Note

Hudgens v. NLRB: Protection of Shopping Center Picketing Under the Constitution or NLRA?

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In Hudgens v. NLRB, the Supreme Court held that the first amendment does not protect picketing in privately owned shopping centers. The Court further held that in the context of labor picketing in these shopping centers, the rights and liabilities of the parties are dependent upon the National Labor Relations Act. The authors examine this development in first amendment doctrine and explore the implications of applying the balancing principle of NLRB v. Babcock & Wilcox Co. to the facts in Hudgens.

I

INTRODUCTION

In 1968, the United States Supreme Court held that peaceful picketing within a large shopping center was constitutionally protected.1 Only eight years later, the Court reversed that position in Hudgens v. NLRB,2 holding that picketing employees have no first amendment right to enter a privately owned shopping center for the purpose of advertising a strike against their employer. The Court reasoned that a shopping center is not sufficiently imbued with the functional attributes of the state to bring the actions of the owner within the proscriptions of the first amendment. The rights and liabilities of the parties are therefore dependent exclusively upon the National Labor Relations Act.3

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II

FACTS

Scott Hudgens is the owner of the North DeKalb Shopping Center located in suburban Atlanta, Georgia. The shopping center complex consists of sixty stores connected by an enclosed mall with four primary entrances. Most of the stores can be entered only from the enclosed mall. The shopping center building is completely surrounded by a parking area with spaces for 2,640 cars. The entire property of the center covers fifty-five acres and the closest public property, consisting of highways and streets, is 500 feet from the mall itself. Commercial tenants in the center draw their customers from the entire metropolitan area. The Butler Shoe Company, one of the lessees, occupies a store that can be entered only from the enclosed mall. Butler operates a warehouse and nine retail stores in the Atlanta area. Although the warehouse employees are represented by the union involved in the case, the employees of the Butler store in the shopping center are nonunion.

In January 1971, Butler's warehouse employees went on strike, protesting the company's refusal to accept union demands made in contract negotiations. The union determined to picket Butler's stores and warehouse. Four warehouse employees went into the shopping center's mall, carrying picket signs reading, "Butler Shoe Warehouse on Strike, AFL-CIO, Local 315." They were noticed by the general manager of the shopping center who told them that picketing was not permitted in the mall or the parking lot and that they would be arrested if they did not leave. The pickets left but returned shortly and began picketing in the mall corridors in front of the entrances to the Butler Shoe Store. After thirty minutes of picketing, the manager again told the pickets that they would be arrested for trespassing if they did not leave. The pickets left and the union later filed an unfair labor practice charge against Hudgens with the National Labor Relations Board.

5. Id.
10. Id.
11. Hudgens v. NLRB, 501 F.2d at 163 & n.2.
13. Id.
14. Id.
15. Id.
Relying upon *Amalgamated Food Employees, Local 590 v. Logan Valley Plaza, Inc.*, the Board concluded that Hudgens had violated section 8(a)(1) of the NLRA by threatening the pickets with arrest while they were engaging in protected activity within the meaning of section 7 of the NLRA. The Board held that *Logan Valley* established the union's right to picket in the shopping center. The Board entered a cease-and-desist order against Hudgens, and Hudgens filed a petition for review in the United States Court of Appeals.

The Supreme Court decided *Lloyd Corp., Ltd. v. Tanner* and *Central Hardware Co. v. NLRB* while Hudgens was before the Fifth Circuit. Thereafter, the Court of Appeals remanded the case for reconsideration by the Board in light of those two decisions. The NLRB ordered a hearing before an administrative law judge. The administrative law judge held that Hudgens had committed an unfair labor practice, ruling that *Central Hardware* had established that under the NLRA the proper test for balancing protected employee activity against the rights of private property owners was the one enunciated in *NLRB v. Babcock & Wilcox Co.*, and not the constitutional test of *Logan Valley*. The administrative law judge concluded that picketing at the employees affected, he was found to be a statutory employer under the NLRA. See note 121 infra.

18. Section 8 provides in part:
"Unfair labor practices.
19. 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 except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."—29 U.S.C. § 157 (1970).
20. Scott Hudgens, 192 N.L.R.B. at 672.
21. *Id.* at 673.
25. 351 U.S. 105 (1956). The *Babcock* case is discussed in Part III of this Note.
26. Scott Hudgens, 205 N.L.R.B. 628, 629 (1973). The Supreme Court in *Hudgens* noted that while the administrative law judge's decision was "ostensibly" reached under the statutory criteria of *Babcock*, the opinion "... also relied on this Court's constitutional decision in *Logan Valley* for a 'realistic view of the facts.'" Hudgens v. NLRB, 96 S. Ct. at 1032. The Supreme Court apparently used this observation as its basis for reaching the constitutional question of first amendment protection of shopping center picketing. Justice Marshall argued in his dissent that...
highways bordering the center did not provide the union with a reasonable alternative to picketing the store itself.\textsuperscript{27}

The NLRB affirmed the rulings of the administrative law judge but based its decision on a different rationale:

Clearly, it was Respondent's intent to permit use of the shopping mall to these classes of persons [the public and the employees of Hudgens' tenants], and that thus Butler's employees were within the acceptable groups. That being the case, Butler's employees could not be designated as unacceptable and excluded [sic] from the mall solely because they chose to engage in protected concerted activity.\textsuperscript{28}

Hudgens again appealed to the Court of Appeals for the Fifth Circuit, which enforced the Board's cease-and-desist order.\textsuperscript{29} While declaring that section 7 rights are not necessarily coextensive with constitutional rights, the Court of Appeals held that the constitutional issue in Lloyd isolated the factors relevant to balancing section 7 rights against private property rights.\textsuperscript{30} The court found that both components of the Lloyd test—(1) whether the picketing is related to the use to which the property is put, and (2) whether there are no reasonably effective alternative means of communication to reach the intended audience—were satisfied under the circumstances present in the case at bar.\textsuperscript{31}

The Supreme Court reversed. Stating that Lloyd had overruled Logan Valley,\textsuperscript{32} the Court held that "... under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this."\textsuperscript{33} The Court remanded the case to the NLRB for decision under the criteria provided by the NLRA alone.\textsuperscript{34}

The decision in Hudgens resolves the confusion over whether access to private property for the purpose of conducting labor-related expressive activity is to be determined under the NLRA alone, under a first amendment standard, or under some combination of the two.\textsuperscript{35} This Note will examine two facets of the decision: the denial of constitutional protection for shopping center picketing and the extent to which the NLRA protects labor picketing in shopping centers.

the administrative law judge had based his opinion solely on section 7 and that the Court should decide the statutory question without reference to the first amendment. \textit{Id.} at 1040-42.

\textsuperscript{27} Scott Hudgens, 205 N.L.R.B. at 632.
\textsuperscript{28} \textit{Id.} at 628.
\textsuperscript{29} Hudgens v. NLRB, 501 F.2d 161 (1974).
\textsuperscript{30} \textit{Id.} at 167.
\textsuperscript{31} \textit{Id.} at 167-69.
\textsuperscript{32} 96 S. Ct. at 1036.
\textsuperscript{33} \textit{Id.} at 1037.
\textsuperscript{34} \textit{Id.} at 1038.
\textsuperscript{35} \textit{Id.} at 1033.
III

THE DENIAL OF FIRST AMENDMENT PROTECTION OF SHOPPING CENTER PICKETING

Discussion of first amendment protection of expressive activity conducted on private property must begin with *Marsh v. Alabama.* In that case, the Court invoked the first and fourteenth amendments to reverse a trespass conviction of a Jehovah's Witness who had distributed religious literature in the privately owned company town of Chickasaw, Alabama. The Court noted that Chickasaw had "all the characteristics of any American town," complete with streets, sewers, residences, a post office, and a business district and was "accessible to and freely used by the public." Focusing on the public functions performed by the company town and the public benefits it provided, the Court concluded that the town's actions constituted state action.

In *Logan Valley,* the Court extended the first amendment protections of *Marsh* to shopping center picketing. *Logan Valley* involved union members who peacefully picketed a nonunion supermarket located in a privately owned shopping complex. The Court reversed the Pennsylvania Supreme Court's affirmation of a state trespass injunction, holding that the picketing was protected by the first amend-


38. *Id.* at 502-03.
40. *Id.* at 310-11. The picketing, which was designed to publicize the fact that the store was nonunion and its employees were not receiving union wages or other union benefits, was largely confined to a parcel pickup zone and the adjacent parking area.
41. Because of its disposition of the case, the Court did not formally address the issue of preemption in *Logan Valley.* See *id.* at 310 & n.1. Justice Harlan discussed this issue generally in a separate dissent. *Id.* at 333-36. Principles of preemption were also
not in issue in either Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551 (1972), or Hudgens, where neither state courts nor state laws were involved. Both the handbill distributors in Lloyd and the picketers in Hudgens left the private property "voluntarily" without having to be arrested for state trespass violations. Moreover, Lloyd was initiated in federal court, while the NLRB was the first forum to address Hudgens. The issue of preemption was raised in collateral proceedings in the Georgia courts. Hudgens petitioned the court for a declaration of rights that, under the state's trespass laws, it could exclude the union pickets. The Georgia Court of Appeals held that the pendency of proceedings before the NLRB deprived it of jurisdiction to determine whether entry of union members within the shopping center property to picket a retail store violated its criminal trespass statutes. Hudgens v. Local 315, 133 Ga. App. 329, 210 S.E.2d 821, cert. denied, — Ga. — (1974), cert. denied, 96 S. Ct. 1435 (1976).


42. Citing Thornhill v. Alabama, 310 U.S. 88 (1940), the Court reaffirmed that "peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or manner of the picketing, protected by the First Amendment." 391 U.S. at 313.

43. See note 36 supra.

44. 391 U.S. at 318. The Court reasoned that the shopping center premises were open to the public to the same extent as the commercial center of a normal town and consequently, were functionally equivalent to traditionally available public forums. The Court thus concluded that for first amendment purposes the shopping center must be treated in substantially the same manner as a normal business district. 391 U.S. at 319.

45. 391 U.S. at 318-19.


47. 407 U.S. 539 (1972).


49. Logan Valley has been criticized insofar as it makes first amendment protection turn on the nature of the property involved. The Supreme Court, 1967 Term, 82 HARV. L. REV. 63, 135 (1968).

50. The handbills also invited the public to a meeting to protest the draft and the war. 407 U.S. at 556.
premises of a shopping center. They left the center after being threatened with arrest, and subsequently brought suit for declaratory and injunctive relief, claiming that the actions of Lloyd Center violated their rights under the first amendment. The Supreme Court rejected respondents' argument that Logan Valley had held that all shopping centers that were open to the public and served the same purpose as a business district were the equivalent, for first amendment purposes, of publicly owned thoroughfares. The Court stressed that Marsh, unlike Logan Valley, involved the assumption by a private entity of "all of the attributes of a state-created municipality," including the exercise of municipal powers. Given this distinction, the Lloyd Court found a more attenuated first amendment mandate with respect to shopping centers: Logan Valley provided constitutional protection only to picketing (1) that was directly related in its purpose to the use to which the shopping center property was being put, and (2) where no other reasonable opportunities for the pickets to convey their message to their intended audience were available. Noting that respondents' activity was unrelated to any use or function of the shopping center, and that surrounding public streets and sidewalks provided adequate alternative avenues of communication, the Lloyd Court distinguished Logan

51. Lloyd Center maintained a non-discriminatory policy against the distribution of handbills to which it made no exceptions. Use of the center for political purposes was also forbidden, except that presidential candidates of both parties had been permitted to speak in the auditorium located on the premises. Id. at 555.

52. Security guards employed by the center informed respondents that the center did not permit distribution of handbills in the mall and that it would lead to their arrest. The security guards were commissioned by the city of Portland and had police authority within the center. The respondents complied with the guards' suggestion that they resume handbilling on the public streets and sidewalks bordering the center.

53. Id. at 562-63 and 568-69. The Court noted: "There is some language in Logan Valley, unnecessary to the decision, suggesting that the key focus of Marsh was upon the 'business district,' and that whenever a privately owned business district serves the public generally its sidewalks and streets become the functional equivalents of similar public facilities..." This would be an incorrect interpretation of the Court's decision in Marsh..." Id. at 562 (emphasis added).

54. Id. at 569 (emphasis added).

55. Id. at 563. The Court focused on a footnote in the Logan Valley decision which had expressly reserved judgment on the issue presented in Lloyd.

The picketing carried on by petitioners was directed specifically at patrons of the Weis Market located within the shopping center and the message sought to be conveyed to the public concerned the manner in which that particular market was being operated. We are, therefore, not called upon to consider whether [Logan Valley's] property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put.

391 U.S. at 320 n.9 (emphasis added).


57. Id. at 566-67.
Valley and found any infringement of private property rights on the basis of the first amendment unwarranted. 58

The Court further limited the force of Logan Valley in Central Hardware, 59 a case which initially arose in the context of a labor dispute under the NLRA. In Central Hardware, the owner of two hardware stores enforced a rule against solicitation on his property by ordering nonemployee union organizers from store parking lots. Neither of the stores nor their parking facilities were part of a shopping center complex.

Justice Powell, writing the majority opinion in Central Hardware as well as in Lloyd, was unwilling to extend the rationale of Logan Valley to Central Hardware's parking lots merely because they were "open to the public." 60 Emphasizing that the first and fourteenth amendments were limitations on state action and not on action by the owners of private property used only for private purposes, he stated that "privately owned property must assume to some significant degree the functional attributes of public property devoted to public use" before its owner could be subjected to the constitutional demands of free speech. 61 The Court held that Central Hardware's property had not met this threshold test for state action and, unlike Logan Valley which was decided on constitutional grounds, 62 Central Hardware involved only rights under section 7 of the NLRA. The Court remanded the case for reconsideration under the principles enunciated in NLRB v. Babcock & Wilcox Co. 63

The Lloyd 64 and Central Hardware 65 modifications 66 of Logan

58. In his dissent, Justice Marshall indicated that Lloyd Center more closely resembled the company town in Marsh than did Logan Valley Plaza. Id. at 576.


60. Id. at 547. The Court noted that almost every retail store and service establishment in the country, regardless of size or location, was arguably "open to the public" and that this was, by itself, an insufficient basis for the dilution of private property rights. Id.

61. Id. (emphasis added).

62. Id. at 545.


64. See text accompanying note 53 supra.

65. See text accompanying notes 61-62 supra.

66. The majority opinion in Hudgens controverts the existence of a hybrid test based on Logan Valley and Lloyd. The Court stated that "the reasoning of the Court's
Valley’s functional equivalency test\textsuperscript{67} circumscribe sharply the scope of first amendment protection\textsuperscript{68} for expressive activity on private property. Under Logan Valley, functional equivalency existed even though a private enterprise had only some attributes of a normal town;\textsuperscript{69} if private property was the functional equivalent of a municipal business district, then the first amendment provided protection.\textsuperscript{70} A broad interpretation of this concept suggested that the first amendment also applied when private property had some functional attributes of a municipality other than those associated with the presence of a business district.\textsuperscript{71} But after Lloyd,\textsuperscript{72} it seemed that when the private entity had some, but not all,\textsuperscript{73} of the attributes of a public community, the first amendment protected expressive activity only upon the satisfaction of three requirements:\textsuperscript{74} (1) the private property had attributes functionally equivalent to those characteristic of a municipality;\textsuperscript{75} (2) the assertedly protected expression was directly related to the use to which the property was put; and (3) no alternative avenues for effective communication existed.

opinion in Lloyd cannot be squared with the reasoning of the Court’s opinion in Logan Valley.\textsuperscript{96} 96 S. Ct. at 1033-34. But see notes 54-56 supra and accompanying text.

67. See notes 44-45 supra and accompanying text.

68. The Court has recognized that, even where public property is involved, reasonable regulation of its use with respect to time, place, and manner is permissible. See Grayned v. Rockford, 408 U.S. 104 (1972); Cameron v. Johnson, 390 U.S. 611 (1968). Moreover, certain types of public property may be closed to first amendment activity if such activity would interfere with the use to which the property is normally put. See Adderley v. Florida, 385 U.S. 39 (1966); Cox v. Louisiana, 379 U.S. 536 (1965). But cf. Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972) (state may not discriminate in allowing free expression on the basis of the content of the expression).

69. For a discussion of what constitutes a “normal town” see text accompanying note 86 infra.

70. The Logan Valley Court relied heavily on Marsh in articulating this concept. 391 U.S. at 319.

71. See note 75 infra.

72. Even after Lloyd and Central Hardware, courts relied on Marsh to invoke limited first amendment protection when private property was functionally equivalent to part of a public municipality. E.g., Illinois Migrant Council v. Campbell Soup Co., 519 F.2d 391 (7th Cir. 1975) (Campbell Soup Company’s residential community possessed functional attributes of a municipality and was therefore covered by the first amendment); Petersen v. Talisman Sugar Corp., 478 F.2d 73 (5th Cir. 1973) (sugar company’s labor camp subjected to first amendment proscriptions); cf. Trabajadores Agrícolas v. Green Giant Co., 518 F.2d 130 (3d Cir. 1975).

73. When private property assumes all of the attributes of a public municipality, first amendment freedoms are fully applicable under Marsh. See text accompanying note 87 infra.


75. It is unclear which public attributes private property must assume before falling within the purview of the first amendment. Nonetheless, it is consonant with Central Hardware that there should be an assumption of significant municipal characteristics before the first amendment is applied. See text accompanying notes 60-61 supra. It follows that, by itself, merely opening property to the public or providing sewers, alleys, or a postal service would not suffice.
In Hudgens, decided only eight years after Logan Valley, the Supreme Court indicated the demise of this three pronged test. The Court began by discrediting the concept of functional equivalency espoused in Logan Valley, incorporating lengthy excerpts from Justice Black's dissent in that case.76 Black, who had been the author of the majority opinion in Marsh, emphasized in Logan Valley that Marsh permitted treatment of private property as though it were public for first amendment purposes only if "that property had taken on all the attributes of a town."77 The presence of only one feature of a municipality, such as a business district, was insufficient to permit picketing on private property.78

The Court in Hudgens also relied heavily upon the reasoning in the Lloyd opinion in concluding that the constitutional protection established in Logan Valley was no longer available to expressive activity conducted in shopping centers. While noting that Lloyd did not explicitly overrule Logan Valley, the Court made it clear, "... if it was not clear before, that the rationale of Logan Valley did not survive the Court's decision in the Lloyd case."79

In holding that Lloyd overruled Logan Valley the Court proceeded to undermine the two additional components of state action analysis adopted in Lloyd. Alluding to the deficiencies in Logan Valley's constitutional analysis, the Court reasoned to its conclusion that the union pickets were not protected by a constitutional guarantee of free speech:

"[f]a large self-contained shopping center is the functional equivalent of a municipality, as Logan Valley held, then the First and Fourteenth Amendments would not permit control of speech within such a center to depend upon the speech's content ... . It conversely follows, therefore, that if the respondents in the Lloyd case did not have a First Amendment right to enter that shopping center to dis-

76. 96 S. Ct. at 1034-35.
77. Id. at 1035 (quoting Logan Valley, 391 U.S. at 332).
78. Id.

"[T]here is no legitimate way of following Logan Valley and not applying it to this case. But, one may suspect from reading the opinion of the Court that it is Logan Valley itself that the Court finds bothersome." See also The Supreme Court, 1971 Term, 86 Harv. L. Rev. 1, 123-25 (1972); Clark & Landers, Sniadach, Fuentes and Beyond: The Creditor Meets The Constitution, 59 Va. L. Rev. 335, 377 n.84 (1973).
tribute handbills concerning Vietnam, then the respondents in the present case did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike against the Butler Shoe Company.  

In this discussion of the prohibitions against government control of speech on the basis of its content, the Court indicated that, for constitutional purposes, whether the content of speech activity does or does not have a direct relationship with the use being made of the property is immaterial to the question of first amendment applicability. Accordingly, there is no constitutional protection for expressive activity in shopping centers, either in the Lloyd situation, where the communications are unrelated to the property, or in the Hudgens context, where the picketing is directly related to the premises at which it is aimed.

Moreover, though not considered expressly by the Court, the availability of alternative forums for conveying a message to an intended audience is also no longer significant in an analysis of state action. Because a privately owned shopping center is not sufficiently imbued with the attributes of public property, the actions of its owner do not constitute state action; the question of alternative locations is therefore irrelevant and need never be reached. By eliminating from the state action question the analysis of relatedness of expressive activity and of the existence of alternative forums, the Court's interpretation of Lloyd unavoidably suggests that the two criteria postulated in that case have no bearing upon the determination of when private property must be opened to the exercise of expressive activity.

Although Hudgens rejects Logan Valley's rationale pertaining to a shopping center as the functional equivalent of a business district, it

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80. 96 S. Ct. at 1036-37 (emphasis added by the Court).
81. Id. at 1036. The Court quoted from Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972): "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."
82. Justice White concurred in the result reached in Hudgens, but stated that Logan Valley could be distinguished and should not be overruled. 96 S. Ct. at 1038. He argued that, because the pickets of the Butler Shoe Company store located in the North DeKalb Shopping Center purported to convey information regarding the operation of Butler's warehouse and not that particular store, the picketing was unrelated. This seems to conflict, however, with the Board's finding that the parties had stipulated that the store and the warehouse were a single employer. Scott Hudgens, 205 N.L.R.B. 628, 630 (1973).
83. It seems that the availability of alternative forums might preclude a finding that there is a true "company town." But cf. Marsh v. Alabama, 326 U.S. 501, 516-17 (1946) (Reed, J., dissenting); Illinois Migrant Council v. Campbell Soup Co., 519 F.2d 391, 396 (7th Cir. 1975). See generally Gould, supra note 37, at 514.
84. See note 36 supra.
leaves *Marsh* intact. Tacit approval of *Marsh* can be seen in the Court's reliance on Justice Black's dissent in *Logan Valley* in which he stated:

But *Marsh* was never intended to apply to this kind of situation. *Marsh* dealt with the very special situation of a company-owned town, complete with streets, alleys, sewers, stores, residences, and everything else that goes to make a town . . .

Accordingly, the constitutional prohibitions of the first amendment will be fully activated if the private property exhibits characteristics comparable to those of the company town in *Marsh*, including the assumption of municipal functions and the exercise of municipal powers. This reading of *Hudgens* is consistent with *Central Hardware*, where the Court stated that before an owner of private property can be subjected to the proscriptions of the first and fourteenth amendments, the private property must assume to some *significant degree* the functional attributes of public property devoted to public use.

By eliminating first amendment protection for shopping center picketing, the *Hudgens* Court has in effect licensed shopping centers, insofar as constitutional considerations apply, to insulate themselves from effective picketing "by creating a *cordon sanitaire* of parking lots around their stores." A concern that business districts could immunize themselves in this fashion is what motivated the Court, at least partially, when it decided *Logan Valley* and, arguably, *Marsh* as well. Nevertheless, the potential consequences of the immunization established in *Hudgens* are striking in light of the proliferation of shopping

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85. It has been noted that the current vitality of *Marsh* is severely limited because it involved a company town, an "economic anachronism" rarely encountered today. Central Hardware Co. v. NLRB, 407 U.S. at 545. But see Illinois Migrant Council v. Campbell Soup Co., 519 F.2d 391 (7th Cir. 1975); Petersen v. Talisman Sugar Corp., 478 F.2d 73 (5th Cir. 1973).
86. 96 S. Ct. at 1035 (quoting *Logan Valley*, 391 U.S. at 330).
88. 407 U.S. at 547 (emphasis added).
89. See text accompanying note 35 supra.
91. Justice Marshall delivered the opinion of the majority in *Logan Valley*. The Court was particularly concerned that first amendment activity would be substantially curtailed due to the economic phenomena stimulating the increase in shopping centers of a size sufficient to make targets of expressive activity difficult to reach or totally inaccessible. Quoting *Marsh* the Court stated:

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.

391 U.S. at 325.

Justice Marshall addressed this point again in *Hudgens*. He stated: "The crucial fact in *Marsh* was that the company owned the traditional forums essential for effective communication. . . ." 96 S. Ct. at 1046.
centers during the past several decades. Various groups in addition to 
dissatisfied union members may desire access to shopping center com-
plexes for the purpose of engaging in expressive activity. Such com-
plexes would serve as the most effective locations for consumer picket-
ing against excessive prices or inferior merchandise, advocacy of 
political opinions, and dissemination of information by minorities re-
garding unfair employment practices. As far as these groups are 
concerned, the protections of the first amendment provided their only 
recourse against exclusion from such premises. Unlike labor-related 
activity, which has some refuge under the NLRA, these groups now 
have no protection against exclusion. Without access to shopping 
complexes, they may be impeded in their efforts to inform the public.

There may be another important consequence of limiting picketing 
to areas outside the perimeter of a shopping center. Removal of 
picketing to a location distant from the establishments at which it is 
directed may adversely affect neutral employers as well as pickets. 
Though the effects of the picketing will be appreciably diluted because it 
is not proximately located, neutral employers may be implicated in the 
controversy. Picketing confined to public property adjacent to en-
trances of a complex may be associated most readily with the entire 
center or its tenants. In contrast, business enterprises located in down-
town areas will be subject to on-the-spot public criticism, on public 
sidewalks directly in front of the establishments, for their practices.

IV

SECTION 7 PROTECTION OF SHOPPING CENTER PICKETING

After concluding that the first amendment right of free speech has 
no application to picketing in a privately owned shopping center, the 
Supreme Court in Hudgens held that the rights and liabilities of the 
parties to the labor dispute should be determined solely under the 
NLRA. In this situation, the section 7 rights of the picketers and the

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93. See text accompanying notes 158-61 infra.
94. Cf. Amalgamated Food Employees, Local 590 v. Logan Valley Plaza, Inc., 391 
    U.S. at 324.
    Marshall argued: “As far as these groups are concerned, the shopping center owner has 
    assumed the traditional role of the state in its control of historical First Amendment 
    forums. Lloyd and Logan Valley recognized the vital role the First Amendment has to 
    play in such cases. . . .” Id.
96. See generally Broomfield, supra note 41, at 553.
97. Amalgamated Food Employees, Local 590 v. Logan Valley Plaza, Inc., 391 
    U.S. at 324-25.
98. Hudgens v. NLRB, 96 S. Ct. at 1037.
99. Id.
private property rights of the employer are in conflict and the problem is ". . . to seek a proper accommodation between the two." The NLRB has "primary responsibility" for making this adjustment, subject to review by the courts.

A. The Babcock Accommodation Principle Applied to Hudgens

The Court cited with approval NLRB v. Babcock & Wilcox Co. as establishing the basic objectives of such an accommodation of interests. In Babcock, the employer refused to allow distribution of union

100. Central Hardware Co. v. NLRB, 407 U.S. at 543.
101. Hudgens v. NLRB, 96 S. Ct. at 1038. The Board has been recognized elsewhere as the major forum for weighing competing interests in the field of labor relations. "The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." NLRB v. Truck Drivers Union, 353 U.S. 87, 96 (1957).
103. Hudgens v. NLRB, 96 S. Ct. at 1037. While the Hudgens case was before the court of appeals, the Board unsuccessfully argued that Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), was controlling. Hudgens v. NLRB, 501 F.2d at 165-66 (1974). In Republic Aviation, the Court approved the Board's presumption that a company rule prohibiting union solicitation on company property by an employee outside of working hours is invalid, absent proof of special circumstances that make the rule necessary for maintaining production or discipline. Republic Aviation Corp. v. NLRB, 324 U.S. at 803-04. This presumption had originally been set forth by the Board in Peyton Packing Co., 49 N.L.R.B. 828 (1943), enforced, 142 F.2d 1009 (5th Cir.), cert. denied, 323 U.S. 730 (1944). In Republic Aviation, the Supreme Court also upheld the Board's finding of an unfair labor practice in the companion case of Le Tourneau Co., 54 N.L.R.B. 1254, enf. denied, 143 F.2d 67 (5th Cir. 1944), where the employee had enforced a general "no distribution" rule against distribution of union literature on company owned parking lots by employees on their own time. There was no finding that the plant's location made solicitation away from company property ineffective. Republic Aviation Corp. v. NLRB, 324 U.S. at 798-99, 801-05. The major difference between the holding of Republic Aviation and the Babcock rule for nonemployee organizers is that the availability to the employee organizers of alternative means of communications with the other employees is not relevant. National Steel Corp. v. NLRB, 415 F.2d 1231, 1233 (1969); Republic Aluminum Co. v. NLRB, 394 F.2d 405 (1968) (en banc). Contra, NLRB v. Rockwell Mfg. Co., 271 F.2d 109, 115 (1959).

In Hudgens, the Supreme Court distinguished Republic Aviation from Babcock and Central Hardware by saying it involved a completely different balance of interests because the employees were already lawfully on the employer's property. Therefore, the employer's management interests rather than his property interests were at stake. Hudgens v. NLRB, 96 S. Ct. at 1037 n.10. The Hudgens Court also relied upon the statement in Babcock that the distinction between rules of law applicable to employees and those applicable to nonemployees is "one of substance. NLRB v. Babcock & Wilcox Co., 351 U.S., at 113." Hudgens v. NLRB, 96 S. Ct. at 1037 n.10.

The Board has propounded a similar analysis of the different interests balanced under the presumption principle of Republic Aviation as compared with the accommodation test of Babcock. In deciding that Babcock, rather than Republic Aviation, properly controls the access of off-duty employees to the employer's property, the Board stated:
literature on company-owned parking lots by nonemployee union organizers. The NLRB found a section 8(a)(1) violation by the employer, based on the fact that the parking lot and the walkway from it to the plant were the only "safe and practicable" places for dissemination of the union information. The court of appeals, however, denied enforcement and the Supreme Court affirmed. The Court in Babcock set forth a balancing test that is still being applied:

Accommodation between the two [organization rights and property rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other. . . . But when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.

In Central Hardware Co. v. NLRB, the Supreme Court quoted the above language from Babcock and reaffirmed it as the "guiding principle for adjusting conflicts between §7 rights and property rights. . . ."

While it cited the Babcock accommodation test as demonstrating the nature of the Board's task in balancing section 7 rights against private property rights under the Act, the Court in Hudgens also carefully pointed out the difference between the duty of the Board and the courts in applying the Babcock rule and the duty of the courts in applying the mandate of the first amendment. Although the guarantee of free speech requires that the government not restrict expression on the basis of subject matter or content, a proper accommodation under the

This is so because the interests to be balanced in determining the validity of such a [no solicitation or no distribution] rule are very different as between an employee on the premises in connection with his work and an off-duty employee who seeks to enter. The former involves a balancing of statutory rights of self-organization against the employer's interests in production, safety, or discipline, and in this situation the statutory rights prevail (unless it can be shown that interference with those rights is essential) because an employer may not close off this normal channel of communication among the workers without proper justification. The latter situation, however, requires a balancing of the employees' Section 7 rights against the employer's private property rights.

106. E.g., Scholle Chemical Corp. v. NLRB, 82 L.R.R.M. 2410 (7th Cir. 1972); see Zimny, Access of Union Organizers to "Private" Property, 25 LAB. L.J. 618 (1974).
109. Id. at 544.
110. Hudgens v. NLRB, 96 S. Ct. at 1037.
Babcock test "... may largely depend upon the content and context of the § 7 rights being asserted." The Hudgens Court implicitly reaffirmed the statement in Babcock that "... the Board has the responsibility of 'applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms.'"

Perhaps as an aid to the NLRB in applying this accommodation test on remand, the Supreme Court in Hudgens pointed out three factors that distinguish the section 7 activity in Hudgens from that in both Babcock and Central Hardware. Not wanting to usurp the "primary responsibility" of the Board on this question, the Court said that these differences may or may not be relevant in reaching the proper balance. First, the Court observed that Hudgens involved lawful economic strike activity while Babcock and Central Hardware involved organizational activity. Second, in Hudgens the picketing was conducted by employees while the two prior cases concerned the exercise of section 7 rights on private property by nonemployees. Third, the property at issue in Hudgens belonged to a third party and not to the employer against whom the union activity was directed.

In citing the Babcock accommodation test for guidance on remand, the Hudgens Court appears to have broadened the scope of application of Babcock. Babcock was a major development in the law concerning limitations on an employer's ability to restrict the communication of information regarding the right to organize to its employees while they were on the employer's property. In Central Hardware, the Court had emphasized a restrictive reading of the Babcock standard: "In short, the principle of accommodation announced in Babcock is limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and minimal." Moreover, the opinion

111. Id. at 1037.
113. Hudgens v. NLRB, 96 S. Ct. at 1037-38.
114. Id. at 1037.
115. Id. at 1038.
116. It has been argued that the Board and, especially, the reviewing courts have repeatedly denied access to the employer's property under the Babcock standard despite very compelling circumstances favoring access. Zimny, Access of Union Organizers to "Private" Property, 25 LAB. L.J. 618 (1974); cf. Broomfield, supra note 41, at 553-54; NLRB v. Solo Cup Co., 422 F.2d 1149, 1151-52 (7th Cir. 1970).
117. See NLRB v. Babcock & Wilcox Co., 351 U.S. at 109-11, 113. The Court in Babcock refused to apply to the nonemployee organizing situation the rules first developed in Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), regarding employee-to-employee communication of organizational information. For a discussion of the Court's choice of Babcock, rather than Republic Aviation, as controlling in Hudgens, see note 103 supra.
118. Central Hardware Co. v. NLRB, 407 U.S. at 545.
in Babcock had made clear the relation between the employees' section 7 right to organize and the nonemployee organizers' right to enter on to the employer's property. That access was not a section 7 right, but was merely a derivative of the employees' right to organize, and was entirely dependant upon the lack of alternative means for communicating with the employees.¹¹⁰

In Hudgens, the Court directed application of the Babcock accommodation principle to circumstances far different than those under which it had originally been developed. In addition to the three differences mentioned by the Court,¹²⁰ three other distinctions are also important. First, the employer in Hudgens charged with violation of the Act had no dispute with his own employees.¹²¹ Second, the employees' picketing was conducted at the shopping center and not upon their employer's property at the location of the strike (which was the warehouse). Third, any access to the shopping center granted to the employees would not be derivative of any right of the target group, Butler Shoe retail customers, but would apparently be derivative of the employees' own section 7 right to strike against their employer at their place of employment.¹²² Thus, the Supreme Court has extended application of

¹¹⁹. No restrictions may be placed upon the employees' right to discuss self-organization among themselves unless the employer can demonstrate that a restriction is necessary to maintain production or discipline. Republic Aviation Corp. v. Labor Board, 324 U.S. 793, 803. But no such obligation is owed nonemployee organizers. Their access to company property is governed by a different consideration. The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. Consequently, if the location of the plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on the property. . . .

¹²⁰. See text accompanying note 115.


The application of this concept has vast potential in other cases where an “employer’s” actions affect employees who are not his own. See also Operating Engineers Local 3 v. NLRB, 266 F.2d 905, 909 (D.C. Cir. 1959); Epperson v. Dorsel, 202 N.L.R.B. 23 (1973).

¹²². Ultimately, access may still turn on the unavailability of other means to communicate with the store customers, despite the lack of NLRA protection for their interests. See text accompanying notes 156-61 infra.
the Babcock accommodation principle from the specific nonemployee organizing situation to conflicts between property and section 7 rights in general.

B. Balancing the Interests of the Parties in HUDGENS

Consideration of the three differences mentioned by the Court in Hudgens may alter the weight given under the Babcock accommodation test to the respective interests of the picketers and the property owner. The potential effect of the fact that Hudgens involved the property rights of a third party employer, and not those of the employer who was the target of the section 7 activity, is not clear in light of the present development of the accommodation test. The court cases which have considered application of Babcock to fact situations involving property rights of third parties have not articulated the significance, if any, of this factor.

In NLRB v. Solo Cup Co.,123 the Seventh Circuit held that application of Babcock was unnecessary because the owner of the industrial park, in which the employer involved in the labor dispute leased a plant, had consented to permit union organizers to use the entrance road owned by the park. The court reasoned that this access provided an effective means of communication with the employees and thus there was no necessity to allow organizational efforts in the immediate area of the plant.124

In Scholle Chemical Corp. v. NLRB,125 the same court of appeals granted nonemployee organizers access over a private road owned by a corporation that was not the focus of the organizational campaign. The court noted that the employer against which the section 7 activity was directed held an easement over the road,126 but did not discuss the significance of third party ownership of the property in its application of Babcock.127

The NLRB expressed its view regarding the weight to be accorded third party ownership of the property in Frank Visceglia and Vincent Visceglia t/a Peddie Buildings,128 a case upon which the Board relied in its second opinion in Hudgens.129

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123. 422 F.2d 1149 (7th Cir. 1970).
124. Id. at 1151.
125. 82 L.R.R.M. 2410 (7th Cir. 1972).
126. Id. In Hudgens, the lease between Hudgens and Butler granted Butler and its employees, agents, customers, and invitees the right to use the parking lot and other common areas of the shopping center. Brief for the NLRB at 6, Hudgens v. NLRB, 96 S. Ct. 1029 (1976).
127. 82 L.R.R.M. at 2411-12.
striking against their employer picketed not only their place of employment, but also a second nearby facility of the employer which was located on property owned by a third party. The Board held that the third party violated section 8(a)(1) when it threatened to have the employees who picketed the second facility arrested. Since the employees were engaged in protected activity, economic strike picketing, a building of their employer "... was not insulated from the picketing merely because someone else, Peddie, was the technical owner of the land surrounding it."130 The Board's order, however, was denied enforcement on other grounds by the Court of Appeals for the Third Circuit.131

*Solo Cup,* Scholle Chemical, and Peddie Buildings show that third party ownership of the property to which the union desires access will not prevent the application of the Babcock standard for accommodating section 7 rights and private property rights. Of the three cases, Peddie Buildings provides a fact situation most nearly analogous to that in Hudgens, since the employer charged with violation of the Act was also the third-party property owner. But whether third-party property ownership is significant in weighing the interests and striking the balance is still uncertain.132

The second difference pointed out by the Court is that the section 7 activity in Hudgens was conducted by Butler Shoe employees, while in Babcock the organizational activity was conducted by nonemployees. The Board's decision in GTE Lenkurt, Inc.133 provides insight as to whether the employee status of the picketers in Hudgens will affect its weighing of interests under the Babcock balancing test.

In GTE Lenkurt, the Board confronted the problem of whether the presumption rule of Republic Aviation, under which the question of reasonable alternative means of communication is irrelevant to the issue of solicitation by employees during their non-working hours (i.e., lunch and rest breaks),134 or the accommodation test of Babcock, under which the existence of other effective channels of communication is central to

130. 203 N.L.R.B. at 267.
131. NLRB v. Visceglia, 498 F.2d 43, 49-50 (3d Cir. 1974). The court refused to either adopt or reject the Board's conclusion that Babcock applied to economic pickets in industrial parks, but held that, even assuming it did apply, the Board had failed to evaluate a significant number of important ingredients in the balancing test.
132. Justice Marshall, in his dissent in Hudgens, stated his view that the ownership of the property by the shopping center owner rather than by the employer was irrelevant, as the nature of the property interest was the same in either instance. Hudgens v. NLRB, 96 S. Ct. at 1043 & n.5.
133. 204 N.L.R.B. 921 (1973).
134. See note 103 supra.
the issue of organization on company property by nonemployees, was the proper standard to apply to off-duty employees desiring access to company property for organizational purposes. The Board stated that, "It seems apparent that for purposes not protected by this Act off-duty employees and nonemployees would be invitees to the same extent, and one is no more entitled than the other to admission to the premises. We are unable to conclude that a different rule is required where union organization is involved . . . " The NLRB held that an employer could deny off-duty employees access to his property unless the Babcock standard of a lack of adequate alternative avenues of communication was met.

The Board in GTE Lenkurt viewed the status of off-duty employees as more analogous to that of nonemployees than to that of employees. The off-duty employee who returns to his workplace is not "on the premises in connection with his work." Thus a balancing of the employees' section 7 rights against the employer's private property rights is required. Section 7 activity by "employees lawfully on the premises," however, involves a balancing of statutory rights of self-organization against the employer's interests in production, safety, or discipline.

The status of the picketers in Hudgens would also seem to fit this analysis. Picketing employees, like off-duty employees, are not on the shopping mall premises for work purposes, and their section 7 rights are in conflict with the owner's property rights rather than with his management interests.

GTE Lenkurt indicates that the mere fact that the picketers in Hudgens were employees rather than nonemployees will not tip the balance in their favor under the Babcock accommodation of interests test. If this analysis of the picketers' status is adopted, then the question of alternative means of communication becomes the critical consideration that determines the access rights of employees who are not on the property due to a work relationship.

136. 204 N.L.R.B. at 921.
137. Id. at 922; cf. McDonnell Douglas Corp. v. NLRB, 472 F.2d 539, 547 (8th Cir. 1973).
138. 204 N.L.R.B. at 922.
139. Id. at 921.
140. Id.
141. Id. at 922. The Justices of the Supreme Court have differed in point of emphasis while interpreting the holding of Babcock. Justice Stewart in the majority opinion in Hudgens found that the "basic objective" established by Babcock was the accommodation of section 7 rights and private property rights with as little destruction of one as is consistent with the maintenance of the other. Hudgens v. NLRB, 96 S. Ct. at
The third difference noted by the Court is that Hudgens involved lawful economic strike activity, rather than organizational activity which characterized Babcock and Central Hardware. The Court's denomination of the picketing in Hudgens as "lawful economic strike activity," meaning protected section 7 activity, expanded prior understanding of what constitutes strike activity. Picketing at a retail store to inform consumers of the existence of a labor dispute at another place may raise the question whether such picketing is prohibited secondary activity. The answer depends on whether the picketing is directed at the primary or secondary employer, not on the nature of the dispute with the primary employer. Although the picketing in Hudgens was not prohibited secondary activity, the Court failed to consider the fact that the picketing occurred far from the location of the primary dispute when it characterized it as lawful strike activity. Indeed, United Steelworkers v. NLRB (Carrier Corp.), cited by the Hudgens Court to stress the importance of picketing in support of a strike, seemed to implicitly restrict strike picketing to picketing conducted in direct support of a strike at the location of the strike:

Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been aimed at all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt.

The Hudgens Court has broadened the scope of strike picketing to include picketing whose direct objective is not to prevent operation of the facility being struck, but only to advertise the strike to consumers at the employer's retail store.

1037. Justice Marshall, on the other hand, stated in his dissent: "Thus the general standard that emerges from Babcock & Wilcox is the ready availability of reasonably effective alternative means of communication with the intended audience." Id. at 1043.
142. 96 S. Ct. at 1037.
143. See NLRB v. Fruit & Vegetable Packers Local 760, 377 U.S. 58, 63-64 (1964).
144. The relevant proviso to section 8(b)(4) of the NLRA, 29 U.S.C. § 158(b)(4) (1970), states "[t]hat for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers... that a product or products are produced by an employer with whom the labor organization has a primary dispute..." (emphasis added).
145. Although the Butler Shoe Co. utilized separate entities for its warehouses and retail stores, "[t]he parties stipulated that for the purposes of this case store and warehouse are single employer." Scott Hudgens, 205 N.R.L.B. at 630. Striking employees of one division who picket another division of their employer do not violate section 8(b)(4)(B) of the Act if the employer exercises "actual, or active, control" over both divisions. San Francisco Examiner, Division of the Hearst Corp., 185 N.L.R.B. 303, 304 (1970). See also Miami Pressman's Local 46 v. NLRB, 322 F.2d 405 (1963).
146. 376 U.S. 492 (1964).
147. Id. at 499.
By noting the difference between the Hudgens strike activity and the Babcock organizational activity, the Court has opened the possibility of an accommodation more favorable to employees. There are many indications of the high priority given economic strike activity in federal labor law policy. The right to strike is specifically protected by section 13 of the NLRA.\textsuperscript{148} The Court has emphasized the central role of strike activity: "Collective bargaining, with the right to strike at its core, is the essence of the federal scheme."\textsuperscript{149} The Court has recognized a repeated Congressional solicitation for the right to strike, based upon the conclusion that legitimate use of the strike greatly enhances the collective bargaining system.\textsuperscript{150}

The deference afforded the strike in federal labor law suggests that this factor should weigh heavily in favor of picketing employees in balancing interests under the Babcock accommodation test. The NLRB took this position in its Peddie Buildings decision, where it applied the Babcock balancing test to an instance of economic picketing during a strike.\textsuperscript{151} At oral argument before the Third Circuit, the Board presented what the court termed "an impressive argument" that Congress intended to give more protection to the section 7 right to strike than to the section 7 right to organize.\textsuperscript{152} The Board based this stand on the fact that section 8(b)(7)(C) of the NLRA\textsuperscript{153} limits organizational picketing to thirty days, while the right of strikers to engage in primary economic picketing is not similarly restricted.\textsuperscript{154} The court of appeals, however, did not adopt this position and denied enforcement of the Board's order; it concluded that the Board had failed to evaluate a significant number of important considerations in the balancing test, assuming that Babcock applied at all to economic strike activity.\textsuperscript{155}

There is yet another difference between the circumstances in Hudgens and those in Babcock which was not mentioned by the majority in Hudgens, although it was emphasized by the court of appeals\textsuperscript{156} and by

\begin{footnotesize}
\textsuperscript{148} Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 29 U.S.C. § 163 (1970). Picketing has been equated with striking for section 13 purposes. NLRB v. Drivers Local, 362 U.S. 274, 281 n.9 (1960); see NLRB v. International Rice Milling Co., 341 U.S. 665, 672-73 (1951).
\textsuperscript{151} 203 N.L.R.B. at 266-67.
\textsuperscript{152} NLRB v. Visceglia, 498 F.2d 43, 48 (3d Cir. 1974).
\textsuperscript{154} 498 F.2d at 48.
\textsuperscript{155} Id. at 49-50.
\textsuperscript{156} Hudgens v. NLRB, 501 F.2d 161, 168-69 (1974).
\end{footnotesize}
The target group of an organizing campaign at a factory can be identified with much less difficulty than can be a group composed of the customers of a single store in a large shopping center that draws its consumers from an entire metropolitan area. This factor is very significant in considering the question of alternative channels of communication under Babcock. If organizers at a plant are kept off company property, they can at least record the license plate numbers of cars leaving the parking lot. In the shopping center context, however, it is impossible to identify the patrons of one store by observation from the distant perimeters of the parking area. Difficulty in identifying the intended audience in a situation similar to Hudgens greatly lessens the utility of the traditional other means of communication suggested in Babcock for organization campaigns, such as telephone calls, letters, personal meetings at home, or advertised meetings. As Justice Marshall stated in his dissent: "In this case, of course, the intended audience was different, and what constitutes reasonably effective alternative means of communication also differs." Unlike Babcock, the audience in Hudgens could be reached effectively only by employee access to the employer's property for the purpose of conducting picketing.

In summary, the factual differences between Hudgens and Babcock require a different weighing of employee and employer interests under the accommodation test. Neither the fact that a third party owns the property in question nor the presence of employees, as compared to nonemployees, bars application of the Babcock standard. The involvement of economic strike activity, rather than organizational activity, and the limitation on communication inherent in the shopping center context strongly suggest that the section 7 rights of the picketing employees in a Hudgens-type situation should outweigh the right of the property owner to control access to his property under the Babcock balancing test.

161. Although the majority opinion did not discuss the question of alternative means of communication, Hudgens' contention that the union should have used newspapers, radio, television, and direct mailing was rejected by the court of appeals, Hudgens v. NLRB, 501 F.2d at 168-69, and in the dissent in the Supreme Court, Hudgens v. NLRB, 96 S. Ct. at 1043-44. Justice Marshall asserted, "[c]ertainly Babcock & Wilcox did not require resort to the mass media, or to more individualized efforts on a scale comparable to that which would be required to reach the intended audience in this case." Id. at 1043.
A diminished ability of pickets in general\textsuperscript{162} to convey messages to patrons and employees of shopping centers is a natural consequence of \textit{Hudgens} due to the removal of first amendment protection. As far as union picketing is concerned, the decision separates constitutional issues from labor related matters that are best resolved under the guidelines of the NLRA. In disposing of the confusing first amendment standards developed in \textit{Logan Valley} and \textit{Lloyd}, the \textit{Hudgens} Court has established under \textit{Babcock} a simpler structure within which the lower courts and the Board can evaluate the right to conduct union activity in privately owned shopping centers. The decision does, however, leave open the important question of the ultimate range of situations to which \textit{Babcock} may be applied now that the accommodation test has been expanded beyond its traditional setting. \textit{Hudgens} may also have far reaching consequences for the definition of strike activity, and the question of secondary boycotts may be crucial in future cases arising under this precedent.

Within the factual context of \textit{Hudgens}, a different approach to the question of alternative means of communication is called for because of the significant differences between shopping center picketing and organizational campaigns at factories, such as in \textit{Babcock}. The inherent restrictions on communications in a shopping center situation and the high priority afforded strike activity in labor policy imply that access to the property of the employer should be granted more readily under the accommodation test to striking employees than to nonemployee organizers.

\textsuperscript{162} Though the decisions did not specifically address the issue, Justice Marshall intimated in \textit{Logan Valley}, 391 U.S. at 324, and in his dissent in \textit{Hudgens}, 96 S. Ct. at 1048, that members of the public who seek to communicate on subjects other than labor disputes, i.e. those not protected by the NLRA, may be effectively precluded from doing so in large shopping centers. This would include consumers wishing to picket for lower prices, political demonstrators, and minorities seeking to advance equal opportunity in employment.