NONEMPLOYEE UNION ORGANIZERS AND ACCESS TO PRIVATE PROPERTY: LECHMERE, INC. v. NLRB

INTRODUCTION

Section 7 of the National Labor Relations Act ("NLRA") provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) of the NLRA protects an employee's section 7 rights by prohibiting an employer's attempts "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7]."1

In 1945, the United States Supreme Court recognized that the NLRA limits an employer's ability to prohibit employee organizational activity, even when that activity occurs on an employer's private property.2 However, the scope of the rights afforded nonemployee union organizers under section 7 when their organizational efforts occur on an employer's private property has been the subject of continuous debate, and has resulted in the Court addressing the issue on several occasions.3

Recently, in Lechmere, Inc. v. NLRB,4 the Court again addressed the issue of when nonemployee union organizers are entitled access to an employer's private property.5 In ruling that the nonemployee union organizers in Lechmere were not protected under section 7, and therefore not entitled to access to the employer's property, the Court claimed to reaffirm the rule established in NLRB v. Babcock & Wilcox Co.6 In Babcock, the Court held that an employer is under no obligation to allow nonemployee union organizers access to company

5. Although nonemployees are not expressly mentioned in the language of § 7, the Court in Babcock noted that employees’ organizational rights may depend on employee communication with nonemployees. Babcock, 351 U.S. at 113. The Court later stated that any right nonemployees may have to gain access to employer property is derivative of an employee's § 7 rights. Sears, Roebuck & Co., 436 U.S. at 206 n.42.
7. 351 U.S. 105 (1956); Lechmere, 112 S. Ct. at 848-50.
property unless exceptional circumstances render the employees inaccessible to reasonable union communication efforts.\textsuperscript{8}

The Court in \textit{Lechmere} also rejected the analysis formulated by the National Labor Relations Board ("Board") in \textit{Jean Country}.\textsuperscript{9} According to the Court, the analysis was faulty because it failed to give due consideration to alternative means of communication available to nonemployee organizers.\textsuperscript{10} Additionally, because the Board had utilized the analysis in all access cases, the Board had not sufficiently distinguished nonemployee organizational activity from nonorganizational activity.\textsuperscript{11}

This Note examines the Court's reasoning in \textit{Lechmere} and the evolution of the law concerning access to private property by nonemployees since the decision in \textit{Babcock}.\textsuperscript{12} In addition, this Note argues that the Court's refusal to sustain the validity of the Board's analysis in \textit{Jean Country} was justifiable in light of \textit{Babcock} and its progeny.\textsuperscript{13} Finally, this Note argues that the Court in \textit{Lechmere} appropriately concluded that the employer's property right was not required to yield in order to protect the employees' section 7 rights.\textsuperscript{14} However, the Court's deviation from precedent may adversely impact union attempts to organize in the future.\textsuperscript{15}

\textbf{FACTS AND HOLDING}

In June of 1987, Local 919 of the United Food and Commercial Workers Union initiated an attempt to organize the employees of Lechmere, Inc. ("Lechmere"), a Newington, Connecticut, retail store.\textsuperscript{16} The Lechmere outlet was the anchor store in a shopping plaza, and was accessible from all parking areas in the plaza.\textsuperscript{17} The primary parking area for Lechmere employees was a small parking

\textsuperscript{8} Babcock, 351 U.S. at 112.
\textsuperscript{9} 291 N.L.R.B. 11 (1988); \textit{Lechmere}, 112 S. Ct. at 848. The analysis in \textit{Jean Country}, 291 N.L.R.B. 11 (1988), was applied in all nonemployee access cases and consisted of weighing 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 if access should be granted" with "the consideration of the availability of reasonably effective alternative means as especially significant in [the] balancing process." \textit{Jean Country}, 291 N.L.R.B. at 15.
\textsuperscript{10} \textit{Lechmere}, 112 S. Ct. at 848.
\textsuperscript{11} \textit{Id.}
\textsuperscript{12} See infra notes 32-52, 61-145 and accompanying text.
\textsuperscript{13} See infra notes 146-87 and accompanying text.
\textsuperscript{14} See infra notes 188-97 and accompanying text.
\textsuperscript{15} See infra notes 198-207 and accompanying text.
\textsuperscript{16} Lechmere, Inc. v. NLRB, 914 F.2d 313, 315 (1st Cir. 1990), rev'd, 112 S. Ct. 841 (1992).
\textsuperscript{17} \textit{Id.} at 315.
lot near a secondary entrance to the store.\textsuperscript{18}

The nonemployee organizers initially attempted to contact Lechmere employees through a series of local newspaper advertisements, but the ads generated little interest from Lechmere employees.\textsuperscript{19} The organizers then attempted to contact Lechmere employees by placing flyers on automobiles in the employee parking lot.\textsuperscript{20} Lechmere management officials, enforcing a strict "no solicitation" policy, informed the union organizers that solicitation was prohibited and demanded that the organizers leave.\textsuperscript{21} After complying with the management's request, the organizers renewed their efforts alongside the entrance to the employee parking lot.\textsuperscript{22} While positioned on a strip of public property between the parking lot and the adjacent thoroughfare, the union organizers picketed, distributed flyers, and recorded employee automobile license numbers.\textsuperscript{23} From this effort, the union attained the names and addresses of about twenty percent of the Lechmere employees.\textsuperscript{24} After contacting these employees, the union acquired only one signed union authorization card.\textsuperscript{25}

The union filed an unfair labor practice charge with the National Labor Relations Board ("Board"), alleging that Lechmere had violated section 8 of the National Labor Relations Act ("NLRA") by denying the nonemployee organizers access to Lechmere's property.\textsuperscript{26} An administrative law judge ("ALJ") upheld the union's charge.\textsuperscript{27} The Board affirmed the ALJ's order, employing an analysis first used

\textsuperscript{18} Id.
\textsuperscript{19} Id. at 316.
\textsuperscript{20} Id.
\textsuperscript{21} Id. at 315-17. The "no solicitation" policy was strictly and uniformly enforced. The Girl Scouts and the Salvation Army are among the groups that have been denied access to Lechmere, Inc., property for the purpose of soliciting. Id. In order for employers to post notice banning union activity on their property, they must extend the ban to all soliciting by nonemployees. ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW 186-87 (1976).
\textsuperscript{22} Lechmere, 914 F.2d at 317.
\textsuperscript{23} Id. The Connecticut Department of Motor Vehicles supplied the union with the names and addresses corresponding to the license numbers. Id.
\textsuperscript{24} Id. at 316.
\textsuperscript{25} Id. at 317. Section 9(c)(1) of the NLRA states that the National Labor Relations Board ("Board") may require an employee election to determine union representation if it is shown that a substantial number of employees have a desire to be represented. 29 U.S.C. § 159(c)(1) (1988). The Board generally has required that 30% of the workforce show an interest in representation before it will declare the need for an election. The interest is normally illustrated by signed union authorization cards. FLORIAN BARTOSIC & ROGER C. HARTLEY, LABOR RELATIONS LAW IN THE PRIVATE SECTOR § 7.03(b)(1), at 146 (2d ed. 1986).
\textsuperscript{26} Lechmere, 914 F.2d at 317.
\textsuperscript{27} Id. The ALJ analyzed the matter under the analysis set forth in Fairmont Hotel, 282 N.L.R.B. 139 (1986), overruled by Jean Country, 291 N.L.R.B. 11 (1988). Lechmere, Inc., 295 N.L.R.B. 92, 98-100 (1989). This analysis was the predecessor of the test set forth in Jean Country, 291 N.L.R.B. 11, 14 (1988), the difference being that
in Jean Country. The Jean Country analysis balances employees' section 7 rights against an employer's property rights, while considering the availability of alternative means of communication as a significant factor in the balancing test. Lechmere petitioned the United States Court of Appeals for the First Circuit for a review of the Board's order. The First Circuit upheld the determination that Lechmere had violated section 8 of the NLRA, stating that the Jean Country analysis was a permissible view of the law.

In Lechmere, Inc. v. NLRB, the United States Supreme Court reversed the decision of the First Circuit. The Court stated that the Jean Country analysis used by the Board conflicted with the Court's previous statements on the issue of nonemployee organizers' access to private property. Instead, the Court applied the test established in NLRB v. Babcock & Wilcox Co., and concluded that the nonemployees were not entitled access to Lechmere's parking lot.

In reaching its conclusion, the Court first examined the language of section 7. The Court noted that by "its plain terms, . . . the NLRA confers rights only on employees, not on unions or their nonemployee organizers." However, the Court reiterated the observation made in Babcock concerning the need for employee communication with nonemployees if the employees are to effectively exercise the organization rights guaranteed under section 7. To safeguard such communication, the Court recognized that the general rule providing that an employer may prohibit nonemployee organizers from company property may be required to yield when exceptional circumstances preclude employees from engaging in the organizational rights provided to them by section 7. The Court noted that classic examples of circumstances necessitating nonemployee access included circumstances present when employees work

under Fairmont Hotel, alternative means of communication were not always considered. Fairmont Hotel, 282 N.L.R.B. at 142. See supra note 2 and accompanying text.

30. Lechmere, 914 F.2d at 314.
31. Id. at 321, 325.
34. Id. at 848.
35. Id.
38. Id. at 845. See supra note 1 and accompanying text.
40. Id. (citing Babcock, 351 U.S. at 113).
41. Id.
at isolated resort hotels and logging or mining camps.\textsuperscript{42}

After discussing post-\textit{Babcock} cases that were not "intended to repudiate or modify \textit{Babcock}'s holding," the Court examined the analysis set forth in \textit{Jean Country}, in which the Board balanced section 7 rights and private property rights with alternative means also considered a factor.\textsuperscript{43} According to the Court, the Board not only failed to give sufficient consideration to alternative means of access, but it also failed to distinguish between nonemployee organizational and nonorganizational access cases.\textsuperscript{44}

The Court stated that it was inappropriate to apply the balancing test established in \textit{Jean Country} when the issue involves nonemployee access to company property for organizational purposes.\textsuperscript{45} In such cases, the Court stated, the holding in \textit{Babcock} places no duty on employers to grant nonemployees access to company property unless communication between employees and nonemployees would not be feasible off company premises.\textsuperscript{46} The Court stated that the sort of balancing used by the Board is mandated only when the nonemployee union organizers demonstrate such infeasibility.\textsuperscript{47}

The Court then applied the method of accommodating both parties' rights that the Court had used in \textit{Babcock}.\textsuperscript{48} Stressing the narrowness of the exception to the general rule, the Court stated that because Lechmere employees did not occupy living quarters on company property, the employees were presumed to be accessible to nonemployee organizers through means other than direct contact on company property.\textsuperscript{49} The Court further stated that the Lechmere employees were in fact accessible through alternative means of communication.\textsuperscript{50} Not only did the Lechmere employees reside away from company property, but the union also had access to the employees through the union's direct contact with a "substantial percentage" of the employees, its access to available media advertising, and its efforts to contact employees on the strip of public property be-

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\item \textsuperscript{42} \textit{Id.} at 849 (citing NLRB v. S&H Grossinger's Inc., 372 F.2d 26 (2d Cir. 1967); NLRB v. Lake Superior Lumber Corp., 167 F.2d 147 (6th Cir. 1948); Alaska Barite Co., 197 N.L.R.B. 1023 (1972), \textit{cert. denied}, 414 U.S. 1025 (1973)).
\item \textsuperscript{43} \textit{Id.} at 846-47 (citing Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 346 U.S. 180 (1978); Hudgens v. NLRB, 424 U.S. 507 (1976); Central Hardware Co. v. NLRB, 407 U.S. 539 (1972)). The Court noted that these cases discussed the \textit{Babcock} test, but the Court itself did not apply the test. \textit{Lechmere}, 112 S. Ct. at 846-47.
\item \textsuperscript{44} \textit{Id.} at 848.
\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} \textit{Id.}
\item \textsuperscript{48} \textit{Id.} at 849-50.
\item \textsuperscript{49} \textit{Id.} at 849.
\item \textsuperscript{50} \textit{Id.} at 849-50.
\end{itemize}
between the employee parking lot and the adjacent thoroughfare.\textsuperscript{51} The Court concluded by stating that "[a]ccess to employees, not success in winning them over, is the critical issue," and that the union had failed to meet its burden of showing that "unique obstacles" prevented its access to Lechmere employees.\textsuperscript{52}

The dissent disagreed with the majority opinion on several points.\textsuperscript{53} First, the dissent argued that the inaccessibility feature of the Babcock test should not be construed as the exclusive reason for allowing nonemployee access to an employer's private property.\textsuperscript{54} As examples of situations that the Court in Babcock did not address, the dissent pointed to shopping center parking lots that generally are open to the public and to situations where employee residences are dispersed over a wide area.\textsuperscript{55}

Second, the dissent stated that the majority's interpretation of Babcock was inconsistent with Supreme Court decisions subsequent to Babcock.\textsuperscript{56} The dissent stated that the post-Babcock decisions illustrated that the Court has "consistently declined to define the principle of Babcock as a general rule subject to narrow exceptions, and [has] instead repeatedly reaffirmed that the standard is a neutral and flexible rule of accommodation."\textsuperscript{57} The dissent argued that the Court's reliance on Babcock, despite later conflicting rulings on the issue of nonemployee access, was improper and that the Court's later articulations should control.\textsuperscript{58} The dissent stated that the Jean Country analysis was consistent with these later Court rulings and was appropriately approved by the First Circuit.\textsuperscript{59}

Finally, the dissent stated that Babcock conflicted with recognized standards of judicial deference to administrative agency decisions, and that the majority exceeded its authority by not remanding the case to the Board.\textsuperscript{60}

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\item \textsuperscript{51} \textit{Id.}
\item \textsuperscript{52} \textit{Id.} at 850 (quoting Sears, Roebuck & Co., 436 U.S. at 205-06 n.41).
\item \textsuperscript{53} \textit{Id.} at 850-53 (White, J., dissenting). Justice John Paul Stevens also wrote a separate dissenting opinion. See \textit{Id.} at 854 (Stevens, J., dissenting).
\item \textsuperscript{54} \textit{Id.} at 851 (White, J., dissenting).
\item \textsuperscript{55} \textit{Id.} at 851 (White, J., dissenting). The decision in Babcock dealt with a private manufacturing concern where the employee parking lot was not publicly accessible. Babcock, 351 U.S. at 107. The Board has rejected the proposition that proximity of employee residences is an issue in determining the accessibility of employees. Monogram Models, Inc., 192 N.L.R.B. 705, 706 (1971).
\item \textsuperscript{56} \textit{Lechmere}, 112 S. Ct. at 851 (White, J., dissenting).
\item \textsuperscript{57} \textit{Id.}
\item \textsuperscript{58} \textit{Id.}
\item \textsuperscript{59} \textit{Id.} at 852 (White, J., dissenting).
\item \textsuperscript{60} \textit{Id.} at 852-53 (White, J., dissenting). The dissent based its judicial deference argument on Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1983). \textit{Id.} A discussion of the proper deference due the Board is outside the scope of this Note.
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BACKGROUND

THE NONEMPLOYEE ACCESS ISSUE IN THE SUPREME COURT

The United States Supreme Court first addressed the issue of when nonemployee union organizers are entitled access to an employer's private property in *NLRB v. Babcock & Wilcox Co.* In *Babcock*, a manufacturing company prohibited nonemployee union organizers from distributing union literature on company property, relying on a nondiscriminatory policy banning solicitation. The union filed an unfair labor practice charge with the National Labor Relations Board ("Board"), and the Board found that the employer had violated the National Labor Relations Act ("NLRA"). The Board ordered the employer to grant access to the union organizers. To enforce its order, the Board petitioned the United States Court of Appeals for the Fifth Circuit, which refused to enforce the order on the ground that the NLRA did not empower the Board to impose a servitude on an employer's property unless an employee is directly involved. The Board petitioned the United States Supreme Court for certiorari.

The Supreme Court affirmed the Fifth Circuit's decision. However, the Court disagreed with the Fifth Circuit's statement that the Board could not order employers to grant access to nonemployee union organizers unless an employee was directly involved. The Court noted that the effective exercise of the organization rights guaranteed to employees under section 7 might depend on the ability of employees to communicate with nonemployees concerning the benefits of organization. This consideration prompted the Court to call for an accommodation of both the employer's interest in private

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62. NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 106-07 (1956). The plant rested on a 100-acre tract about one mile from a nearby town with more than 250 of the 500 employees residing in town, the rest living within a 30-mile radius. The majority of the employees traveled to work in automobiles and parked in a company owned lot, thus forcing the organizers to distribute their literature from a strip of public property adjacent to the intersection of the parking lot drive and the nearby thoroughfare. Id.
63. Id. at 108.
64. Id. at 107-08. The union's access was limited to the employer's parking lot and the gatehouse walkway. The access also was subject to employer rules designed to promote efficiency and maintain discipline. Id.
65. NLRB v. Babcock & Wilcox Co., 222 F.2d 316, 318-19 (1st Cir. 1955), aff'd, 351 U.S. 105 (1956). Board orders are not self-executing; therefore, if an order is not complied with, the Board must seek enforcement by a United States court of appeals. ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW 10-11 (1976).
67. Id. at 114.
68. See id. at 112-13.
69. Id. at 113.
property and the employees' interest in learning about the value of organization from nonemployee organizers. The Court stated that the "[a]ccommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other ("accommodation principle")." The Court further stated that "[t]he employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization."  

The Court articulated a method of achieving the accommodation to govern when nonemployee organizers may be entitled access to private property. The Court stated that:

an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message . . . [b]ut 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 [is] required to yield to the extent needed to permit communication of information on the right to organize ("alternative means test").

The Court examined the conditions in Babcock and concluded that reasonable alternative channels of communication were open to the nonemployee union organizers. To support its conclusion, the Court noted that a substantial percentage of employees lived in nearby communities, that the union had contacted more than 100 of the employees by mail several times, and that many employees had been informed of the union's efforts in person. Therefore, the Court held that section 8 of the NLRA had not been violated.

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70. Id. at 112. The accommodation called for by the United States Supreme Court is referred to as the "accommodation principle" throughout this Note.
71. Id.
72. Id. at 112.
73. Id. The Court's method of accommodation in Babcock is referred to as the "alternative means test" throughout this Note.
74. Id.
75. Id. at 107 n.1, 113.
76. Id.
77. See Babcock, 351 U.S. at 113-14. After the Court's decision in Babcock, there ensued a short period in the late 1960s and early 1970s in which the question of access to private property by nonemployee union organizers became infused with First Amendment law. Robert A. Gorman, Union Access to Private Property: A Critical Assessment of Lechmere, Inc. v. NLRB, 9 HOFRS LAB. L.J. 1, 4 (1991). The Court ultimately reasserted the NLRA as the applicable law in Hudgens v. NLRB, 424 U.S. 507, 518-21 (1976). Other Supreme Court cases related to the First Amendment issue include: Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Central Hardware Co. v. NLRB, 407 U.S. 539 (1972); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza,
The Court reasserted the alternative means test as a method of achieving accommodation in *Central Hardware Co. v. NLRB.* In *Central Hardware,* nonemployee union organizers attempted to speak with employees in company-owned parking lots to encourage those employees to sign union authorization cards. Enforcing a no-solicitation policy, management officials of the Central Hardware Company ("Central Hardware") refused to allow the union organizers to continue their efforts on company property.

Central Hardware then filed a charge with the Board, alleging that the union had engaged in an unfair labor practice by harassing employees. The union in turn filed an unfair labor practice charge against Central Hardware, alleging that Central Hardware's denial of access was a violation of section 8 of the NLRA. The Board dismissed Central Hardware's charge, but upheld the union's charge and ordered Central Hardware to allow access to the nonemployee union organizers. The United States Court of Appeals for the Eighth Circuit affirmed the Board's decision.

Central Hardware petitioned the United States Supreme Court for certiorari. The Supreme Court vacated the judgment and remanded the case to the Eighth Circuit. The Court instructed the Eighth Circuit to apply the analysis set forth in *Babcock* when it reconsidered the case. The Court noted that in *Babcock* the Court had recognized the importance of employee communication with nonemployees concerning organization, and therefore the Court had sought to achieve an accommodation between private property rights and organization rights. The Court further recognized that the analysis in *Babcock* limits nonemployee access to private property to the extent necessary when employees are otherwise inaccessible, but stipulated that "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."  

Several years later, the Court decided *Hudgens v. NLRB*, and extended the application of the accommodation principle to include nonorganizational activities under section 7. In *Hudgens*, warehouse employees engaged in nonorganizational economic strike activity by picketing a retail outlet leased by their employer and located in a large, enclosed shopping mall. After the picketers were told by a mall representative that they could not picket in the mall or on the surrounding parking lot, the union representing the warehouse employees filed an unfair labor practice charge against the mall owner. The union charged that the mall owner had unlawfully interfered with the section 7 rights of the striking employees. The Board upheld the union's charge, and the mall owner appealed to the Fifth Circuit. The Fifth Circuit enforced the order requiring the mall owner to allow access to the striking employees, and the mall owner petitioned the Supreme Court for certiorari.

The Supreme Court granted certiorari and vacated the Fifth Circuit's decision. In its treatment of the nonemployee access issue, the Court first noted that in *Babcock* and *Central Hardware*, the Court had called for an accommodation between section 7 rights and private property rights. However, the Court recognized that those two earlier cases had differed from *Hudgens* in several respects. In both *Babcock* and *Central Hardware*, the section 7 rights that were allegedly violated concerned organizational activity by nonemployees on company property. In *Hudgens*, however, the section 7 rights involved (1) economic strike activity instead of organizational activity, (2) company employees instead of nonemployees, and (3) the property interest of a mall owner instead of an employer. The Court stated that these three factors may or may not be relevant in determining how to accommodate the parties' respective rights.

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89. *Id.* at 544-45.
93. *Id.*
94. *Id.* at 510.
95. *Id.* at 511.
98. *Id.* at 521.
99. *Id.* at 521-22.
100. *Id.* at 521.
101. *Id.* at 521-22.
102. *Id.*
The Court in *Hudgens* did not articulate a specific method of accommodating the section 7 rights and private property rights under these circumstances.\(^{103}\) Instead, the Court stated that "the nature and strength of the respective [section] 7 rights and private property rights" will dictate how the Board is to accommodate them.\(^{104}\) Under these instructions, the Court remanded the case to the Board.\(^{105}\)

Several years after *Hudgens*, the Court decided *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*,\(^{106}\) a case involving nonorganizational activities.\(^{107}\) In *Sears, Roebuck & Co.*, nonemployee union members formed picket lines on the property of Sears, Roebuck & Co. ("Sears") to protest the store's use of nonunion carpenters.\(^{108}\) The store manager urged the union to relocate the picket lines off company property, but the union refused to do so unless forced off the property by legal action.\(^{109}\) Subsequently, Sears received a court order restraining the union from further picketing on Sears's property.\(^{110}\) The union withdrew from the property and appealed the order, ultimately gaining a reversal by the California Supreme Court.\(^{111}\) Sears petitioned the United States Supreme Court for certiorari.\(^{112}\)

On certiorari to the California Supreme Court, the Court reversed the California court's judgment.\(^{113}\) In its discussion of the nonemployee access issue, the Court noted that the accommodation of section 7 rights and private property rights called for in *Babcock* had been extended in *Hudgens* to encompass section 7 activity that is nonorganizational in nature.\(^{114}\) The Court recognized that "accommodation of [section] 7 rights and private property rights . . . may fall at differing points along the spectrum depending on the nature and

\(^{103}\) Id. at 522.

\(^{104}\) Id.

\(^{105}\) Id. at 523.


\(^{108}\) Id. The union maintained that its activity was area-standards activity. *Id.* at 186-87. The purpose of area-standards activity is to persuade customers not to shop at an employer's store in order to force the employer to pay the wages and benefits the union has secured in similar conditions within the community. Patrick G. Kavanagh, *Note, Accommodating Nonemployees: NLRA Protection of Concerted Union Conduct in the Wake of Sears*, 29 CATH. U.L. REV. 185, 207-08 (1979).

\(^{109}\) Sears, Roebuck & Co., 436 U.S. at 182-83.

\(^{110}\) *Id.* at 183.

\(^{111}\) *Id.* at 183-84.


\(^{113}\) *Id.* at 208.

\(^{114}\) *Id.* at 204. The Court's discussion of the nonemployee access issue occurred within the larger context of whether state trespass laws are preempted by the NLRA. *See id.* at 182.
strength of the respective [section] 7 rights and private property rights asserted in any given context.\textsuperscript{115}

To aid its determination of this nonorganizational case, the Court considered the analysis of organizational rights in \textit{Babcock}.\textsuperscript{116} The Court stated that under \textit{Babcock}, an employer's right toexclude nonemployee union organizers remained the general rule and that the alternative means test remained the method of accommodating employees' organizational rights and employers' private property rights.\textsuperscript{117}

\textbf{THE NONEMPLOYEE ACCESS ISSUE BEFORE THE NLRB}

In 1986, the NLRB decided \textit{Fairmont Hotel}.\textsuperscript{118} In \textit{Fairmont Hotel}, union officials engaged in nonorganizational area-standards activity, distributing flyers to the guests of a hotel while stationed on the hotel's property.\textsuperscript{119} The flyers urged the guests not to patronize the hotel because of the hotel's association with a nonunion bakery.\textsuperscript{120} After the union officials were ordered to leave the property by a hotel security officer, the nonemployee union members distributed the flyers from the public sidewalk a short distance away from the hotel.\textsuperscript{121} Subsequently, the union filed an unfair labor practice charge with the Board, alleging that the hotel had violated section 8 of the NLRA by refusing to permit the distribution of the flyers on hotel property.\textsuperscript{122} An administrative law judge ("ALJ") recommended dismissal of the complaint because the union's stated purpose — advising the public of the hotel's association with a nonunion bakery — was not a strong section 7 right, and therefore could not be undertaken on the employer's property without the employer's consent.\textsuperscript{123}

The Board agreed with the ALJ's recommendation, but under a different rationale.\textsuperscript{124} The Board interpreted \textit{Babcock}, \textit{Hudgens}, and \textit{Sears, Roebuck & Co.}, as collectively authorizing the use of a balancing test as a method of accommodating the rights of employers and

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\item Id. at 204 (quoting \textit{Hudgens}, 424 U.S. at 522).
\item Id. at 204-05.
\item Id. at 205.
\item 282 N.L.R.B. 139 (1986).
\item \textit{Fairmont Hotel}, 282 N.L.R.B. 139, 139 (1986). For an explanation of area-standards activity, see supra note 108.
\item Id. at 140.
\item Id. at 139.
\item Id. at 144.
\item Id. at 147-48. The administrative law judge ("ALJ") stated that because he concluded that access was not required, there was no need to consider whether reasonable alternative means were available to the union. He did so anyway in order to "avoid a possible remand" by the Board. He concluded his analysis by finding that alternative means were not available. Id. at 148.
\item Id. at 140.
\end{enumerate}
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employees in all cases involving access to private property by nonemployees.\textsuperscript{125} This test was to be applied whether the activity involved was organizational or nonorganizational in nature.\textsuperscript{126} The test required the Board to “weigh the relative strength of each party’s claim.”\textsuperscript{127} Whichever claim was then determined to be the most compelling would be sustained, while the competing claim would be required to yield.\textsuperscript{128} The Board noted that in those cases where the section 7 right and the property right were of equal weight, effective alternative means of communication would be examined and would dictate which right would be required to yield.\textsuperscript{129} In applying this balancing test to the facts in Fairmont Hotel, the Board determined that the hotel’s property right outweighed the union’s section 7 rights.\textsuperscript{130} Consequently, the Board did not consider alternative means of communication.\textsuperscript{131}

Two years after Fairmont Hotel, the Board altered the balancing test in Jean Country.\textsuperscript{132} In Jean Country, nonemployee union members picketed near a clothing outlet in a shopping mall.\textsuperscript{133} After being informed that they might be charged with trespassing, the union filed an unfair labor practice charge against the retail outlet and the mall owner.\textsuperscript{134} An ALJ found that because the picketing was organizational, the owners did not have to provide access under Babcock unless the union demonstrated that alternative means of communication were unavailable.\textsuperscript{135} The ALJ found that alternative means were available, and recommended that the union’s charge be

\begin{enumerate}
\item \textsuperscript{125} Id. at 140-42.
\item \textsuperscript{126} See id.
\item \textsuperscript{127} Id. at 142.
\item \textsuperscript{128} Id.
\item \textsuperscript{129} Id.
\item \textsuperscript{130} Id. at 142-43. In assessing the property right, the Board noted that the hotel had a strong security interest in controlling its property and in limiting its tort liability. The § 7 right, although protected, was determined to be of lesser weight because the activity was not linked to the employees of the hotel, nor was there a dispute between the hotel ownership and the union. Id.
\item \textsuperscript{131} Id. at 143.
\item \textsuperscript{133} Jean Country, 291 N.L.R.B. at 21-22.
\item \textsuperscript{134} Id. at 20-22.
\item \textsuperscript{135} Id. at 24.
\end{enumerate}
dismissed. 136

In its review of the ALJ’s recommendation, the Board reconsidered the balancing test set forth in *Fairmont Hotel*. 137 The Board also considered the Babcock analysis and determined that alternative means of communication must always be considered in cases where nonemployees seek access to privately owned property. 138 The Board also noted that the Court in *Hudgens* had indicated that various section 7 rights existed and that those rights were of unequal weight in relation to private property rights. 139

These considerations prompted the Board to formulate a means of accommodating the parties’ respective rights that would be applicable in “all access cases.” 140 The analysis consisted of measuring “the degree of impairment of the [s]ection 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” with “the consideration of the availability of reasonably effective alternative means as especially significant in [the] balancing process.” 141

Applying the analysis to the facts of *Jean Country*, the Board determined that the mall owner’s property interest was “quite weak,” due in large part to the quasi-public nature of the property. 142 In contrast, the section 7 right was regarded as strong because it was organizational in nature. 143 In considering the alternative means portion of the analysis, the Board determined that the number of potential customers on the property and the substantial distance of the nearest public property would render other methods of communication ineffective. 144 Therefore, the Board upheld the unfair labor practice charge against the mall owner and the employer. 145

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136. *Id.* at 25. The ALJ also found, in the alternative, that the union activity was not organizational, but rather was area-standards activity. Based on this alternative finding, the ALJ recommended that the union’s charge be upheld. *Id.* at 25-26.

137. *Id.* at 11.

138. *Id.* The Board noted that the union need not always attempt to use an alternative form of communication, specifying that the Board objectively may determine whether alternative means are available through an examination of the evidence. *Id.* at 13.

139. *Id.* at 12.

140. *Id.* at 14.

141. *Id.*

142. *Id.* at 16-17.

143. *Id.* at 17-18. The Board determined that the union activity was organizational in its discussion of the strength of the § 7 right, yet analyzed the alternative means of communication from an area-standards perspective. In its discussion of the alternative means factor of the test, the Board stated that the union’s target audience consisted not of the employees, but rather the store’s customers. *Id.* at 17-18.

144. *Id.* at 18-19.

145. *Id.* at 19.
UNION ACCESS

ANALYSIS

In *Lechmere, Inc. v. NLRB*, the United States Supreme Court appropriately denied the validity of the National Labor Relations Board's ("Board") *Jean Country* analysis. The Court determined that the analysis conflicted with Supreme Court precedent addressing the issue of a nonemployee union organizer's access to private property. Although this deviation did not affect the outcome in *Lechmere*, it may adversely impact union attempts to organize in the future.

The Board's most striking misinterpretation was its statement that a generic balancing test as a method of accommodation should be applied in all nonemployee access cases, regardless of whether the cases involve organizational or nonorganizational activity. An examination of Supreme Court precedent beginning with the seminal case of *NLRB v. Babcock & Wilcox Co.* reveals that the distinction between nonemployee organizational and nonorganizational activity has consistently affected the Court's analysis of nonemployee access cases.

In *Babcock*, the Court recognized that for employees to effectively exercise the organization rights guaranteed them under section 7 of the National Labor Relations Act ("NLRA"), communication with nonemployees may be essential. The Court therefore called for an accommodation of property rights and section 7 rights when access to private property by nonemployee union organizers is involved. The Court in *Babcock* formulated a specific means of achieving the goal of accommodation in cases involving nonemployee access for organizational purposes. The Court stated that an employer may prohibit nonemployee organizers from company property unless the employees' inaccessibility renders reasonable alternative means of communication inadequate for the union to impart its message to the employees, in which case the employer must grant access to the extent necessary to permit communication about the right
The Court reaffirmed the applicability of the alternative means test to nonemployee organizational activity in \textit{Central Hardware Co. v. NLRB}.

The Court in \textit{Central Hardware} recognized that the accommodation principle established in \textit{Babcock} might require that an employer’s private property rights yield in order to secure employees’ section 7 rights. Accordingly, the Court remanded the case with express instructions for the United States Court of Appeals for the Eighth Circuit to accommodate the nonemployee organizational activity and the employer’s private property rights in a manner consistent with the holding in \textit{Babcock}.

In \textit{Hudgens v. NLRB}, the Court extended the accommodation principle articulated in \textit{Babcock} to nonorganizational activity under section 7. Unlike in \textit{Babcock}, where the Court generated a particular method of accommodation, the Court in \textit{Hudgens} did not provide the Board with a specific method of accommodating nonorganizational section 7 rights and private property rights. Instead, the Court directed the Board to accommodate nonorganizational section 7 activity and private property rights depending on the nature and strength of those rights.

The Court’s vague instructions in \textit{Hudgens} contributed to the Board’s failure to distinguish between nonemployee organizational activity and nonemployee nonorganizational activity. In both \textit{Fairmont Hotel} and \textit{Jean Country}, the Board accurately interpreted the decision in \textit{Hudgens} as extending the Court’s goal of accommodation to nonorganizational activity by nonemployees. However, the Board also found that the extension of the accommodation principle in \textit{Hudgens} nullified the distinction between nonemployee organizational activity and nonorganizational activity. The Court’s language in \textit{Hudgens} directing the Board to establish the appropriate accommodation “depending on the nature and strength of the respective section 7 rights and private property rights” involved in \textit{Hudgens}.

\begin{thebibliography}{99}
\bibitem{158} \textit{Id.} at 112.
\bibitem{159} 407 U.S. 539, 544-45 (1972).
\bibitem{160} \textit{Central Hardware Co. v. NLRB}, 407 U.S. 539, 544-45 (1972).
\bibitem{161} \textit{Id.} at 548.
\bibitem{162} 424 U.S. 507 (1976).
\bibitem{163} See supra notes 90-105 and accompanying text.
\bibitem{164} See supra notes 103-05 and accompanying text.
\bibitem{165} See supra note 104 and accompanying text.
\bibitem{166} \textit{See Hudgens}, 424 U.S. at 521-23.
\bibitem{167} 282 N.L.R.B. 139 (1986).
\bibitem{168} \textit{Fairmont Hotel}, 282 N.L.R.B. 139, 140-41 (1986); \textit{Jean Country}, 291 N.L.R.B. at 12.
\bibitem{169} \textit{See Fairmont Hotel}, 282 N.L.R.B. at 140-41; \textit{see Jean Country}, 291 N.L.R.B. at 12.
\end{thebibliography}
was interpreted by the Board to mean that organizational section 7 activity also was to be analyzed in this manner. The result was that the Board abandoned the use of the alternative means test as the means of accommodation in cases involving nonemployee union organizers seeking access to an employer's private property. Instead, the Board applied a general analysis which balanced section 7 rights against private property rights in all nonemployee access cases, organizational and nonorganizational alike.

The Board's interpretation of Hudgens was incorrect for two reasons. First, the language in Hudgens did not affect the previously established method of resolving disputes between nonemployee organizational activity and private property rights. The Court simply noted that the context of the section 7 activity in Babcock and Central Hardware involved organizational activity by nonemployees on company property, whereas in Hudgens the section 7 activity was nonorganizational and carried out by employees on private property that was not owned by their employer. The Court then stated that whether the section 7 activity involved in Hudgens was protected would depend on the nature and strength of the activity in relation to the private property rights involved.

Second, in Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, the Court recognized that the decision in Hudgens had extended the accommodation principle to nonorganizational section 7 activities. The Court stated that in nonorganizational cases, the accommodation of employees' section 7 rights and employers' private property rights depended on the nature and strength of the rights being asserted. The Court also stated, however, that the test established in Babcock remained the law governing organizational activities by nonemployees on private property. Therefore, the Court recognized that an employer's right to prohibit nonemployee union organizers from private property "remain[ed] the general rule," and would not be affected unless the union demonstrated that reasonable alternative means of communication were un-

173. See supra notes 103-05, 162-65 and accompanying text.
174. See supra notes 98-101 and accompanying text.
175. See supra notes 103-04 and accompanying text.
178. Id.
179. Id. at 205.
available.\textsuperscript{180} The Court's discussion in \textit{Sears, Roebuck & Co.}, indicates that although the accommodation principle applies in both organizational and nonorganizational access cases, the alternative means test is the specific method of accommodating the parties' respective rights in organizational cases.\textsuperscript{181}

The Board's analysis in \textit{Jean Country} is subject to additional criticism notwithstanding its generic application in all nonemployee access cases. First, although the Board correctly perceived that the parties' respective rights must be accommodated, it ignored the method of accommodating those rights mandated by \textit{Babcock}.\textsuperscript{182} Under \textit{Babcock}, the accommodation principle was achieved by using the alternative means test: nonemployee organizers were only to be granted access to employers' property when "the inaccessibility of employees makes ineffective" reasonable attempts to communicate with the employees.\textsuperscript{183} The Board in \textit{Jean Country}, however, accommodated the parties rights via a balancing test.\textsuperscript{184}

Second, the method of accommodation used in \textit{Jean Country} did not sufficiently consider the availability of alternative means of communication the union might have used to impart its organizational message to employees.\textsuperscript{185} Although alternative means were factored into the Board's balancing test, the Court in \textit{Babcock} considered alternative means as the determinant element.\textsuperscript{186} Under \textit{Babcock}, if alternative means of communication are not available, access is granted to the extent necessary on this point alone.\textsuperscript{187}

This discussion reveals that the Court in \textit{Lechmere} appropriately rejected application of the Board's method of accommodating nonemployee organizational activity on private property.\textsuperscript{188} The Court accurately based this determination on its finding that \textit{Central Hardware}, \textit{Hudgens}, and \textit{Sears, Roebuck & Co.} did not modify \textit{Babcock} regarding the method of accommodation to be used in nonemployee organizational cases.\textsuperscript{189} Yet, in a display of inconsistency, the Court also stated that \textit{Hudgens} requires a balancing of section 7 organizational rights after it has been demonstrated that alternative means of communication are not available for the union to impart its message to

\begin{itemize}
\item \textsuperscript{180} \textit{Id.}
\item \textsuperscript{181} See supra notes 113-17 and accompanying text.
\item \textsuperscript{182} See supra notes 137-41 and accompanying text.
\item \textsuperscript{183} Babcock, 351 U.S. at 112; see supra notes 67-74 and accompanying text.
\item \textsuperscript{184} See supra notes 140-41 and accompanying text.
\item \textsuperscript{185} See supra notes 140-41 and accompanying text.
\item \textsuperscript{186} Jean Country, 291 N.L.R.B. at 11; see Babcock, 351 U.S. at 112-13.
\item \textsuperscript{187} Babcock, 351 U.S. at 112-13.
\item \textsuperscript{188} See Lechmere, 112 S. Ct. at 848.
\item \textsuperscript{189} See id. at 846-47.
\end{itemize}
employees.\textsuperscript{190} This interpretation of \textit{Hudgens} is inconsistent with the Court's initial statement that \textit{Hudgens} did not modify the holding in \textit{Babcock}.\textsuperscript{191} In addition, the Court's interpretation of \textit{Hudgens} is inconsistent with the decision in \textit{Hudgens} itself, and with the Court's later directives concerning the nonemployee access issue in \textit{Sears, Roebuck & Co.}\textsuperscript{192} Neither the decision in \textit{Hudgens} nor \textit{Sears} indicated that a two-tiered method of accommodation was to be used in cases concerning nonemployee organizers' access to private property.\textsuperscript{193}

The Court's reasoning in this area did not affect the outcome in \textit{Lechmere} because the Court determined that reasonable alternative means of communication were available to the nonemployee organizers.\textsuperscript{194} This conclusion was supported by the facts in \textit{Lechmere}.\textsuperscript{195} The organizing campaign continued over the course of several months, and the communication channels used by the nonemployee organizers included mailings, telephone calls, direct personal contact, and picketing a short distance from the store.\textsuperscript{196} Because the \textit{Babcock} test calls for communication with the employees, and not affirmative responses from them on the merits of the union's message, it would be difficult to argue that the Lechmere employees were not cognizant of the union's message after such an extended organizing campaign.\textsuperscript{197}

However, even though the Court did not reach the newly formulated balancing portion of the method of accommodation in \textit{Lechmere}, the Court's deviation from the \textit{Babcock} analysis may have a detrimental effect on nonemployee union organization efforts.\textsuperscript{198} In \textit{Babcock}, the Court essentially provided a barrier to nonemployee access for organizational purposes to protect an employer's property rights when alternative means of communication are available.\textsuperscript{199} This barrier may be circumvented to protect employees' section 7 rights when the nonemployee organizers demonstrate that reasonable alternative means of communication are unavailable.\textsuperscript{200} However, because \textit{Lechmere} requires a balancing of employees' section 7 rights against an employer's property rights after alternative means

\textsuperscript{190.} See id. at 848.
\textsuperscript{191.} See id. at 846-48.
\textsuperscript{192.} See supra notes 90-117, 173-81 and accompanying text.
\textsuperscript{193.} See supra notes 90-117, 173-81 and accompanying text.
\textsuperscript{194.} \textit{Lechmere}, 112 S. Ct. at 849-50.
\textsuperscript{195.} See id. at 844, 849-50.
\textsuperscript{196.} \textit{Id}. at 849-50.
\textsuperscript{197.} See id. at 849-50.
\textsuperscript{198.} See \textit{Lechmere}, 112 S. Ct. at 848.
\textsuperscript{199.} See \textit{Babcock}, 351 U.S. at 112.
\textsuperscript{200.} \textit{Id}. at 112.
are shown to be unavailable, the nonemployee organizers are now faced with two barriers before gaining access: the initial demonstration that alternative means of communication are unavailable as required by the Court in Babcock, and a second demonstration that the employees section 7 rights are stronger than the employer's property rights. This may result in nonemployee union organizers being denied access in cases where alternative channels of communication are unavailable. Thus, the Court's recognition in Babcock that section 7 organizational rights may depend on employee communication with nonemployees concerning organization will not be served, resulting in a loss of protected activity under section 7.

The Court's deviation from Babcock also may damage the sense of certainty that the test established in Babcock provided the parties involved in a conflict between organizational section 7 rights and property rights. The test enabled the nonemployee union organizers and the property owner to predict with a substantial degree of certainty whether their respective rights might be required to yield in a given set of circumstances. In contrast, the Board in Jean Country readily admitted that its analysis did not offer predictability. Predictability alone does not sustain the legitimacy and continuing validity of the Babcock test; however, predictability coupled with the recognition that the test is a justifiable means of attaining the requisite accommodation between organizational section 7 rights and property rights does support the continued validity of Babcock.

CONCLUSION

In Lechmere, Inc. v. NLRB, the United States Supreme Court rejected the National Labor Relations Board's analysis set forth in Jean Country because it conflicted with precedent. Although

201. See id.; see Lechmere, 112 S. Ct. at 848. The Court's two-tiered test alternatively may be interpreted as allowing nonemployee union organizers access to private property after alternative means of communication are shown to be unavailable, with the proper extent of the union's access then determined under the balancing test. This Note rejects this interpretation.

202. See supra notes 46-47 and accompanying text.

203. See Babcock, 351 U.S. at 113.


205. Id.


207. See supra notes 67-74 and accompanying text.


the Court's interpretation of the precedent was itself flawed because of a misinterpretation of Hudgens v. NLRB, the Court's conclusion that Lechmere's property right was not required to yield to secure the organizational section 7 right of the Lechmere employees was properly reached.

The Court's conclusion purports to achieve the goal it established in NLRB v. Babcock & Wilcox Co.: protection of employees' section 7 organizational right while simultaneously maintaining employers' property rights. This accommodation is well served by the test formulated in Babcock. The Babcock test provides a standard that employers and unions may use to predict whether their respective rights may be required to yield.

However, the Court's use of a balancing test in addition to the alternative means test is a deviation from Babcock that reduces the likelihood of predictability. Therefore, the net result of the Court's decision in Lechmere is a loss for both employers and unions.

Jeff T. Courtney—'94

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212. See supra note 1 and accompanying text.