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UNION ACCESS TO PRIVATE PROPERTY: A CRITICAL ASSESSMENT OF
LECHMERE, INC. v. NLRB

Robert A. Gorman*

In its recent decision in Lechmere, Inc. v. National Labor Relations Board,1 the Supreme Court has addressed yet again an issue that it first addressed some thirty-five years ago but that has become increasingly important over the past decade — the right of union

* Kenneth W. Gemmill Professor of Law, University of Pennsylvania. I want to thank Peter W. Hirsch, Regional Director of the National Labor Relations Board in Philadelphia (Region Four), for encouraging me to pay close attention to the issues discussed in this article; and Professors Matthew W. Finkin of the University of Illinois College of Law and Michael H. Gottesman of the Georgetown University Law Center for their very helpful comments on an earlier draft. I also want to extend my deep gratitude to Felecia Listwa, University of Pennsylvania Law School Class of 1992, for her indispensable assistance, in research and discussion, in the preparation of this article.

representatives to engage in concerted activity on private property. Normally, the unauthorized entry on property owned by another is a trespass, a violation of state law which subjects the offender to damages and injunction and even to ejectment by the police. Section 7 of the National Labor Relations Act ("NLRA"), however, gives employees the right to form, join or assist labor organizations, and to engage in concerted activity. It was held by the Supreme Court some 35 years ago, in NLRB v. Babcock & Wilcox Co., that in certain circumstances Section 7 will entitle union representatives to come onto private property.

In purporting to follow the Supreme Court's lead in Babcock & Wilcox and later cases, the National Labor Relations Board ("NLRB") adopted an analytical approach in its 1988 decision in Jean Country which attempted to accommodate the Section 7 rights of workers with the rights of private landowners in a variety of factual circumstances. A key element in most of the Board cases was the fact that the property involved, although technically privately owned, was within a shopping mall that was widely accessible to the public for purposes of parking, visiting and shopping. The Board's Jean Country approach was blessed by at least the First, Sixth, Seventh, and District of Columbia Circuits.

In reviewing the Lechmere case on certiorari to the Court of Appeals for the First Circuit, the Supreme Court has now unequivocally repudiated the Jean Country line of cases — at least as applied to organizing efforts by nonemployee union representatives — and has sharply restricted the access of union organizers and other union representatives who attempt to come onto private property normally open to members of the public, in particular the familiar suburban shopping mall. In doing so, the Court very strictly construed and applied Babcock & Wilcox, and ignored the authority and responsibility traditionally accorded to federal agencies in interpreting the governing statute and in applying it to particular factual circumstances.

5. The terms "mall" and "shopping center" are used interchangeably throughout this article, regardless of whether the stores are all joined and enclosed within a single roofed structure.
6. See Lechmere, Inc. v. NLRB, 914 F.2d 313, 320-21 (1st Cir. 1990), rev'd, ___ U.S. ___, 112 S. Ct. 841 (1992); Emery Realty, Inc. v. NLRB, 863 F.2d 1259, 1264 (6th Cir. 1988); Sentry Markets Inc. v. NLRB, 914 F.2d 113, 115-17 (7th Cir. 1990); Laborers' Local 204 v. NLRB (Hardee's), 904 F.2d 715, 717-19 (D.C. Cir. 1990).
The purpose of this article is to examine the legal background of the issue of union access to private property, to recount the Court's decision in *Lechmere, Inc. v. NLRB*, and to critically evaluate that decision and its implications.

I.

To understand the Court's decision in *Lechmere*, it is necessary to consider three earlier Supreme Court decisions that spoke to the matter of union activity on private property.

In *NLRB v. Babcock & Wilcox Co.*, decided by the Court in 1956, full-time union organizers sought access to the company's privately owned employee parking lot, adjacent to its manufacturing plant, to solicit for the union. The Supreme Court rejected the view of the court of appeals that the law of trespass always trumps the employee interest in having the union come onto company property, and held instead that the Board was to work out an "accommodation" between the interest in private property and the employees' statutory interest in knowing about the union. Key to this accommodation was the question whether the union could effectively communicate with company employees away from company property; only if the union could not do so would the employer be required by the Board to open its property so that the union could communicate its message to the workers there. The Court found that the organizers were able, on the particular record there, to contact employees on the streets of the nearby small town (where many of the employees lived) and through home visits and telephone calls. It therefore held that there was no need for the employer to open its private property to the organizers.

In cases decided over the next twenty years, the NLRB tended to take a strict attitude in awarding the union access to private property, finding generally that the union could effectively communicate without trespassing — except in cases in which employees lived as well as worked on company property.

With the shift toward union organizing of service and retail establishments, as opposed to manufacturing establishments, and the development of the shopping mall — technically private property but
infused with an open-ended invitation to the public to park, visit, stroll, and shop — the issue of union access to so-called private property became more complex. With the Supreme Court decision in 1968 in Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza Inc., it looked as though labor activity in shopping malls was to be treated as akin to free speech on public streets, such that the federal constitution would displace state trespass laws, even without reference to the NLRA. The Court retreated from this position in its 1976 decision in Hudgens v. NLRB, but nonetheless announced in that case an approach that was broadly receptive to union access under Section 7 of the Act.

Hudgens involved peaceful primary economic picketing (in the midst of contract negotiations) by warehouse employees who went to the company's retail shoe store in a large privately owned shopping center. The Court invoked its 20-year old precedent in Babcock & Wilcox, and reminded the NLRB that its task was to seek a proper accommodation between the property rights of the mall owner and the Section 7 rights of the shoe-company employees. Significantly, the Court acknowledged that in making that accommodation, the respective property and statutory interests could properly be calibrated differently depending on different fact situations. The Court stated that the point of accommodation "may fall at differing points along the spectrum depending on the nature and strength of the respective [Section] 7 rights and private property rights asserted in any given context," and that the decision was principally for the Board to make.

On remand in Hudgens, the Board found an unfair labor practice. Although the economic picketing there was different from the organizing effort in Babcock & Wilcox, it nonetheless was a weighty Section 7 right; and because the union’s intended audience was not limited to store employees but also included customers, that entire group could not effectively be reached by picketing at the nearest public property at the distant edge of the shopping center.

One more Supreme Court case features in our prologue — Sears, Roebuck & Co. v. San Diego County District Council of

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12. 391 U.S. 308 (1968)(stating that peaceful picketing in a public place is protected by the First Amendment).
13. 424 U.S. 507, 519 (1976)("The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use.").
14. Id. at 522.
15. Id.
Carpenters, decided in 1978. In that intricate case, the Court held that state courts were not stripped of their jurisdiction to hear trespass cases involving union activity, despite the contention that this would create an intolerable risk of state-court interference with activity protected under Section 7. The Court concluded that the risk would not generally be significant. It noted that the union’s burden of showing inability to communicate away from company property “is a heavy one,” that the balance struck by the Board in implementing the Babcock & Wilcox “accommodation” approach “has rarely been in favor of trespassory organizational activity,” and that access to private property “has generally been denied except in cases involving unique obstacles to nontrespassory methods of communication.”

Ten years later, in 1988, after a substantial number of cases attempting in the light of Hudgens to balance private-property rights and concerted-activity rights, the NLRB made a comprehensive statement in Jean Country.

There, as in Hudgens, the scene was a store owned by a tenant within a shopping mall. The activity that the Jean Country store owner challenged was picketing by union representatives (not employed by Jean Country) who carried signs, inside the mall at the front of the store, to inform potential customers that the employees at the store were not represented by the union. The mall owner and the store owner had the police eject the pickets. In ruling that the pickets were entitled to patrol there, and that it was an unfair labor practice to exclude them, the Board set forth a detailed analytical approach that it continued to apply in some 30 cases thereafter. It stated that in each case it would assess, and then give varying degrees of weight to, three factors:

the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted. We view the consideration of the availability of reasonably effective alternative means as especially significant in this balancing process.

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18. Id. at 198.
19. Id. at 205.
20. Id. at 205 n.41.
23. See, e.g., infra notes 31, 85, 86 and accompanying text.
The Board went on to state that, in weighing the property right, it would consider among other things “the restrictions, if any, that are imposed [by the owner] on public access to the property...”\textsuperscript{25} In weighing the Section 7 right, the Board would consider among other things the nature of the right (e.g., was it an economic protest, a protest against employer unfair labor practices, an organizing effort, or an “area standards” appeal?) and the identity of the intended audience. In assessing alternative means of reaching the union’s audience, the Board would among other things look to “the safety of attempting communications at alternative public sites, the burden and expense of nontrespassory communication alternatives, and most significantly, the extent to which exclusive use of the nontrespassory alternatives would dilute the effectiveness of the message. ...”\textsuperscript{26}

The Board in \textit{Jean Country} then proceeded to apply its newly articulated analysis to the facts at hand. The Board found that the mall owner and tenant store had a private-property interest that was “quite weak,”\textsuperscript{27} principally because the mall had 106 stores and serviced between 10,000 and 20,000 visitors every day, who freely parked and wandered where they wished; and the picketing inside the mall structure was done by no more than two persons at a time in a non-obstructive manner akin to that of persons ordinarily walking and shopping at the mall. The Board found the picketing to be organizational, designed to induce store customers not to patronize, and held this to be within the protection of Section 7 — even though such informational activity “has lesser significance in the scheme of Section 7 than direct organizational solicitation or the protestation of unfair labor practices.”\textsuperscript{28}

Finally, the Board assessed whether the union could reasonably bring its message to the intended audience — the Jean Country customers — by nontrespassory means. It found that a campaign through television, radio, newspaper and mass mailings would not be reasonable for the union to undertake; it would not address the customers as they approached the situs, and it would be extremely expensive to undertake such a campaign in the New York metropolitan area.\textsuperscript{29} Nor would it be reasonable to relegate the picketing to the nearest public property abutting the mall, an automobile entry point

\textsuperscript{25} \textit{Id.} at 13.
\textsuperscript{26} \textit{Id.}
\textsuperscript{27} \textit{Id.} at 17.
\textsuperscript{28} \textit{Id.}
\textsuperscript{29} \textit{Id.} at 18 n.18.
one-quarter of a mile from the Jean Country store; this would make it impossible to target Jean Country customers (particularly “impulse” buyers) and would risk turning away customers from the mall altogether or from stores other than Jean Country. The Board thus concluded that the only way the union could effectively communicate its message was to do so on mall property adjacent to the Jean Country store.\(^{30}\)

In its summary, the Board found no significant impairment of a private property right — but that the Section 7 right would be significantly impaired (if not destroyed) without entry onto mall property. In the overwhelming proportion of its decisions subsequent to Jean Country, the Board after utilizing the same tripartite analytical framework, concluded that owners of mall property had a light-weight private-property interest and that alternative forms of communication to promote Section 7 rights were impracticable, and directed the respondent to admit the union onto the mall property.\(^{31}\)

II.

Lechmere, Inc. v. NLRB\(^{32}\) was one of those cases. Lechmere owned the principal store in an L-shaped suburban “strip” shopping center in Connecticut. The parking lot for employees and customers, between Lechmere and the other stores, was jointly owned by Lechmere and the mall owner. On one of its sides, the parking lot was separated from the adjacent four-lane divided highway by a 46-foot-wide grassy strip of public property. Unlike in Jean Country, the union representatives in Lechmere were not seeking to communicate with customers but rather with Lechmere's employees, to induce them to join the union. Union efforts to enter onto the parking lot to insert handbills on the windshield of employee cars were met by demands by Lechmere personnel to leave the lot; the company had a longstanding policy announcing a prohibition upon nonemployees

\(^{30}\) Id.

\(^{31}\) See, e.g., Target Stores, 300 N.L.R.B. No. 136, 137 L.R.R.M. (BNA) 1028 (Dec. 21, 1990)(lessee in shopping mall had weak property interest due to lack of notices restricting access, and other methods were dangerous or would dilute the union’s message); Wegmans Food Markets, Inc., 300 N.L.R.B. No. 114, 136 L.R.R.M. (BNA) 1319 (Dec. 11, 1990)(supermarket in strip center had weak property interest in part because of public accessibility, and picket signs would be inadequate and unsafe). But see Richway, 294 N.L.R.B. No. 49, 131 L.R.R.M. (BNA) 1362 (Aug. 29, 1989)(property right of two free-standing retail department stores, located on company-owned tracts of land with parking lots used solely by their customers, found substantial enough to merit denying access).

"soliciting and distributing literature at all times anywhere on Company property, including parking lots"\textsuperscript{33}, and it consistently applied that prohibition, even against the likes of the Salvation Army and the Girl Scouts. The union handbillers relocated to the grassy strip, where they picketed. Union representatives also got names and addresses (of some 40 employees out of 200) from state motor-vehicle authorities by recording license plate numbers as presumed employee cars entered and left the parking lot, and they sent some mailings to those employees and also reached a few by telephone (half had unlisted numbers) and home visits.

The Board held, relying on \textit{Jean Country}, that Lechmere's insistence on removing the union organizers from the mall parking lot was an unfair labor practice. It emphasized the importance under Section 7 of communicating with employees about the merits of the union, and gave rather little weight to the private-property interest in the parking lot, given its openness to customers and employees of all stores in the mall and the unobtrusive conduct of the handbillers. The Board also scrutinized the nontrespassory means of communicating with the Lechmere employees, and found them to be wanting: newspaper advertisements were expensive and far from assured to reach the workers, tracking license plates would leave many Lechmere employees unidentified, the bulk of the employees whose names and addresses were obtained either had unlisted telephone numbers or were minors whose parents forbade them to speak with the union, and picketing on the grassy strip adjoining the busy highway created safety problems. A divided court of appeals approved the Board's tripartite analysis under \textit{Jean Country} and the application of that analysis to the facts of the case.

The Supreme Court reversed, in an opinion for six Justices written by Justice Clarence Thomas; three Justices dissented. The Court majority held that the case was completely covered by its decision in \textit{Babcock & Wilcox}, whose force the Court stated had not been diluted or its rationale modified in later Court cases such as \textit{Hudgens}\textsuperscript{34}. \textit{Babcock & Wilcox} was said to turn on the question whether the persons seeking access to private property were company employees or rather were nonemployee union organizers; if the latter, persons without Section 7 rights themselves, then their access rights are totally derivative from those of the company workers. Whether access is to be afforded thus turns \textit{exclusively} on whether

\begin{itemize}
\item \textsuperscript{33} U.S. \underline{\textsuperscript{33}}, 112 S. Ct. at 844 n.1.
\item \textsuperscript{34} \textit{id.} at \underline{\textsuperscript{34}}, 112 S. Ct. at 845-47.
\end{itemize}
the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them."

The Court stated that this would be so only in the rarest of cases, where there are "unique obstacles" to communicating away from company property, and that the "union's burden of establishing such [employee] isolation is . . . 'a heavy one.'"

Justice Thomas noted, as "classic examples," earlier decisions of the Board and the appeals courts involving the logging camp, the mining camp, and the mountain resort hotel, where employees live as well as work on company property and thus are "presumptively" beyond the reach of the union's message.

The Court flatly repudiated the Board's effort at "accommodating" interests of nonemployee organizers and private-property owners in cases in which there are alternative means of communicating with the workers. In effect, the Court held that it was altogether irrelevant, in the application of Section 7 to organizing efforts by nonemployees, whether the company property is a manufacturing plant far from a public highway and accessed only by company employees and from which members of the public are barred, or is a retail establishment in a mall whose stores and parking facilities are frequented throughout the day by shoppers and by members of the public seeking recreation.

In a rather striking conclusion to its opinion, the Court majority chose not to remand the case to the NLRB for an assessment of the issue of reasonable nontrespassory access under the single-factor Babcock & Wilcox analysis rather than the three-factor "accommodation" analysis of Jean Country. Instead, the Court took it upon itself to review the record evidence, and to conclude — contrary to the Board — that the union had adequate access to the Lechmere employees away from the mall property, given the substantial number of names and addresses uncovered by tracking license plates,

35. Id. at ___, 112 S. Ct. at 849 (quoting NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956)).
36. Id. at ___, 112 S. Ct. at 850 (quoting Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 205-06 n.41 (1978)).
37. Id. at ___, 112 S. Ct. at 849 (quoting Sears, Roebuck, 436 U.S. at 205).
38. Id. at ___, 112 S. Ct. at 849 (quoting NLRB v. Lake Superior Lumber Corp., 167 F.2d 147 (6th Cir. 1948)).
39. Id. at ___, 112 S. Ct. at 849 (quoting Alaska Barite Co., 197 N.L.R.B. 1023 (1972)).
40. Id. at ___, 112 S. Ct. at 849 (quoting NLRB v. S & H Grossinger's Inc., 372 F.2d 26 (2d Cir. 1967)).
41. Id. at ___, 112 S. Ct. at 849.
along with the mailings, telephone calls and home visits. Because of the “presumption” of access flowing from the fact that the Lechmere workers did not live on company property, and the “heavy burden” the union or General Counsel bears to overcome that presumption, the Court held that Lechmere had no obligation to afford access to the union organizers, reversed the court of appeals, and denied enforcement of the Board’s order.

Justice White dissented for himself and Justice Blackmun, and Justice Stevens separately dissented for similar reasons. The principal points made by Justice White — and they are, to this reader, fully persuasive — are that Babcock & Wilcox in fact invited the Board to make an “accommodation” of the respective Section 7 and property interests of the parties, that this approach was yet more clearly endorsed by the Court years later in Hudgens, that the Board can properly consider in making that accommodation factors other than merely nontrespassory access to the workers, that access to company property may be appropriate under Section 7 even though workers do not live there, that the Court had failed (under standards announced in post-Babcock & Wilcox cases concerning the respective role of court and agency in matters of statutory construction) to give proper deference to the Board’s reasonably based interpretation of Section 7, and that the Court also exceeded its power by reviewing the factual record itself to determine whether the union could convey its message through reasonable means away from company property.

III.

The Lechmere case, as the Court suggests, is very much a replay of the Babcock & Wilcox case some 35 years before: Are non-employee union organizers entitled to enter upon privately owned property in order to communicate (by speech or written literature) with company employees about the union? Nonetheless, the Court’s mechanical approach to the application of the Babcock & Wilcox decision is untenable. It disregards open-ended language in Babcock & Wilcox and clarifying developments in later Court cases, especially Hudgens. It ignores what should be treated as a very important difference in the nature of the employer’s property in Babcock & Wilcox and in Lechmere. It trivializes the core Section 7 right of

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42. Id. at ___, 112 S. Ct. at 849.
43. Id. at ___, 112 S. Ct. at 849-50.
44. Id. at ___, 112 S. Ct. at 850-53 (White, J., dissenting).
workers to learn about the merits of a union. And it cavalierly ignores the strictures on judicial review of agency decisionmaking in statutory interpretation and application.

The right of employees to be informed about a union must be regarded as the central right to be protected by Section 7, for it is a necessary predicate to the rights explicitly given there to "form, join, or assist" a labor organization and thereafter to deal through that organization in collective bargaining — and also the Section 7 right to refrain from supporting the union. Babcock & Wilcox was arguably wrong in holding that union organizers, who are not employed by the company being organized, have no Section 7 rights themselves because they are not "employees" within that Section — given the total open-endedness of the statutory definition of "employee" in Section 2(3) the NLRA; the fact that the key labor legislation coincident with the 1935 Wagner Act (the Norris-LaGuardia Act and the history of judicial events leading to it) leaves no doubt of Congress's intention altogether to abandon artificial limits on the definition, such as any requirement of a "proximate" employer-employee relationship; and the fact that union organizers are employees of the union.

Assuming, however, that it is too late to challenge that point in Babcock & Wilcox, and that "nonemployee" organizers derive rights of access only to the extent necessary to advance "employee" Section 7 rights, the right to learn about the union should be staunchly supported, no less surely than property rights (which are nowhere mentioned in the NLRA).

The Court said as much in Babcock & Wilcox:

Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. . . . [W]hen 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 communica-

46. Id.
47. See 29 U.S.C. § 152(3). "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise . . . ." Id.
tion of information on the right to organize.\(^4\)

Although holding that this was indeed a tougher standard to satisfy than in the cases of solicitation by company employees who are already on company property during the workday, the Babcock & Wilcox Court did not at all state that the standard was well-nigh impossible to satisfy, as the Court now portrays it in Lechmere.

The Babcock & Wilcox test just quoted is full of open-ended language: inaccessibility, ineffective, reasonable attempts, communicate, usual channels. The Babcock & Wilcox Court in effect provided two interpretive boundary lines in applying this standard: in the remote lumber camp, organizers must normally be allowed onto company property, but on the facts of Babcock & Wilcox itself, where “the plants are close to small well-settled communities where a large percentage of the employees live,”\(^5\) organizers need not be allowed onto company property. But, as Justice White stated in dissent, there is nothing in Babcock & Wilcox that compels the conclusion that the remote logging camp is the only kind of situation that warrants an access order from the Board.\(^6\)

It is indisputably the business of the Board, at least initially and presumably subject to very limited judicial review, to apply the open-ended language from Babcock & Wilcox. In the past 35 years, population centers have become more concentrated at the core and more sprawling on the periphery, unionization has moved increasingly from the manufacturing sector into retail and service establishments dealing directly with the public, privately owned property has been widely opened to the community for commercial purposes, and methods of communication have become more diversified. One would think that the NLRB — particularly in light of its recurrent expo-

\(4\) Babcock & Wilcox, 351 U.S. at 112.

\(5\) Id. at 113.

\(6\) See Lechmere, ___ U.S. at ___, 112 S. Ct. at 851 (White, J., dissenting). The Court majority strongly relied on the passages in Sears, Roebuck, 436 U.S. 180, 204-05 (1978), that pointed out how rare and unique were the occasions on which the Board found nontrespassory organizational activity to be inadequate. See Lechmere, ___ U.S. at ___, 112 S. Ct. at 846-50. Yet Justice White, at footnote 1 of his dissenting opinion, convincingly challenged the weight placed by the Court upon Sears, Roebuck and its downplaying of the “accommodation” analysis endorsed in Hudgens. See Lechmere, ___ U.S. at ___, 112 S. Ct. at 851-52 (White, J., dissenting). Most pertinently, the Court's concern in Sears, Roebuck was the trespass jurisdiction of state courts which “only peripherally involved substantive principles of § 7 accommodation by the NLRB,” which was the central issue in Hudgens. Moreover, the summary in Sears, Roebuck of what was the Board's rather tight-fisted jurisprudence in access cases should be treated, as Justice White says, as “a descriptive recounting” of the Board law at that time “and not any prescription from this Court as to the analysis the Board should apply.” Lechmere, ___ U.S. at ___, 112 S. Ct. at 851-52 n.1 (White, J., dissenting).
sure to those developments in the cases that come before it — would be in a peculiarly effective position to apply the broad mandates of the statute to the circumstances that surround union communication in a changing society.

When applying that language, the Board may properly be mindful of the “accommodation” language of Babcock & Wilcox, which invites an assessment of the gravity of the Section 7 right — here, the cardinal right of access to information about the union — and the gravity of the employer’s property right. This kind of assessment and accommodation are even more explicitly invited by the Court in Hudgens which, after quoting the “accommodation” language from Babcock & Wilcox, went on to say that:

The locus of that accommodation . . . may fall at differing points along the spectrum depending on the nature and strength of the respective [Section] 7 rights and private property rights asserted in any given context. In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance.52

Thus, it seems quite consistent with the Court’s precedents for the Board to allocate varying weights to different Section 7 rights and to different kinds of private property.

The Supreme Court in Lechmere altogether ignores the fact that the only factual setting presented to the Court in Babcock & Wilcox was the manufacturing plant and adjacent employee parking lot. This kind of isolated private tract to which the public had no access could properly have been thought by the Court to weigh very heavily in its “accommodation” analysis, thus imposing an obligation upon the union organizers to go to fairly arduous lengths to communicate with workers at their homes and places of recreation in the nearby towns. It does not at all follow that the Babcock & Wilcox analysis compels precisely the same disposition when the private property interest to be “accommodated” is manifested in a freely accessible shopping mall parking lot to which the public is invited and which in fact serves as a place of recreation as well as a place to shop (and for many young persons, it seems, a home away from home).

Even if the condition for access to private property for union organizers is a finding that there are no reasonable means to communicate with workers away from that property, the Board should not be denied the power to find that, say, reaching 40 percent of the

52. Hudgens, 424 U.S. at 522.
workers away from company property might be "adequate" to warrant keeping them off securely guarded plant property, but might not be "adequate" when the countervailing employer property interest is the sort found in the standard suburban mall. Nor should the Board be denied the power to find that, for example, reaching 20 percent of the employees away from company property\textsuperscript{53} is "adequate" when the union is seeking to enlist the support of workers or of consumers in aid of a work stoppage at another business at a distant location, but might not be "adequate" when the union is seeking to inform the workers about the union's advantages and to enclose a membership application.\textsuperscript{54}

By making the test of "alternative means of communication" turn exclusively upon the finding of some percentage of workers who might be reached away from company property, regardless of the "openness" or "closedness" of that property (and apparently regardless of the nature of the union's message and the "strength" of the Section 7 right), the \textit{Lechmere} Court failed adequately to heed the "accommodation" standard announced in \textit{Babcock & Wilcox} and elaborated in \textit{Hudgens}.

IV.

The flaw in the Court's \textit{Lechmere} opinion runs yet deeper. The Court conceded that, under the so-called \textit{Chevron} doctrine, named for the Court's 1984 decision in \textit{Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.}\textsuperscript{55} in the absence of Congress having "directly addressed the precise question at issue," i.e., if the statute is "silent or ambiguous," courts should defer to an agency's statutory interpretation if it is "permissible" or "reasonable."\textsuperscript{56} The \textit{Chevron} decision states that "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency,"\textsuperscript{57} and that "The court need not conclude that the agency construction was the only one it plausibly could have adopted to uphold the construction, or even the reading

\footnotesize{\textsuperscript{53} See, e.g., \textit{Lechmere}, \textit{U.S.}, 112 S. Ct. at 845 (the union had secured the names and addresses of 20\% of \textit{Lechmere}'s employees, and sent them three mailings).}

\footnotesize{\textsuperscript{54} See Laborers' Local 204 v. NLRB (Hardee's), 904 F.2d 715, 718 (D.C. Cir. 1990) ("The principle that non-core rights merit less weight in the balance, the Board recognized, should inform the analysis of whether a union has reasonable alternative means to reach the targets of its section 7 activity").}


\footnotesize{\textsuperscript{56} \textit{Chevron}, 467 U.S. at 843.}

\footnotesize{\textsuperscript{57} \textit{Id.} at 844.
the court would have reached if the question initially had arisen in a judicial proceeding." The *Chevron* Court gave as a particularly pointed case for judicial deference one in which the agency has made "a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute."59

One can quibble with *Chevron* as mandating an undue level of judicial deference to the agency, as stripping the courts of their responsibility to draw upon the usual sources of statutory analysis to make a definitive interpretation of congressional will, and as inviting or at least condoning undue equivocation and inconstancy by the agency over time. Be that as it may, the *Chevron* doctrine is by now well established; and it not only gives the agency discretion to choose among reasonable statutory interpretations but also to change the interpretation over time. In *Lechmere*, Justice Thomas stated that the deferential *Chevron* standard did not obtain, because the language of Section 7 was sufficiently clear to compel the conclusion that rights are accorded under that Section only to a company's employees, that nonunion organizers are to be accorded a right to come onto private property only as a derivative of employee rights, and therefore if employees can learn of the union's message through non-trespassory communications the nonemployee organizers need not be permitted on company property.60

For the *Lechmere* Court to assert, however, that the language of Section 7, by according rights only to "employees," satisfies the *Chevron* requirement — that Congress directly address the precise question at issue — is little short of mind-boggling. Even apart from the ambiguity in the meaning of the word "employees" in Section 7, that Section says not a word remotely bearing upon the issue of employer private-property rights, nor does any other provision in the NLRA. The Court in *Babcock & Wilcox* concluded that such property rights were to be taken into account in applying the statute because “[o]rganization rights are granted to workers by the same authority, the National Government, that preserves property rights.”61 It also derived, without the slightest statutory directive, a requirement that these two competing rights were to be accommodated "with as little destruction of one as is consistent with the maintenance of the other"62 — precisely the kind of "accommodation of

58. *Id.* at 843 n.11.
59. *Id.* at 845 (quoting United States v. Shimer, 367 U.S. 374, 382-83 (1961)).
62. *Id.*
conflicting policies" noted by the *Chevron* Court as the prime context for judicial deference to agency interpretation.

The open-ended texture of the statute on this issue was emphasized even further by the Court in its *Hudgens* decision, which explicitly states that in making the required accommodation the Board may give varying degrees of weight to the property interest in different cases depending upon its nature and strength.62 The Court there, in a case involving a 60-store suburban shopping mall with a parking lot with room enough for 2,640 automobiles at once, obviously viewed the private-property claim as less substantial than that in a case like *Babcock & Wilcox*, involving a stand-alone secluded manufacturing facility and employee parking lot.

Given the absence of any statutory reference to employer private-property interests, let alone any statutory clues as to how to “accommodate" those interests against employee rights to form and join unions, it is simply untenable for the *Lechmere* majority to conclude that it is impermissible and unreasonable for the NLRB to take into account in making the required accommodation the nature and weight of the employer's property interest. Even if the *Babcock & Wilcox* decision were to be read as construing the NLRA to require a single-factor analysis turning exclusively upon reasonably available nontrespassory communications, without any attention to the nature and weight of the employer's property interest, that would be a reading of the statute that is consistent with its terms. But it does not follow that a single-factor interpretation is the only permissible or reasonable one, or that *Babcock & Wilcox* would have so held had it been prescient enough to advert to the *Chevron* standard of judicial review.

If that is true, then as Justice White argued in dissent, *Chevron* would clearly require that the Board's tripartite accommodation analysis of *Jean Country* should be sustained — without eliminating the possibility that a future Board might change its mind and embrace instead the narrower, single-factor approach dictated by the Court majority in *Lechmere*.64 It appears, given its failure to defer to the Board in *Lechmere*, that the Court's attachment to the *Chevron* doctrine — a congenial doctrine for a Court committed to "judicial restraint" — waxes and wanes, depending less upon the Court's identification of statutory ambiguity than upon its approval or its dislike of the principle endorsed by the agency in the case under

review.

V.

That Lechmere manifests a regrettable disregard of the Board’s proper role is highlighted all the more by the Court’s failure to remand the case to the Board, to give the Board an opportunity to reassess its conclusion regarding inadequate nontrespassory means in light of the rejection of the Board’s balancing approach and the substitution of the Court’s single-factor analysis. Instead, the Court looked at the record evidence and drew its own independent conclusion as to whether the union had been reasonably able to communicate with Lechmere’s employees away from company property. To say the least, the Court rode roughshod over the Board’s factual inferences.

Babcock & Wilcox requires a determination of “when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.”65 Determining whether employees are “inaccessible,” what channels of communication are “usual,” what union attempts are “reasonable” and, the central issue, whether in light of all of these, the union’s efforts are “ineffective,” requires the finding of evidentiary facts and the drawing of conclusionary inferences. Application of the Babcock & Wilcox standard entails an assessment of at least three factual elements: the number or percentage of employees who are (or could be) reached, the communicational media that are (or could be) used, and the nature of the message to be communicated. These are matters as to which the Board’s findings and inferences are entitled to the greatest deference; a court must treat them as conclusive if they are “supported by substantial evidence on the record considered as a whole,” as provided in Section 10(f) of the NLRA.66

In Lechmere, the Board concluded “that there was no reasonable, effective alternative means available for the Union to communicate its message to the Respondent’s employees.”67 No reader of the Board’s decision can fairly regard its factual findings and inferences, and its ultimate conclusion, as perfunctory; they are fully developed and substantiated. The Supreme Court should not have set them aside. The Court’s superficial assessment of the factual record makes

65. Babcock & Wilcox, 351 U.S. at 112.
it all the plainer why such a task should be undertaken by the Board, subject to a heavy presumption of expertise, regularity and judicial approval.68

The Board considered all of the same means of communication as did the Court — placing an advertisement in the local newspapers, tracking down employee names and addresses from license plates and state motor-vehicle authorities, mailings to some 20 percent of the Lechmere workforce, telephone calls and home visits, and picketing on the grassy strip alongside a heavily trafficked highway.

The Board noted that the union had placed notices in local newspapers, but concluded that “this method of communication is both expensive and ineffective.”69 It was thought ineffective because the Board could not find “evidence of receipt of a discrete message intended for a specific audience,” because “many” of the Lechmere employees may never have received, purchased or read the papers in question.70 The Supreme Court, rather than making its own findings of fact, should have considered whether the Board erred in announcing these two standards: that there must be receipt of a discrete message intended for a specific audience, and that a communication should not fail to reach “many” of the Lechmere workers. Those standards are altogether unexceptionable,71 as is the Board’s factual finding that they were not satisfied in the case.

68. It is true that the Supreme Court in Babcock & Wilcox did precisely the same thing — reverse a Board finding of inadequate nontrespassory access without remand for a fresh Board conclusion in light of the correct legal standard just announced by the Court. See Babcock & Wilcox, 351 U.S. 105. As indefensible as such an outright reversal was in Babcock & Wilcox, it is surely more untenable in Lechmere, in light of the intervening Chevron decision which commands deference not merely on factual inferences but also on matters of statutory construction, and also in light of the fact that the Board has since Babcock & Wilcox developed some 35 years of accumulated experience in addressing the issue of nontrespassory communication by union organizers.


70. Id. The NLRB does not treat newspaper and radio campaigns as inevitably ineffective. See Red Food Stores, 296 N.L.R.B. No. 62, 132 L.R.R.M. (BNA) 1164 (Aug. 31, 1989)(Board found media campaign to be effective alternative means).

71. Compare Excelsior Underwear Inc., 156 N.L.R.B. 1236, 1240-41 (1966), in which the NLRB supported its requirement that employee names and addresses must be turned over to the Regional Director, who would then make them available to the union, in a representation election with the observation that the union otherwise “has no method by which it can be certain of reaching all the employees with its arguments in favor of representation.” (emphasis added). See also NLRB v. Transportation Mgt. Corp., 462 U.S. 393 (1983), in which the Court held that the NLRB acted reasonably and within its power when it interpreted Section 8(a)(3), 29 U.S.C. § 158(a)(3) (1988), to be violated when an employee discharge was motivated in any degree by anti-union animus, rather than requiring that such animus be the dominant motive.
The Board also concluded that ascertaining names and addresses by tracking automobile license plates, even through diligent efforts, was “flawed,” in view of the fact that some employees may have been driven to work by others, or used automobiles registered to others, or parked elsewhere in the Lechmere lot, or traveled to work by means other than automobiles. Thus, the effectiveness of the license-tracking technique “as a comprehensive source” of employee names and addresses is “patently minimal,” said the Board. Again, the requirement that access to names and addresses must be “comprehensive,” and the fact-based conclusion that such a requirement was not satisfied in Lechmere, are unexceptionable, and should have been upheld by the Court as having fallen well within the authority of the Board.

The same is true of the Board’s determination that union attempts to communicate on a strip of public property (whether grassy or concrete) between a mall parking lot and a highway should not be treated as adequate if such attempts would create significant problems of traffic congestion or would jeopardize the union representatives’ personal safety, as the factual record showed in Lechmere.

The Supreme Court’s discussion of inaccessibility of employees is worrisome for other reasons. The Court appears to warn that it will not sustain a finding of inaccessibility based solely on the fact that employees live in a large metropolitan area, or solely on the fact that “direct contact” with employees cannot be made. Indeed, on the latter point, the Court came close to repudiating the Board’s finding that newspaper advertisements are not to be regarded as effective when they are unduly expensive and are unlikely to come to the attention of most of the employees. Yet the Board should be permitted to give great weight to these facts in making a determination of accessibility, and for the Court to suggest otherwise ignores decades of its own pronouncements about the Board’s special expertise in matters relating to worker communications in the industrial setting.

More worrisome yet is the Court’s conclusion that, quite apart


73. *See, e.g.*, Sentry Markets, Inc. v. NLRB, 914 F.2d 113, 117 (7th Cir. 1990) (upholding Board’s finding of no reasonable alternative means where such finding was based in part on testimony that “the high volume of traffic may make distribution of handbills on public property unsafe”).

from newspaper advertisements, home visits and the like, "other alternative means of communication were readily available," referring in particular to "signs (displayed, for example, from the public grassy strip adjoining Lechmere's parking lot) [that] would have informed the employees about the union's organizational efforts. . . . Access to employees, not success in winning them over, is the critical issue . . . ." The Court grievously trivializes the Section 7 right of employees to learn about the union when it treats that right as satisfied by the communication of a short phrase or two on a typical picket sign, displayed to employees entering their workplace at a distance from the pickets.

The Court in Babcock & Wilcox referred to safeguarding the Section 7 right of employees by protecting, if need be by access to private property, the union's ability "to distribute union literature," "to reach the employees with its message," and to "communicate information on the right to organize." Surely that statutory objective is not satisfied simply because union representatives can hold up a picket sign. More pertinently, surely it is reasonable for the Board — in applying the Babcock & Wilcox phrases to the facts of particular cases — so to conclude, and that was the only question properly before the Court in Lechmere. Justice White is correct when he states in dissent: "If employees are entitled to learn from others the advantages of self-organization, it is singularly unpersuasive to suggest that the union has sufficient access for this purpose by being able to hold up signs from a public grassy strip adjacent to the highway leading to the parking lot."

The Court poses a false dichotomy when it states: "Access to employees, not success in winning them over, is the critical issue." There is a mid-point between simply alerting employees that a union wants them to join and successfully convincing them to join; that point is the opportunity to communicate reasons to join. The Board did not conclude, as the Court suggests, that the union could come onto the Lechmere parking lot simply because it had been unsuccessful in winning them over through other means. Rather, the Board

75. Id. at , 112 S. Ct. at 849.
76. Id. at , 112 S. Ct. at 849-50.
77. See Sentry Markets, 914 F.2d at 117 ("picket signs could not contain all the information that the Union wished to disseminate").
80. Id. at , 112 S. Ct. at 850 (emphasis deleted).
81. See Lechmere, 295 N.L.R.B. No. 15, 131 L.R.R.M at 1482, enforced, 914 F.2d 313
concluded that the union had no reasonable opportunity away from company property to communicate a message with some substantive content. That understanding of "access" is clearly consistent with the statute and with Babcock & Wilcox.

The Court chided the Board for basing its factual conclusion of non-access on "mere conjecture or the expression of doubts concerning the effectiveness of nontrespassory means of communication."82 If, however, the Board's doubts are substantial and properly based on the record, and if what the Court calls conjecture is in fact the Board's derivative inferences about union-employee communications in a factual setting familiar to it as an expert agency, then the Court's admonitions are altogether misplaced.83

VI.

In conclusion, three limitations on the decision in Lechmere warrant mention.

First, it must be emphasized that the Court did not in any respect purport to diminish the Section 7 rights of employees to engage in organizing activity on company property, at least during the time period when those employees are there in connection with their work. Moreover, even if an employee working at a mall decides to do an hour of shopping at other mall stores at the end of the workday, and then returns to his or her automobile in the employee section of the parking lot, it would be highly artificial to treat that employee as beyond the shelter of Section 7 when placing, for example, a handbill under the windshield wiper of an automobile known to belong to a fellow employee.

Second, even in those cases in which the persons seeking to engage in organizing activities on property owned by the employer are not its own employees, Babcock & Wilcox contemplates that an employer order forbidding access will be invalidated if that order "discriminate[s] against the union by allowing other distribution."84 Nothing in Lechmere — which focuses only on the "no alternative communication" basis for striking down a no-access rule — can reasonably be understood as undermining the "discrimination" basis for so doing. Thus, if an owner of a mall property allows there a number of solicitations, meetings, celebrations and other uses by third persons — unlike Lechmere, which excluded the likes of the Girl Scouts

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82. Lechmere, --- U.S. at ---, 112 S. Ct. 849.
83. See Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).
84. Babcock & Wilcox, 351 U.S. at 112.
and the Salvation Army — then singling out the union for exclusion is unlawful. The Board in several cases decided after Jean Country had pointed to such permitted gatherings as diluting the employer's private-property interest. But even after the Supreme Court decision in Lechmere, any such disparate application of the employer's no-solicitation rule should be given yet greater weight through a standard application of Babcock & Wilcox, so as automatically to trigger an unfair labor practice finding.

Third, the Court in Lechmere did not speak at all to the fact situation in the bulk of the cases decided by the Board after 1988 under the Jean Country analysis — union appeals to customers of the offending employer, typically a retail establishment in a mall setting. In some cases, the handbilling or picketing of customers was done by persons employed by the targeted company, protesting either the company's unfair labor practices or its involvement in stalled labor negotiations. This was indeed the fact situation in Hudgens, in which a shoe store in a mall was picketed by employees from the company's warehouse, seeking to inform customers of a strike resulting from a breakdown in collective negotiations.

In other cases presented to the Board after its decision in Jean Country, the handbilling or picketing of customers was done by persons employed at some other company, typically either a unionized competitor of the targeted company (protesting its failure to meet the union's "area standards") or a unionized company with which the targeted company was doing business. In Jean Country itself, for example, the picketing was "conducted at least in part on behalf of the unionized employees of those stores that were in competition with the nonunion Jean Country store," and their picket signs announced: "To the Public. Jean Country is non-union. The maintenance of a non-union store is a threat to wages, hours and conditions established by the union."

The cases just described are to be distinguished from Lechmere.


88. Id. at 15.
in two crucial respects. First, the persons seeking access to private property to communicate the union's message are — unlike the Lechmere nonemployee organizers — "employees" (of the targeted company, a competitor or a company contractually related) within the shelter of Section 7 of the NLRA or are the designated majority representative of those employees (who are properly to be treated as acting in their stead and thus entitled to Section 7 rights as well).

Thus, the right of these persons to communicate is based directly upon the NLRA, and is not merely derivative from the right of others. Second, the handbillers or pickets are directing their message to the customers of a retail establishment, rather than its employees. Because this audience is much more diffuse, and difficult if not impossible to identify as they make their way between mall property and adjacent public walkways and roadways, the need to address them on the mall property closer to the targeted store can reasonably be found more compelling than in the case of a discrete and often more identifiable employee audience.

Lechmere thus represents a fairly small piece — nonemployee organizers seeking to address the members of a discrete workforce — of a larger picture of union communication on property open to the public. In the bulk of the cases recently presented to the Board, there are Section 7 rights to be taken into account, along with the nature and accessibility of the intended audience, and the property interest of the store and/or mall owner. In those cases, the tripartite analysis invited by Hudgens and fully formulated in Jean Country should still obtain.

POSTSCRIPT

One might note, in conclusion, that the suggestion just made regarding the continued vitality of Jean Country is supported by the 1990 decision of the United States Court of Appeals for the District of Columbia Circuit in Laborers' Local 204 v. NLRB (Hardee's). There, a union representing employees at a construction company remodeling a Hardee's restaurant distributed handbills at the privately owned parking lots at a number of other Hardee locations, urging Hardee customers to withdraw their patronage because of the construction company's failure to pay area-standard wages.

The Board employed its Jean Country analysis, and found among other things that Hardee's property right was not compelling, in light of the unobtrusive distribution of handbills and the fact that

89. 904 F.2d 715 (D.C. Cir. 1990).
its parking lots were generally treated as public property. However, the Board ruled against union access, because the weight of the union’s statutory right to protest substandard wages being paid by a different company at a distant location was found to be weak.\footnote{90}

The court of appeals sustained the Board and denied the union’s petition for review. In its opinion, written by Judge Ruth Ginsburg, the unanimous panel invoked the “accommodation” analysis articulated in \textit{Hudgens}, acknowledged the deference due the Board in accommodating Section 7 rights and private-property rights, and held that, “The elaboration thus advanced in \textit{Jean Country}, we are satisfied, sensibly construes the Act in light of High Court precedent in point.”\footnote{91}

Joining in the court’s opinion was then Circuit Judge Clarence Thomas.

\footnote{90. See Hardee’s Food System, Inc., 294 N.L.R.B. No. 48, 131 L.R.R.M. (BNA) 1345 (May 31, 1989), \textit{enforced sub nom.} Laborers’ Local 204 v. NLRB (Hardee’s), 904 F.2d 715 (D.C. Cir. 1990).}

\footnote{91. \textit{Laborer’s Local} 204, 904 F.2d at 718.