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Union acces to organize the workplace vs. an employer's right to control its private property

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For several months in 1987, a retail clerk's union mounted an unsuccessful campaign to organize about 200 employees at a large non-union retail store specializing in appliances and electronics goods. The store was located in a "strip mall" in the metropolitan area near Hartford, Connecticut. As with strip malls elsewhere, the store shared a rectangular swath of land with more than a dozen smaller retail stores, and was bordered by a busy major boulevard. To contact the store's employees, the union organizers, who were not employees of the store itself, entered the mall's parking lot on two occasions to place handbills on cars that belonged to employees. The parking lot was open to the general public to visit or shop at any of the stores. During the entry by union organizers, no traffic was blocked, no customers were bothered, and no business was disrupted.

Responding to the union's activity in the parking lot, which was owned by the store and the mall's developer, store representatives told the union's organizers that they needed to leave because they were on private property. In one instance, the police were summoned. The police instructed the organizers to stay on a narrow grassy strip of public land alongside the boulevard. In asking the union organizers to leave, the store relied on a policy, consistently enforced in the past, prohibiting solicitation of any kind on its property, whether by unions or charitable groups.

Through all of the union's efforts over the next few months, which included newspaper ads, picket signs held aloft, and tracking down car license plate information, the union acquired the names and addresses of 41 store employees. After multiple mailings and a number of phone calls and personal contacts, only

one authorization card was signed approving the union as the workplace representative.

On these facts, the United States Supreme Court ruled in Lechmere v. NLRB[1] that the employer's property rights and trespass laws were properly invoked to prohibit the union's access to the parking lot to communicate with employees.

Leading to the Supreme Court's decision was the union's claim that the store's ban on parking lot solicitation interfered with the union's right to organize under Section 7 of the National Labor Relations Act (NLRA).[2] The NLRA, passed in 1935 and amended in significant measure in 1947, is the principal statute governing labor relations in the private sector of the United States economy.[3] Section 7 of the NLRA is the key statement of union and employee organizing rights under federal law, providing, in relevant part, that, "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." Over the years, Section 7 has been interpreted as protecting the right of unions to communicate with employees about the advantages of unionization, and about expressing solidarity with other employees.[4] This proposition is consistent with longstanding First Amendment preservation of freedom of speech and association for union communications.[5]

According to the union, as a result of the employer's action to bar leaflet distribution in the parking lot, the store violated Section 8(a)(1) of the NLRA. Section 8(a)(1) states that it shall be an "unfair labor practice" for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed

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[1]502 U.S. 527 (1992). The facts recounted in this article are drawn from the Supreme Court decision, and also from the decisions of the National Labor Relations Board and the Court of Appeals, reported , respectively, at 295 NLRB 92 (1989) and 914 F.2d 313 (1st Cir. 1990).

[2]29 U.S.C. Section 157.

[3]See, generally, 29 U.S.C. Section 150, et seq.

[4]See, e.g., Eastex, Inc. v. NLRB, 437 U.S. 556, 564 n. 13 (1978).

[5]Thomas v. Collins, 323 U.S. 516, 533-534 (1945).

in section 7."[6] In essence, the union urged that the employer's insistence on strict enforcement of its property interest in the form of a parking lot access ban created an impermissible obstacle to the union's organizing attempts.

The National Labor Relations Board, the administrative agency charged with overseeing union and employer rights under the NLRA, agreed with the union, determining that the trespass laws should give way, and that the store violated the NLRA by denying parking lot access to the union. The Board's decision was enforced at the appellate stage. However, the Supreme Court reversed the Board in a decision with six justices in the majority, and three judges dissenting.

As a starting point, the Court stated that the NLRA confers rights on employees, not on unions or their organizers.[7] The rights of the latter are, in the Court's view, derivative, and not equivalent to the primary rights of employees at the work site. While acknowledging that employees can be assisted by unions in deciding whether to unionize, the Court drew a sharp distinction between those who are working on an employer's property, and those who are not. In doing so, the Court relied on a previous Supreme Court decision from 1956: NLRB v. Babcock & Wilcox Co.[8] That case also involved a union claim for access rights for non-employees.

The property at issue in Babcock & Wilcox was an isolated factory off a main road, but not far from a small town in which many of the employees lived. As Babcock & Wilcox made clear, and Lechmere confirmed, employees generally are free to communicate with each other about unionization while they are at the workplace.[9] Such activity preferably takes place during non-work times and in non-work areas such as break rooms, cafeterias, and the like, unless it is demonstrated that a restriction is necessary to maintain production or to protect another valid interest of the employer.[10] In a passage designed to guide future application of the Court's

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[6] 29 U.S.C. Section 158(a)(1).

[7] 502 U.S. at 531-532.

[8] 351 U.S. 105 (1956).

[9] 502 U.S. at 533, citing Babcock & Wilcox, 351 U.S. at 113, and Republic Aviation v. NLRB, 324 U.S. 793, 803 (1945).

[10] Id.

decision in Babcock & Wilcox, the Court stated that an employer's right to control its property, and the union's right to organize under Section 7 of the NLRA, must be subject to "accommodation" with "as little destruction of one as is consistent with the maintenance of the other."[11] If the Court in Babcock & Wilcox had stopped with that admonition, some of the problems encountered later, in Lechmere, might have been avoided.

However, the majority in Lechmere focused instead on another portion of the Babcock & Wilcox decision; one that permitted the Court to establish a more rigid barrier to non-employee union access to employer property. Hence, as the Court said in Babcock & Wilcox, only when "the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate"[12] can an employer's property rights be compromised, and only "to the extent needed to permit communication of information on the right to organize."[13]

Compounding potential confusion from the tension in these portions of the Babcock & Wilcox ruling, over the next 20 years a shadow was cast on Babcock & Wilcox's precedential force by developments in constitutional and administrative law. As to constitutional law, freedom of expression under the First Amendment, including labor union communication, was extended in 1968 to shopping centers.[14] The Court's rationale for this approach was that shopping centers constitute the modern equivalent of the town center and public streets in which open debate has been protected through the evolution of constitutional principles.

This view of the broad reach of First Amendment freedoms to shopping centers was narrowed in the 1970's, and eventually overruled, but not without carving out a distinction for labor union activity that preserves special communication rights, and potential limits on employer property rights.[15] This ongoing assurance is

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[11] 351 U.S. at 112.

[12] 502 U.S. at 533-534, quoting Babcock & Wilcox, 351 U.S. at 112.

[13] Id., at 534, quoting Babcock & Wilcox, 351 U.S. at 112.

[14] Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

[15] Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Central Hardware Co. V. NLRB, 407 U.S. 539 (1972); Hudgens v. NLRB, 424 U.S. 507 (1976).

reflected in the Hudgens case which rejected First Amendment rights in shopping centers, but preserved the possibility of non-employee labor union activity in such locations. In the Hudgens decision, unions could take heart from the Court's observation that, "the locus" of the necessary accommodation between Section 7 organizing rights and private property rights "may fall at differing points along the spectrum depending on the nature and strength" of the contrasting rights.[16]

In the area of administrative law, the most significant development after Babcock & Wilcox was the Supreme Court's decision in 1984 in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,[17] Applying the doctrine established in that case, the judiciary is instructed to defer to an agency's "permissible construction" of a statute where the legislature has not specifically and clearly addressed the issue.[18]

Taken together, these developments prompted the NLRB to reformulate its approach to union organizer access rights in 1988. In the Board's Jean Country decision,[19] issued while Lechmere was pending, the Board stated that it would weigh the relative strength of employee and employer rights, the degree to which the respective rights would be impaired by granting or denying access, and "the availability of reasonably effective alternative means" of communication.[20] Under Jean Country, information conveyed through newspapers, radio, and television would not, in the typical case, be deemed an adequate alternative to access for direct communication.[21]

According to the Court majority in Lechmere, Jean Country departed from the previous ruling in Babcock & Wilcox which was based on "clear" statutory language, and therefore the Court need not defer to the Board's administrative expertise under the Chevron doctrine.[22] The Court also observed that the Board's

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[16]424 U.S. at 522.

[17] 467 U.S. 837 (1984).

[18]Id., 467 U.S. at 842-843.

[19]291 NLRB 11 (1988). Jean Country superceded a previous articulation by the Board in Fairmont Hotel Co., 282 NLRB 139 (1986).

[20]Id., 291 NLRB at 14.

[21]Id., 291 NLRB at 12, 18, n. 18.

[22]502 U.S. at 536-538.

ruling was at odds with the "heavy" burden placed on the union to show an inability to reach employees off-site as a reason to override laws against trespass at the workplace.[23]

In the Court's view, an access dispute is not to be resolved by balancing employer and employee (and union) interests in terms of property and organizing rights. Instead, said the Court, referring to the "accommodation" language in Babcock & Wilcox and later in Hudgens, "So long as nonemployee union organizers have reasonable access to employees outside an employer's property, the requisite accommodation has taken place. It is only where such access is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees' and employers 'rights."[24]

Rather than remand the dispute to the Board for another administrative review, the Court applied its "infeasibility" standard to the union's organizing campaign in Lechmere. In so doing, the Court rejected the notion that the employees were so inaccessible that non-employee access was justified. In contrast, the Court cited cases involving employees who lived in logging and mining camps as examples of situations in which access appropriately could be ordered because direct contact with employees outside of work was rarely possible.[25] On the facts before the Court in Lechmere, it noted that the union had contacted many employees in the metropolitan area, thus showing that there were alternative means of communication available.[26] The court also pointed to the possible use of signs, advertising, picketing, and other means of giving notice to employees as ways in which communication options were "readily available."[27] In sum, said the Court, "Access to employees, not success in winning them over, is the critical issue."[28]

The Court's dissenting justices challenged the majority's interpretation of past precedent as constraining union organizing rights previously recognized by the

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[23]Id., 502 U.S. at 535, citing Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180, 205 (1978).

[24]Id., 502 U.S. at 538.

[25]Id., 502 U.S. at 539.

[26]Id., 502 U.S. at 540.

[27]Id.

[28]Id.

Supreme Court, as a departure from the need to defer to the Board's administrative expertise, and, on the merits, as improperly disregarding the semi-public nature of the Lechmere shopping center parking lot.[29] At the core of the dissent is the view that applying Section 7 of the NLRA requires an assessment of whether actual communication is feasible absent union access, not whether a union merely can give notice of its intent to organize.[30]

[29] Id., 502 U.S. at 542-543.
[30] Id., 502 U.S. at 543.

The Lechmere decision has been subject to critical commentary in the legal and labor relations fields, including observations beyond those made by the dissenting justices.[31] First, Lechmere has been criticized as unnecessarily creating a protected zone of private employer property in which union organizers, with rare exception, cannot enter. As an alternative approach, the Court in Lechmere (and in Babcock & Wilcox) could have treated organizing rights as they were dealt with in the earlier Republic Aviation case involving communications by employees at the workplace; that is, by applying a reasonableness test to take employer production and efficiency interests into account in assessing whether union access is appropriate.[32] Employer property rights are not mentioned in the NLRA as a domain protected against union access, much less granted automatic protection without regard to any employer reason other than its ownership of property. By shifting the legal focus from the trespass laws to the issue of unacceptable union interference with workplace needs, the Board and courts could utilize a single standard that is not tethered to lines of property, while freeing the Board to use a flexible approach taking into account the real workplace circumstances in any particular case. Whether the Babcock & Wilcox decision mandated the result in Lechmere decades later can be debated by scholars, but, as a practical matter, there can be little doubt that unions suffered a major setback in Lechmere.

A second criticism concerns the Court's premise drawing a bright property line distinction for on-site employees and for off-site union organizers. This premise is questionable under the NLRA. Section 2(3) of the NLRA defines "employee" in broad terms, stating that the statute covers "any employee, and shall not be limited to the employees of a particular employer."[33] In the words of a leading labor law treatise, the Court's failure in Lechmere, and, before that in Babcock & Wilcox, to address the definition of an "employee" under Section 2(3) amounted to a "judicially created substantive distinction."[34] The distinction is particularly

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[31]See, e.g., Gorman and Finkin, *Labor Law* (2d ed.), pp. 238-245; Ray, Sharpe and Strassfeld, *Understanding Labor Law* (2d ed.), pp. 69-77; Gorman, *Union Access to Private Property: A Critical Assessment of Lechmere, Inc. v. NLRB*, 9 Hofstra Lab. L. J. 1 (1991); Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 Stan. L. Rev. 305 (1994).

[32]See, e.g., Estlund, supra, n. 26, citing Republic Aviation Corp v.NLRB, 351 U.S. 105. Also see Peyton Packing Co., 49 NLRB 828, 843-844 (1943).

[33]29 U.S.C. Section 152(3).

[34]Gorman & Finkin, *Labor Law*, supra, at 239

worrisome for situations in which unions seek to organize employees on an industry-wide basis, thereby giving consideration to employee mobility as well as anticipating employer concerns about accepting unionization and operating at a higher cost-basis than competitors.

Third, Lechmere reinforced an advantage favoring employers in terms of resistance to union organizing in the workplace. As now construed, the NLRA permits employers to speak freely to employees about anti-union preferences, at least as long as a speech is not coercive or recklessly intimidating.[35] These speech rights include leeway for an employer to assemble employees for what is known as a "captive audience" speech to present anti-union views.[36] In the captive audience situation, unions are denied a right to reply on the employer's property, even if the employer's speech has been so threatening as to constitute a violation of the NLRA.

As a consequence of the Lechmere decision, unions have accelerated efforts to find ways around the restrictions that have been imposed. One approach involves increased reliance on distribution of union literature at the workplace since such material can be protected from employer retaliation under the "mutual aid" prong of Section 7.[37] In an era of increasing use of , email, this method of making contact is leading to situations in which unions are testing the limits of permissible communications. Another approach involves the expansion of union and employee rights under state law. In California, for example, the state's constitutional "free speech" provision permits shopping center access for citizen (and union) advocates seeking large-scale public contact.[38] California also has adopted regulations permitting access by agricultural unions that are not covered by the NLRA.[39] A third approach increasingly used by unions is to send organizers to apply for jobs with employers who are being targeted by union organizing campaigns. This practice, known as "salting," has been upheld by the

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[35]NLRB v. Gissel Packing Co., 395 U.S. 575 (1969)

[36]NLRB v. United Steelworkers of America (NuTone and Avondale), 357 U.S. 357 (1958); Livingston Shirt Corp., 107 NLRB 400 (1953).

[37]Eastex, Inc. v. NLRB, 437 U.S. 556 (1978).

[38]Robins v. Pruneyard Shopping Center, 23 Cal.3d 899 (1979); Glendale Assoc., Ltd. v. NLRB, 347 F.3d 1145 (9th Cir. 2003).

[39]ALRB v. Superior Court, 16 Cal.3d 392 (1976).

Supreme Court against employer attempts to imply an exclusion under the NLRA's definition of "employee."[40]

It is unlikely that the rule of law adopted in Lechmere can be reversed by the Board under current Court doctrine, even though modern society has developed substantial and practical impediments to communications with workers. These impediments include dispersed urban and suburban areas, employee commuting over vast distances, and ever-longer workdays for many. Similar arguments were raised in Lechmere, and rejected. The Court's declaration of what is "clear" under the NLRA would, in all probability, require a statutory change in the U.S. Congress if unions wanted to open the door to wider non-employee access. Absent such political change, unions must find alternatives, blunt or clever, to avoid the near-absolute property protections established by Lechmere.

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[40]NLRB v. Town & Country Elec., Inc., 516 U.S. 85 (1995),