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Union Organizing After Lechmere, Inc. v. NLRB - A Time to Reexamine the Rule of Babcock & Wilcox

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I. INTRODUCTION

The American labor movement rests upon the foundation of union organizing. Without successful organizing efforts, unions have no members and cease to exist; the idea of collective bargaining is essentially useless; unfair labor practices are, for all practical purposes, meaningless; and the National Labor Relations Act ("NLRA" or "Act") becomes nothing more than an academic and philosophical exercise in the possibilities of social engineering.

Congress realized the critical importance of organizing when it enacted the NLRA. Employees specifically received the rights "to self-organization, to form, join, or assist labor organizations . . ." in Section 7 of that Act. These guarantees have remained since the inception of the statute in 1935.

While all organizing activity is critical to the future viability of labor organizations, the primary emphasis of this article will focus on the actions performed by nonemployees. Specifically, the evaluation will be directed at the right of these individuals to enter employers' premises during union organizing campaigns.

The scope of this article is narrowed for several reasons. Union organizing activity performed by employees is important, but it pales in comparison to efforts conducted by professional nonemployees. These individuals have specific knowledge of, and experience in, union matters. Also, the rules relating to activity by employees, based on solid principles of order and discipline in the workplace, have been relatively straightforward for many years. The rule announced in

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Republic Aviation Corp. v. NLRB ("Republic Aviation")\(^3\) in 1945 that, with some exceptions, employees can organize on an employer's property while on nonwork time, is still valid today. Although there have been modifications to the rules relating to activities allowed by employees when organizing other employees, these variations have been more in terms of "fine tuning" rather than significant policy change.

An examination of the law relating to nonemployee organizers is important when the difficulty that the courts and the National Labor Relations Board ("NLRB" or "Board") have encountered in establishing guidelines for activity in this area is recognized. Decisions have often been based on vague and outdated ideas of property and individual rights. A conflicting and unworkable set of rules has resulted.

In 1956, the Supreme Court issued its landmark decision, NLRB v. Babcock & Wilcox Co. ("Babcock"),\(^4\) establishing the black-letter law in this area. Recently, in Lechmere, Inc. v. NLRB,\(^5\) the Court "clarified" the rule it enunciated in Babcock. That decision may have a significant and adverse impact upon unions' abilities to organize employees in the workplace. Thus, the Lechmere decision illustrates the need to reevaluate the nation's policies regarding organizing activities by nonemployees.

This article will first consider the current state of the labor movement in this country. Organized labor has been, and continues to be, in a serious state of decline. Its future is bleak unless modifications are made to the current structure of the law. Next, this article will review the law in the area of labor organizing. This examination will include scrutiny of important statutory, administrative and judicial rulings, paying particular attention to the Supreme Court's landmark decisions in Republic Aviation, Babcock, and Lechmere. The text of this article and the accompanying footnotes also contain analyses of other important developments in the law. Important policy considerations as enumerated by the legislature, the Board, and the courts, merit detailed scrutiny. Finally, this article concludes with an introduction and a consideration of specific proposals for change. These recommendations offer various alternatives to the current system. To achieve meaningful change, modification of the physical process and rules governing organizing is required. Meaningful change also neces-

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icates a transformation of the perception and role of the labor movement in a United States entering the twenty-first century.

II. UNION ORGANIZING EFFORTS — A DECREASE IN MEMBERSHIP

The history of American labor is one replete with violence, bloodshed and immeasurable losses in terms of human misery and economic cost. For example, between 1915 and 1921, there were an average of 3,043 strikes per year, resulting in the loss of 1,745,000 jobs and an annual loss of 50,242,000 working-days.6

One of the most significant union organizing attempts occurred in 1918 and 1919 when the American Federation of Labor sought to unionize the steel industry and the giant United States Steel Corporation.7 Actions taken against labor included the discharge of union members, prohibition of union meetings, company espionage, physical violence, and the terrorizing of employees. The union’s efforts ended in defeat.8 In the years that followed, labor unrest continued to exact a severe toll on the economy. Even during the early days of the Great Depression the losses were staggering; over 32,000,000 working-days were lost because of labor controversies in 1933 and 1934.9

When Congress enacted the NLRA in 1935, its impact on union organizing was immediate and immense. When the NLRA became law, the ratio of union membership to the nonagricultural workforce was only 13%; one decade later the percentage increased to 35%.10 In 1954 the number was still near 35%, but then began a decline to approximately 30% by 1965, and to just over 20% by 1980.11 In 1988 the percentage decreased to 17%.12 Secretary of Labor Robert Reich testified in January 1993 that the number of unionized employees in the private sector had dropped to 11.8%.13 One authority has

8. See id.
9. S. REP. NO. 573, supra note 6, at 2301.
11. Weiler, supra note 10, at 1771; see also Dickens & Leonard, supra note 10, at 326.
suggested that if trends do not change by the year 2000, the percentage of employees represented by unions in the private sector will number only 7% — the same percentage of individuals that were represented by unions in 1900.14

The causes for this decline in membership have resulted in much conjecture and study. Theories provide that the decline in union membership has occurred as a result of a shift in employment from organized to unorganized industries,15 movement of jobs to states with right-to-work laws,16 and even the appreciation in the exchange rate of the U.S. dollar.17 Other mentioned causes for the decrease in union membership include the use of sophisticated union busting techniques by management and a composition of the NLRB that has not viewed labor's interests favorably.18

There may be merit to these theories; however, the responsibility for the decrease in union membership also rests with the organizational tactics and efforts of the unions themselves. Evidence suggests

47 (January 18, 1993) (remarks by Robert Reich, Labor Secretary-designate, at Senate Confirmation hearing before the Senate Labor and Human Resources Committee (January 7, 1993)).


15. See Theodore J. St. Antoine, Federal Regulation of the Workplace in the Next Half Century, 61 Chi.-Kent L. Rev. 631, 635 (1985). Statistics establish, for example, that the trend is from manufacturing, construction and mining occupations to those in the retail, wholesale trade, finance and service industries. In 1950, about 41% of the American workforce labored in the manufacturing, construction and mining industry, while by 1983 this figure had dropped to 26%. During the same period, employment in retail and wholesale trade, finance and service occupations rose from almost 37% to over 51%. Id. at 635-36.

16. Id. at 636 (workforce in right-to-work states grew from 25% to 29% of the country's population between 1950 and 1980); see also Charles B. Craver, The Impact of Financial Crises Upon Collective Bargaining Relationships, 56 Geo. Wash. L. Rev. 465, 482 (1988).

17. See Labor Conference, supra note 14, at 209 (Troy theorizes that the appreciation in the exchange rate of the U.S. dollar from 1979 to 1985 destroyed the U.S. auto and steel industries, resulting in huge losses in the United Autoworkers and United Steelworkers unions — thereby causing a decline in union membership in the private sector).

18. Julius G. Getman, Ruminations on Union Organizing in the Private Sector, 53 U. Chi. L. Rev. 45 (1986); see also Labor Conference, supra note 14, at 210 (remarks by David Silverman, President of Union Privilege Program of the AFL-CIO, debating union decline at New York labor conference (June 4, 1992)). Silverman took the position that employer opposition is a factor in union membership decline, and talked of efforts by the United Auto Workers (UAW) to organize a Nissan plant in Smyrna, Tennessee. He indicated that the employer carefully screened forty applicants for every employee hired. The company also issued shirts that contained only the employees' first names, and employees drove cars registered to Nissan. It took the UAW five years just to get the names of the employees at the plant. The final result was that the UAW lost the representation election by a 2-1 margin. Labor Conference, supra note 14, at 210.
that the number of employees organized and the success rate of unions at the ballot box in union representational elections have decreased. In the early 1940’s, certification elections involved more than one million voters a year with unions achieving success in 80% of those determinations. More recent statistics provided by the NLRB, however, clearly illustrate the downward spiral in the number of elections held and a decrease in the unions’ success rate. In 1980, the Board reported that unions were successful in only 46% of the 8,198 representation elections held. By 1985, the number of elections had dropped to 4,614 and the unions’ rate of success fell to 42%. More recent data available indicates that the number of elections slipped to only 4,210 in 1990, with the union success rate improving slightly to almost 47%. In a span of only ten years, a reduction of one-half occurred in the number of elections held.

Professor Paul Weiler notes that two possible reasons for the decline in membership include either a sustained resistance by employers or a lack of union appeal to the American worker. He suggests that in order to increase membership, it is the responsibility of unions to refurbish their structures, platforms and images. If this is the case, it is imperative that unions reach and meaningfully communicate with employees in the workforce. For a message to have value, effective delivery to its intended audience is critical.

The mere fact of a decrease in union membership cannot be the sole reason for altering the current policies relating to organizational activity by nonemployees. Rather, the reasons for change involve important principles of individual rights and concepts of fairness and industrial democracy. The previous discussion, however, demonstrates the potential significant adverse economic consequences to a country with a weak labor policy. In addition to creating labor peace, the formation and continued existence of unions have added to the high standard of living enjoyed by Americans over the past decades. Without question, unionized workers as a group have higher wages, better

19. See Dickens & Leonard, supra note 10, at 323-24; see also Getman, supra note 18, at 45-46; Weiler, supra note 10, at 1774-76.
20. Weiler, supra note 10, at 1775.
22. Id.
23. PAUL C. WEILER, GOVERNING THE WORKPLACE — THE FUTURE OF THE LABOR AND EMPLOYMENT LAW 105-14 (1990). Weiler cites a Gallup Poll which reported that 76% of the American people favored unions in 1957, while 14% did not. In 1987, the approval rating was only 55%, while the disapproval rating rose to 35%. Id. at 106 n.3.
24. Id. at 107.
benefits, greater job security and, in effect, better working conditions than their nonunion counterparts.25 With the passage of the NLRA, we have moved away from periods of labor violence, huge losses in work time and a low standard of living. The recent trend away from organized labor, however, has caused Americans to experience a gradual slowdown in the growth of their standard of living. Families that previously lived comfortably on the income of one wage earner now struggle even with both spouses working. Questions have arisen as to whether the next generation of Americans will live as comfortably as the current generation. Undeniably, a strong labor policy is in the best interest of the country. Reasonable labor organizing standards contribute significantly to a strong policy.

The downward trend in union membership in this country at the present time illustrates the precarious state of organized labor. Under these circumstances, is it necessary for labor to engage in expensive organizing campaigns to transmit its ideas to employees? The NLRA, after all, guarantees the right of self-organization to employees.26 It is obvious, however, that unions are no longer in a position to conduct expensive and time-consuming campaigns.27

With the current number of elections at less than 5,000 annually, do workers really have the opportunity to exercise their rights under the Act? At the very least, unions need the opportunity to develop new methods that allow them to inexpensively state their views to the employees of this country. It is important that employees have the opportunity to hear the message of self-organization and make a meaningful decision based on all of the arguments presented by both labor and management.

25. See 126 Daily Lab. Rep. (BNA) B-1 (June 30, 1992). The Department of Labor reported that in March 1992 total compensation for union workers averaged $21.09 per hour, compared to $15.22 for nonunion workers. Benefits made up 35.4% of union workers' compensation packages compared to 26.4% for non-union workers. Id.; see also Marc Levinson, Living on the Edge, NEWSWEEK, November 4, 1991, at 22. Levinson theorizes that the decline of labor unions has helped widen the wage gap between ordinary workers and the well-to-do. Today, for example, only one in eight young men with a blue-collar job belongs to a labor union compared to twenty years ago when the number was three times as high. The author suggests that the weakening of labor unions accounts for one-fifth of the increase in the wage gap since 1978; employers no longer feel pressured to pay higher wages to keep unions out. Id. at 24.


27. See Brief for the AFL-CIO as Amici Curiae for Respondent at 23, Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992) (No. 90-970) (estimating that as of 1980, union organizing costs averaged $1,000 for every new member).
III. THE CURRENT STATE OF THE LAW

A. STATUTORY LAW

The passage of the NLRA in 1935 was a response by Congress to the terrible losses in life, bodily harm and economic injury occurring in the industrial theater of the time. Before the NLRA’s enactment, Congress attempted to guarantee the right of self-organization to employees under the National Industrial Recovery Act (“NIRA”).28 The Supreme Court, however, found the NIRA invalid.29 Subsequently, Congress passed the NLRA, which guarantees employees’ rights very similar to those previously provided by the NIRA. These promises have remained substantially unchanged to this day.

Under the current law, two provisions of the NLRA — section 157 (“Section 7”)30 and section 158 (“Section 8”)31 — relate to employees’ organizational rights. Section 7 of the Act grants employees a right of “self-organization” to “join, or assist labor organizations.”32 Specifically, it states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organiza-


Every code of fair competition, agreement and license approved, prescribed or issued under this title shall contain the following conditions . . . [t]hat employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining . . .

Id. at 198.


tion as a condition of employment as authorized in section 158(a)(3) of this title.33

Section 8 of the Act defines certain actions by employers and employees as unfair labor practices. Of particular importance is the sanction of 8(a)(1) which provides that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] of this title."34

Notwithstanding its prior decision which invalidated the NIRA, the Supreme Court upheld the NLRA in NLRB v. Jones & Laughlin Steel Corp.35 In that case, the employer, Jones & Laughlin Steel Corporation, challenged the validity of the Act, arguing that it violated the Commerce Clause of the Constitution, the Fifth Amendment Due Process Clause and the Seventh Amendment.36 The Court rejected each of these arguments.37

The Court in Jones & Laughlin Steel held that Congress had broad power under the Commerce Clause to enact appropriate legislation to protect and advance interstate commerce.38 According to the Court, Congress, through its enactment of the NLRA, properly exercised its power under the Commerce Clause since it had the authority to regulate activities in this area if the activities had a close and substantial relation to interstate commerce.39 The Court found that the employer's business had a direct impact on the nation's commerce and thus fell under the umbrella of the NLRA.40

33. Id.
35. 301 U.S. 1 (1937).
36. See Jones & Laughlin Steel, 301 U.S. at 25; see also U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States . . . "); U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."); U.S. CONST. amend. VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").
38. Id. at 36-37.
39. Id. at 37.
40. Id. at 41. In arriving at its conclusion, the Court detailed the size and importance of the company and its impact on interstate commerce. Id. at 26-27. It indicated that the steel company had nineteen subsidiaries and was a completely integrated operation; that it owned or controlled ore, coal and limestone mines, steamships, railroads, warehouses manufacturing plants and sales offices; and that the company shipped approximately 75% of its product out of its home state of Pennsylvania. Id. at 27. The Court also noted that the plant in
The NLRA, according to the Court, safeguarded the right of employees to self-organize.\textsuperscript{41} The Court observed that the right of employees to self-organize was a proper subject for action by Congress under the Commerce Clause, and further indicated that:

Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; the union was essential to give laborers opportunity to deal on an equality with their employer.\textsuperscript{42}

The Court in \textit{Jones & Laughlin Steel} declared the right of employees to organize and select representatives to be "fundamental."\textsuperscript{43} In its discussion regarding the right of employees to self-organization and to select representatives, the Court held that "[e]mployees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents."\textsuperscript{44}

Similarly, the Court held that no violation of the employer's right to due process resulted from the passage of the NLRA. According to the Court, the Act did not compel agreements between the parties; it did not interfere with the normal exercise of the right of an employer to hire or fire employees; nor did it violate procedural due process requirements.\textsuperscript{45} Further responding to the due process challenge, the Court found that the Act established proper standards and procedures to which the Board must conform, including the requirements of a complaint, notice, and hearing. It also held that decisions

\textsuperscript{41} Id. at 33-34.

\textsuperscript{42} Id. at 33.

\textsuperscript{43} Id.; see Texas & New Orleans R.R. v. Railway Clerks, 281 U.S. 548 (1930). Seven years before \textit{Jones & Laughlin Steel}, the Court had the opportunity to examine the importance of organizing in the railroad industry under the Railway Labor Act. In \textit{Railway Clerks}, the Court upheld an injunction against an employer that interfered with union activity, holding that "[i]t has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work." \textit{Railway Clerks}, 281 U.S. at 571.

\textsuperscript{44} \textit{Jones & Laughlin Steel}, 301 U.S. at 33.

\textsuperscript{45} Id. at 45-46.
of the Board were subject to review in designated courts.  

Finally, the Court found no violation of the Seventh Amendment. It held that the Seventh Amendment did not apply where the action was not in the nature of a suit at common law. According to the Court, actions brought under the NLRA were statutory in origin and not subject to the provisions of the Amendment.  

With the passage of the NLRA and the Court's approval of that statute in *Jones & Laughlin Steel*, employees received significant rights to organize and choose their labor representatives free from employer interference. Employers' claims that the Act interfered with their rights were rejected. The actions by Congress and the courts sent a message to the country that an environment favorable to labor existed.  

While the Supreme Court approved Congress' enactment of the NLRA in *Jones & Laughlin Steel*, it failed to delve into any significant analysis of the meaning of the right to self-organization in that case. Several components of this right require emphasis. Section 7 of the Act provides rights only to "employees." After passage of the NLRA, the Supreme Court has noted that the Act specifically grants a direct right only to employees, and not to unions or other labor organizations. The Court has held that individuals, groups, or institutions other than employees only have a derivative right under the Act. Similarly, other than providing generally for the right to join or assist labor organizations, Section 7 does not specifically define the right to self-organization.  

While this section of the NLRA retains essentially the same form today as when it was first enacted, a review of the legislative history of the Act provides few clues about how broadly the proponents of the Act construed the right of self-organization. On its face, the
right is a very broad employee right which precludes employers' interference. Carried to an extreme interpretation, an employer cannot limit employees in any activity at any time that involves their pursuit of the right to self-organize. If interpreted literally, Sections 7 and 8(a)(1) of the Act would allow employees to form and join labor organizations in the workplace and on working hours.

The only evidence available in the legislative history of the Act regarding the issue of the scope of the right to organize is a short debate between Senators Wagner and Hastings in 1935, involving discussion regarding when an employee could exercise the right under the proposed Act. Senator Wagner suggested that the right to organize could not be exercised while on working time, stating that "[n]o sensible person would interpret [the language of Section 7] to mean that while a factory is at work the workers could suddenly stop their duties to have a mass meeting in the plant on the question of organization." With the addition of the pro-management Taft-Hartley Amendments in 1947, the Act underwent significant change. However, failed to provide any specific guidance as to the meaning or parameters of the Section 7 right to self-organization. Throughout the history of the Act, Congress has offered little direction as to the nature or limits of the activities included in the Act's right to self-organization. In the late 1970's, Congress did attempt to modify the NLRA to expand the right to organize in the proposed Labor Reform Act. These efforts were not successful as the bill failed passage in Congress.

This lack of legislative guidance has left the responsibility for interpreting the right of self-organization to the NLRB and the courts.

53. See S. REP. No. 573, supra note 6, at 2410.
54. See S. REP. No. 573, supra note 6, at 2410.
56. See H.R. REP. No. 637, 95th Cong., 1st Sess. (1977) [hereinafter H.R. REP. No. 637]. Section 6(b)(1)(A) of the proposed Act would have required the Board to promulgate rules: which shall, subject to reasonable conditions, including due regard for the needs of the employer to maintain the continuity of production, assure that if an employer or employer representative addresses the employees on its premise or during working time on issues relating to representation by a labor organization during a period of time that employees are seeking representation by a labor organization, the employees shall be assured an equal opportunity to obtain in an equivalent manner information concerning such issues from such labor organization.

Id. at 53.
These bodies have found it difficult to establish parameters or concrete standards for employers and employees alike, and nowhere has this been more true than in the area relating to activities by non-employee organizers.

B. JUDICIAL AND ADMINISTRATIVE RULINGS

Removing the facade of employee and employer rights, a review of court and Board decisions relating to organizing activity on an employer's property emerges as a study in economic power and influence. Current caselaw frames the debate as an assessment of the property rights of an employer against the individual rights granted to employees under Section 7 of the NLRA. The decisions generally value employers' property rights more significantly than employees' individual rights. This fact is particularly true when the situation involves nonemployee organizers.

The cases decided by the NLRB and the courts involving matters of labor organizing activity are divided into two broad categories: those where the organizer is an employee, and those where the organizer is not an employee. The primary focus of this article is on the issue of nonemployee access to an employer's property. A better understanding of this subject is possible, however, only after reviewing situations where employees engage in organizing activity.

The treatment afforded employee and nonemployee organizers by the Supreme Court has followed an approach of assessing the respective rights of management and labor. Under this procedure, the rights of the employer and the rights of employees must be compared. Development of a final rule occurs only after considering and evaluating the competing rights, as those rights are defined by the Court. In cases where the organizer was an employee, the Court has weighed the employer's management rights and the need to maintain order and discipline in the workplace against the employees' rights under the Act. A significant difference occurs, however, in the application of this concept to nonemployees. In these cases, the Court has assessed the employees' rights against a broad employer property right. This

57. See, e.g., Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945).
58. See NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956) (holding that no restriction may be placed on the employees' right to discuss self-organization amongst themselves unless the employer can demonstrate that a restriction is necessary to maintain production or discipline, but no such obligation extends to nonemployee organizers since their rights only flow from the employees' right to learn the advantages of self-organization from others).
change in the standard, from the consideration of a management right to a property right, has resulted in the application of stricter rules to nonemployee organizers.

1. Republic Aviation Corp. v. NLRB

In 1945 the Supreme Court decided the landmark case of Republic Aviation, which set forth rules applicable to situations where employees attempt to organize fellow employees in the workplace. Republic Aviation involved the resolution of two conflicting circuit cases decided in 1944.

In Republic Aviation the employer was an aircraft manufacturer that had established a broad policy of no solicitation of any type on company property. On appeal from the Second Circuit, Republic Aviation involved an employee who distributed union membership applications to his fellow workers on his own time during lunch periods. After a warning, the employee continued to distribute applications, and the company discharged him. The NLRB and the Second Circuit Court of Appeals found that the employer had violated Section 8(1) of the NLRA, finding that the employer's actions restrained and coerced employees from exercising their rights under Section 7 of the Act.

In the second case, Le Tourneau Company of Georgia suspended two employees for distributing union literature on the employer's property in a parking lot during nonworking hours. The lot consisted of one hundred feet of company-owned land which divided a public highway from the plant entrance. The NLRB had previously held that the employer had violated Sections 8(1) and 8(3) of the Act; however, the Fifth Circuit Court of Appeals reversed the Board's decision.

In Republic Aviation, the Supreme Court affirmed the Second Circuit's decision.

59. 324 U.S. 793 (1945).
60. See Republic Aviation Corp. v. NLRB, 142 F.2d 193 (2d Cir. 1944); Le Tourneau Co. v. NLRB, 143 F.2d 67 (5th Cir. 1944).
61. Republic Aviation, 324 U.S. at 795-96.
62. Id. Prior to the passage of the Taft-Hartley amendments to the NLRA in 1947, what is now Section 8(a)(1) of the Act used to be Section 8(1). The 1947 amendments retained employer unfair labor practices under Section 8(a), and created union unfair labor practices under Section 8(b) of the Act. See Taft-Hartley Act, ch. 120, 61 Stat. 136, 140-43 (1947) (codified as amended at 29 U.S.C. §§ 151-169 (1988)).
63. Le Tourneau, 143 F.2d at 68.
64. See Republic Aviation, 324 U.S. at 797.
65. Le Tourneau, 143 F.2d at 68-69.
Circuit decision, but reversed the Fifth Circuit ruling. The Court took notice that employees have an undisputed right of self-organization guaranteed by the NLRA, and that employers also have an undisputed right to maintain discipline in their establishments. Both rights, the Court found, are essential elements in a balanced society. Referring to a rule established by the Board in an earlier decision, the Court held that the controlling principle is the need to maintain production and discipline in the workplace. Applying this concept, the Court adopted the simple rule that working time is for work and, therefore, absent a discriminatory purpose, an employer may prohibit union solicitation activities during working time. However, the Court held that when an employee is not on working time, his time is his own and he can engage in union solicitation activity even though he is on the employer’s property. An employee’s right to organize during nonwork time may only be limited when the employer shows that there are special circumstances needed to maintain production or discipline.

In Republic Aviation, the Court placed an emphasis on the management rights of the employer. Management rights, however, embrace only the employer’s interest in maintaining the efficiency of his business, and are thus distinguishable from an employer’s property rights. In contrast, property rights are all of the common-law rights usually associated with the ownership of real property, including but not limited to, the right to exclude trespassers.

Essentially, the straightforward rule set forth in Republic Aviation remains the law today. In 1962 the Board refined the rule as it applied to distribution of literature by employees engaged in organizational activity. The Board noted that a difference existed between oral solicitation by employees and solicitation through the distribution of literature, reasoning that the latter activity carried with it the poten-

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66. Republic Aviation, 324 U.S. at 797-98.
67. Id.
68. Id. at 803 & n.10 (citing Peyton Packing Co., 49 N.L.R.B. 828, 843-44 (1943)).
69. Id.
70. Nonworking time was held to include the periods before and after work, lunch breaks and rest periods. Id. at 803 n.10.
71. Id. at 803-04.
73. Id.
tial for littering, which may cause a “[h]azard to production.” Because of this litter problem, the Board created a new rule for workplace distribution of literature by employees. The oral solicitation rule remained the same, i.e., employees may solicit during nonwork hours if special circumstances do not exist that adversely impact on production or discipline. The Board held in Stoddard-Quirk, however, that employees could distribute literature only in the nonwork areas of the plant’s premises. Specifically, the Board noted that its new rule applied only to activity by employees and not to activity performed by nonemployees.

In contrast to the relatively straightforward rules governing organizational activity engaged in by employees, a complex web of rules developed with respect to ventures performed by nonemployees. Adopting and adapting some form of the Republic Aviation rule to nonemployee situations would have provided the most practical approach in this area. In the years shortly after the Supreme Court’s decision in Republic Aviation, the Board made some efforts in this direction. The courts of appeal, however, did not always accept the Board’s decisions.

2. NLRB v. Babcock & Wilcox Co.

Over a decade after its decision in Republic Aviation, the Supreme Court had the opportunity to consider the boundaries of union organizing activities when the soliciting individuals were nonemployees. In Babcock, the Supreme Court severely restricted the

75. Id. at 619.
76. Id. at 621. Two members of the Board voiced objections to the new rule in Stoddard-Quirk. Members Fanning and Brown wrote that the controlling test for oral solicitation and distribution of literature remained a “working time” test, and that an additional test of “area” was inappropriate. Id. at 626 (Fanning and Brown, Members, dissenting) (citing Warren Mfg. Co., 126 N.L.R.B. 697, enforced, 289 F.2d 117 (5th Cir. 1960)).
77. Id. at 622.
78. See Gresham, supra note 72, at 158 n.274; see generally Sarah Korn, Property Rights and Job Security: Workplace Solicitation by Nonemployee Union Organizers, 94 YALE L.J. 374, 378 (1984) (history of Board’s decisions between the time of Republic Aviation and prior to its decision in Babcock); see also Carolina Mills, Inc., 92 N.L.R.B. 1141 (1951) (affirming a trial examiner’s finding of an unfair labor practice when an employer did not allow nonemployee organizers onto his property; the examiner clearly applied the rule of Republic Aviation to a nonemployee organizer situation); Caldwell Furniture Co., 97 N.L.R.B. 1501, 1502 (1952) (placing the burden on the employer to establish why special circumstances existed to warrant the exclusion of nonemployee union organizers from its parking lot); Monsanto Chem. Co., 108 N.L.R.B. 1110 (1954).
79. See, e.g., NLRB v. Monsanto Chem. Co., 225 F.2d 16 (9th Cir. 1955).
extent to which nonemployee union organizers could encroach onto an employer's property. In this landmark decision, the Court ruled on the decisions of the NLRB in three similar cases: Babcock & Wilcox, Seamprufe, and Ranco. In each of these cases, the employer refused to permit distribution of union literature by nonemployee union organizers on company-owned parking lots. In all three cases the Board found that the employers had committed unfair labor practices in violation of Section 8(a)(1) of the NLRA, holding that the respective union organizers found it difficult to reach the employees off company property; hence, the Board reasoned that by refusing the unions access to employer parking lots the employers had violated the employees' Section 7 rights to self-organization. The courts of appeal divided on the issue of enforcement of the Board's orders.

In Babcock, the Supreme Court paid particular attention to the specific facts of each of the three cases before it. It noted that the facts were similar in that: a large number of the employees lived in the town in which the plants were located; most of the employees drove to work in private automobiles and parked in company-owned lots; and the respective parking lots were accessible only by traveling down a company-owned driveway.

In contrast to its earlier decision in Republic Aviation, however, the Court in Babcock did not conform to the judgment of the NLRB. Rather, the Court specifically addressed the issue of the difference between employee and nonemployee union organizers in Babcock, and ruled that there must be an accommodation between the right of workers to organize and the protection of the property rights of an employer. According to the Court, accommodation between the two must be obtained "with as little destruction of one as is con-

85. See Babcock & Wilcox, 109 N.L.R.B. at 493-94; Ranco, 109 N.L.R.B. at 1007; Seamprufe, 109 N.L.R.B. at 32-33.
86. Babcock, 351 U.S. at 106-08.
87. See infra note 164 and accompanying text (in his dissent in Lechmere, Justice White opined that the lack of deference given by the Babcock Court to the Board's decision was erroneous).
88. Babcock, 351 U.S. at 112.
sistent with the maintenance of the other." 89 The Court indicated that while it was the duty of the Board to make the proper adjustment with respect to the accommodations, the Board’s factual rulings, based on substantial evidence, must also be based on valid legal foundations. 90 In Babcock, the Court noted that the NLRB did not distinguish between the rule relating to employees soliciting for self-organization, as enumerated in Republic Aviation, and the rule relating to solicitation by nonemployees, and declared this difference to be one of "substance." 91 The obligation owed to nonemployees, according to the Court, was different from that owed to employees. The Court did acknowledge, however, that the right of self-organization under the Act depended in some measure upon the ability of employees to learn the advantages of self-organization from others. 92 Consequently, it held that an employer could preclude union organizing solicitation by nonemployees without violating the Act if "reasonable efforts by the union through other available channels of communication [would] enable it to reach the employees with its message and if the employer’s notice or order [would] not discriminate against the union by allowing other distribution." 93

Applying this rule to the facts of the cases before it, the Court found that the circumstances of each case did not prevent the unions from communicating with employees using reasonable efforts. 94 It also found that the plants in question were "close to small, well-settled communities where a large percentage of the [affected] employees live," 95 and that the unions had the usual methods of imparting information available to them. 96 The Court specifically identified the following methods that the union could avail itself of to communicate with employees: use of the mail, personal communication on the public streets or in the employees’ homes, and use of telephones. 97 Based on these facts, the Supreme Court denied access to the employers’ property in all three cases, 98 noting in summary that:

89. Id.
90. Id.
91. Id. at 113.
92. Id.
93. Id. at 112.
94. Id. at 113.
95. Id.
96. Id.
97. Id. at 107 n.1.
98. Id. at 114.
The Act requires only that the employer refrain from interference, discrimination, restraint or coercion in the employees' exercise of their own rights. It does not require that the employer permit the use of its facilities for organization when other means are readily available.99

Thus Babcock established the black-letter law in the area of nonemployee organizer access to an employer's property. Of particular significance in this ruling is the distinction made between employee and nonemployee organizers. The Court found this difference to be material, and accorded employee organizers far greater leeway in pursuing their activities on the employer's property than nonemployee organizers.

The key to the Court's decision is its finding that a distinction of "substance" existed in situations where the organizer was a nonemployee.100 With this bold statement, the Court established a new rule and distanced itself from the Republic Aviation standard. Although of critical importance, nowhere in the decision did the Court discuss its basis for making this distinction. Instead, after citing the Republic Aviation rule as the standard for employee organizers, that is, an employee can pass out union cards on his own time on an employer's property in non-work areas even if there is a general ban on all solicitation, the Court merely concluded that "no such obligation is owed nonemployee organizers."101 This lack of analysis has been the basis of much criticism.102

The significance of this omission is more notable considering the fact that in all three cases, Seamprufe,103 Babcock,104 and Ranco,105 the Board had approved the trial examiner's report which

99. Id. at 113-14.
100. Id. at 113.
101. Id. (emphasis added).
102. See generally Korn, supra note 78. See also Jay Gresham, Note, Still as Strangers: Nonemployee Union Organizers on Private Commercial Property, 62 Tex. L. Rev. 111 (1983). Gresham writes that the Court in Babcock announced "a rule without a reason"; indicating that no court or commentator has supplied a convincing rationale for the "distinction of substance" argument. Id. at 119-20. Gresham also notes that the Court in Eastex did address this "distinction of substance" statement, and that in employee organizer situations the employee was not a trespasser on the company property as compared to nonemployee cases, where the nonemployee is a trespasser. Id. at 162 (citing Eastex, Inc. v. NLRB, 437 U.S. 556, 571 (1978)).
103. Seamprufe, 109 N.L.R.B. at 32.
105. Ranco, 109 N.L.R.B. at 1006.
applied a *Le Tourneau-Republic* type of analysis. In *Seamprufe*, the trial examiner wrote that “[t]o differentiate between employees soliciting on behalf of the Union and nonemployee union solicitors would be a differentiation not only without substance but in clear defiance of the rationale given by the Board and the courts for permitting solicitation.”

The distinction of substance, so clear to the Court in *Babcock*, was not so evident to the Sixth Circuit in *Ranco* when it affirmed the Board’s order. In *Ranco*, the Sixth Circuit specifically approved the Board’s application of *Le Tourneau-Republic* principles to the nonemployee organizer.

The lack of explanation regarding the distinction of substance issue weakens the Supreme Court’s conclusions in *Babcock*. In a matter of such importance, it was incumbent upon the Court to better explain the difference which moved it away from applying a *Republic Aviation* test to nonemployees. Application of the *Republic Aviation* test to nonemployee organizers would still allow employers to prevent their entry upon a showing of the need to maintain discipline or production. The Court, however, elected to find a distinction and placed a heavy burden on nonemployee organizers attempting to gain access.

By calling the distinction between employee and nonemployee organizers one of “substance,” the Supreme Court manufactured an opportunity to establish a new test for nonemployee organizers. The Court in *Babcock*, as in *Republic Aviation*, continued to compare employees’ rights against employers’ rights. The test after *Babcock*, however, was more strict and measured the employees’ Section 7 rights, not against a management right, but the employers’ property rights. No longer was the legally cognizable interest of the employer the need to maintain production and discipline, but rather, the interest was a much broader property right.

Neither the *Babcock* Court in its decision, nor any of the parties in their briefs, defined the term “property rights.” An inference can

107. See *Ranco*, 222 F.2d at 543.
108. Id.
110. Id. at 112.
be drawn from Babcock that the Court was referring to some form of common law property rights. Although the Court identified only one attribute of these rights, it specifically mentioned the “right to exclude from property” and “access to company property” in its decision.\(^\text{112}\) However, by seemingly equating property rights with only the right to exclude, the Court placed an improper emphasis and accorded too much weight to employers’ interests in nonemployee access cases. Property rights involve many other factors.\(^\text{113}\)

Professor Summers notes that the property right described in Babcock was not the right of personal use to obtain individual expression or fulfillment, but rather the right of exclusive control over physical space. He refers to it as the “primitive right to exclude.”\(^\text{114}\) Nevertheless, as Summers observes, the Act already protected the employer’s right to use his property by protecting production and discipline.\(^\text{115}\) The Act did not give the employer the further property right to exclude nonemployee organizers. Accordingly, the right affected in Babcock, in Summers’ judgment, had no purpose but to control the rights of others.\(^\text{116}\)

Another commentator explains that property rights are all of the common-law rights traditionally associated with the ownership of real property, including the right to exclude trespassers.\(^\text{117}\) These are different from the management rights identified in Republic Aviation. The commentator notes that management rights embrace only the employer’s interest in maintaining the efficiency of the business and asserts that the Court in Babcock erred by equating the term “property rights” with only the right to exclude.\(^\text{118}\) Property rights consist of other attributes as well, including the right to regulate the activity on the land.\(^\text{119}\) Congress already diminished this right when it enacted the NLRA. Furthermore, the Act itself and the Supreme Court’s decision in Republic Aviation allow employees to engage in activities of which the employer might not approve, for example, engaging in

\(^{112}\) Babcock, 351 U.S. at 112-13.
\(^{113}\) See infra text accompanying notes 213-15.
\(^{115}\) Id.
\(^{116}\) Id.
\(^{118}\) Id.
\(^{119}\) See infra text accompanying notes 213-15.
union activity during nonworking hours.\textsuperscript{120}

As the Court implied in Babcock, property rights include much more than only a right to exclude. Past legislative and judicial actions have mitigated the importance of property rights. Thus, in failing to consider the diminished value of property rights, the Court improperly weighed the competing interests involved under the Act.

In Babcock, the Supreme Court placed too much significance on an employer's property right and simultaneously undervalued the employees' rights. The Court in Babcock held that an extension of employees' Section 7 right to self-organization did not apply to nonemployee organizers, and nonemployee rights were limited to providing employees with an ability to "learn the advantages" of self-organization.\textsuperscript{121}

In effect, the Court in Babcock increased the strength of the employers' position by substituting property rights for management rights, and decreased the value of the employees' status by diminishing the weight accorded the nonemployees' right to communicate with employees. This holding created a more difficult standard for nonemployee organizers to surmount when seeking access to an employer's property.

Another weakness of the Babcock decision is the difficulty of applying its rules to the workplace. Even a cursory review of the opinion discloses a lack of the clarity and certainty found in the Republic Aviation test for employee organizers.\textsuperscript{122} While the latter test applies a basic "work time" standard, Babcock uses vague and cloudy language such as "reasonable efforts by the union," "accommodation" and "other available channels of communication" to distinguish cases on a factual basis.\textsuperscript{123} Even simple clarification of what the Court meant when it used the term "communication" is missing in Babcock. Was "communication" the right to hand a leaflet to an individual in a passing automobile, the right to display an organizing sign, or the right to meet and discuss the issues of unionization personally with employees? While the Court in Babcock pronounced that the rule in Republic Aviation did not apply to nonemployee organizers, and that the difference between employees and nonemployees was

\textsuperscript{120} See Gresham, supra note 117, at 164.
\textsuperscript{121} Babcock, 351 U.S. at 113.
\textsuperscript{122} See Republic Aviation Corp. v. NLRB, 324 U.S. 793, 805 (holding that an employer prohibiting union organization during an employee's "own time" violated Section 8(3) of the Act because such a prohibition discourages membership in labor organizations).
\textsuperscript{123} Babcock, 351 U.S. at 112.
a "distinction of substance," this case created more questions than it answered.

Thus Babcock is an illustration of the confusion created by a Court which fails to issue a clear and easily understood policy. The Babcock Court acknowledged the responsibility of the NLRB to apply the NLRA to "the infinite combinations of events" arising under its umbrella. After finding this, however, the Court then rejected the Board's interpretation and application of the rules in nonemployee access cases, even though it noted it was "... slow to overturn an administrative decision." Unfortunately, the Supreme Court failed to deliver a clear, easily understood alternative to the Board's decisions in its decision in Babcock.

However, the weakness in Babcock caused by a lack of well-defined rules does not suggest that achieving clarity and certainty is a goal worth attaining at all costs. The Lechmere decision, interpreting Babcock, all but denies access to an employer's property by non-employee organizers. Lechmere, while establishing a more concrete rule, fails to give proper consideration to the rights of labor. After Lechmere, employers' property rights have practically extinguished the power of nonemployees to enter upon company property for the purpose of labor organization.

Any final rule promulgated by the legislature or the courts must consider the proper allocation and balance between the competing interests of management and labor. The NLRA grants specific rights to labor and also allows employers to retain important managerial rights. However, the need for precise rules is one significant factor requiring consideration when establishing a fair and workable policy in this area. The enactment of a rule which can be easily understood and applied by employers, employees and unions is the proper goal for the courts and the legislature to strive for. Uncertainty only breeds litigation, delay and unfairness.

124. Id. at 113.
125. Id. at 111-12.
126. Babcock, 351 U.S. at 112.
3. FAIRMONT HOTEL CO.\textsuperscript{128} — JEAN COUNTRY\textsuperscript{129}

While \textit{Babcock} remains the basic black-letter law today, numerous decisions by the NLRB and lower courts have attempted to give some definition and form to the murkiness found in \textit{Babcock}. The decisions promulgated by the Board and the courts prior to \textit{Lechmere} were often inconsistent and difficult to apply in everyday labor-management confrontations. Furthermore, the Board often found it difficult to have their decisions enforced by the appellate courts.

Inevitably, cases decided by the Board and the lower courts involved fact patterns which included many different types of circumstances. Situations best suited for a finding of nonemployee access to an employer's property, under the \textit{Babcock} rationale, may have involved circumstances where the employer's location was in a remote area and the employees lived on the employer's premises. Yet, even these decisions did not consistently allow for a finding of allowing organizer access.\textsuperscript{130} Other cases involved a variety of fact patterns including those where the employer's location was in a “big city” or a “small town”,\textsuperscript{131} matters involving access to employer-owned park-

\textsuperscript{128} 282 N.L.R.B. 139 (1986).
\textsuperscript{129} 291 N.L.R.B. 11 (1988).
\textsuperscript{130} Compare, e.g., S & H Grossinger's Inc., 156 N.L.R.B. 233 (1965), order modified and enforced, 372 F.2d 26 (2d Cir. 1967) with Kutsher's Hotel & Country Club, Inc., 175 N.L.R.B. 1114 (1969), enforcement denied, 427 F.2d 200 (2d Cir. 1970); see also NLRB v. New Pines, 81 L.R.R.M. (BNA) 2423 (2d Cir. 1972). In Grossinger's, the Board allowed union access to a resort hotel located in a remote area of New York because the organizers had no alternative means of communication with the employees, most of whom lived on the employer's premises. Grossinger's, 156 N.L.R.B. at 247-50, 261-62. The Second Circuit affirmed the Board's order allowing entry. Grossinger's, 372 F.2d at 30. In Kutsher's, however, the Second Circuit denied enforcement of a Board order allowing entry by nonemployee organizers. Kutsher's, 427 F.2d at 200. Although the employer in Kutsher's was also an owner of a resort hotel located in a remote area of New York, the court used the fact that the employees (who also lived on the employer's premises) had to cross a public highway on their way to the main area of the resort where they performed their work to conclude that nonemployee organizers could approach employees on their way to and from work and, therefore, alternative means of communication existed. Id. at 201.

It would appear to the casual observer that the difference between the facts in Grossinger's and Kutsher's is a distinction of no substance. In New Pines, the Second Circuit refused enforcement of a Board order because in its opinion the union did not make reasonable efforts to communicate with the employees. New Pines, 81 L.R.R.M. at 2424. The court described the union's efforts as “lackadasical.” Id.

131. In these cases, the Board attempted to distinguish between situations where the location of the employer inhibited efforts to organize, finding that organizing a small town employer allowed easier access by a union organizer to the employees, while large cities presented access problems because the employees lived in a much larger area, making access to
ing lots surrounding retail stores and shopping centers; and situations where employers operated tug boats on the Mississippi River.

The application of the Babcock rule has also affected other areas of labor activity such as economic strike actions, product boycotts, and area standards picketing. In these matters the Board has applied a comparison of rights criteria similar to that found in Babcock.

them off the employer's premises more difficult and costly. See, e.g., Solo Cup Co. Calumet, 172 N.L.R.B. 1110 (1968), rev'd and remanded, 422 F.2d 1149 (7th Cir. 1970); Monogram Models, Inc., 192 N.L.R.B. 705 (1971). In Monogram, however, the Board refused to apply a "big city-small town" distinction when analyzing cases under the Babcock test. Although the Board conceded that unions may find it more expensive or less convenient to use means of communication such as mail, telephones or home visits in a large city, it found that these factors were not dispositive of the issue of nonemployee access under Babcock. Monogram, 192 N.L.R.B. at 706. The Board indicated that "the test established [under Babcock] was not one of relative convenience, but rather whether 'the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable efforts to communicate with them . . . .'" Id.

132. See, e.g., Hudgens v. NLRB, 424 U.S. 507 (1976); Hutzler Bros., 241 N.L.R.B. 914 (1979), enforcement denied, 630 F.2d 1012 (4th Cir. 1980); Lee Wards, 199 N.L.R.B. 543 (1972). In Lee Wards, the Board denied access by nonemployee organizers to the company's parking lot surrounding its retail store, finding that reasonable means existed by which the union could communicate with the employees by copying down license plate numbers of employees who drove to work. Lee Wards, 199 N.L.R.B. at 545. In Hutzler, the Board held that the employer violated the Act, indicating that it was unreasonable for the union to use means of communication such as television, radio, newspapers, billboards, obtaining license plate numbers from employees' automobiles, telephone contacts, personal visits to employees' homes and handbilling at the entrance to the parking lot to reach employees. Hutzler, 241 N.L.R.B. at 915-18. Interestingly, the Fourth Circuit in Hutzler did not find sufficient evidence to support the Board's ruling allowing nonemployee access and refused to enforce the order, thereby complicating the issue even more. Hutzler Bros. Co., 630 F.2d at 1013.

133. In G.W. Gladders Towing Co., 287 N.L.R.B. 186 (1987), and SCNO Barge Lines, Inc., 287 N.L.R.B. 169 (1987), enforced sub nom. National Maritime Union v. NLRB, 687 F.2d 767 (2d Cir. 1989), the Board applied its Fairmont Hotel test and engaged in a balancing of employer and employee rights as well as looking at the availability of alternative means of communication to decide whether nonemployees should be granted access to an employer's property. See Fairmont Hotel Co., 282 N.L.R.B. 139 (1986). In both cases, the fact patterns were similar in that the union sought access to employers who owned tug boats plying the Mississippi River. In Gladders, the Board allowed access after concluding that no other meaningful means of communication were available. Gladders, 287 N.L.R.B. at 186. In SCNO Barge, however, the Board held that alternative means of communication were available since the employer provided the union with the names and addresses of the employees. SCNO Barge, 287 N.L.R.B. at 171-72. In SCNO Barge, the fact that the employees resided in 12 different states, from Michigan to Texas, did not alter the Board's conclusion that the union could communicate with the employees. Id.

The Board, recognizing the difficulty of applying the mandate of the Babcock test and the need to obtain more consistent results, sought to establish a better defined balancing standard in Fairmont Hotel.\footnote{282 N.L.R.B. 139 (1986).} Having had much difficulty in applying the Fairmont Hotel standards, the Board modified its test and further refined its rule in Jean Country two years later.\footnote{291 N.L.R.B. 11 (1988).} In these two cases, the Board at-

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3 Having had much difficulty in applying the Fairmont Hotel standards, the Board modified its test and further refined its rule in Jean Country two years later.

135. 282 N.L.R.B. 139 (1986). Fairmont Hotel involved area standards activity rather than the typical case of organizational activity. The Board, however, used it as a vehicle to establish a balancing test under the Babcock criteria, establishing the rule that when applying a balancing test to determine whether to allow nonemployee access to an employer's property, the first step was to evaluate the relative strengths of each parties' claims. Id. at 142. If it was found that the property owner's claim was a strong one while the Section 7 right was clearly less compelling, then the Board could properly conclude that an employer's property right prevailed. The reverse was also true. It was only in those cases where the respective claims were of relatively equal strength that it was necessary to determine whether the union had alternative means of communication. Id.

The Fairmont test, although relatively straightforward, had many weaknesses. It was based on vague concepts of "strong" and "relatively weak" claims of property rights versus Section 7 rights. Factors considered included the nature and purpose of the right asserted, the employer involved, and even the manner used in asserting the right. Id. These criteria were very subjective and led to different conclusions. Furthermore, under the test, not all Section 7 rights were equal and an evaluation of the type of right involved required a separate analysis in each case. Id.; see also Diane Avery, Federal Labor Rights and Access to Private Property: The NLRB and the Right to Exclude, 11 INDUS. REL. J. 145, 168 (1989) (noting that "virtually all" of the federal labor decisions issued by the Board in 1987 contained footnoting explaining the individual Board member's view of the rights involved).

136. 291 N.L.R.B. 11 (1988). Jean Country involved organizational activity in a large, privately owned shopping center. In Jean Country, although the Board continued to apply a balancing test of employee organizing rights against employer property rights, it held that an evaluation of the availability of reasonable alternative means of communication was a factor that must be considered in every case, and not only in those situations where the opposing rights of the parties were equal in weight. Id.

The Board in Jean Country found that, under its balancing test, the General Counsel had the initial burden on the alternative means factor, i.e., that the Counsel had to establish that without access to the property, those seeking to exercise the right in question had no reasonable means of communicating with the audience that exercise of that right entailed. Id. It added that only in exceptional cases would the use of newspapers, radio or television have substituted for direct contact. Id. In this decision, the Board identified factors that were relevant in evaluating the respective strengths of an employer's property rights, an employee's Section 7 rights, and an organizer's alternative means of communication. As to property rights, the Board indicated the following factors were significant: the use to which the property was put, restrictions imposed on public access to the property and the property's relative size and openness. Id. Section 7 factors deemed significant included: the nature of the right, the identity of the employer to which the right was directly related, the relationship of the employer or other target to the property of which access was sought, the identity of the audience to which the communication concerning the Section 7 right was directed, and the manner in which the activity related to that right was carried out. Id. Factors of relevance when evaluating the alternative means of communication included: the desirability of avoiding the enmeshment of neutrals in labor disputes, the safety of attempting communications at
tempted to apply a balancing test involving the weighing and evaluating of an employer's property rights against an employee's Section 7 right and, additionally, the Board undertook an analysis of the alternate means of communication available to the union in each particular situation. Notwithstanding these two cases, however, the problem of applying the rule of Babcock to situations where nonemployees sought access to an employer's property continued to exist.

The lack of a clear rule inured to the detriment of employer and employee alike. Union representatives were often threatened with trespassing charges and arrest by local law enforcement officials summoned by employers. Often the legal right to enter an employer's property, even when granted, came only after years of legal action before the Board and the courts. After such delays the right to access was often of no value.

Neither did the uncertainty of the rule benefit employers, who often had to request assistance from local law enforcement officials to remove the nonemployee "trespassers" from their premises. The threat of public disorder and harm to the community was often present. Employers also had the financial burden of meeting the cost of legal expenses in these actions.

alternative public sites, the burden and expense of nontrespassory communication alternatives and the extent to which exclusive use of the nontrespassory alternatives diluted the effectiveness of the message. Id.

Although the Board in Jean Country attempted to clarify and refine the rules it first enumerated in Fairmont Hotel, Jean Country was also susceptible to many of the same weaknesses as the Fairmont Hotel test. That is, the "test" promulgated in Jean Country continued to produce inconsistent results and was difficult to apply in practice.


138. See Recent Developments, supra note 137, at 1413-14.


140. See Avery, supra note 135, at 161-68 (detailing the lengthy delays of processing cases when the issue involved a denial of access to nonemployee organizers, and noting that a delay in the organizing drives caused them to lose momentum and fail).
In an effort to dissipate the confusion created by its earlier decision, the Supreme Court recently attempted to explain Babcock in Lechmere. The Lechmere opinion reduced the degree of uncertainty in the law by markedly limiting nonemployee organizer access to an employer's property. It has, however, raised many more serious questions as to the extent of the right of self-organization afforded employees.

In Lechmere, the employer at issue operated retail stores and owned a parking lot adjacent to its store which was surrounded by public highways. Union representatives entered the parking lot and attempted to organize Lechmere's employees using several tactics, including, inter alia, distributing literature to employees in their automobiles as they entered and exited the parking lot and displaying signs advertising the organizational effort. The employer objected to the union's organizational efforts on the grounds that the union officials were trespassing on privately owned company property. Accordingly, the union then filed an unfair labor practice charge against Lechmere. In the initial case, the Board found that the employer had violated the Act, and ordered access to the property. The First Circuit Court of Appeals affirmed the Board's ruling.

The Supreme Court issued a 6-3 ruling on January 27, 1992, reversing the decisions of the Board and the First Circuit. In the majority opinion, drafted by Justice Thomas, the Court reaffirmed its earlier decision in Babcock and provided a very narrow and conservative reading of that rule. It essentially banned nonemployee organizers from entering upon an employer's property, except in a few limited situations. The majority opinion affirmed the finding in Babcock that the NLRA confers rights only on employees, although in Lechmere the Court acknowledged that the right of self-organization depends in some measure on the employees' "ability to learn the

142. Id. at 530.
143. Id.
144. Id.
146. Lechmere, Inc. v. NLRB, 914 F.2d 313 (1st Cir. 1990); see also Recent Developments, supra note 137.
148. Id. at 533.
advantages of self-organization from others."\textsuperscript{149} As was the case in Babcock, the Lechmere Court also failed to identify the reasons why the difference between employee organizers and nonemployees was a "distinction of substance."

Noting that nonemployee organizers have only derivative rights under Section 7 of the Act, the Court in Lechmere indicated that, as a rule, these individuals cannot compel an employer to allow them to distribute union literature on his property.\textsuperscript{150} The Court explicitly found an exception to that rule in circumstances where "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, [then] the employer's property rights may be 'required to yield to the extent needed to permit communication of information on the right to organize."\textsuperscript{151} The Court indicated that its prior rulings on the matter supported this interpretation.\textsuperscript{152}

Turning its attention to the Board's ruling in Jean Country, the Supreme Court concluded that Jean Country was not consistent with its past decisions.\textsuperscript{153} The Court noted that Jean Country required, in every nonemployee access case, a process of balancing employee rights under Section 7 with an employer's property rights, and an examination of the alternate means of communication available to the
union. The Court ultimately found this to be an incorrect application of the Babcock rule, noting that Babcock did not protect nonemployee union organizers except in the rare cases where the inaccessibility of employees made it unreasonable for the unions to communicate with them through other channels. Because of this fact, according to the Court, a balancing of property rights and Section 7 rights in all cases as required by Jean Country, was incorrect. Instead, the Court ruled, if union organizers had reasonable access to employees outside an employer's property, then the necessary accommodation occurred and any further analysis was inappropriate.

The majority opinion in Lechmere places a significant burden on a union wanting to gain access to an employer’s premises. It mandates that the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists. According to the Court in Lechmere, the exception to the Babcock rule of nonaccess is a “narrow one” and does not apply “wherever nontrespassory access to employees may be cumbersome or less-than-ideally effective.” Rather, the Court notes that the burden upon the union to show nonaccess is a “heavy one,” and adds a further presumption that an employee is not beyond the reach of a union’s efforts to communicate if he does not reside on the employer’s property. As if to emphasize the rarity of the situations that fit into the exception, the Court provided examples of circumstances that might allow nonemployee access to an employer’s property: logging camps, mining camps, and mountain resort hotels. While Lechmere does provide some guidance as to the types of available communication a union may utilize that would be sufficient to get its message across, it also allows an employer to deny access to his property to nonemployee organizers. The limited exception of allowing access, according to the Court, does protect the rights of employees in those instances where they would be “isolated from the ordinary flow of information that characterizes our society.”

154. Id.
155. Id.
156. Id.
157. Id. at 537.
158. Id.
159. Id. (quoting Sears, 436 U.S. at 205).
160. Id.
161. Id.
ever, the Court held that direct contact with employees is not necessary, and that other means of communication, such as the use of signs or advertising, might suffice to convey an organizational message to employees. Thus, the critical point in the inquiry under *Lechmere* is whether the employees are “informed” of the union’s efforts.

Justices White and Stevens filed dissenting opinions in *Lechmere*. Both noted several grounds for disagreement. They opined that even under the *Babcock* decision, perhaps reasons other than inaccessibility might justify granting nonemployee access.

162. *Lechmere*, 502 U.S. at 540. In *Lechmere*, the Court indicated that access to employees was the critical issue, rather than success in winning their support. *Id.* It inferred that mere employee awareness of an ongoing organizational effort can meet the requirement for communication. *Id.* In discussing the facts of the case, the Court in *Lechmere* found that: “[t]hus, signs (displayed, for example, from the public grassy strip adjoining Lechmere’s parking lot) would have informed the employees about the union’s organizational efforts.” *Id.*

Query: Is the Court equating communication with only being “informed” of the union’s efforts?

163. *Id.*

164. *Id.* at 539-43 (White, J., dissenting). In his dissenting opinion in *Lechmere*, Justice White wrote that the Court should uphold a Board rule if the decision is rational and consistent with the NLRA, and he stated four reasons for his dissent. *Id.* at 541. First, he questioned whether a broader interpretation might apply to the issue of nonemployee access. Justice White wrote that although *Babcock* did provide that inaccessibility was one reason for nonemployee access, this does not preclude other circumstances that would warrant such access. *Id.* at 542. He further reasoned that even if one chose to conclude that only inaccessibility could be a reason for allowing access by nonemployees, *Babcock* did not limit the restriction as narrowly as the Court did in *Lechmere* by confining those situations to logging camps or similar remote locations. *Id.* at 543. Justice White also took issue with the majority’s finding that mere notice of organizational activity was sufficient to meet the requirement of *Babcock*; he believed that actual communication with nonemployee organizers was essential to vindicate employee rights under Section 7. *Id.* Second, Justice White argued that subsequent decisions of the Court modified *Babcock*. He specifically cited *Hudgens*, which provided that the Board apply a balancing of rights procedure. *Id.* at 543-44. His third point of contention with the majority opinion was in the area of the concept of deferral to decisions by an administrative agency. He argued that *Babcock* may have been improperly decided, since the Court in that case not only announced the standard, but then applied the rule to the specific facts of the case rather than remanding it to the NLRB for further review. *Id.* at 545-46. Finally, Justice White indicated that in the *Lechmere* case itself the majority should have remanded the case to the Board for further review. *Id.* at 546.

The depth of Justice White’s disagreement with the majority opinion is evident from one of his closing statements:

Under the law that governs today, it is *Babcock* that rests on questionable legal foundations. The Board’s decision in *Jean Country*, by contrast, is both rational and consistent with the governing statute. The Court should defer to the Board, rather than resurrecting and extending the reach of a decision which embodies principles which the law has long since passed by.

*Id.* at 548. Justice Stevens concurred with the first two reasons stated in Justice White’s dissent. *Id.*
5. POST-LECHMERE DECISIONS

The courts and the Board have issued several decisions since Lechmere. The impact of Lechmere, however, is evident in the rulings issued by these lower judicial and administrative bodies. In Sparks Nugget, Inc., where the Board had initially applied a Jean Country analysis, the Ninth Circuit Court of Appeals refused to enforce an order allowing nonemployee access to an employer’s property.\textsuperscript{165} Thus, the narrow rule of Lechmere was adopted by the Ninth Circuit in Sparks Nugget, which held:

The only analysis we are allowed to make, under Lechmere, is to determine whether “nonemployee union organizers have reasonable access to employees outside an employer’s property.” However, this “exception to Babcock’s rule is a narrow one.” It only applies where “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.”\textsuperscript{166}

The reach of Lechmere is also reflected in administrative decisions issued after the Supreme Court’s decision. In Pepsi-Cola Co.,\textsuperscript{167} the Board gave the NLRB General Counsel an opportunity to relitigate the issue of nonemployee organizer access to employer property.\textsuperscript{168} Pepsi-Cola involved an employer’s property which was located rurally and bordered by two freeways. The General Counsel conceded that, after the Lechmere ruling, it could not argue that the employees were so isolated as to be beyond the reach of reasonable union efforts to communicate with them.\textsuperscript{169}

Subsequent to the Lechmere decision, the Board has looked at other related issues when deciding nonemployee access cases. On remand from the Supreme Court, the Board in the Lechmere matter found again that the employer had committed an unfair labor prac-

\textsuperscript{165} See Sparks Nugget, Inc. v. NLRB, 968 F.2d 991 (9th Cir. 1992), denying enforcement in pertinent part to Sparks Nugget, Inc., 298 N.L.R.B. 524 (1990).
\textsuperscript{166} 968 F.2d at 997 (quoting Lechmere, 502 U.S. at 539) (citations omitted).
\textsuperscript{167} 307 N.L.R.B. 1378 (1992).
\textsuperscript{168} Id. at 1378 & n.2. An administrative law judge decided the Pepsi-Cola case prior to Lechmere. Thus, on remand the Board reviewed the matter and issued a Notice to Show Cause to the General Counsel, asking it to consider the issue of nonemployee access in light of the Supreme Court’s decision in Lechmere. The General Counsel withdrew its complaint on the issue. Id.
\textsuperscript{169} Id. at 1378 n.2.
The Board concluded that the Supreme Court's ruling in *Lechmere* only affected the issue of nonemployee access to an employer's property. The specific facts of *Lechmere* allowed the Board to find that the employer had also attempted to remove the organizers from property that the employer did not control, i.e., the public property surrounding the employer's parking lot; therefore, the Board concluded, a violation of Section 8(a)(1) of the Act had occurred.

In *Bristol Farms, Inc.*, and *Pay Less Drug Stores Northwest, Inc.*, the Board performed a close examination of the extent of an employer's property rights, holding that the employers in question had committed unfair labor practices by restricting nonemployee union agents from picketing and handbilling on sidewalks in front of stores leased by the employers. Both of the stores were located in a strip shopping center in California. The Board looked to the property rights that the employers enjoyed under state law, and found in *Bristol Farms* that "[u]nder California law, neither a shopping center nor its individual tenant-retailers have a right to prohibit individuals from handbilling or picketing on the shopping center premises [. Picketing was also prohibited] in front of individual stores in the shopping center, even though the shopping center [was] privately owned." Therefore, the Board concluded, the employers did not have a valid property interest defense in either case; the union agents did not interfere with any property right of the employers; and the employers had committed unfair labor practices by threatening to have the agents arrested.

While *Lechmere* affected the access rights of nonemployee organizers to an employer's property, it did not alter the provision that employers cannot discriminate on the basis of union activity. The Board has continued to enforce this rule. In *Davis Supermarkets*,

171. *Id*.
172. *Id*.
177. *Id* at 441; *see also Pay Less Drug Stores*, 311 N.L.R.B. at 679.
179. *See*, e.g., *Pay Less Drug Stores*, 312 N.L.R.B. 972 (1993) (holding that an employer which allowed nonorganizing groups to use its public sidewalk but asked organizing groups to leave violated Section 8(a)(1) of the NLRA, which prohibits employer discrimination.
the Board ruled that "[a]lthough the Supreme Court in
Lechmere v. NLRB rejected the Board's holding in Jean Country, the
Lechmere decision does not disturb the Court's statement in NLRB v.
Babcock & Wilcox that 'an employer may validly post his property . . . if [it] does not discriminate against the union by allowing
other distribution.'"

In another area of interest, the Board has also allowed union
access to company property in circumstances where a labor organiza-
tion has already been recognized as a bargaining
agent, noting
that the rules expressed by the Supreme Court in Babcock and
Lechmere may have application to these types of situations and aid in
determining whether access to the property is appropriate.

6. SUMMARY OF JUDICIAL AND ADMINISTRATIVE RULINGS

The foregoing summary review of the law does more than pro-vide the ground rules that apply to the union organizing aspect of la-bor-management activity. In 1935, Congress granted employees a right
to self-organization. Although the limits of this right were not de-
defined, the general intent of Congress was clear and bold for its
time.

Throughout the intervening years, the courts and the NLRB
have provided guidance to labor and management regarding the pa-
rameters of this area.

In the realm of activity by employees, the Board and the Su-
preme Court acted quickly and decisively in establishing a simple
rule. In Republic Aviation, the Supreme Court held, very simply, that
"working time is for work." Thus, an employee is free to engage
in organizing activity when not on "working time." While some mod-
ifications of this rule have evolved over the years, it enjoys the vir-
tues of simplicity and ease of application.

Conversely, the standards applicable to nonemployee situations
have lacked clarity and simplicity. From the Board's first efforts at
applying employee organizer rules to nonemployees, to the Babcock

against organizing activity); New Jersey Bell Tel., 308 N.L.R.B. 277 (1992).
180. 306 N.L.R.B. 426 (1992), aff'd, remanded on other grounds, 2 F.3d 1162 (D.C. Cir.
1993).
181. Id. at 426 (citations omitted).
182. See, e.g., Brown Shoe Co., 312 N.L.R.B. 285 (1993); CDK Contracting Co., 308
183. Brown Shoe, 312 N.L.R.B. at 285 n.3.
184. See supra text accompanying notes 28-34.
185. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 n.10 (1945) (quoting Peyton
Packing Co., 49 N.L.R.B. 828, 843-44 (1943)).
Union Organizing After Lechmere, Inc.

decision which delineated a distinction of substance between employees and nonemployees, this area of activity has encountered a quagmire of conflicting rules and interpretations. These conflicts and shifting policy concerns are magnified in subsequent Board and court rulings.

The most recent decision of Lechmere, while ostensibly affirming the Babcock test and perhaps minimizing the diversity of rulings by the Board and courts, has had perhaps a more severe impact on the labor movement then the uncertainty of Babcock itself. The Court has held that requiring nonemployee access to an employer's property occurs only in rare situations.\(^{186}\) One could infer from the Court's opinion that mere notice of an attempted organizing campaign constitutes adequate communication to employees.\(^{187}\) Now, only some miners, loggers and employees in remote mountain resort hotels will have the opportunity to fully exercise their Section 7 rights.

The majority of Justices in Lechmere have done more than offer their view of Babcock. They have misinterpreted the rule found in Babcock and other decisions, and, in the process, may have delivered a death blow to the American labor movement.

IV. PROPOSALS FOR LEGISLATIVE AND JUDICIAL CHANGES

A. AN OVERVIEW

By enacting the NLRA, Congress guaranteed to the American worker the right of self-organization. While employees have a naked right, they do not have the means and information to make the privilege meaningful. Nonemployee organizers are in a position to provide accurate and useful information concerning the right to self-organization. These individuals have the specific knowledge and resources to supply employees with real information on the subject of unionization.

The Supreme Court, first in Babcock, and more significantly in Lechmere, effectively closed the door to employees seeking to obtain information about their rights from union organizers. Nonemployee organizers can now enter upon an employer's property to deliver their message only in rare situations.

\(^{186}\) Lechmere, 502 U.S. at 535.
\(^{187}\) Id. at 540.
Preserving the guarantees of the NLRA for future generations of American workers requires the implementation of changes to the present scheme. To be meaningful, any modifications must correct the underlying problems that presently exist. The law, as defined in *Lechmere* and *Babcock*, is based on policy positions and philosophies that are suspect and outdated. Before offering any concrete proposals for change, a review of some important policy considerations is necessary.

At least six areas merit analysis. The most significant issues for review relate to the Court's concept of a "distinction of substance," and the importance and value that an employer's property rights deserve in deciding the question of access for nonemployee organizers. Other issues requiring evaluation include: an examination of the type, degree and form of communication that employees should receive; the necessity of a simple, consistent and straightforward rule in this area; the need for industrial democracy in the workplace; and a review of the Fifth Amendment's prohibition against the taking of private property without just compensation.¹⁸⁸

B. POLICY CONSIDERATIONS

1. DISTINCTION OF SUBSTANCE

In *Babcock*, the Supreme Court held that a "distinction of substance" exists between employee and nonemployee organizers.¹⁸⁹ Under *Babcock*, separate standards apply to different situations. Consequently, any transformation of the present rules relating to organizing by nonemployees must change, or at least modify, this concept.

Section 7 of the NLRA explicitly gives specific rights to employees, but this section fails to include nonemployee organizers.¹⁹⁰ The problem occurs when the Court, as it did in *Lechmere*, concludes that nonemployee organizers have only derivative rights under the Act.¹⁹¹ Such labeling, although on the surface aimed only at nonemployees, in fact has an impact on and diminishes the rights granted to employees. The focal point in these cases should not center on the issue of whether the organizer is an employee or a

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¹⁸⁸. See U.S. CONST. amend. V.
¹⁹¹. See supra note 150 and accompanying text.
nonemployee, it should be on the rights of employees to obtain and receive information regarding self-organization.\textsuperscript{192}

Under the principles of agency, tort, and property law, it is generally accepted that employees are invitees of the employer.\textsuperscript{193} As invitees, employees have access to an employer’s property for the purpose of working.\textsuperscript{194} Nonemployee organizers have no such invitation. Their unwanted presence upon the property technically labels them as nothing more than trespassers. This conclusion, however, misses the point that the purpose of nonemployee organizers entering onto an employer’s property is not to derive benefits for themselves. The purpose of entry is to fulfill the guarantees of Section 7 and provide information to the employees targeted in an organizing drive.\textsuperscript{195}

If one accepts the proposition that the entry of nonemployee organizers upon an employer’s property is for the benefit of the employees, then it must follow that, for the purposes of the Act, there is no significant distinction between employee and nonemployee organizers. Decisions issued by the Board immediately after the Court decided \textit{Republic Aviation} tend to support this view.\textsuperscript{196} Nonemployee organizers were held by the Board to be merely supplying information to the employees who, under the Act, had a right to receive it.\textsuperscript{197} It was not until the Court rendered its bold yet unsupported statement in \textit{Babcock} that the “distinction of substance” became the prevalent concept of law in this area.

The Court in \textit{Babcock} admitted that the potency of the

\begin{flushright}
\textsuperscript{192} See Gresham, supra note 117, at 123.
\textsuperscript{194} Id.
\textsuperscript{195} Id. Korn suggests that the starting point of the inquiry begins with the rights of the employees rather than those of nonemployee organizers. Applying this approach makes it difficult to conclude that employees cannot receive information merely because it comes from an outside source. \textit{Id.}
\textsuperscript{197} Jay Gresham, Note, \textit{Still as Strangers: Nonemployee Union Organizers on Private Commercial Property}, 62 TEX. L. REV. 111, 117 (1983). The author notes that after the Court decided \textit{Republic Aviation}, it was not unreasonable to assume that the rule enunciated therein would also apply to nonemployees. The Board’s decision in \textit{Republic Aviation} indicated that an employer’s property rights did not permit him to deny access to his property to \textit{persons} whose presence was necessary to enable the employees to effectively exercise their rights to self-organization. \textit{Id.} The author also notes that the Board’s decision centered on the right of employees to receive information, therefore permitting access to nonemployee organizers. \textit{Id.}; see also Seamprufe, 109 N.L.R.B. at 24 (trial examiner found no distinction of substance between employee and nonemployee organizers).\
\end{flushright}
employees’ right of self-organization depends upon their ability to learn the advantages of unionization from others. When the emphasis in access cases is placed on the right of employees to obtain information, then the distinction between employee and nonemployee organizers falls away. Nonemployees, who can supply more detailed information on the subject of organization, merit access to an employer’s property for the purpose of educating the employees.

There is no significant reason for the Court in Babcock to have altered the test set forth in Republic Aviation. It should not have changed from a benchmark of an employer’s managerial rights to his property rights. The results sought in all organizational cases, employee or nonemployee, are identical, i.e., to provide information to employees. By keeping the focus on the end result, rather then on the common-law property status of the person providing the information, the issue of whether to allow access comes into focus.

Under the rule in Republic Aviation, employees in a plant can, on their own time, discuss organizational matters. With this in mind, under what theory should the employees be precluded from obtaining the best possible data on the subject merely because an outside source provides it? Receiving information and meaningfully communicating with others about the subject of self-organization allows them to fully exercise their rights under the Act. It is not sufficient that employees merely have some vague notice that an organizational campaign is underway.

The Court’s holding in Republic Aviation allows an employer to enforce production and discipline in the plant. This provision should, in some form, also apply to attempts made by nonemployees to organize. A method that protects an employer’s rights — while permitting employees to receive information from outside sources — must be developed. A direct application of the Republic Aviation rule to nonemployee organizer situations may disturb employers, whose interests in the security of the plant premises and the need to maintain production and discipline are certainly valid. However, the establishment of a standard that builds upon the framework of Republic Aviation and allows for management’s concerns would benefit all. Just as Republic Aviation set limits upon employees’ organizing activities, a similar rule, with reasonable limitations, could apply to

200. See id. at 803.
nonemployee organizers.

2. **PROPERTY RIGHTS AND INDIVIDUAL RIGHTS**

The use of employers' property rights as the benchmark against which to decide the question of access by nonemployee organizers has had a significant impact upon the current state of the law. Certainly the Supreme Court's assumption in *Lechmere* that the proper approach is to utilize a "property right" standard is subject to question.

When the Court first examined the issue of organizing activity in *Republic Aviation*, it weighed the managerial rights of an employer against the organizational rights of employees. In *Babcock*, after finding a "distinction of substance" between the rights of employees and nonemployees, the Court changed its focus and considered an employer's property rights rather than its right to "maintain production or discipline" in the workplace. The Court then gave heavy weight to those property rights. This modification placed an enormous burden upon unions attempting to organize employees.

The resulting hardship was magnified when the worth of the employees' right of self-organization was simultaneously diluted. Non-employee organizers, although seeking to advance the employees' Section 7 rights, were found by the Court in *Babcock* to have no direct right to organize, but assumed this privilege in only a derivative fashion.

After comparing both sides of the equation, the employees' rights, so greatly diminished, have little meaning. The *Lechmere* decision provides an excellent example of the elevation of property rights and the resulting simultaneous destruction of employees' right to organize under Section 7.

To preserve employee rights, the method of comparing the competing interests must be reassessed. Historically, property rights have had a very special status. A reevaluation of the policies regarding property rights is currently in order. An America entering the twenty-first century has moved in the direction of elevating the importance of individual rights rather than those established through common law "property rights." The Supreme Court's decision in *Babcock*, and

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201. See id. at 798.
203. Id. at 112.
204. See id. at 113.
more recently in \textit{Lechmere}, do not reflect these changes. Although the opinions in \textit{Republic Aviation}, \textit{Babcock}, and \textit{Lechmere} discuss an employer's "property right,"\textsuperscript{205} the Supreme Court failed to define the meaning of this term in these cases. In \textit{Babcock}, the Court only discussed one attribute of property rights, i.e., the right of a property owner to exclude unwanted individuals.\textsuperscript{206} These opinions merely discuss a generic "property right."\textsuperscript{207} This omission is significant. What are property rights? Is the right to own and use property a constant and unchanging principle? Are property rights as valuable and important in 1994 as they were in 1956, or even 1935?

In its recent \textit{Bristol Farms, Inc.}\textsuperscript{208} decision, the NLRB noted that the property rights the Supreme Court considered in \textit{Babcock} are those created by the specific states.\textsuperscript{209} Although such rights may be

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\textsuperscript{206} See \textit{Babcock}, 351 U.S. at 112-13.

\textsuperscript{207} See \textit{Lechmere}, 502 U.S. at 537-38; \textit{Babcock}, 351 U.S. at 112; \textit{Republic Aviation}, 324 U.S. at 803.

\textsuperscript{208} 311 N.L.R.B. 437 (1993).

\textsuperscript{209} Id. at 438. In \textit{Bristol Farms}, the Board cited \textit{Babcock}, noting that "[o]rganization rights are granted to workers by the same authority, the National Government, that preserves property rights." \textit{Id.} (citing \textit{Babcock}, 351 U.S. at 112). Furthermore, the Board implied that since the Court found that the federal government is only preserving property rights, these "rights" must be those granted by the states. \textit{Id.} (emphasis added).

The author takes issue with the Board's analysis in \textit{Bristol Farms}. The Board indicated that to determine the nature and extent of the property owner's interest, it must look to the law of the state. \textit{Id.} at 439. Yet, to support its argument the Board then used the Supreme Court's decision in \textit{PruneYard Shopping Ctr. v. Robins}, 447 U.S. 74 (1980). \textit{Id.} This analysis seems inconsistent and incomplete. Property rights may be initially defined by the states, but other factors — including federal action and, in this instance, the courts — refine the final property right. Although one may argue that the states "create" property rights, the determination of the nature and extent of those rights is a combination of many factors and values, and not just what one particular state may conclude.

Additionally, the Board in \textit{Bristol Farms} referred to three Supreme Court decisions to support its proposition that the states "create" property rights. \textit{Id.} at 438 (citing \textit{PruneYard Shopping Ctr. v. Robins}, 447 U.S. 74 (1980); \textit{Board of Regents v. Roth}, 408 U.S. 564 (1972); and NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956)). The Court citations quoted by the Board are vague and less than convincing.

For example, the Board notes that in \textit{Roth}, the Supreme Court indicates that "property interests . . . are created and their dimensions defined by rules and understandings that stem from an independent source \textit{such as state law}— rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." \textit{See Bristol Farms}, 311 N.L.R.B. at 438 (quoting \textit{Roth}, 408 U.S. at 577) (emphasis added). The author submits that this quote implies that factors other than state law define the dimensions of property rights. \textit{PruneYard}, the Board noted, contains a phrase which indicates that the states define property
“created” by the states, the measurement, valuation and definition of
the boundaries of property rights are much more complex then those
defined by any particular state. A property right is one derived not
only from state law, but also from federal actions and other activity
as well. Can it be argued, for example, that a property right is not
measured and its parameters defined, in part, by the impact of federal
statutes such as the Occupational Safety and Health Act,210 the
Americans with Disabilities Act211 or even the National Labor Rela-
tions Act212 itself? Federal judicial decisions, among various other
contributors, shape and define property rights. To merely conclude
that property rights are those created by the states is to oversimplify
the matter. Any property right, and the valuation of that right, is the
sum of many varied factors.

The classic concept of property right is not that it is a single
privilege, such as the right to exclude trespassers, but rather a “bun-
dle of rights.”213 An owner of property has a variety of interests in-
cluding the right to possession, enjoyment and disposal.214 Dean
Roscoe Pound identified six specific property interests: possession,
exclusion, disposition, use, enjoyment of the fruits and profits, and
the freedom to destroy or injure the property.215

A review of the history of property law clearly leads to the
conclusion that rights associated with it are not constant. Changes in
law and society affect an owner’s interest in his property. With the
impact of labor and social legislation, property rights are in fact less
important now than they were in the past.

During the late nineteenth century the courts, by resorting to
labor injunctions, vigorously defended employers’ property interests

214. Id. at 6-7.
against attempted union activity. Injunctions were frequently issued upon a showing of an actual or threatened invasion of an employer’s property interest, and became a very valuable tool in the employer’s arsenal to destroy union activity.

If one defines a property right as a bundle of interests encompassing the six factors identified by Dean Pound, then the decline of the almost unlimited power of an employer to exclude others from its property, in a labor relations context, occurred with the legislation enacted in the early years of this century. The Clayton Act of 1914, the Railway Labor Act of 1926, the Norris-LaGuardia Act of 1932, and the National Industrial Recovery Act all limited, to some degree, the authority an employer has over its property. These laws restricted the power of the owner to use his property and exclude others, imposed severe limits upon the use of injunctions in labor disputes, and enabled the right of self-organization to emerge. With the enactment of the National Labor Relations Act, the employer’s authority was further and significantly reduced. It could not exclude employees from company property if they engaged in protected concerted activity. Negotiated collective bargaining agreements limited a property owner’s use of the premises and enjoyment of its fruits and profits.

Republic Aviation further limited an employer’s authority in the “property” context. Although that case revolved around the concept of management rights, the Court’s final decision implicitly involved property rights. An employee was free to organize on his own time on company property. In effect, the employer’s use of its premises was further narrowed. Even Babcock, which restricted access to

217. Id.
224. See id.; see also Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945).
225. Republic Aviation, 324 U.S. at 798.
226. Id. at 805.
nonemployees, allowed for entry onto an employer’s private property in some situations.\textsuperscript{227} This again, although to a more limited extent, damaged the “bundle of rights” which an employer enjoys in its property.

Legislation enacted since the passage of the NLRA has also devalued an employer’s property rights. In 1938, Congress passed the Fair Labor Standards Act (“FLSA”),\textsuperscript{228} which limited an employer’s ability to employ child labor, established a minimum wage paid to employees, and restricted the number of hours that an employer could have an employee work without compensating that employee for overtime.\textsuperscript{229} To ensure compliance with these requirements, government officials have access to company property in order to inspect the establishment, gather data and records, and question employees.\textsuperscript{230} FLSA thus restricted an employer’s property rights by limiting its authority to exclude others from his premises.

One statute that has limited an employer’s property rights in the workplace like no other is the Occupational Safety and Health Act of 1970 (“OSHA”).\textsuperscript{231} OSHA restricts an employer’s authority over property where the possession of, exclusion from, use of and the power to destroy or injure its property is concerned. Congress passed OSHA to resolve problems of workplace safety and health.\textsuperscript{232} It is not necessary to delve into the substance of OSHA regulations other then to highlight the fact that to enforce the law, OSHA empowers compliance officers of the Department of Labor to enter upon an employer’s property to inspect and examine working conditions.\textsuperscript{233} If

\begin{itemize}
\item \textsuperscript{227} NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956).
\item \textsuperscript{230} See 29 U.S.C. § 211 (1988).
\item \textsuperscript{232} 29 U.S.C. § 651 (1988).
\item \textsuperscript{233} See id. § 657. This section provides, in part, that:
\begin{itemize}
\item (a) In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator or agent in charge, is authorized . . .
\item (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
\item (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein, and to question privately any such employer,
\end{itemize}
there is resistance by the employer, compliance officers may enter only after obtaining a search warrant. Under OSHA, compliance officers can inspect a workplace after presenting credentials to the owner, and the employer and his representative have the right to accompany the inspector on his rounds. A conference concludes the tour. Congress has made a conscious choice that the protection of the individual rights of the worker, i.e., their health and welfare, must take priority over the property rights of the owners. Although OSHA has been subject to much criticism, clearly it establishes a precedent. When Congress perceived a need to advance the rights and safety of workers, it promoted those interests over the property rights of employers.

Numerous other laws enacted since 1935 have limited the property rights of employers at the workplace. Some measures limit the employer's property rights by restricting its ability to exclude potential employees through the hiring process, thus constraining the employer's right to invite individuals on to or exclude them from its premises. Clearly, limiting the employer's power to hire affects an employer's property right since it impacts upon the decision of which individuals can enter and stay upon the premises.

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234. See Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). The Court in Marshall indicated the need for a warrant if the employer resisted. Id. at 312. In order to preserve the element of surprise, a court may issue a warrant ex parte. Id. at 316. By the end of 1978, the Secretary had to issue a search warrant in only 1% of more than 80,000 inspections it conducted. GREGORY & KATZ, supra note 216, at 626-28.


236. Id.


239. See Jay Gresham, Note, Still as Strangers: Nonemployee Union Organizers on Private Commercial Property, 62 TEX. L. REV. 111, 163 n.291 (1983). Gresham notes that in Eastex, Inc. v. NLRB, 437 U.S. 556 (1978), Justice Rehnquist's dissent opined that an employer had a property right to decide not only who could come on its property, but also the conditions under which an individual could stay on the property. Id.; see Easter, 437 U.S. at 580 (Rehnquist, J., dissenting).
The Immigration Reform and Control Act of 1986 is another example of a hiring law which restricts an employer’s property rights. Under it, an employer must execute and maintain an Employment Eligibility Verification Form for all of its employees. A requirement exists that all job applicants provide an employer with either a passport, or a birth certificate and driver’s license to confirm that they are either citizens or aliens authorized to work in the United States. Title VII of the Civil Rights Act of 1964 also limits the employer in the hiring process and in job actions if the employment decision relates to race, color, religion, sex or national origin. The recently enacted Americans with Disabilities Act of 1990 not only prohibits employment discrimination because of an employee’s disability, it affirmatively requires the employer to make reasonable accommodations in the workplace for an employee’s disability, including job restructuring and physically changing existing facilities.

Additional arguments support the proposition that an employer’s property rights do not deserve the value the Court has bestowed upon them. Many cases decided by the Board and the courts have included situations where employers excluded nonemployee organizers from the property while inviting the general public onto the premises. As an example, in Lechmere the employer denied union organizers access to a parking lot surrounding its retail store. If the same individuals carried the status of customers instead of organizers, the property owner would have welcomed them as invitees. Instead, their designation as organizers made them trespassers. A similar situation occurred.

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241. See id. at 3362-63.
242. See id. at 3361-62.
246. See id. § 12183.
247. See 3 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS 866-71 (1986). An individual (such as a customer) who enters upon the premises of another, at his invitation, is an “invitee.” A trespasser is one who enters onto another’s property without right, lawful authority, or express or implied invitation or license. Id. An invitee who exceeds the owner’s permission either by performing unwanted activities or entering a portion of the property restricted to him converts into the status of a trespasser and is subject to lawful removal. 4 id. at 106-14, 162-64.
in *Fairmont Hotel* when union organizers sought access to a public hotel. One must question the strength of an employer's claim to a property right in these cases, since the premises are open to the public. A lessening of the claim of the property right occurs, particularly as it relates to the interest of exclusion. For example, once the employer opens its property to the public, it cannot generally deny access because of race, sex or national origin. Why then is an employer permitted to exclude based on union organizing activity? In these circumstances, the rights of employees under Section 7 of the Act and public policy should override the employer's property rights.

Two elements of property rights, according to Dean Pound, are the freedom to use the property and to enjoy its fruits and profits. A legitimate concern of management may be that allowing non-employee organizers on the premises would deter customers, patrons or others from entering the property, resulting in a reduction in sales and profits. While the need to make sales and profits is a valid management concern, it cannot be used as a reason to totally deny access to nonemployee organizers.

Various constraints may hinder management’s maximization of profits earned and the number of patrons and business associates entering onto the premises. Local zoning laws, for example, often impede an employer’s use of his property. Requirements relating to maximum occupancy allowed in an establishment, location of businesses and size, and other construction demands all, in some manner, limit the potential uses of property and profits to the employer. Yet, there is common acceptance of these restrictions in our society.

Many other rules serve to limit business and reduce profits: alcohol and tobacco products cannot be sold to minors; taverns have mandatory closing hours; Sunday closing laws limit sales; traffic laws may preclude parking in front of establishments; fire prevention regulations limit selling floor space; prescription drugs can only be dispensed on orders from a doctor; and recently enacted firearms regulations (such as the Brady Handgun Violence Prevention Act) requires a five-day waiting period for the sale of handguns. The list is endless. A myriad of laws and regulations affect an employer’s freedom to control his property and business. Societal acceptance of

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these restrictions occurs, however, because policy concerns override the employer's interests in making a profit. Why should the right to self-organization receive less consideration? Public policy, in the guise of the NLRA, gives employees the specific right to self-organize.

Using an argument that nonemployee access reduces customer traffic and business profits is unfair. Some cause for alarm might exist if nonemployee organizers secured unlimited access to the property. The same results would follow, however, if patrons received an unlimited right of access to a business. Just as customers do not have unrestricted access to an employer's property, so too, an organizer's rights must have limitations. The solution is not to bar organizers altogether, as Lechmere implies, but to allow reasonable access. A rule similar to that in Republic Aviation, or a variation of it, would protect the employer's property interests and allow an employer to retain control of production and discipline in the workplace.

A reduction in the value of an employer's property rights has occurred since the passage of the NLRA and, particularly, since the Babcock decision in 1956. An employer's power to possess, exclude, use and enjoy the fruits and profits of its premises has diminished. The importance of property rights in the 1990's is not as great as in earlier years. The Court in Babcock, and again in Lechmere, erred in placing these rights on a pedestal that all but overshadowed the individual statutory rights of employees.

In contrast to the declining importance of employers' property rights is the increase in the value society has placed on an individual's rights in the workplace. Each of the legislative enactments previously discussed not only reduced the right of the employer to use his property as he wished, but also frequently allowed employees (and even job applicants) certain rights that they did not have earlier. It would serve no useful purpose for this article to delineate the specific rights granted by each legislative act. However, the trends cited clearly illustrate how employee rights have gained a much greater prominence in the workplace. Recently, the courts have tended to conclude that employees, even employees-at-will, acquire rights by working for a given employer. Thus, it is not only the employer who has a vested interest in the workplace.

Certainly it is easier to visualize an employer's interest in the

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253. See generally Klare, supra note 111, at 46.
254. See supra notes 218-46 and accompanying text.
255. See Weiler, supra note 23, at 48-104.
workplace. Evidence of its interest is visibly and physically apparent. Buildings, parking lots, machinery, tools, trucks and automobiles, desks, telephones and fax machines are all the trappings of an employer's property interest. The interests of the employee, however, are not quite so evident. The employee's contribution is found in his labor, loyalty, and hard work. The products produced, the sales made, the customers satisfied are not, in many cases, physically visible in the workplace; nonetheless, the employees' efforts created those products, made the sales or satisfied the customers.

An employee receives wages in compensation for work produced, but is this all that is merited? It is becoming more apparent that a mere cash disbursement is not all that is due to employees; certain additional rights and interests in their place of employment exist. A job has changed into much more than a means of income, it is a status of what one is worth in more personal terms. Professor Klare describes work as one of the most important opportunities in life to experience personal autonomy and a sense of self-realization.  

An employee's rights and interests in the workplace have much greater importance now than in 1935 or even 1956. The Court in Babcock, and again in Lechmere, failed to recognize the full import of employees' rights in its opinions. Obviously, employees have a right under Section 7 of the Act to self-organize. In this day and age this right is as important, if not more so, than the employers' property rights.

In its decisions concerning organizing efforts, the Supreme Court has failed to accept the changing character of management and labors' rights. Placing property rights on a pedestal was perhaps valid in some distant and murky time past; it no longer has merit in an age when America has recognized and valued personal rights above all else. Therefore, any changes to the present system of organizing must recognize the importance of the modern trend of valuing individual rights above property rights and, consequently, the old value system requires change.

256. See Klare, supra note 111, at 9.
257. See supra note 164 and accompanying text. While discussing the viability of Babcock in Lechmere, Justice White noted that the Court should not be "resurrecting and extending the reach of a decision which embodies principles which the law has long since passed by." Lechmere, Inc. v. NLRB, 502 U.S. 527, 548 (1992) (White, J., dissenting).
3. TYPE OF COMMUNICATION

In *Lechmere*, Justice Thomas considered the type of interaction and communication between nonemployee organizers and employees that would suffice to meet the *Babcock* test. In his view, direct contact was not necessary to satisfy the required element of reasonably effective communication.\(^\text{258}\) Rather, it was sufficient that workers only be “informed” about the organizing efforts, and means such as advertising or signs were found to be sufficient to impart this information.\(^\text{259}\)

Justice Thomas’ interpretation fails to comply with past decisions of the Board, lower court decisions, and even the Court’s own decision in *Babcock*.\(^\text{260}\) The Court in *Babcock* discussed the role of the nonemployee organizer and the employees’ right of self-organization. It noted that the right to organization depended in some measure on the ability of employees to learn the advantages of self-organization from others. Although the Court did not specifically find that direct communication with employees was necessary to meet its test, it implied this in its specific analysis of the case.\(^\text{261}\) Furthermore, if the Court in *Babcock* had meant to require only notification to employees of an organizing effort, it would have specifically so provided. Instead, it used the word “communicate,”\(^\text{262}\) which implies something more than mere notice. This conclusion would comport with the NLRA, which grants a right of self-organization to employees.

If one assumes that communication with employees requires some sort of direct contact, then the next logical question is: what type of interaction is appropriate? Cases decided by the Board and courts have permitted instances of an organizer being limited to jotting down license plate numbers, through which the organizer acquired names and addresses from the Department of Motor Vehicles.

\(^{258}\) See *Babcock*, 351 U.S. at 540.

\(^{259}\) See id.


\(^{261}\) See *Babcock*, 351 U.S. at 107 n.1, 113. The Court found that organizers had access to employees, noting that “[t]hough the quarters of the employees are scattered they are in reasonable reach.” Id. at 113. The Court backed up its finding by indicating that the union had communicated with over 100 employees by talking to them on the streets, by driving to their homes and by talking on the telephone to them. Id. at 107 n.1.

\(^{262}\) Id. at 112.
for later home visits, telephone or mail contact.\textsuperscript{263}

But does this type of so-called "direct" interaction really comply with the spirit of the NLRA? These activities may be expensive, time consuming and ineffective.\textsuperscript{264} Often, individual employees are not contacted. It is no defense to argue that it is up to the union to contact the employees it seeks to organize. The Act guarantees a right of organization to employees; when organizers cannot contact employees with reasonable efforts, the statutory mandate is not fulfilled.

Furthermore, limitations on direct contact place the organizer at a very distinct disadvantage. Under current law, an employer has virtually unlimited authorization to give anti-union speeches to employees on company time and property. There is no requirement that the employer give the union equal opportunity for rebuttal.\textsuperscript{265} Furthermore, the Act contains a First Amendment freedom of speech provision which allows the employer to express any view, argument or opinion if its comments contain no threat, reprisal or promise of benefit.\textsuperscript{266} With all of the advantages and weapons an employer has at its command, it is no surprise that the trend has been away from unions mounting successful organizing campaigns.

Many authorities have suggested that allowing nonemployee organizers direct access to a company would promote better labor relations.\textsuperscript{267} Professor Weiler has stated that "[w]ether our concern is the enlightenment of the employee electorate or fairness to the union campaign, a simple solution would be to offer the union the same access to the employees as the employer has."\textsuperscript{268} Professor Getman

\begin{footnotes}

\textsuperscript{264} See Lechmere, 502 U.S. at 530 (noting that organizers attempted this type of approach and were able to obtain the license plate numbers of only 41 of the store's 200 employees).

\textsuperscript{265} See NLRB v. United Steelworkers of Am. (NuTone), 357 U.S. 357 (1958).

\textsuperscript{266} See 29 U.S.C. § 158(e) (1988). This section mandates that:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promises of benefit.

\textit{Id.}

\textsuperscript{267} See, e.g., Getman, supra note 18, at 71; St. Antoine, supra note 15, at 649; Korn, supra note 193, at 383.

\textsuperscript{268} \textsc{Paul C. Weiler, Governing the Workplace — The Future of the Labor and Employment Law} 242-43 (1990). Weiler notes that common sense tells us that campaigning at the worksite provides employers with a great advantage. He indicates that empirical re-
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has suggested that direct access would give the employees a greater appreciation of unionization in general, as well as an understanding of the particular union attempting to organize them, stating that “[i]t seems obvious that employees who know the employer but are doubtful about the union ought to be given the chance to learn about the union at first hand.”

Other sources report that excluding organizers from an employer’s property puts the union at a distinct disadvantage. Employees are much more likely to attend meetings regarding labor issues which are held by management at the place of employment. Meetings called by union organizers outside working hours and away from company property are less effective. The union is thus at a substantial disadvantage when it cannot enter the company property, which is the natural forum to approach employees for an exchange of views about unionization. This effect is magnified when the location of the workplace is in a large city, and workers disperse widely at the end of every day.

In 1977, Congress attempted to pass legislation that would have allowed nonemployee organizers limited access to company property. The drafters of the legislation saw the need to allow nonemployee organizers access to an employer’s property when the employer had already stated its views on the matter. Efforts to enact the legislation, however, failed at that time.

The demise of the Labor Reform Act does not diminish the value of its content. The bill successfully passed the House of Representatives and had significant, perhaps even majority, support in the Senate. A Senate filibuster defeated the legislation even though it had the approval of all then-living Democratic and Republican ex-Secretaries of Labor. The circumstances surrounding the defeat of the bill illustrate the intense and controversial nature of proposals of this

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search (referring to a study by Julius Getman, Stephen B. Goldberg and Jeanne N. Herman) has shown that disparity in access can make a significant difference in the votes of wavering employees. Id. at 242.

269. Getman, supra note 18, at 71 (noting that union access alone would have the effect of demonstrating to the employees that unions can play a significant role in the workplace despite employer opposition).

270. See Korn, supra note 193, at 383 n.48.


272. See H.R. REP. NO. 637, supra note 56.

273. In the report on the bill it was noted that “[section § 6(b)(1)(A)] helps provide greater equality of opportunities to get [an organization’s] message across to the employees.” H.R. REP. NO. 637, supra note 56.

274. See St. Antoine, supra note 15, at 647.
type. Its rejection was based not on the majority vote of Congress, but rather on the procedural maneuvers of a minority. The defeated legislation represents an unsuccessful attempt to correct a weakness in the NLRA. It also provides a model for future action.

If the purpose of the NLRA is to guarantee the right of self-organization to employees, then part of the privilege must include the opportunity to communicate, in some meaningful manner, with those who can provide accurate and useful information relevant to achieving that end. Merely granting a right of self-organization, and then denying any realistic means of obtaining information relating to that right, is nothing more than a sham. This was not the intent of the framers of the Act.

Communication is much more than notice. It is the act of exchanging information in a reasonable manner so that one can make an informed, intelligent and meaningful decision about the issue under consideration. At the very least, it is the process that insures the delivery and receipt of one's message. In a larger and more common sense, communication implies the existence of a dialogue where give and take occurs between the parties.

It is apparent from the present state of the law that communication cannot take place. Employees do not receive their rights under Section 7 of the Act. It is absurd to suggest that a meaningful decision about self-organization can take place in a situation where, at best, employees acquire notice by means of a leaflet handed to them at a plant entrance.

To obtain the full measure of the Section 7 rights granted to employees, some method must be implemented allowing employees the opportunity to obtain real information about organizational activities taking place at their facility. Accomplishment of this objective can occur in several ways. The best place to impart information to employees and communicate with them on the issue of self-organization is at the place of employment. The present system, which almost bans such activity by nonemployees at the worksite, does not fulfill the guarantees of Section 7.

4. CONSISTENCY AND CLARITY

Any modification to the current state of the law must, ideally, provide for a process that is simple, straightforward and easy to apply in the everyday workplace. This is not to suggest that reaching a simple and clear rule is the only goal. Lechmere, for example, sets forth a basically straightforward edict which bars access to almost all
nonemployee organizers. This is not acceptable. Clarity and simplicity, however, are necessary elements to ensure the establishment of a rule that is fair to both management and labor.

The history of the law in this area illustrates the difficulty of applying the Babcock test to the workplace; under this rule neither the employer nor the union organizer was certain where organizing activity could physically take place. Often, the property available to the organizer was a blurred boundary line that marked the division between an employer’s property and public land. In other circumstances, access depended upon a vague concept of alternative means of communication. This uncertainty served no useful purpose. In many — if not most — access cases, disputes arose requiring the summoning of local law enforcement officials to quell the disturbances. Sometimes organizers faced arrest for trespass. Not only does such ambiguity lead to increased labor tension, which the Act seeks to minimize, but it also works as a detriment to the public good. Law enforcement officers should spend their time protecting the general welfare of the public. It is senseless to embroil them in needless labor disputes, caused by the marking of a boundary line or a sticky principle of labor law, over whether an organizer may set foot on company property.

The difficulty of applying the Babcock rule runs deeper than where an employer’s property ends. It is difficult to apply because its foundation consists of cloudy, unclear terms and concepts. Even the mere attempt to define “communication” has resulted in a quagmire of various legal conclusions running the gamut from notice to personal contact. The Babcock rule contains many of these vague concepts that are subject to various interpretations.

The need for a simple, consistent policy is also important to

275. “[Babcock’s rule] does not apply wherever nonrespassory access to employees may be cumbersome or less-than-ideally effective, but only where ‘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.’” Lechmere, Inc. v. NLRB, 502 U.S. 527, 539 (1992) (quoting NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956)) (emphasis in original).

276. For example, besides the question of the meaning of “communication,” what constitutes “reasonable” union efforts and what locations place the employees “beyond” the organizer’s reach? As to the meaning of reasonable union efforts, Justice Thomas stated that reasonable efforts are “nothing more than a commonsense recognition that unions need not engage in extraordinary feats to communicate with inaccessible employees . . . .” Lechmere, 502 U.S. at 537 (emphasis added). This language paves the way for more uncertainty. Regarding the issue of what locations are beyond the reach of an organizer, the Court in Lechmere narrowly defined such locations. Id. at 539. However, questions of the boundaries of this concept remain.
protect the Section 7 rights of employees. If union organizers find it necessary to challenge the employer's refusal to allow access in any given situation, a good possibility exists that subsequent legal confrontation will destroy the organizing effort altogether. Even if the union is successful in winning its case before the Board or the courts, the delay in the process is often fatal to its campaign. The time required to achieve a final legal decision is significant. In Lechmere, for example, the legal proceedings consumed almost five years. Even if the union had won the case, the dynamics of the organizing effort in 1987 were probably no longer present in 1992. Lest one think that Lechmere was a matter that took an unusually long time to decide, there have been studies indicating that it is not unique. For example, between December 1977 and December 1984, an average case took six years and eleven months to process from the initial dispute through the issuance of a Board decision. The situation has improved, but the principle still remains: a system that allows for uncertainty and the need to resort to legal action will not serve to further the right of self-organization guaranteed under Section 7. The old axiom "justice delayed is justice denied" is nowhere more true than in these cases, where delays of more then a few weeks, or at most months, could prove significant. Timing is more than the difference between success and failure. The presence of delay denies employees the opportunity to fully exercise their rights under the Act.

277. See Diane Avery, Federal Labor Rights and Access to Private Property: The NLRB and the Right to Exclude, 11 INDUS. REL. L.J. 145, 165 (1989). Avery notes that events which neither an employee nor the union control frequently form the basis for the union's need to access. When the event passes, the issue of access becomes moot. In organizing drives, delay causes lost momentum and the effort fails. Id. at 162-63; see also Paul C. Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA, 96 HARV. L. REV. 1769, 1777 n.24 (1983). Although Weiler discusses the impact of delay on the organizational process between the filing of the representational petition with the NLRB and the date of the Board-conducted election, the general principle is the same for the pre-petition stage: a delay works to the advantage of management. Professor Weiler submitted a study which found that for each month of delay, the union's opportunity for success in an election decreased by 2.5%. Id.

278. See Lechmere, 502 U.S. at 529-31. The organizational efforts began in June 1987 and ended with the Supreme Court's decision on January 27, 1992. Subsequently, the Board reviewed the matter on remand and issued its supplemental decision on September 30, 1992. See Lechmere, Inc., 308 N.L.R.B. 1074 (1992). Even if the case had terminated at the appellate level, over three years had elapsed in the interim.

279. See Avery, supra note 277, at 162.
5. DEMOCRACY IN THE WORKPLACE

When debating the merits of the NLRA, Senator Wagner noted in 1935 that "[d]emocracy in industry must be based upon the same principles as democracy in government." One definition of industrial democracy may be the meaningful participation by workers in the critical decisions that control their lives.

Although the principles of government may form the basis for industrial democracy, few individuals would argue that employees in the American workplace expect the full panoply of individual rights found in a democratic government. Workers, for example, do not nominate or elect the corporate directors, choose the management team or decide the product or product mix the company produces.

The workplace, however, does contain many elements of a democratic form of government. Workers have rights guaranteed by various laws. These rights are generally enforceable through various administrative bodies and the judicial system. Also, constitutional standards have relevance and importance in workplace activities. While not as significant as in the public sector, these principles impact the private industrial world. The very passage of the NLRA legislated a statutory form of protecting workers' rights of freedom of speech and assembly. Professor Summers has noted that Section 7 of the Act and the Court's decisions in Republic Aviation and Babcock provide workers with some First Amendment safeguards which are outside an

280. 79 CONG. REC. 7571 (1935) (remarks of Senator Wagner).
282. See Karl E. Klare, Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform, 38 CATH. U. L. REV. 1, 54 (1988). Klare suggests that employees should enjoy a vested right to participate in workplace decision making. Labor law, in his opinion, should encourage employees to obtain direct participation in the firm's governance through the bargaining process. Id.
283. At the present time, one of the major discussions occurring in the labor law field concerns whether labor management cooperative arrangements are valid under the current state of the law. See, e.g., Electromation, Inc., 309 N.L.R.B. 990 (1992). Cooperative arrangements, if valid, allow for more employee involvement in the company's decision making process. They take a variety of forms, including quality circles, job enrichment programs, quality of worklife programs, Scanlon plans and employee stock ownership plans. The decision in Electromation upheld, in some situations, the validity of cooperative arrangements. Id. at 995.
284. See supra text accompanying notes 210-12, 228-31, 238.
employer's control.286

If industrial democracy is the opportunity for workers' involvement in the critical decisions that affect their lives, it certainly applies to the right of self-organization. Senator Wagner specifically indicated that for industrial democracy to exist, workers need the chance to organize.287 This right gives employees the opportunity to determine a chosen form of industrial government and to choose representatives in the workplace. In effect, it is the equivalent of the rights granted to American citizens to establish a form of government and to vote.

There are several critical elements that must exist if democracy is to succeed in the workplace, many of these elements are already present under the Act. Employees have a basic right of to decide whether they want to organize.288 If they want unionization, they can elect their representatives. These privileges have little value, however, if the employees have no information about these matters. Individuals must have access to accurate information relating to important issues and decisions confronting them. Communication and the opportunity for a free exchange of ideas must exist.

The American ideas of democracy and fairness are also based, in part, on the concept of the adversary process. Both sides to an issue have the opportunity to state their position. In a public political election, the various parties express their ideas and often publicly debate pertinent issues. In the industrial setting, however, the Nutone289 principle allows an employer to give anti-union speeches to employees on company time and property.290 Moreover, after having given such a speech, the employer can then deny the union the opportunity to reply.291

Section 8(c) of the NLRA allows employers to express their views, arguments or opinions concerning organization if the comments do not contain threats or promise benefits.292 In effect, the employer has a captive audience in the physical location, the plant, where such comments have the greatest impact. Even if such speeches do not have an overt threatening message, one may speculate about the subliminal message the employees receive. An employer's anti-union

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286. Id. at 705.
287. See Bixler, supra note 281, at 441 & n.112.
290. Id. at 363-64.
291. See id.
sentiments may have a chilling effect on an employee’s desire to organize. Workers may question the strength of a union that cannot adequately respond to an employer’s adverse comments.

In contrast to the employers’ rights to communicate ideas about self-organization in the workplace, employees have few opportunities for access to countervailing information and ideas. While the rule in Republic Aviation permits workers to discuss matters of self-organization amongst themselves in the workplace,\textsuperscript{293} workers are usually limited in their knowledge and experience in the field of labor organizing. Moreover, the Babcock and Lechmere decisions markedly reduced the right of nonemployee organizers to provide information to employees. Indeed, these later decisions have essentially emasculated the Section 7 right of self-organization and reduced industrial democracy.

There is a significant need in the workplace for more communication and discussion among employees regarding the self-organizational process and the advantages of unionization. It is, therefore, necessary that nonemployee organizers have the opportunity to provide information to, and to debate these matters with, employees. These professionals are in a position to disseminate detailed information about organization and can rebut any inaccuracies that employees have heard from their employers.

An examination of the current system reveals the overwhelming unfairness present. Indeed, the failure to ensure some elements of democracy is particularly egregious considering Congress’ guarantee to workers of the right to self-organization. By stacking the deck against employees in its Babcock and Lechmere decisions, the Supreme Court has eliminated this right.

When recommending a new system to replace the edicts enunciated in Babcock and Lechmere, it is important that at least a sense of fairness consistent with workplace democracy prevail. Only the addition of such principles will deliver a real right to self-organization to the American workforce.

\textsuperscript{293} See Republic Aviation Corp. v. NLRB, 324 U.S. 793, 805 (1945).
6. THE FIFTH AMENDMENT — THE QUESTION OF A TAKING OF PROPERTY

The Fifth Amendment to the Constitution provides: "[n]or shall private property be taken for public use, without just compensation."294 Neither the Babcock nor Lechmere decisions considered the issue of whether granting nonemployees access to an employer's property constituted a taking of private property without just compensation.295 In these cases, the Court allowed nonemployees to enter the property in limited situations, and, as a result, created an inference that (at least in some circumstances) no illegal taking of private property occurred. What remains unanswered, however, is whether it is constitutionally valid to allow nonemployees to enter onto an employer's property on a broader scale than allowed in Babcock or Lechmere. For example, would the extension of the Republic Aviation rule to nonemployee organizers violate the Fifth Amendment?

The Supreme Court has not ruled on this issue in any case involving the right to self-organization under the NLRA. Other decisions, however, provide some guidance. In Kaiser Aetna v. United States,296 the Supreme Court noted that "this Court has generally been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government."297 The Court added that the "taking" question has been resolved by ad hoc factual inquiries.298

The major Supreme Court decision relating to the "taking" issue is PruneYard Shopping Ctr. v. Robins,299 which involved efforts by a shopping center owner to remove individuals from his property who were soliciting signatures on a petition expressing opposition to a United Nations resolution.300 In PruneYard, the Supreme Court upheld the California Supreme Court's validation of a state constitutional provision allowing freedom of expression.301 In arriving at its

294. U.S. CONST. amend. V.
297. Id. at 175.
298. Id.
300. Id. at 77.
301. Id. at 88.
Conclusion, the Court reached the issue of whether the government action of enforcing freedom of expression constituted a taking of property rights of the shopping center owner, who alleged an impairment of his right to exclude. In determining that no taking had occurred, the Supreme Court stated that "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense." It established a three-part test which examines the character of the governmental action, its economic impact and its interference with reasonable investment-backed expectations. In finding that no taking had occurred, the Court focused on the fact that the shopping center was not limited to the personal use of the owner, but rather was a business open to the public. It also highlighted the fact that the employer could impose time, place, and manner regulations on the activity, thus limiting interference with commercial functions.

Although no concrete answer is available at this time, PruneYard certainly lends support to the proposition that an expanded access rule for nonemployee organizers would not violate the Taking Clause of the Fifth Amendment. The character of a governmental action of this type is to enforce the rights of employees to self-organization under the NLRA. Congress undeniably has the right to legislate in this area. Allowing controlled access, where the employer may impose certain time, place and manner restrictions, limits any economic impact. In addition, interference with reasonable investment-backed decisions is minimal.

Employers operate in a business environment where the possibility of unionization is always present. The right of employees to organize is guaranteed by the NLRA; thus, every employer must operate and make investment decisions within that universe. Under these circumstances, businesses are not closed concerns; they are open to the public or to other business invitees. An owner operating a business has no legitimate expectation of complete privacy. Thus, many of the same arguments in PruneYard, with minimal modification, may apply to situations involving access by nonemployee organizers to an employer's property.

302. See id. at 82.
303. Id.
304. Id.
305. Id. at 83.
306. Id. at 83, 87.
307. Id. at 83.
In its decisions in Babcock and Lechmere, the Supreme Court has already given tacit approval to the view that nonemployee access to an employer’s property is not a violation of the Fifth Amendment. Expansion of the rule, in moderation, would not violate the constitutional rights of employers. In this regard it is important to note Justice Blackmun’s dissent in Loretto v. Teleprompter Manhattan CATV Corp.,\textsuperscript{308} where he stated that “this Court long ago recognized that new social circumstances can justify legislative modifications of a property owner’s common-law rights, without compensation, if the legislative action serves sufficiently important public interests.”\textsuperscript{309}

C. SPECIFIC PROPOSALS FOR A NEW PROGRAM

My proposals for implementing a new program to ensure employee rights of self-organization break down into two categories. The first set of proposals relate to actions that the courts and the Board can accomplish. Primarily, these recommendations focus upon interpreting the Lechmere decision in a manner that allows for greater nonemployee access to the workplace. The second category considers potential legislative changes. These suggestions vary, ranging from simple modifications of existing law to major revisions of the NLRA.

To achieve meaningful changes in the area of self-organization, it is evident that some Congressional involvement is necessary. The Supreme Court’s ruling in Lechmere severely limits actions by the Board and the courts. Congress has no such restriction placed on it. All of the suggestions proposed are important, but if real change is to occur, those that require legislative reform are vital.

1. PROPOSALS FOR THE BOARD AND THE COURTS

Lechmere permits nonemployee organizers access to an employer’s property only in rare situations. An examination of the decision reveals, however, that arguments exist to expand the narrow rule of that case.

The Court stated that the presence of “unique obstacles” may allow for access by nonemployee organizers.\textsuperscript{310} It is clear from the

\textsuperscript{308} 458 U.S. 419 (1982).
\textsuperscript{309} Id. at 454 (Blackmun, J., dissenting) (citing Munn v. Illinois, 94 U.S. 113, 134 (1877); United States v. Causby, 328 U.S. 256, 260-61 (1946)).
Lechmere decision that a likelihood for access exists where employees live on the employer's premises in remote areas.\(^{311}\) The Court, however, did not specifically limit access to these circumstances.\(^{312}\) The question remains unanswered then, whether there are circumstances or "unique obstacles" other than remote location situations which render employees inaccessible to communication from a union organizer. It is feasible, however, that factors other than physical location may constitute "unique obstacles." Imagine an organizing campaign of migrant farm workers, where the targeted employees are illiterate or foreign speaking, and unable to read newspapers of general circulation. Could this situation qualify as a "unique obstacle" that permitted access? Admittedly, this exception does not have broad application, but it deserves exploration and further explanation.

The Lechmere Court also ignored the issue of how the cost of providing alternative means of communication may affect a union's efforts in pursuing such alternate means.\(^{313}\) In response to the question of whether the expense of a form of communication could influence the issue of alternative means, Justice Thomas summarily dismissed the matter by commenting that "[w]hatever the merits of that conclusion, other alternative means of communication were readily available."\(^{314}\)

Lechmere involved a situation where the organizers stood on public property at the perimeter of the company-owned parking lot and displayed signs advertising their cause.\(^{315}\) Would the Court's ruling have been the same if the organizers had to resort to very expensive means of communication to deliver their message, e.g., television commercials in a major metropolitan market? The Court

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311. According to the Court, an exception to the presumption that a union has access to a company's employees arises when the employees reside on their employer's property. \(\text{Id. at 539-40.}\)

312. Although Justice Thomas referred to logging camps, mining camps and mountain resort hotels as "classic examples" of when the "narrow" exception to the Babcock presumption (that employees are accessible outside the workplace) was applicable, he did not limit the "narrow" exception to those exclusive situations. \(\text{Id. at 539-41 (citing NLRB v. Lake Superior Lumber Corp., 167 F.2d 147 (6th Cir. 1948); Alaska Barite Co., 197 N.L.R.B. 1023 (1972), enforced, 83 L.R.R.M. (BNA) 2992 (9th Cir.), cert. denied, 414 U.S. 1025 (1973); NLRB v. S & H Grossinger's Inc., 372 F.2d 26 (2d Cir. 1967)).}\)

313. \(\text{Id. at 540.}\)

314. \(\text{Id.}\)

315. \(\text{See supra text accompanying notes 142-43.}\)
noted that "[a]ccess to employees . . . is the critical issue." When the cost of communication becomes very expensive, do nonemployee organizers truly have access to the employees? Could cost be included as one of the "unique obstacles" to which the Court was referring?

*Lechmere* centered on the issue of the employees' self-organizational rights under Section 7 of the Act. It neither involved nor altered the provisions of Section 8(a)(3) of the NLRA, which prohibit an employer from discriminating against union activity. Indeed, the Court in *Lechmere* specifically quoted *Babcock* in noting that a nonemployee organizer may gain access if the employer's no-solicitation rules are discriminatory towards union solicitation.

In nonemployee organizational cases, the Board and courts must take a closer look for possible violations of Section 8(a)(3) of the Act. Even though an employer may not violate the Act's self-organization provisions, a violation of Section 8(a)(3) occurs if he acts in a discriminatory manner in the establishment or application of solicitation policies. If this occurs, the Board may grant access in a remedial order.

Since the Court's ruling in *Lechmere*, the Board has decided cases involving alleged employer discrimination. In several cases the Board held that an employer denying access to union officials committed acts of anti-union discrimination where other organizations, such as charities, acquired entry to the property. The Board must

317. Section 8(a)(3) of the Act provides, in pertinent part, that "[i]t shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3) (1988).
319. See id.
320. See Pay Less Drug Stores Northwest, Inc., 312 N.L.R.B. 972 (1993); New Jersey Bell Tel., 308 N.L.R.B. 277 (1992); Davis Supermarkets, Inc., 306 N.L.R.B. 426 (1992), aff'd and remanded on other grounds, 2 F.3d 1162 (D.C. Cir. 1993). In all three cases, the Board noted that *Lechmere* did not alter the *Babcock* rule that regardless of whether an organizer is allowed access under the general rule, an employer may commit an unfair labor practice if his actions discriminate against union activity. *Pay Less* involved a situation where union agents picketed outside a store located in a strip shopping mall. The Board held that the employer acted in a discriminatory manner by requiring the pickets to leave the premises while allowing other groups, such as charities, to solicit for their causes. This disparate treatment, according to the Board, violated the Act. *Pay Less*, 312 N.L.R.B. at 974. In *Davis*, the Board found that the employer had discriminated against the union by obtaining an injunction preventing union picketing, while allowing charitable organizations to sell raffle tickets on the property. *Davis*, 306 N.L.R.B. at 461. In *New Jersey Bell*, the Board concluded that the employer's policy of requiring only the union to obtain permission to conduct union business on the employer's property, without requiring other groups to obtain such permission where
continue and expand such efforts. Careful analysis must be directed to any situation where employers allow nonunion individuals or groups access to its property. Of course, if an employer enforces a strict no-solicitation policy against all groups, it will be difficult, if not impossible, to prove unlawful discrimination.

The Board and the courts should distinguish between nonemployee access cases depending upon whether the purpose of access is for organizational activity or for other reasons. These latter cases include economic strike activity, product boycotts, and area standards actions. 321

Technically, Republic Aviation, Babcock, and Lechmere were cases involving organizational activity. The Board and the courts have applied the balancing tests developed under the Babcock case, including the Board’s Fairmont Hotel and Jean Country standards, to other union actions seeking nonemployee access to the employer’s property. 322

The Board must reevaluate its approach when deciding non-organizational cases, since a need exists for another standard. It is difficult, for example, to apply the Lechmere test to a product boycott, informational picketing or area standards situation since the intended audiences are not the employees but public consumers. Lechmere allowed access in organizational cases “only where ‘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.’” 323 This rule has little application in an informational picketing situation or product boycott matter. Customers of a specific

access was for other purposes, constituted discrimination against union officers. New Jersey Bell, 308 N.L.R.B. at 281.

321. See Leslie Homes Inc., 316 N.L.R.B. No. 29, 148 L.R.R.M. (BNA) 1105 (1995); Makro Inc. and Renaissance Properties Co., 316 N.L.R.B. No. 24, 148 L.R.R.M. (BNA) 1116 (1995). In these cases, a majority of the Board applied a Lechmere-type analysis to area standards picketing. In the 3-2 decisions, Chairman Gould “regrettably” concurred with the majority, noting that “[i]f there is to be a different result, it must come from the President and the Congress and not the Board”. Leslie Homes, 148 L.R.R.M. (BNA) at 1113 (Gould, Chairman, concurring); see also Makro, 148 L.R.R.M. (BNA) at 1122 (Gould, Chairman, concurring).


company do not live on the employer's premises. Moreover, unlike employees, it is often very difficult to identify consumers. In fact, they are often a changing group of people. There are few means of reasonably communicating with them, other than at the employer's property. Thus, Lechmere simply does not apply to situations where the intended audiences are not employees.\(^\text{324}\)

The new test for these various situations requires the development of a simple, straightforward rule. Standards developed in the past, such as the Fairmont Hotel and Jean Country tests, have been difficult to apply. A better rule results if the Board reevaluates the weight currently given property rights and individual rights. An improved standard ensues if nonemployees obtain access to an employer's property that is limited in terms of time, place and manner of actions allowed.\(^\text{325}\) One possibility, for example, might allow two or three nonemployees access to a store or shopping center entrance during specified hours to deliver their message to consumers. A remedy of this type achieves a balance between the competing interests of an employer and a union.

After the Supreme Court decided Lechmere, the Board reviewed the matter on remand and again held that the employer had violated the Act.\(^\text{326}\) Its decision was based on the fact that the employer had not only barred the organizers from gaining entry to its property — which the Supreme Court had just been deemed permissible under the NLRA — but had also prevented the organizers from even using the public property surrounding the employer’s parking lot.\(^\text{327}\) A violation of Section 8(a)(1) was found to have occurred since the employ-


\(^\text{325}\) See Karl E. Klar, Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform, 38 CATH. U. L. REV. 1, 48 (1988). Klar argues that the Republic Aviation rule should apply to nonemployee access cases, since the use of reasonable time, place and manner restrictions would protect the employer's interests of productivity, safety, customer service and privacy. See id. This theory also applies to non-organizational situations. See also PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (upholding California rule that allowed political petitioning in a shopping center since the employer retained the right to set the time, place and manner of the activity).


\(^\text{327}\) Id.
er had no right to prevent the activity, which was not performed on its property or under its control.328

The Board must continue to carefully examine cases of nonemployee access to ensure that organizers are not prevented by employer action from exercising their rights on public property or property not under the employer's control. In a similar manner, the Board must also continue to apply and expand the analysis it used in *Bristol Farms* to ensure that the employer really has a property interest which it can assert as a defense to support a claim of nonaccess.329 When evaluating property rights, the Board may want to expand its current posture and give consideration to other factors that bear on the measurement of these rights. Defining property rights is not the sole province of the states, but is subject to federal and other actions as well.330

2. PROPOSALS FOR LEGISLATIVE REFORM

The legislature must ensure a fair and speedy process to resolve disputes relating to the right of self-organization and to prevent employers from denying employees their rights to self-organization through the use of dilatory tactics in the legal system. Indeed, past instances of nearly seven years elapsing before the Board issued a final decision in nonemployee access cases are unconscionable.331 If Congress does nothing else, it must at least ensure that it will take action to avoid a return to past situations where unfair labor practice charges were not quickly processed by the Board and the courts. Although recent information suggests a significant improvement in the situation, efforts must continue to resolve these cases quickly. With the advent of *Lechmere*, the number of nonemployee access cases brought before the Board and the courts will undoubtedly diminish. If

328. Id.
329. *Bristol Farms*, Inc., 311 N.L.R.B. 437 (1993). *See supra* text accompanying notes 171-78. In *Bristol Farms*, the Board ruled that an employer's property rights are defined by the state in which the property is located. *Bristol Farms*, 311 N.L.R.B. at 438. This ruling is significant because it will undoubtedly result in a time-consuming review of each case that will turn on an analysis of the property rights a state grants to its citizens. Considering the restrictions imposed by *Lechmere*, however, it is vitally important to perform this review to protect employees' rights by precluding an employer from claiming a property right to which it is not entitled. Because *Lechmere* has already provided employers with a definite advantage in organizing matters, the Board must not allow an expansion of an employer's rights when the applicable state law and facts do not warrant it.
330. *See supra* text accompanying notes 208-55.
331. *See, e.g.*, *supra* notes 276-80 and accompanying text.
Congressional action changes the current state of the law, however, the number of such actions may again increase. Congress must either increase the budget of the Board to hire more personnel to deal with the situation, or more ideally, it must explore other procedures means by which to streamline the process. One possible solution is to have organizational cases expedited for direct, immediate action. Under current law, the Board is directed to give priority consideration to the investigation and resolution of certain cases.\textsuperscript{332} Congress must legislate to raise the status of \textit{Lechmere}-type organizing situations to the level accorded secondary boycott situations.\textsuperscript{333} The Board must investigate these matters immediately and, if reasonable cause exists to believe a violation of the Act has occurred, then injunctive relief must be sought from the federal courts. As with secondary boycott cases, time is of the essence in organizing situations; therefore, immediate judicial action is needed.\textsuperscript{334}

Congress should also consider enacting legislation that applies some form of the \textit{Republic Aviation} test to nonemployee organizers.\textsuperscript{335} This makes the "working time" test applicable to nonemployee organizers and grants organizers access to company property during nonworking hours, such as lunch breaks or before or after work hours. Early decisions by the Board support this type of proposed legislation. After the issuance of the Court's \textit{Republic Aviation} decision, the Board tended to extend these rules to nonemployee-organizer situations.\textsuperscript{336} The Board's interpretation prevailed until the Court issued its \textit{Babcock} ruling.

\textsuperscript{332} The NLRA currently awards priority status to secondary boycott cases and similar matters arising under Section 8(b)(4). In these situations, the investigation and decision must be expedited and, if reasonable cause exists, the NLRB Regional Attorney must seek injunctive relief or a temporary restraining order in the appropriate federal district court. See 29 U.S.C. § 160(l) (1988). To a somewhat lesser degree, priority is also given to discrimination cases arising under Sections 8(a)(3) and 8(b)(2). See 29 U.S.C. § 160(m) (1988).

\textsuperscript{333} \textit{Id.}

\textsuperscript{334} \textit{Id.} Delay of an ongoing campaign causes irreparable and immediate harm to the union. The harm caused is even more severe than that present in secondary boycott actions. In these latter cases, some estimate of the employer's financial loss is possible; in organizing cases, the loss to the union cannot be measured in financial terms, but the damage is real and severe.

\textsuperscript{335} Several commentators have suggested the application of the \textit{Republic Aviation} approach. See Randall J. White, Note, \textit{Union Representation Election Reform: Equal Access and the Excelsior Rule}, 67 IND. L.J. 129, 155 (1991); Gresham, \textit{supra} note 239, at 114, 172; see also Klare, \textit{supra} note 325, at 46-48 (questioning the differences between \textit{Republic Aviation} and \textit{Babcock}). Although these articles appeared before the Supreme Court decided \textit{Lechmere}, the thoughts expressed therein nonetheless remain valid today.

\textsuperscript{336} See \textit{supra} text accompanying notes 59-73.
In contrast to Babcock standards, organizers that are not employees obtain a more straightforward rule. Employees can receive basic information about their right of self-organization and employers’ interests are protected by its continued right to maintain production and discipline. Thus, law and order are maintained in the workplace.

A similar result would occur if Congress amends Section 7 of the NLRA to include nonemployee organizers under its umbrella. The Court’s decisions in Babcock and Lechmere rely significantly on the fact that nonemployee organizers have no direct rights under the self-organization provision of the Act. Because nonemployees receive their privileges derivatively, modifying the Act by granting direct rights to nonemployee organizers gives them equal standing with employees. Both groups of individuals, therefore, benefit from application of the Republic Aviation standard. Furthermore, protection of the employers’ rights remains intact given their authority to maintain production and discipline under the Republic Aviation test.

Congress must also take action to remedy the situation where an employer has the right to discuss its thoughts on unionism on company property, while a union is denied such a right. Enacting legislation that revokes the NuTone rule and Section 8(c) of the Act would accomplish this goal. If Congress believes that an employer has a right to express its thoughts on the matter of self-organization in the workplace, then fairness dictates granting a similar right to employees and nonemployee organizers. Statutory language similar to that found in the unsuccessful Labor Reform Act of 1977 would balance the positions of management and labor.

Congress should either revoke the employers’ right to discuss matters of self-organization in the workplace, or provide this same right to nonemployee organizers. The preferred approach would allow freedom of speech to management and unions. Granting both parties the opportunity to state their views has the advantage of providing

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337. See supra text accompanying note 150.
338. See supra text accompanying notes 289-93.
339. See supra text accompanying note 292. Section 8(c) was a product of the pro-management Taft-Hartley Amendments. See Taft-Hartley Act, ch. 120, sec. 8(c), § 158(c), 61 Stat. 136, 140 (1947) (current version at 29 U.S.C. § 158(c) (1988)). While theoretically these provisions are based, in part, on First Amendment principles of an employer’s right to freedom of speech, in practice they give an unfair advantage to an employer.
340. See H.R. REP. NO. 637, 95th Cong., 1st Sess. (1977). Section 6(b)(1)(A) of that proposed legislation allowed employees to learn the advantages of self-organization from nonemployee organizers whenever the employer addressed its employees on the issue during work time. See id. at 53.
more information to employees. On the other hand, denying comment by management and labor reduces the flow of ideas and debate. Whichever approach is finally adopted, Congress’ guiding principle must be to ensure fairness in the workplace. The present system of allowing only the employer an opportunity to express views regarding unionism is inappropriate since it undermines the employees’ right of self-organization under the Act.

Another proposal designed to provide basic labor relations information to employees would require the government to prepare and issue to all workers a statement of their rights under the NLRA. To reduce the cost of distribution, such a document could be prepared once a year and be included with every individual’s federal income tax return. In addition to providing information about rights under the Act, the government could also prepare and deliver a small booklet that contains elementary facts about other federal labor laws. For example, the booklet might incorporate basic information about employee rights under Title VII of the Civil Rights Act, the FLSA, OSHA and entitlement to Social Security disability benefits. A more ambitious plan could incorporate the addition of data regarding state labor laws such as workers’ compensation or equal employment opportunity plans.

Preserving brevity and simplicity remains a critical requirement for any publication of this type because it increases the likelihood that employees will read and understand the material contained within it. In keeping with this goal, the statement should contain only a short synopsis of the rights granted under the NLRA and other relevant labor laws. Providing the name, address and telephone number of each agency would provide any employee with the means to obtain additional information.

Presently, employees receive minimal information from unions regarding their organizational rights. Congress can correct this imbalance if it grants any union seeking to organize the right to use a company bulletin board in an employer’s plant. Under this pro-

341. See supra note 243.
342. See supra note 228.
343. See supra note 231.
345. Alternatively, employers could receive copies of the document and then be responsible for delivering the pamphlet to their employees. The one or two page statement would include basic labor law information and the telephone number of the local Department of Labor and NLRB offices. Employees could then call for more information about their rights, including the right to self-organization.
346. While this is a novel idea for use in non-organized companies, the use of a compa-
posal, the use of the bulletin board would be the only type of employer "property" nonemployee organizers would have access to. The union would receive use of such a space for a limited time (e.g., two months) to post flyers or informational items. The information posted would be left to the discretion of the union, but might include the telephone number of an organizer or of the union office. Interested employees could then contact the union for further information. Perhaps a space could also be designated in the workplace to leave union authorization cards.

This recommendation offers a compromise solution because the union acquires some reasonable access to the employees in the plant - access which is greater than it now retains under Lechmere. Employees also benefit by having access to information regarding self-organization and unionization with only a minimal intrusion on the employer's property rights. Moreover, little or no confrontation occurs so that the general public benefits from reduced labor tension. This proposal also precludes the union from engaging in any other organizing activity requiring nonemployee access on or near the company property. It does not, however, prevent the union from pursuing any other type of organizing activity, such as obtaining license plate numbers, making home visits, or advertising in the local newspapers.

Several alternatives to this general proposal exist. For example, the union, instead of receiving access to a bulletin board, could acquire the right to deliver sealed packets of information for direct distribution to employees from management. Under this plan, the employer must sign an affidavit attesting to the delivery of the packets to all employees and the union has a right to receive the signed affidavit.\textsuperscript{347} Falsification of the statement would result in significant fines or other punishment. Penalties may vary, but might include Board remedial orders providing the union with a list of the employees' names and home addresses. A severe violation could result in an order requiring access to the plant by union organizers.\textsuperscript{348}

\textsuperscript{347} To ensure delivery of the packet, each employee must sign a statement of receipt of the sealed package. The employer retains the responsibility for collecting the employees' signed statements of receipt. A designated government agency, such as the NLRB or the Federal Mediation and Conciliation Service, could act as the depository for the signed statements. To ensure privacy, the union acquires no right to receive the employees' signed statements (in contrast to the employer's affidavit).

\textsuperscript{348} Such remedial orders, if the employer's violation is severe enough, might even in-
These proposals have the effect of providing some information to employees while maintaining, to the maximum extent possible, the property rights of an employer. An employee desiring additional information is in the position to take affirmative steps to contact the union. These suggestions do, however, suffer from some weaknesses. Because actual communication by nonemployee organizers does not occur in the workplace, employees are unable, under this plan, to ask questions or to obtain information from union organizers at their place of employment. Since nonemployees will not have actual physical access to the property, an aura of superiority will continue to surround the employer. If an employer communicates anti-union messages to employees under the *NuTone* doctrine, a chilling effect could still linger.349

The final recommendation guarantees that actual communication occurs between union organizers and employees. It abolishes the “distinction of substance” principle.350 Under this proposal, employees could receive information and discuss labor issues with an organizer either on the employer’s premises or at another neutral site. Workplace democracy is promoted. With proper implementation, the proposal is not much more complex than the application of *Republic Aviation* in employee-organizer situations.

Congress should enact legislation which would allow at least limited access to the employer’s worksite by nonemployees during an organizing campaign. Accomplishing this would require the creation of a new unfair labor practice. The following is one specific recommendation for new legislation to be added to the NLRA as Section 8(h):

(1) It shall be an unfair labor practice for an employer or labor organization to violate this section. An employer cannot refuse to allow representatives from a labor organization, engaged in an organizational campaign, access to an employer’s property for the pur-

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349. See supra text accompanying notes 289-93.

350. See NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956) (noting a “distinction of substance” between union activities involving employees and nonemployees). The rationale of the Supreme Court was that while the Act requires an employer not to interfere with employees’ self-organization, no such obligation was owed to nonemployees unless no other means are available. Id.; see also Lechmere, Inc. v. NLRB, 502 U.S. 527, 537 (1992).
pose of discussing with employees and distributing literature regarding the employees' rights to self-organize under Section 7 of this Act. Such access shall:

(A) be required, within 10 days of demand, but such demand shall be made only once during the thirty-day period specified in Section 8(b)(7)(C) of the Act, and in no event more than once a year for any particular labor organization;

(B) be limited to no more than one representative for every 50 employees the employer has employed on the day of the demand for the meeting;

(C) be limited to meeting during a non-work time and an indoor non-work area designated by the employer, except when such time exceeds that allowed for lunch periods or scheduled breaks, but in no event greater than that time noted in subsection (D); the meetings shall be scheduled during the course of a regular work week and during a regular tour of duty during the work day;

(D) be limited to a reasonable amount of time, but in no event shall the amount of time exceed two hours for each work shift the employer schedules for work activity;

(E) not be monitored by the employer other than to protect the employer's property or to provide security for the employer's interests; in this regard an employer may escort the organizers onto the premises and into the place designated for the meeting and from such meeting.

(2) The access allowed under this Section shall be the only access allowed by the labor organization on or near an employer's premises during an organizational campaign but shall not preclude the labor representatives from engaging in any other organizational activity that is otherwise permitted by Federal or State law.

(3) Nothing in this provision shall interfere with an employer's rights under Section 8(c) of this Act or as otherwise enumerated in NLRB v. United Steelworkers of Am. (NuTone), 357 U.S. 357 (1958).

(4) The National Labor Relations Board is empowered to fashion whatever remedies it deems appropriate to ensure compliance with this provision by employers and labor organizations.

This proposed unfair labor practice mandates that an employer allow access to its premises by any labor organization seeking to unionize its employees. It further limits the organizer to only one visit per year. The employer must honor the request within 10 days of the demand, and, in order to ensure that order in the workplace according to Republic Aviation is maintained, certain restrictions will be imposed not only as to the visit, but also regarding the actions of the organizers and the employer.
Under the proposed section to be included in the NLRA, organized labor receives access only once during the thirty-day period during which a union may lawfully picket an employer in order to organize the employer's workers without having to file a petition for election. Furthermore, the proposed section prohibits any one union from gaining access more than once a year. This requirement also provides specific time frames during which a meeting may take place and prevents the union from trying to conduct conferences too frequently.

The quantity of workers employed at the time of the demand would control the number of organizers allowed on the premises. With some modification, any meetings must take place in an indoor non-work area on non-work time. To have a meaningful conference, the proposal suggests a time limit of up to two hours. This may exceed the time normally scheduled for breaks or lunch periods. The employer has the authority to set the date and time of the meeting, but it must occur during the regular work week and during the regularly scheduled tour of duty hours. An employer would pay the employees for the time spent attending the meeting beyond that of the normally scheduled lunch period or break. The employer has the

351. See 29 U.S.C. § 158(b)(7)(C) (1988). This section of the Act allows picketing during a thirty day organizational period, providing that:

   It shall be an unfair labor practice for a labor organization . . . to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: . . . (C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing . . . .

Id.

352. The number recommended is one organizer per 50 employees. This number should allow enough time for an organizer to present a short statement of the union's position, distribute literature and authorization cards, and respond to questions. Of course the number is subject to change if Congress deems a different ratio more appropriate.

353. To make this proposal more agreeable to management, modification of this requirement might include allowing access only during non-work time. This change may shorten the meeting but might result in more organizers coming onto the property to fully communicate with the employees.

354. For example, scheduling a two-hour meeting around a one-hour lunch break would require the employer to compensate the employee for the one hour of work time missed. The employee would not receive compensation for his lunch hour unless he normally received payment for the lunch period. Undoubtedly this provision will generate a great deal of controversy since it exceeds even the Republic Aviation rule. This expense to the employer, how-
right to set the time and place for the assembly, but is present, if at all, only for the purposes of ensuring security, and it cannot engage in any surveillance or coercive activities.

In the interest of fairness, the proposal provides that the employer retain all of its rights under the *Nutone* rule and Section 8(c) of the NLRA.\(^{355}\) Finally, under this proposal, this statutory right of entry shall be the only access allowed to unions. Nonemployee organizers would retain other organizational rights but cannot engage in any additional activity requiring access on or near the employer's property. To ensure compliance with the provision, strict penalties for any violation must be implemented. A finding that an employer has denied access would compel the imposition of strict penalties and the fashioning of an appropriate remedy. If the union violates its responsibilities, the Board could also design an appropriate, substantial remedy to discourage such activity in the future.\(^{356}\)

An alternative to allowing organizers onto an employer's property would be to permit the employees to meet with the organizers at another site, such as a local union hall or another nearby building. This meeting would occur during an extended break or lunch period. However, the difficulty with this suggestion lies in the possibility that there may not be a suitable facility close to the workplace, and further, arranging transportation to the meeting place can also present problems.

Having the employer present at the assembly may be desirable to\(^\)
allow a response to the organizer's comments. This suggestion, however, carries with it the potential for heated argument or even violence. The employer's presence may also have a chilling effect on the employees, and prevent them from asking questions. Using a debate format would require the presence of officials from the NLRB or the Federal Mediation and Conciliation Service to ensure a fair and peaceful meeting.\footnote{357}

The creation of a new unfair labor practice relating to the right of employee self-organization is offered as an improvement over the suggestion to expand the Republic Aviation rule to nonemployee organizers. The advantages work to the benefit of both management and labor. First, labor obtains an express right to enter onto an employer's property, once a year, to speak to employees in an indoor setting. Even under a Republic Aviation standard, if the rules of production and discipline prevail, organizers might not have any access, or they may be forced to meet in a company parking lot. Furthermore, the production and discipline rule of Republic Aviation, although vastly superior to the Babcock test, still leaves room for uncertainty.\footnote{358} Enforcement of rights may, in some circumstances, require prolonged litigation. In contrast, the proposed statutory amendment to the NLRA definitive as to the rights granted labor. Labor organizations are given the opportunity to reach employees with their message, and likewise, employees benefit by receiving vital information concerning their rights.

Second, under the proposal, management also profits in several ways. In effect, the employer retains basic control of the organizational process by regulating the time, place and conditions of the union's presentation. Management does not have to confront an ongoing organizing effort in public. The unfair labor practice rule only grants an organization one opportunity per year to deliver its message and any other requests for access on or near company may be lawfully rejected. Security over the employer's property increases and management also receives the benefit of a concrete rule. The result is the reduction or elimination of litigation expenses, while the employer retains its right to comment as enunciated in Nutone and Section 8(c) of the Act.

\footnote{357. The NLRB already uses its employees to conduct and monitor representational elections under the Act in certain situations. See, e.g., 29 U.S.C. § 159 (1988). A problem may develop as to whether the agency has the staff, or would receive the budget to obtain the personnel, to also monitor meetings of the type described in the main text.}

\footnote{358. See supra text accompanying notes 66-79.}
Although not as expansive as the Republic Aviation rule, in many ways the recommendation improves upon that test. It has the advantages of certainty, promoting industrial democracy, and securing employers' interests. The standard achieves a fair balance of the competing interests of labor and management. As a result, the unfair labor practice model provides employees with the opportunity to receive information and to make meaningful decisions regarding their right to organize.

While this proposal is certainly very controversial, it is no more contentious than the Wagner Act was in 1935. The recommendation is somewhat more liberal than the failed provision in the Labor Reform Act of 1977. In that unenacted bill, Congress intended to allow access only if an employer had made comments about the union organizational efforts. In the recommended proposal, however, access occurs regardless of an employer's comments about organization. Communication and information regarding the subject of self-organization remains important whatever the employer's actions. This is necessary since an employer may communicate with its employees without saying a word; its mere presence and stature as the employer conveys an implicit message. This chilling effect has the result of placing a union at a disadvantage. In the interest of fairness and industrial democracy, an organizer in all campaigns must have the opportunity, on at least one occasion, to discuss labor relations issues with the employees.

Enacting the proposal significantly alters the present state of the law. It is one idea, however, for providing employees with an opportunity to obtain meaningful information about their rights under the Act. After obtaining this information, they are in a position to make a decision that is in their best interest. The proposal also encourages and generates additional discussion among the employees as to organizational activities, while employers retain their current right to comment on the subject of self-organization.

It must be noted that none of the proposals or any of the previous suggestions mentioned in this article require unconditional acceptance. Indeed, it is entirely possible that some elements of one or more of the recommendations offer a viable method for improving the present situation. It is certain, however, that the current interpretation of the law does not provide employees with all of their rights under the Act. Significant changes are necessary to balance the scales of

V. CONCLUSION

The discussion in this article clearly illustrates society’s overall failure to adequately protect the rights guaranteed to workers under the NLRA. Recent holdings by the Supreme Court have signaled that employees are no closer, and in fact further away from, realizing the rights promised them in 1935. Sixty years after the enactment of the NLRA, it is evident that changes, perhaps monumental changes, must occur to correct the problem. With labor organizations facing the worst of times and the American labor movement on the brink of extinction, the time for change is now. The proposals shed light on the deficiencies in this vital area of labor relations by offering many avenues of transformation. The final solution, no matter what form it eventually takes, must provide the American worker with the full measure of the promises made so many years ago when Congress enacted the National Labor Relations Act.