picket sign." Id. The Board feared that stores other than Jean Country could thereby lose patronage. Id.

106. Id. at 18. The grounds for finding that the union message would be diluted if conveyed at the public entrances of the mall were threefold: [1] the "shear physical distance" from the mall entrances to the entrance of Jean Country were considered too great, [2] there were over 100 other stores located within the mall, and [3] with 10,000 to 20,000 people entering the mall at the eight public entrances each day, this number was simply too high for the union to deliver an effective message, except at the Jean Country store entrance. Id. These three factors justified the Board's finding that nontrespassory alternative means of communication would be unreasonable.

107. The "impulse" buyer theory was a pivotal factor in the Board's 1977 Scott Hudgens remand decision. See id.; see also Scott Hudgens, 230 N.L.R.B. 414 (1977). In Scott Hudgens, the Board noted that potential customers, an important component of the picketers' intended audience, "became established as such only when individual shoppers decide to enter the store." Id. at 416. Furthermore, the Board averred that "the fact that many people become members of the pickets' intended audience on impulse . . . weigh[s] against requiring the pickets to remove to public property, or even to the sidewalks surrounding the Mall." Id. at 417; see infra text accompanying notes 168-83 (discussing impulse buying); see also supra text accompanying notes 59-71 (discussing the Hudgens decision).


109. Jean Country, 291 N.L.R.B. at 19. The Board stated that the "Section 7 right [of the union] outweighed the Respondents' [Jean Country] right to the privacy of the mall property in this particular context, and the union was entitled to engage in the picketing that it conducted in front of the Jean Country store." Id. Furthermore, the Board concluded that the "Respondents' refusal to permit the Union's picketing and their subsequent use of the police to threaten the pickets with arrest for trespass violated Section 8(a)(1) of the [National Labor Relations] Act." Id.

110. Id.

111. See Ford, supra note 68, at 700.
thereby provided for union access onto the private property. This series of Board decisions, coupled with the Supreme Court’s decisions in Babcock & Wilcox, Sears, Roebuck & Co., and Hudgens, established a standard for the accommodation of competing rights and the foundational threshold analysis for the court in Lechmere Inc. v. NLRB.

II. Lechmere Applied in a Different Factual Situation

A. Consumers as the Target Audience

The Supreme Court’s holding in Lechmere made it clear that where unions are engaged in organizational activities, their access to private property will depend on a multitude of factors. However, the Supreme

112. See, e.g., Wegman’s Food Mkts., Inc., 300 N.L.R.B. 868 (1990) (permitting informational handbilling on the sidewalk, considered private property, by the store entrance); Sparks Nugget, Inc., 298 N.L.R.B. 524 (1990) (upholding the union’s right to picket and handbill at the rear customer entrance to the hotel/casino, finding that union could not reasonably distribute handbills to customers arriving on tour buses, and those customers would not likely see picket signs from the bus), enforcement granted in part and denied in part, 968 F.2d 991 (9th Cir. 1992); Sentry Mkts., Inc., 296 N.L.R.B. 40 (1989) (holding that picketing and handbilling on the sidewalk near the store entrance should be allowed for a number of reasons, including: (a) handbilling and picketing on public property near the parking lot entrance would be ineffective and unsafe, (b) media advertising would move the union’s message too far in time and distance from the point of purchase, and (c) inclement weather and possible community crime would make hand delivery of the message to homes ineffective), review denied, enforcement granted, 914 F.2d 113 (7th Cir. 1990); Granco, Inc., 294 N.L.R.B. 173 (1989) (holding that picketing and handbilling at the store entrance and in the parking lot were allowed as no reasonable alternative means of communication existed); Dolgin’s, 293 N.L.R.B. 845 (1989) (allowing union access to several retail store entrances for picketing and handbilling purposes); Mountain Country Food Store, Inc., 292 N.L.R.B. 967 (1989) (allowing handbilling in front of retail grocery stores), enforcement denied, 931 F.2d 21 (8th Cir. 1991); Karatjas Family Lockport Corp., 292 N.L.R.B. 953 (1989) (allowing informational picketing and handbilling on the sidewalk by the store entrance); Target Stores, 292 N.L.R.B. 933 (1989) (providing a union with access to a store entrance and defining the employer’s property rights as weak); D’Alessandro’s, Inc., 292 N.L.R.B. 81 (1988) (holding that picketing and handbilling customers at store entrances urging them to boycott the establishment was the only reasonable means of communication). But cf. Red Food Stores, Inc., 296 N.L.R.B. 450 (1989) (refusing union access to grocery stores for purposes of picketing and handbilling); Richway, 294 N.L.R.B. 650 (1989) (denying union access to retail stores to protest use of nonunion contractors); Tecumseh Foodland, 294 N.L.R.B. 486 (1989) (holding that a union does not have the right to obstruct access to a retail store).


117. See id. at 848-50. The most important factor set forth by the Court focuses on the feasibility of reasonable attempts at communicating with employees. See supra text accompanying notes 31-34.
Court failed to address the applicability of the *Lechmere* formula in cases where a union pickets an employer to relay a given message to potential customers. The picketing and handbilling in such situations is typically aimed at protesting the targeted store’s failure to meet the union’s “area standards.” Instead, the Supreme Court focused on nonemployee union efforts aimed at reaching employees rather than customers.

**B. The History and Progression of Consumer Picketing Cases**

In *Hudgens v. NLRB*, employees were striking and picketing a shoe store located within a shopping mall. The union pickets aimed to discourage customers, their principal target audience, from patronizing the shoe store. However, the mall owner forbade picketing in front of the store entrance. On remand from the Supreme Court, the Board held that the mall owner’s interference with the picketing violated the NLRA. Specifically, the Board found that without access to the mall premises, the union members would have no reasonable alternative means of communication with their intended audience. More importantly, the intended audience was not a specific group but rather, members of the buying public who were identifiable only as they were about to enter the respective store.

In *Giant Food Markets, Inc.*, as in the Board’s *Hudgens v. NLRB* remand decision, *Scott Hudgens*, consumers were again the union’s

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118. *See*, e.g., Jean Country, 291 N.L.R.B. 11, 12 (1988). Unions generally believe that stores not complying with union area standards are a threat to the wages, hours and working conditions established by the union. *Id.* at 15.

119. *See* *Lechmere*, 112 S. Ct. at 848-50.

120. 424 U.S. 507 (1976). Although the case made it to the Supreme Court, it was ultimately remanded to the Board with instructions to consider the issues solely under the National Labor Relations Act criteria. *Id.* at 521-23; *Scott Hudgens*, 230 N.L.R.B. 414 (1977).

121. *Hudgens*, 424 U.S. at 507.

122. *See* *id.* at 509 (noting that striking warehouse employees picketed not only the warehouse, but also the retail outlets).

123. *Id.*

124. *See supra* text accompanying notes 63-71. The Board’s decision after remand was issued as *Scott Hudgens*, 230 N.L.R.B. at 414. The Supreme Court had remanded the case to the court appeals, directing it to further remand the case to the NLRB. The remand order directed the Board to consider exclusively the rights and liabilities of the parties to the case under the statutory criteria of the NLRA, and not to measure these rights and liabilities under a First Amendment standard. *Hudgens*, 424 U.S. at 523.


126. *Id.* at 417.

127. *Id.* at 416.


129. 230 N.L.R.B. at 414.
principal intended audience. The union was picketing the public, encouraging them to boycott the store.\textsuperscript{131} Again, the Board found that this audience became readily identifiable only after deciding to enter the store which, according to the Board, "may be on impulse when they see an advertisement in the window."\textsuperscript{132} The Board considered a number of factors before ultimately determining that the balance weighed in favor of the union.\textsuperscript{133} The Board held that any other means of communication besides direct access to the employer's property could not be considered "reasonable" when assessing the possible effectiveness of the message.\textsuperscript{134}

\textit{Seattle-First National Bank}\textsuperscript{135} provided the Board with another opportunity to address the issue of consumer picketing. The case involved striking employees of a restaurant located on one floor of an office building.\textsuperscript{136} The employees picketed and handbilled in the foyer of the restaurant until they were ordered to leave the building.\textsuperscript{137} In again applying a balancing approach, the Board ruled that the strikers' Section 7 rights outweighed the owner's property rights.\textsuperscript{138} The Board reasoned that the union's message could be effectively communicated only if the pickets had access to the employer's property.\textsuperscript{139} According to the Board, restaurant customers became identifiable only as they entered the restaurant, and therefore, access to the restaurant entrance was essential to deliver the message to the intended audience.\textsuperscript{140}

Finally, in \textit{Montgomery Ward & Co.},\textsuperscript{141} the Board again found that striking employees' Section 7 rights outweighed private property interests

\begin{thebibliography}{99}
\bibitem{130} 241 N.L.R.B. at 728.
\bibitem{131} \textit{Id.} at 727.
\bibitem{132} \textit{Id.} at 728.
\bibitem{133} \textit{Id.} at 727-29.
\bibitem{134} \textit{Id.} at 729. Reasoning that the dilution of the union's message was too severe if not delivered by direct access, the Board found no justification for requiring the picketing and handbilling to be conducted on public property at parking lot entrances approximately 250 feet from the store entrance. \textit{Id.}
\bibitem{135} 243 N.L.R.B. 898 (1979), \textit{remanded}, 651 F.2d 1272 (9th Cir. 1980).
\bibitem{136} \textit{Id.} at 898. The Mirabeau restaurant shared the 46th floor of the Seattle-First National Bank Building with a stock brokerage firm. \textit{Id.} However, the restaurant exclusively controlled the 46th floor foyer. \textit{Id.}
\bibitem{137} \textit{Id.} In addition to having pickets distributing leaflets in the foyer adjoining the Mirabeau restaurant, the union pursued its picketing and handbilling efforts on public side-walks near each one of the building's entrances and exits, advising potential restaurant customers of the labor dispute. \textit{Id.}
\bibitem{138} \textit{Id.} at 899.
\bibitem{139} \textit{Id.}
\bibitem{140} \textit{Id.}
\bibitem{141} 265 N.L.R.B. 60 (1982).
\end{thebibliography}
of the employer. The union was conducting consumer handbilling to urge customers not to buy the primary employer's products. The Board held that Montgomery Ward unacceptably diluted the effect of the union's message by attempting to limit the handbilling to specific areas.

In these consumer picketing cases, the Board applied the Babcock & Wilcox accommodation analysis. The Court in Lechmere, however, indicated that the alternative means of communication test may no longer hinge upon a comparative analysis of the nature of the union's message and the strength of the competing Section 7 right. Rather, with respect

142. Id.

143. Id. According to the Board, "[t]he union had a right to handbill consumers on [Montgomery Ward's] property, and to do so effectively, while simultaneously accommodating and disturbing as little as possible [Montgomery Ward's] private property rights." Id.; see also Seattle-First National Bank, 243 N.L.R.B. at 898 (finding that restricting striking employees to the sidewalk, while the object of the strike was located on the forty-sixth floor, excessively hindered the strikers' ability to deliver their message to the intended audience); Hudgens v. NLRB, 424 U.S. 507 (1976) (stating that the union's message was diluted where striking pickets were required to remain approximately three hundred feet from the store entrance).

144. Montgomery Ward & Co., 265 N.L.R.B. at 60. The Board reasoned that requiring the union to "handbill from the curb, driveway entrances, or anywhere else not on its property substantially diluted and restricted [the union's] Section 7 right, since, like picketing, the effectiveness of handbilling depends on its location." Id.; see also United Steelworkers v. NLRB, 376 U.S. 492 (1964).

145. See supra note 37 and accompanying text; see also Hudgens, 424 U.S. at 522. In Hudgens, the Court again reiterated the accommodation test of Babcock & Wilcox, writing:

The Babcock & Wilcox opinion established the basic objective under the Act: accommodation of §7 rights and private property rights "with as little destruction of one as is consistent with the maintenance of the other." The locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective §7 rights and private property rights asserted in any given context. Id. (quoting NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956)) (footnote omitted).

A number of consumer picketing cases have arisen in recent years as well. See, e.g., Dillard's, Inc., 305 N.L.R.B. 1102 (1992) (involving a handbilling campaign aimed at dissuading the public from shopping at certain stores); JMB Properties Co., 305 N.L.R.B. 978 (1991) (involving union picketing at the interior mall entrance of a retail store); Makro, Inc., 305 N.L.R.B. 663 (1991) (involving union picketing at retail store's entrance and exit); Oakland Mall, Ltd., 304 N.L.R.B. 832, (1991) (involving picketing and handbilling of customers of a retail store at the retail store's mall entrances); Sears, Roebuck & Co., 304 N.L.R.B. 58 (1991) (involving picketing in front of auto centers located in shopping centers); Target Stores, 300 N.L.R.B. 964 (1990) (involving the handbilling of stores located within a shopping mall); Red Food Stores, Inc., 296 N.L.R.B. 450 (1989) (involving the picketing of stores located in strip malls). In these cases, however, the Board applied the Jean Country analysis instead of the Babcock & Wilcox test. See supra notes 88-110 and accompanying text.

to union picketing of employees, Lechmere demonstrates that the critical inquiry is whether unions are able to reach their intended audience away from an employer's private property.\textsuperscript{147}

III. \textit{Lechmere}'s Role in Union Access Disputes

\textbf{A. The Broad Holding}

The conflict involved in \textit{Lechmere} encompasses a myriad of issues, many of which have been comprehensively addressed in existing articles and scholastic works.\textsuperscript{148} Under the \textit{Lechmere} holding, unions will have a more difficult time trying to prevail when private property rights clash with employees' statutory rights to organize.\textsuperscript{149} The \textit{Lechmere} standard

\begin{itemize}
    \item 147. Id.
    \item 148. See, e.g., Leonard Bierman, \textit{Justice Thomas and Lechmere, Inc., v. NLRB: A Reply To Professor Robert A. Gorman}, 10 HOFSTRA LAB. LJ. 299, 301 (1992) (discussing the limitations of the Lechmere decision in the context of rules governing union organizing); Clifford R. Oviatt, Jr., \textit{Recent Developments At The National Labor Relations Board}, 22 STETSON L. REV. 115, 127-32 (1992) (providing a discussion of \textit{Lechmere, Inc. v. NLRB}, and identifying a number of unanswered questions raised by the case); Ford, \textit{ supra} note 68 (providing a thorough review of pre-\textit{Lechmere} developments).
    \item 149. \textit{Organizing More Difficult}, 140 Lab. Rel. Rep. (BNA) at 218-19 (June 15, 1992) [hereinafter \textit{Organizing More Difficult}] (pointing out that unions will have a "'tough row to hoe'" when trying to show a lack of reasonable alternative means of communication to contact their target audience) (quoting NLRB board member's chief counsel); see \textit{NLRB's Hunter Discusses Issues Left Open by Lechmere Decision}, [Current Developments] Daily Lab. Rep. (BNA) No. 25, at A-3 (Feb. 9, 1993) (quoting NLRB General Counsel as stating: "'Obviously, \textit{Lechmere} has impacted a union's ability to go onto private property to try to organize employees.')"; \textit{Organizing Tactics Shift in Wake of Lechmere Holding}, 139 Lab. Rel. Rep. (BNA) 102 (Feb. 3, 1992) [hereinafter \textit{Tactics Shift}] ("Union and management practitioners agreed that organizing will be more difficult and more expensive in light of the Supreme Court's decision in \textit{Lechmere v. NLRB}.")
\end{itemize}
articulated a general rule disallowing union business agents who are not employees from entering an employer’s private property for the purpose of union organizational activities. In particular, the Lechmere holding decisively repudiated Jean Country and subsequent cases with respect to organizing efforts on the part of nonemployee union representatives and union organizers who attempt to come onto private property generally open to the public at large, such as shopping malls.

Pursuant to Lechmere, the only factor to be considered when union organizers attempt to enter private property for the purpose of organizing will be the availability of other reasonable alternative means to contact employees. Under Justice Thomas’ opinion, such an exception will only exist in cases where the work site is geographically isolated and the union is only able to communicate with prospective members at work. As a result, unions will find it increasingly difficult to convince courts that they lacked a reasonable alternative means to contact employees who are the target of their organizing drive. Nonetheless, by recognizing possible exceptions to its general rule, Lechmere did not abandon completely the notion that the effectiveness of the resulting communication is a relevant consideration.

150. Organizing More Difficult, supra note 149, at 218-20; see Tactics Shift, supra note 149, at 102. “Mona Zeiberg of the National Chamber Litigation Center [has] hailed the [Lechmere] decision as an important victory for business that secures private property rights and ‘assures that union organizers are not able to disrupt normal business activity when they have other reasonable means of contacting employees.’” Id.

151. See Gorman, supra note 53, at 2. It is important to note that Lechmere and Jean Country were decided in light of differing factual circumstances. In Jean Country, the union tried to reach customers of the store, while in Lechmere, the union representatives tried to reach employees of the store to offer them membership in the union. Id. at 7; see also Strip Malls: Plain But Powerful, in American Demographics, Oct. 1991, at 48. In 1990, strip malls accounted for 87% of all shopping malls and 51% of total shopping center retail sales. Id.

152. See Organizing More Difficult, supra note 149, at 218-19.

153. Lechmere, Inc. v. NLRB, 112 S. Ct. 841, 849 (1992); see Organizing More Difficult, supra note 149, at 218-19; see also More Costly Organizing Tactics Predicted, 139 Lab. Rel. Rep. (BNA) 113-15 (Feb. 3, 1992) [hereinafter More Costly Organizing Tactics]. According to Rosemary Collyer of Crowell & Mooring, the Court has opted for a “‘black and white’ rule with a ‘clean bright line,’” in Lechmere, stating further that the Court may be more willing to “‘find clarity rather than ambiguity in the law.’” Id.


155. Lechmere, 112 S. Ct. at 849; see Hartley, supra note 10, at 529-30; see also More Costly Organizing Tactics, supra note 153, at 113-14. Former NLRB General Counsel Rosemary Collyer stated that the Supreme Court may have left the door open for new litigation to assess when a rare exception will apply to permit access onto private property by union organizers. Furthermore, according to Collyer, the Court’s ruling seems to suggest that access by radio, television and newspapers might be adequate. Id.
B. Application of the Lechmere Reasoning

In rendering the Lechmere decision, the Court revisited its holding in Babcock & Wilcox. Although the majority indicated its preference for adhering to the rule of Babcock & Wilcox, it ignored the authority and responsibility that federal agencies, such as the NLRB, traditionally receive when faced with the task of interpreting and applying a governing statute to specific factual circumstances. In particular, under the holdings of Universal Camera Corp. v. NLRB and Chevron, U.S.A., Inc. v.

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The Chevron doctrine, stemming from the 1984 Supreme Court decision, specifically addresses the issue of judicial deference to an agency's statutory interpretation. The doctrine adheres to the proposition that if an agency administrator has made a reasonable interpretation of a statutory provision, a court may not substitute its own construction of the statutory provision for that of the agency administrator. Id. at 844. Furthermore, the Chevron doctrine provides that an agency's construction of a statute need not be the only permissible adaptation in order to uphold the construction, nor must it be “the reading the court would have reached if the question initially had arisen in a judicial proceeding. Id. at 843 n.11; see also Lechmere, 112 S. Ct. at 847-48; Rust, 111 S. Ct. at 1767.

Although Justice Thomas did acknowledge the Board's unique position in interpreting the NLRA by stating that “[l]ike other administrative agencies, the NLRB is entitled to judicial deference when it interprets an ambiguous provision of a statute that it administers,” Lechmere, 112 S. Ct. at 847, ultimately the Court refrained from granting such deference. Id.; see also NLRB v. Food & Commercial Workers Local 23, 484 U.S. 112, 123 (1987). Instead, Justice Thomas argued that the Chevron standard of deference to an agency's statutory interpretation did not apply in Lechmere because the employees could learn of the union's message through non-trespassory means of communications and therefore, no need existed to grant nonemployee union organizers access to company property. Lechmere, 112 S. Ct. at 847-48.

157. 340 U.S. 474 (1951). Justice Frankfurter observed that “canvassing 'the whole record' in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence.” Id. at 488. Furthermore, Justice Frankfurter opined that the Board's findings of fact could only be set aside when the record “clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or [the Board's] informed judgment on matters within its special competence or both.” Id. at 490. See Clifford R. Oviatt, Jr., Judicial Second-Guessing and the National Labor Relations Board: What Has Happened to Chevron and Universal Camera After Lechmere, Address Before the Labor Law Section of the American Bar Association (Aug. 11, 1992), in 156 Daily Lab. Rep. (BNA) No. 156, at H-1 (Aug. 12, 1992). Board member Oviatt noted his agreement with the underlying result in Lechmere, but disagreed with the Court's analysis that it was not bound by the agency's finding of fact that the nonemployee organizers did not have reasonable access to the employees away from the shopping center. Oviatt also noted an increased willingness on the part of some circuit courts in the months following the Lechmere decision to reverse the Board's factual findings, usually without remand, despite the presence of substantial evidence on the record as a whole to warrant affirmance. Id. In addition, Oviatt noted an increased willingness to "reject out-
Natural Resources Defense Council, the Court should have deferred to the Board's factual finding that the nonemployee union organizers did not have reasonable access to the employees away from the mall area.

The Court unequivocally repudiated the Board's attempt to find an accommodation between the competing interests of nonemployee organizers and owners of private property, particularly where alternate means of contacting employees exist. Thus, the Court posited that the dynamics of a confrontation over competing Section 7 rights are of little importance under the single-factor Babcock & Wilcox analysis. In doing so, the Court failed to distinguish between a confrontation on private property where public access is limited and one where public access is abundant.

By ignoring the important distinction in the nature of an employer's property which must be considered in union access cases, the Court applied an extremely narrow interpretation of the Babcock & Wilcox decision. As discussed in the dissenting opinion of Justice White, the language of Babcock & Wilcox seems to authorize the Board to make an "accommodation" of the respective Section 7 rights and property interests of the parties. In addition to simply conferring authority to make an accommodation, Justice White argued that Babcock & Wilcox also allows the Board to consider factors beyond nontrespassory access to workers in making the accommodation.

Nonetheless, the majority construed the Babcock & Wilcox approach as providing that the accommodation of private property interests is not dependent on public accessibility to the property. According to the majority, the pivotal factor in determining the viability of alternative
means of communication is the percentage of workers who can be contacted away from the company's private property.\textsuperscript{166} No longer will the Court consider the nature or ardor of the union's message, or even the basis of the Section 7 right.\textsuperscript{167}

IV. CONSUMER PICKETING, IMPULSE BUYING & \textit{LECHMERE}

A. The Theory of "Impulse Buying"

The Board's \textit{Scott Hudgens}\textsuperscript{168} decision on remand was the first opinion to refer to the theory of "impulse buying" as a legitimate consideration in evaluating union tactics. The Board considered the theory in deciding whether unions have reasonable alternative means of reaching consumers where shopping center property is made unavailable to them for communication purposes.\textsuperscript{169} The Board concluded that many people become members of the pickets' audience on impulse, and that this weighed against requiring the pickets to move from the store entrance to public property or sidewalks surrounding the mall.\textsuperscript{170}

1. Marketing Studies Supporting "Impulse Buying" Phenomenon

The phenomenon of impulse buying is well established consumer behavior.\textsuperscript{171} The field of marketing has defined two types of consumers: personal (or ultimate) consumers, who buy goods and services for their own use; and organizational consumers, who buy products, equipment, and services for profit or non-profit organizations.\textsuperscript{172} Regardless of the consumer's purpose, every consumer goes through a decisional process when buying a product or service.\textsuperscript{173} Often, this process is subconscious,
and the consumer is not aware of its occurrence.\footnote{174} As a result, much of a consumer's subsequent purchase behavior is hidden or unconscious.\footnote{175}

Consumer product vendors refer to the consumer's unconscious behavior as "point-of-purchase" impulse buying.\footnote{176} Impulse buying has caused in-store marketing to become an extremely important concept among advertisers.\footnote{177} Market studies have shown that in-store media and displays

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Processes (1966); A. Coskun Samli, Retail Marketing Strategy (1989); Irving Crespi, General Concepts, in Handbook of Marketing Research 3-3 (Robert Ferber ed., 1974); Robert W. Pratt Jr., Measuring Purchase Behavior, in Handbook of Marketing Research, supra, at 3-126. An important element of the decisional process are the inner conditions that motivate buying behavior. \textit{Id.} at 137. Formally referred to as "intervening variables" by psychologists, these continuously changing inner conditions are a part of the individual consumer's inward psychic experience. \textit{Id.} As such, the intervening variables supply the psychological framework within which the consumer organizes and interprets perceived environmental stimuli. \textit{Id.} The consumer's organization and interpretation process subsequently leads to overt behavior, i.e., the purchase. \textit{Id.} Intervening variables include motives, beliefs, assumptions, prejudices, attitudes, aspirations, feelings, emotions, expectations, and social values. \textit{Id.}
\end{quote}

\footnote{174}Evans & Berman, supra note 173, at 171. The consumer decision process consists of six steps: stimulus, problem awareness, information search, evaluation of alternatives, purchase, and postpurchase behavior. \textit{Id.} at 172.

\footnote{175}Id. at 171.

\footnote{176}Suzi Fucini, The ABCs of P-O-P, U.S. DISTRIBUTION J., June 15, 1991, at 31. Point of purchase impulse buying generally encompasses impulse purchases made at the actual point of sale, for example, a purchase made as a result of a display within the store.

According to some studies, two-thirds of all consumer buying decisions are now being made in the store. \textit{Id.; see} Pete Hisey, Marketing Support for Lifestyle Merchandising: \textit{K Mart's Fresh New Face}, \textit{Discount Store News}, Dec. 17, 1990, at 107. The goal is to maximize impulse sales once customers have been drawn in, since about 70% of sales are impulse purchases. \textit{Id.} Specific-use items, which include those items having a specific application or solving a specific problem, are commonly purchased on impulse by a consumer who suddenly realizes the benefit of such an item. \textit{Weekly Home Furnishing Newspaper}, July 19, 1993, at 43. Studies have also shown that drugstore shoppers, for example, make approximately 60% of their final purchase decisions after entering the store. Evans & Berman, supra note 173, at 171. Research has shown clothing to be the single most popular impulse purchase. Chris Burritt, Business Report: On Retailing, \textit{The Atlanta J. & Const.}, Oct. 26, 1991, at C2. According to Sharon Beatty, an associate professor at the University of Alabama, shoppers who enter a store in an upbeat mood do more impulse buying than those who go shopping in a neutral or bad mood. \textit{Id.} Other high impulse purchase items include kitchen gadgets, a category "steered by an impulse buying figure of at least 80 percent." Cliff Coady, Showing Resiliency in a Recession, \textit{The Weekly Home Furnishings Newspaper}, Feb. 3, 1992, at S3. Some of the other more popular products for impulse purchases include personal care items, magazines, snack foods, hardware, cosmetics, accessories, nonalcoholic beverages, jewelry, books, stationery and automotive supplies. \textit{See Pilot Study Finds Final Product Choice Usually Made in Store, Marketing News}, Aug. 6, 1982, at 5. In contrast, items for which specific buying plans are made in advance include prescriptions, photographic equipment, tobacco and alcohol, and nonprescription drugs. \textit{Id.} Therefore, these items are less affected by store displays, advertisements and coupons. Evans & Berman, supra note 173, at 171.

influence shopping decisions and lengthen the time consumers spend in a store.\textsuperscript{178}

2. \textbf{The Relevance of Impulse Buying Marketing Data to Unions}

The wealth of available data validating the theory of consumer impulse buying serves to strengthen a union’s effort to gain access to shopping center property.\textsuperscript{179} Since market data conclusively shows that advertisements, particularly in-store media advertisements and window displays,\textsuperscript{180} have a substantial impact on the purchasing behavior of consumers, a union could use this information to establish an empirical argument for access to consumers.\textsuperscript{181} The union’s proposition would center around the fact that the effective ability to convey its message to consumers is directly linked to the point at which consumers identify the advertisements.\textsuperscript{182} This, in turn, strengthens a demand by union representatives to be allowed access as close to the point of purchase as possible.\textsuperscript{183}

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\textsuperscript{178} Washington, supra note 177, at 19.

\textsuperscript{179} See supra notes 176-77 and accompanying text; see also Scott Hudgens, 230 N.L.R.B. 414, 416 (1977) (evidencing judicial recognition of the impulse buying theory in the Board’s description of the picket’s intended audience being, in part, “members of the buying public who might, when seeing [the store’s] window display inside the Mall, think of doing business with that one employer”); supra text accompanying notes 59-108. The consumer electronics industry is one of many to acknowledge the significant impact impulse purchases are having on business. \textit{See Appreciating Remote Controls’ Complexity, Weekly Home Furnishing Newspaper}, May 31, 1993, at S10.

\textsuperscript{180} See supra notes 176-77 and accompanying text; see also supra text accompanying note 177.

\textsuperscript{181} A union could show the need to reach consumers at the point of purchase based on figures compiled by various market sectors. See supra notes 176-77 and accompanying text.

\textsuperscript{182} The validity of this proposition stems from market research proving that consumers only become identifiable once they have decided to make a purchase, often times on impulse. See supra notes 176-79 and accompanying text.

\textsuperscript{183} Following from marketing data, union organizers trying to get a message across to consumers will be most effective if the message is displayed as close to the store as possible. See supra notes 176-79 and accompanying text.
B. Lechmere's Impact

Lechmere establishes the general principle to be applied when dealing with union access to private property.184 This principle makes it clear that nonemployee union representatives will be granted access to an employer's private property only by demonstrating the unavailability of a reasonable alternative means of contacting their target audience.185 Also to be considered, however, is that the typical labor-management scenario resulting in union picketing and handbilling focuses on communicating with potential consumers.186

As discussed above, Lechmere reasons that a union is entitled to reasonably effective means of communication with its targeted audience.187 Accordingly, the reality of consumer impulse buying may require union access to private property because it is virtually impossible to identify in advance who will become a consumer.188 Typically, a person's presence at an employer's place of business provides the only evidence of the person's consumer status. The consumer's presence at an employer's place of business by itself manifests an intention to undertake a business trans-

184. See Lechmere, Inc. v. NLRB, 112 S. Ct. 841, 850 (1992) ("Access to employees, not success in winning them over, is the critical issue . . . in determining whether reasonable access exists.").

185. See supra text accompanying notes 155-67. What is less clear, however, is how the Court would respond to an economic strike where the union already represents the employees, and rather than communicating with the employees, seeks to contact potential consumers. The extreme interpretation would be to construe Lechmere as not permitting union access at all when dealing with a case outside the realm of union access to employees. However, complete exclusion by the courts is simply not a viable solution to this issue since such judicial action would be inapposite to the purpose and ideals of Section 7 of the NLRA.

186. See supra text accompanying notes 120-47; see also NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760, 377 U.S. 58 (1964) (holding that striking union members could conduct a consumer boycott of their employer's products by picketing and handbilling at markets selling the products). The other possibility is that a union may be protesting area standards, thereby attempting to persuade consumers not to patronize a particular establishment. See, e.g., Makro, Inc., 305 N.L.R.B. 663 (1991) (involving union picketing designed to inform customers that non-union employees were jeopardizing union wages and benefits); Jean Country, 291 N.L.R.B. 11 (1988) (involving union picketing aimed at informing consumers of the threat to union wages, hours and conditions created by the non-union store); Giant Food Mkts, Inc., 241 N.L.R.B. 727 (1979) (picketing and handbilling aimed at consumers urging them to boycott a store where the employer did not provide area standard wages and benefits), remanded, 633 F.2d 18 (6th Cir. 1980); see also supra text accompanying notes 79, 95.

187. Lechmere, 112 S. Ct. at 848-49. The Court qualified this entitlement, however, stating that “[i]t does not apply wherever nontrespassory access to [the targeted audience] may be cumbersome or less-than-ideally effective.” Id. at 849.

188. See supra notes 120-47 and accompanying text.
action with the employer. This reality makes impulse buying a compelling consideration.

A union arguably could expend all its efforts and resources on media advertisements, such as radio, television, newspaper, magazine and billboard advertisements designed to communicate their message to potential consumers. Putting aside the impulse buying phenomenon, it is possible that a court might conclude that such an advertising campaign provides the union with reasonably effective means of communicating with customers away from shopping center property.

Considering the effect of impulse buying, however, may require a different outcome. Depending on the product at issue, an extensive media campaign designed to communicate with consumers simply may not constitute a reasonable means of communicating with the intended audience because the audience—here, consumers—is not defined until either exposed to the product at the point of purchase or stimulated by an in-store advertising display. It is only at this point that the audience may become customers and thereby become identifiable.

189. See Giant Food, 241 N.L.R.B. at 727 (finding that customers were the primary intended audience of the pickets and as such, only became identifiable when they decided to enter the store). See generally supra text accompanying notes 120-47.

190. See supra text accompanying notes 170-83.

191. But see supra text accompanying note 103 (discussing the Board's awareness that in certain instances, requiring a union to undertake a mass media campaign may be considered unreasonable). In Jean Country, the Board considered it unreasonable to require the union to undertake a mass media campaign, particularly since the union would thereby incur great costs and the message would have been removed from the situs. Jean Country, 291 N.L.R.B. 11, 18 n.18 (1988). In Lechmere, the Court did not vitiate the Board's position in disfavor of requiring unions to incur great expenses, rather, it allowed the issue to rest on its merits, and simply stated that "other alternative means of communication were readily available." Lechmere, 112 S. Ct. at 849.

192. See supra text accompanying notes 148-55; see also Lechmere, 112 S. Ct. at 849. Although designed to address the union's attempt at making Lechmere's employees aware of its organizational efforts, the Court held that even though the employees lived in a large metropolitan area, they were not automatically rendered "'inaccessible.'" Id. The Court went on to find accessibility in the fact that the union had been able to contact a substantial percentage of employees directly, via mailings, phone calls, and home visits. Id. Finally, the Court mentioned that direct contact "is not a necessary element of 'reasonably effective' communication; signs or advertising may also suffice." Id.

193. See supra text accompanying notes 168-81. In order to analyze more effectively their $15.3 billion impulse purchase market, British retailers and manufacturers have developed a system to record purchases from all retail outlets and thereby hope to capitalize fully on the impulse purchase market. Andrew Don, New Consumer Panel to Aid British Impulse Buy Market, Food & Drink Daily, May 25, 1993.

194. See supra notes 176-77 and accompanying text. As has been pointed out, a broad range of products fall prey to impulse shoppers. See supra note 176 and accompanying text.

195. See supra notes 173-79 and accompanying text; see also Giant Food Markets, Inc., 241 N.L.R.B. 727, 728 (1979) (noting that potential customers only become identifiable to
Consumer picketing cases decided prior to *Lechmere* are no longer dispositive sources in delineating union rights in this area. 196 Both *Scott Hudgens* and *Giant Food* establish that “means of communication other than direct entry onto the employer's property . . . [C]annot be considered ‘reasonable’ in relation to their possible effectiveness,” where customers only become readily identifiable as they enter the store on impulse. 197 At a minimum, *Lechmere* invites a reappraisal of *Scott Hudgens* and *Giant Food*. The *Lechmere* formula clearly stands for the proposition that so long as reasonable access to consumers outside of the employer's property exists, the requisite accommodation has taken place. 198 However, *Lechmere* also recognizes that the effectiveness of alternative means of communication remains an important consideration when determining whether reasonable access to consumers exists. 199 Where consumers cannot be identified prior to the point of purchase due to the reality of impulse buying, the effectiveness of alternative means of communication becomes problematic.

**V. Conclusion**

Prior to *Lechmere*, access cases were approached by balancing Section 7 rights against private property rights, taking into account the availability of alternative means of communication. 200 With its *Lechmere* decision, however, the Supreme Court has greatly clarified the status of rights and accommodations of both employers and unions. Courts and the National Labor Relations Board will no longer balance the rights of competing parties, unless reasonable alternative access to the respective party is infeasible. 201 Failure to consider the effects of impulse buying when applying the *Lechmere* test will effectively render consumer picketing meaningless. The courts and the Board should recognize the dichotomy between consumer picketing and union efforts aimed at employees. Given the reality of impulse buying, the courts and the Board should per-

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196. See supra text accompanying notes 120-47.
199. *Lechmere* does establish that success or effectiveness may be relevant in determining whether reasonable access exists. *Id.* at 842.
200. See supra text accompanying notes 120-47; see also *Lechmere*, 112 S. Ct. at 848 (rejecting the Board's multi-factor balancing test of competing interests as developed in the *Jean Country* line of cases).
201. *Lechmere*, 112 S. Ct. at 848. By infeasible, the Court refers to the narrow exception it recognizes where parties (the employees in *Lechmere*) are “‘beyond the reach of reasonable union efforts to communicate with them.’” *Id.* at 849 (quoting NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956)).
mit a union to address consumers as close to the retail establishment as possible. In essence, this translates into allowing the union access to persuade consumers not to follow their impulse when making purchasing decisions.

Since impulse buying is triggered at the point of purchase, the *Lechmere* calculus must assure unions access to the point of purchase—outside the store on an employer's private property. *Lechmere* creates the analysis by which all cases involving private property rights will now be shaped, including consumer picketing cases involving private property rights. Fitting that analysis with the reality of impulse buying will, no doubt, rekindle the union access debate.

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