RIGHTING *LECHMERE*'S DRIFT: NLRA PREEMPTION OF STATE PROPERTY LAW OF EASEMENTS AND LEASES

RAMSIN G. CANON*

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INTRODUCTION

The National Labor Relations Act (NLRA) protects employees' right to engage in activities necessary to vindicate their right to collectively bargain. This includes the rights of unions to truthfully inform the public about an employer's activities and to deploy organizers to inform workers of their right to organize. Neither the National Labor Relations Board (NLRB) nor the Supreme Court has read the NLRA as giving an advantage to employees over employers within the potentially adversarial union organizing process. Accordingly, employers' entrepreneurial and property rights, particularly state property rights, limit the scope of rights granted by the NLRA. At the same time, two doctrines of federal labor law's preemption of state law, termed *Garmon* and *Machinists* preemption, circumscribe the ability of state legislatures and courts to interfere in

* J.D. candidate, December 2013, Chicago-Kent College of Law, Illinois Institute of Technology; B.A., History and Philosophy, University of Illinois at Chicago. I would like to thank Professors Hal Morris, Martin Malin, and Mary Rose Strubbe. My colleagues Jennifer Nimry Eseed, Prava Palacharla, and Donald Caplan were critical in helping me produce this paper. I would also like to thank Waleeta, Marlin, and Yousip for all their support.

Congress' comprehensive regulatory scheme over industrial employment relations.

In *Roundy's Inc. v. NLRB*, the Seventh Circuit correctly enforced a NLRB charge against a supermarket employer who excluded nonemployee union organizers from property near its stores, property over which the company held an easement but did not own. The organizers were engaged in truthful informational leafleting about the employer's labor practices. In enforcing the order, the court, relying on the Supreme Court's decision in *Lechmere v. NLRB*, considered whether the employer's easement, granted by its lessor, gave it a "power to exclude" the organizers, and took up, though ultimately rejected, the employer's defense based on statutory and common law grants of authority to easement holders.

This inquiry was unnecessary because the NLRA should preempt any such defense. The Seventh Circuit missed an opportunity to clarify the purpose and operation of the NLRA's grant of rights to nonemployee organizers: if the employer cannot claim a trespass, the organizers may not be excluded so long as they are otherwise acting lawfully; and any state grant of authority to the contrary should be preempted by the NLRA under *Machinists* preemption.

This Comment will support that contention over the next four sections. First, Section I will discuss the facts and outcome of the Seventh Circuit case, *Roundy's Inc. v. NLRB,* in which the court considered an employer's appeal of an NLRB charge of violating § 8(a)(1) of the NLRA. Next, Section II will trace the development of the jurisprudence surrounding employees' and nonemployees' § 7 rights and exclusion from property. In Section III, the *Garmon* and *Machinists* preemption doctrines are taken up, looking ultimately at the Supreme Court's holding in *Chamber of Commerce of the United States v. Brown*, striking down a California statute that impermissibly interfered with Congress' scheme of keeping employer and employee speech a "free zone" for the interplay of opposing forces. Finally, Section IV draws on the analysis and discussion in the preceding sections and argues that no state statute or common law rule *could* grant easement-holding employers a right to exclude otherwise lawful

§ 7 hand-billers or organizers because of the preemption doctrines and *Lechmere*'s limited concern with trespass.

I. THE CASE OVERVIEW: *ROUNDY'S V. NLRB*

A. Background

Roundy's, Inc. operates more than two-dozen groceries[1] in southeastern Wisconsin under the name Pick'n Save. In the spring of 2005, the Milwaukee Construction and Trades Council ("the Union"), an association of construction workers union locals, deployed organizers to these Pick'n Save stores to distribute leaflets to consumers, urging them to boycott the stores in protest of Roundy's failure to retain union contractors or pay prevailing union wages to workers constructing and remodeling their stores.[2] The hand-billers were not attempting to organize Pick'n Save employees into a union—they were already unionized—nor were they attempting to discourage nonunion construction workers from crossing a picket line, [3] two relevant inquiries under the NLRA.[4] Instead, the leafleting was

[1] *See* Pick'n Save Store Locator, http://www.picknsave.com/StoreLocator.aspx (last visited 10 June, 2013).

[2] Roundy's Inc., Respondent & Milwaukee Bldg. & Constr. Council, Afl-Cio, Charging Party, CASE 30-CA-17185, 2006 WL 325760 (N.L.R.B. Div. of Judges Feb. 8, 2006).

[3] *Id*. ("Let me begin by stating what this case does and does not involve. It does not involve organizing activities, either by employees or non-employee union representatives. And it does not involve a bargaining dispute between union-represented employees and their employer. It deals with nonemployee union representatives publicizing a dispute between a union and an employer over using contractors, in the construction or remodeling of its stores, who do not adhere to area wage standards.").

[4] Section 7 of the National Labor Relations Act protects the rights of employees of employers engaged in interstate commerce to engage in "concerted activity" for the purpose of "mutual aid and protection." Truthfully informing the public about an employer's labor current relations and outreach to employees by nonemployee union organizers are considered protected by § 7 as derivative rights. For the purposes of this comment, protected § 7 activity, including handbilling and communication with employees (but excluding more technical areas such as "recognitional picketing,"

intended to pressure Roundy's to require union contractors be used for its stores, or to require prevailing wages be paid to its nonunion contractors.[5] This type of organizing activity is protected by the NLRA and the legal analysis is the same as if the organizing activity was for the purposes of organizing a new union.[6] Roundy's leases all but one of its Milwaukee-area locations,[7] many of which are situated in shopping strips,[8] and had therefore initially claimed that they did not have control over contracting decisions.[9] However, in his findings, the administrative law judge ("ALJ") found that Roundy's retained authority to insist on lower cost labor through the terms of their lease agreements.[10]

Roundy's management responded to the handbilling effort by having supervisors and managers order the organizers off the property, or have the police called to eject them. The Council filed an unfair labor practice ("ULP") charge with the National Labor Relations Board, specifically alleging that the Union's rights under § 7 of the National Labor Relations Act ("NLRA") to engage in organizing activity was unlawfully infringed, in part because Roundy's lacked the requisite property interest to exclude the organizers from the property.[11] The Union alleged that § 8(a)(1) of the Act[12] was violated as a result of the unlawful exclusion.

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etc.) is referred to "organizing activity." *See e.g.*, J.E. Macy, Annotation, *Rights of Collective Action by Employees as Declared in § 7 of National Labor Relations Act (29 USCA § 157)*, 6 A.L.R.2d 416 (1949) ("Employer who promulgated and discriminatorily enforced no-solicitation rule barring nonemployee union organizers from meeting with off-duty credit center employees in cafeteria, and who threatened police action and engaged in unwarranted surveillance of protected union activities, violated employees' rights…").

[5] *Roundy's Inc.*, 2006 WL 325760.

[6] *See infra* note 13.

[7] *Roundy's Inc.*, 2006 WL 325760.

[8] *Id.* ("At some of the locations, Respondent's store was in a shopping mall and in others the store was free standing.").

[9] *Id.*

[10] *Id.*.

[11] Roundy's Inc. v. National Labor Relations Board, 674 F.3d 638, 643 (7th Cir.2012).

[12] National Labor Relations Act, § 8(a)(1), 29 U.S.C. § 158 (2006).

Where employee or nonemployee union organizers are excluded from private property, the NLRB and federal courts consider as a threshold issue whether the employer in fact had a property right sufficient to exclude people from the premises.[13] If the employer lacked a property interest sufficient to exclude parties, that exclusion would infringe protected § 7 organizing-like activities, and thus violate § 8(a)(1) of the Act. Only the property and entrepreneurial rights of the employer limit the protections of the NLRA, the federal law governing labor relations. So for example, a sole tenant in a shopping mall who evicts nonemployee organizers leafleting on a sidewalk abutting the street (which they do not own) would presumably not have a property interest in the sidewalk differentiated from that of the general public, and thus would lack an exclusionary property right.[14] Their eviction of organizers would violate § 8(a)(1).[15]

In the *Roundy's* case, the NLRB, after two rounds of fact finding by an ALJ, found that the language of Roundy's leases did not grant the stores easements sufficient to exclude parties from common areas, such as parking lots and sidewalks. Therefore, the Board found that the exclusions of the handbilling organizers infringed on the Union's § 7 rights and violated § 8(a)(1).[16] Roundy's appealed the Board's decision to the Seventh Circuit Court of Appeals.[17]

The court considered a number of issues raised on appeal, including whether the Board's remanding to the ALJ for more fact-finding on the property interest was appropriate considering the Board's General Counsel had failed to properly raise the property interest issue; whether a legal authority on Wisconsin state property law was an appropriate "expert" under the Federal Rules of Evidence and Board precedent; and whether, as a substantive matter, Roundy's easements, created by the language of the lease and interpreted by

[13] Lechmere Inc. v. N.L.R.B., 502 U.S. 527, 535 (Year) (reiterating that "in practice, nonemployee organizational trespassing had generally been prohibited…").

[14] *Id.*

[15] The jurisprudence underlying this doctrine is discussed more fully in Section III; *see* discussion *infra* Section III.

[16] *Roundy's Inc.*, 674 F.3d at 643.

[17] *Id.*

state common law, conferred a sufficient property interest to exclude the organizers.[18]

B. The Seventh Circuit's Analysis.

Roundy's ultimately failed to allege a sufficient property interest to exclude the organizers under a combination of state common and positive law. This was because Roundy's easement, granted through a lease, did not give Roundy's an interest sufficient to exclude parties from those easements. Had Wisconsin courts been more charitable to easement holders—or had the Wisconsin legislature positively granted easement holders a cause of action for trespass even absent a fee simple—the case may have gone the other way. The problem lies therein.

The Board, an administrative agency created by the NLRA, is entrusted with interpreting the Act and is entitled to appropriate judicial deference under *Chevron U.S.A. v. Natural Resources Defense Council*.[19] However, where the Board must interpret and apply state law to arrive at a decision, that analysis is subject to review *de novo*.[20] In reviewing the Board's decision in this case, the court acknowledged that in leafleting exclusion and organizing activity cases a union may prevail on either (a) a disparate treatment theory or (b) on the grounds that the employer lacked a sufficient property interest to exclude.[21]

In disparate treatment cases, the Board or a reviewing court will consider whether the employer treated union activity differently from other analogous activities—such as political or charitable speech—that are permitted.[22] This analysis is unnecessary, however, where the excluding party lacks an initial right to exclude; it is thus a threshold

[18] *Id.*

[19] Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

[20] *Roundy's Inc.*, 674 F.3d at 646 (citing United Food & Commercial Workers Int'l Union Local 400 v. NLRB, 222 F.3d 1030, 1035 (D.C.Cir.2000) (reviewing *de novo* Board's determination of whether employer had sufficient property interest to exclude union organizers because Board has no special expertise in interpreting Virginia law).

[21] *Id.* at 645.

[22] *Id.* at 644-45.

issue.[23] Determining the nature of a party's property interest is a matter of state property law, and is often common law, an area in which the Board lacks "special expertise."[24] In such cases, the reviewing court is charged with trying to determine how a state supreme court—in this instance the Wisconsin Supreme Court—would rule on the issue. In *Roundy's*, state property law defined the rights of easement-holders using this analysis.[25]

To determine whether Roundy's had a property interest sufficient to exclude anyone from the common areas where the hand-billers stood, the court looked first to the language of the leases to determine the type of easements[26] granted to Roundy's by the property owner. The use of the terms "easement" and "lease" may be confusing, so a brief explication may be helpful. Roundy's, like many retail employers, particularly in suburban settings, does not own all of the property in which their store is situated—they lease a building only. However, the lessor (the property owner) grants them an "easement" in the language of their lease. This easement permits their use of the parking lot, berms, loading areas, etc. They need this easement so that their licensees and invitees—their customers primarily—can access the building. But they do not *own* these portions of the property; they simply have an easement for its use, along with the other tenants and the property owner.[27] Easements should be understood as a right to use

[23] *Id.*

[24] *Id.* at 646.

[25] *Id.* at 655 (citing to Blood v. VH-1 Music First, 688 F.3d 543, 546-47 (7th Cir.2012)).

[26] The Board's and court's focus on easements is of particular importance in this case. Easements are flexible and can confer on the recipient a wide variety of property interests, not necessarily inclusionary: "An easement is a property interest that grants a nonexclusive right or privilege to possess or make use of someone else's lands. It may be obtained by contractual grant, by factual or legal implication from the intention of the parties or other circumstances of the transaction, or by an adverse use during a statutorily prescribed period." *See, e.g.*, James L. Buchwalter, Annotation, *What Constitutes, and Remedies for, Misuse of Easement*, 111 A.L.R.5th 313 (2003).

[27] The court reproduced the language found in the majority of leases in question: "Tenant is hereby granted a *nonexclusive easement*, right and privilege for itself and its customers, employees and invitees and the customers, employees and

property that is not otherwise owned, and the nature of the use is determined by the terms used in the language of the easement and state law.

The court adopted the details of Roundy's easements in leases as found by the ALJ.[28] While they differed in some details, the easements were essentially nonexclusive easements that "generally permit use of the common areas by [Roundy's] and its customers, employees and invitees, as well as the landlord and other tenants of the shopping centers, and their customers, employees and invitees."[29] The right to permit *use* of common areas is obviously not coextensive with a right to *exclude*.[30] This limitation/fact can be inferred from the language of

invitees of any subtenant, concessionaire or licensee of Tenant to use the [common areas] without charge with Landlord and other tenants and occupants of the Shopping Center and their customers, employees and invitees; provided, however, no use of the [common areas] shall be made which detracts from the first-class nature of the Shopping Center or obstructs access to or parking provided for customers of the Shopping Center." *Roundy's Inc.*, 674 F.3d at 643.

[28] Roundy's Inc., Respondent & Milwaukee Bldg. & Constr. Council, Afl-Cio, Charging Party, 30-CA-17185R, 2007 WL 966762 (N.L.R.B. Div. of Judges Mar. 28, 2007) ("[Twenty-five of the 26 store] locations were subject to different lease agreements between different landlords and Respondent, which leased the stores themselves, not the common areas in front of the stores, where the handbilling took place. The details of the relevant language of the lease agreements are set forth in a stipulation of the parties during the remand hearing (Jt. Exh. 4). Although the parties differ on whether the Respondent has an exclusionary interest in the common areas where the handbilling took place, there is essential agreement that Respondent had a nonexclusive easement in those common areas. Most of the leases specifically provide that the lessee has a nonexclusive easement in the common areas, including the sidewalks immediately in front of the stores and the parking lots serving the leased premises, and the others implicitly provide as much. The Respondent concedes (Opening brief on remand, at 2 and 37-39) that the leases at all 25 leased locations granted it "non-exclusive easements to the common areas." The easements generally permit use of the common areas by Respondent and its customers, employees and invitees, as well as the landlord and other tenants of the shopping centers, and their customers, employees and invitees.").

[29] *Id.*

[30] *Roundy's Inc.*, 674 F.3d at 651 (quoting Borek Cranberry Marsh, Inc. v. Jackson Cnty., 785 N.W.2d 615, 621 (2010)) ("An easement creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement.").

the easements; if Roundy's had a right to exclude of the type imputed to full property rights, Roundy's could feasibly exclude the customers of other tenants from sidewalks and the parking lot, and by the language of the easement this plainly could not be the case. This is what is meant by the term "nonexclusive"; where the easement holder does not have an absolute right to exclude third parties from the easement.

While the Seventh Circuit looked at how other courts of appeals had treated nonexclusive easements in similar cases,[31] Supreme Court precedent from *Lechmere, Inc. v. NLRB* required the court to look at the particular state's interpretation of property rights.[32] Relying on several cases from the Wisconsin Supreme Court, the Seventh Circuit ultimately determined that the language of the easements did not confer on Roundy's a right to exclude from common areas,[33] and thus violated § 8(a)(1) of the Act.[34]

In so doing, the court took up Roundy's defense that a Wisconsin statute, §§ 844.01 *et seq.*, gave them a cause of action where their property interest, including that in an easement, had been injured through some type of interference.[35] While the court rejected this argument, it failed to address whether such a statute—or, indeed, the state supreme court cases construing the exclusionary interests of easement-holders—would be applicable anyway given doctrines of preemption of federal labor law over state regulations and causes of action, known as *Garmon* and *Machinists* preemption.[36]

[31] *Id.*

[32] Lechmere, Inc. v. NLRB, 502 U.S. 527, 535 (1992).

[33] *Roundy's Inc.*, 674 F.3d at 652.

[34] *Id.*

[35] *Id.*

[36] Fed. Lab. Law: NLRB Prac. § 3:4 ("[M]ost courts divide the preemption doctrine along a bright line, articulating two distinct NLRA preemption principles. The first, the so-called *Garmon* preemption, prohibits states from regulating activity that the NLRA protects, prohibits, or arguably protects or prohibits….The second preemption principle, the so-called *Machinists* preemption, precludes state and municipal regulation concerning conduct that Congress intended to be unregulated.").

Instead, the court focused on the substantive deficiency of the relied-upon statute. The court stated that the statute did not create an independent cause of action granting a right, but only a remedy where a sufficient right existed (presumably by the express terms of the lease and easement).[37] The court thus rejected the employer's proffered defense, saying, "Section 844.01(1)…doesn't create an independent cause of action; it is a remedial and procedural statute that sets forth the remedies available when a cause of action exists…. In other words, Section 844.01 only provides remedies for persons who are injured as a result of an interference with their *interests* in real property."[38] The court then looked to whether, under Wisconsin state law, Roundy's had suffered an "unreasonable interference" with their easement: "Because Roundy's has rights to the extent of its nonexclusive use in the easements, it can enjoin third parties when they unreasonably interfere with this use."[39] After looking at how other circuit courts had treated the question, the court returned to Wisconsin state law and determined that, given the ALJ's findings that the hand-billers were peacefully engaged in their activity in a way not obstructive to Roundy's business operations, they were "not *unreasonably interfering* with Roundy's use and enjoyment of its easement."[40] The exclusion of the hand-billers thus interfered with the Union's § 7 rights and violated § 8(a)(1). The court enforced the Board's order prohibiting future exclusions and requiring posting notices of the violation.[41]

The court's analysis reflects the drift of jurisprudence controlling employer property rights and workers' organizing rights under the NLRA. By drifting with that post-*Lechmere* jurisprudence, the court missed an opportunity to rectify the problem by considering how

[37] *Roundy's Inc.*, 674 F.3d at 652.

[38] *Id.* (citing Menick v. City of Menasha, 200 Wis.2d 737, 547 N.W.2d 778, 782 (Wis.Ct.App.1996); Shanak v. City of Waupaca, 518 N.W.2d 310, 320 (Wis.Ct.App.1994) (stating that Section 844.01 "creates no rights or duties. It does not purport to create a cause of action. It is a remedial and procedural statute.")).

[39] *Id.* at 653(citing Hunter v. McDonald, 78 Wis.2d 338, 254 N.W.2d 282, 285 (1977)).

[40] *Id.* at 654-55.

[41] *Id.*

federal preemption doctrines could come into play in these scenarios. The following section traces the *Lechmere* genealogy, before a consideration of federal labor law preemption.

II. *LECHMERE'S* GENESIS AND SUBSEQUENT DRIFT

The National Labor Relations Act (NLRA) regulates employee organizing activity.[42] These organizing rights are at the heart of the NLRA and are referred to metonymically as § 7 rights. They were originally conceived to encourage unionization and collective bargaining through organizing activities, and to ensure that employers could not unduly interfere with that process. Since its passage in 1935, interpretation of the NLRA has evolved and it is not currently construed as favoring one party over another.[43] Employee and nonemployee organizers' rights to physically access employees are based on state, not federal, law because state law defines "property".[44] Thus, where federal rights interact with property rights, state definitions of property law will be employed.

In *PruneYard Shopping Center v. Robins*, the Supreme Court determined that a state may "exercise its police power or its sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution."[45] The Supreme Court in *PruneYard* held that state law defines a defendant's property rights in an expressive activity case.[46] The Court affirmed

[42] National Labor Relations Act, 29 U.S.C. §§ 151-169 (1935).

[43] Chicago labor lawyer Thomas Geoghegan shares an anecdote of a young attorney who applied for a job with the NLRB; when the attorney questioned which side the Board was on in the struggle between employers and employees, the interviewer said, "We're neutral…but we're neutral on the side of the workers." THOMAS GEOHEGAN, WHICH SIDE ARE YOU ON? 265-66 (1991).

[44] *See e.g.*, New York New York Hotel, 334 NLRB 761 (2001).

[45] PruneYard Shopping Center v. Robins, 447 U.S. 74, 84 (1980) (On the interaction of property rights and First Amendment protected speech).

[46] *Id.* ("Nor as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enables it to define 'property' in the first instance.").

and explicated this principle in the labor context in *Thunder Basin Coal Co. v. Reich* in note 21, stating "[t]he right of employers to exclude union organizers from their private property emanate[s] from state common law, and while this right is not superseded by the NLRA, nothing in the NLRA expressly protects it."[47]

The Court struggled with how the Act's creation and guarantee of organizing rights for workers and unions interacted with an employer's property rights. There seemed to be an intractable contradiction: the very nature of workers' rights to organize one another, discuss unionization, and appeal to the public and other workers to recognize labor disputes requires some interference, if not outright use, of the employer's property; at the same time, a federal statute that seriously burdened employers' property rights would implicate any number of constitutional issues. Beginning with *Republic Aviation v. N.L.R.B.*, through *Babcock & Wilcox v. N.L.R.B.*, *Hudgens v. N.L.R.B.*, and culminating in *Lechmere, Inc. v. N.L.R.B.*, the Court moved along a gentle slope from recognizing that the employees' organizing rights necessarily limited an employer's property rights, to giving preference to those property rights in large categories of cases.

A. Analogy to First Amendment

One strain of the jurisprudence, rooted in First Amendment free speech rights, started strong but fizzled out. In *Marsh v. Alabama*, the Court held that a company-owned town could not prohibit Jehovah's Witnesses from proselytizing on a property-rights theory.[48] The Court rejected the contention that property rights granted "absolute dominion" to curtail First Amendment rights.[49] This was particularly the case where the private property had first been opened to the public and First Amendment expression successively curtailed.[50] The Court extended this theory to the labor rights context in

[47] Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 217, n. 21 ((1994)).
[48] Marsh v. Alabama, 326 U.S. 501 (1946).
[49] *Id.*
[50] *Id.*

Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.[51] The Court expressed a policy concern that businesses migrating to strip malls and business parks in suburban contexts "could largely immunize themselves from similar criticism by creating a cordon sanitaire of parking lots around their stores," if employers could rely on property rights to curtail the First Amendment expression necessarily entailed in § 7 organizational rights.[52] The Court applied the reasoning of *Marsh*, that given the essentially public nature of a shopping center, no meaningful privacy-sourced concern over property rights could justify exclusion.[53]

The progress made on a constitutional theory wedding, or at least analogizing, § 7 rights to free speech began to ebb back down the slope with the Court's decision in *Lloyd Corp. v. Tanner*. *Lloyd* was a Vietnam protest case where the Court distinguished *Logan Valley* and *Marsh* on the grounds that anti-war speech was unrelated to the nature of the property (a shopping mall), and thus courts should not force property owners to tolerate the speech.[54] Subsequently, in *Hudgens v. NLRB*,[55] the Court short-circuited any further expansion of *Logan Valley* into the labor context: "[T]he rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case."[56] Union protesters could not enter a shopping mall for the purpose of advertising their strike against one tenant.[57] *Logan Valley* having conclusively smothered any First Amendment free speech theory for § 7 rights, the expression of those rights is analyzed under its own labor law rubric.

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

[52] *Id.*

[53] *Id.*; *see also* Catherine Lockard, Note, *Gaining Access to Private Property: The Zoning Process and Development Agreements*, 79 NOTRE DAME L. REV. 765, 775-76 (2003).

[54] Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

[55] Hudgens v. NLRB, 424 U.S. 507 (1976).

[56] *Id.* at 518.

[57] *Id.* at 520-21.

B. Republic Aviation Through Lechmere

Outside this truncated thread of cases, the Court otherwise treated the question of employee and nonemployee organizer access to or use of employer property within a narrower labor law context, eschewing any free speech analysis. In *Republic Aviation Corp. v. N.L.R.B.*,[58] the Court enforced a Board order invalidating the employer's blanket prohibition against any solicitation as violative of employees' § 7 rights, even though the prohibition was not discriminatorily applied.[59] In its essence, the Court's holding created an employer duty to accommodate employees' protected § 7 activity even on its own property.

This duty would not encompass too much, however. In 1956, the Court decided *N.L.R.B. v. The Babcock & Wilcox Company*, holding that an employer had no duty to permit *nonemployee* organizers to access its (wholly owned) parking lots for purposes of § 7 activities, where the plant was near to small communities where employees lived, and thus many other means of publicity and organizing were available.[60] A non-discriminatory policy against access by nonemployee organizers in particular was therefore enforceable. The Court in dictum stated that, "Organization rights are granted to workers *by the same authority, the National Government*, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization."[61] The effect of *Babcock* was that the NLRA would not create a duty on the employer to accommodate nonemployee organizers' organizing activities (i.e., "aid[ing] organization") if the union has any other options for contacting employees.

[58] Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793 (1945).
[59] *Id.*
[60] N.L.R.B. v. The Babcock & Wilcox Company, 351 U.S. 105 (1956).
[61] *Id.* at 112.

Of course, later Courts would locate the source of property rights in the states, not the "National Government." While differentiating between employee and nonemployee organizers and explicating the property rights of employers vis a vis § 7 rights, the Court reiterated that § 7 rights are important enough that they *must* trump at least one element of an employer's property rights: "when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize."[62] This caveat/exception is important because it confounds the idea that employer property rights are absolutely sacrosanct—or that § 7 rights are inherently inferior to those property rights.

Hudgens, discussed *supra*, was decided subsequent to *Babcock* and explicated the general rule that employers' rights to exclude trumped nonemployees' § 7 organizing rights.[63] Thus situated, some deeper discussion of *Hudgens* is appropriate. Also a shopping center case, employees of a retailer in a shopping mall entered the mall to picket in support of an economic strike. They were threatened with arrest if they did not disperse. The union filed a complaint with the Board alleging abridgment of § 7 rights and a violation of § 8(a)(1). The Fifth Circuit Court of Appeals enforced the Board's subsequent cease-and-desist order. The Supreme Court reversed that order, on the grounds that the shopping mall owner (the Petitioner, Scott Hudgens) was under no duty to accommodate the striking workers. *Hudgens'* primary effect was to cleave access/accommodation cases under the NLRA from any First Amendment constitutional analysis.[64] The bulk of the opinion is

[62] *Id.*

[63] It may be helpful to think of nonemployee organizers § 7 rights as rights derived from employees' organizational rights under § 7—i.e., as derivative rights. It is often union organizers who inform employees of their rights under the Act and aid them in organizing their workplace and therefore if nonemployee organizers do not have these "derivative" rights, employees would be unable in many cases to effectively exercise their own organizational rights.

[64] Hudgens v. NLRB, 424 U.S. 507, 512-521 (1976) ("While acknowledging that the source of the pickets' rights was s 7 of the Act, the Court of Appeals held that the competing constitutional and property right considerations discussed in

directed at that issue. It also however reinforced the *Babcock* distinction between employees and nonemployees and reiterated that accommodation was only to be an undesirable recourse where the union did not have a means of access, stating that "[t]he *Babcock & Wilcox* opinion established the basic objective under the Act."[65] In what was later determined to be dicta, however, the Court restated at least the premise for a balancing test between § 7 rights and employers' property rights, putting the "locus of that accommodation…at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context."[66]

The Board initially took this to be instruction to implement a balancing test in cases of employee or nonemployee organizers accessing employer property for protected § 7 activities. This idea culminated in the Board's decision in *Jean Country*.[67] *Jean Country*, like the *Hudgens* and *Logan Valley* cases discussed *supra*, dealt with a shopping center, demonstrating just how important massive enclosures of space and the concentration of various service-sector employers in single locations has become to federal labor law jurisprudence.[68] In *Jean Country*, a union attempted to place an "informational picket," letting consumers know that a retailer, Jean Country, was non-union, at the entrance to the store inside the mall.[69] The store and mall management contacted the police to remove the picketers.[70] The Board adopted the ALJ's findings and applied a balancing test to determine whether the removal of the picketers infringed on § 7 rights and thus

Lloyd Corp. v. Tanner, supra, 'burde(n) the General Counsel with the duty to prove that other locations less intrusive upon Hudgens' property rights than picketing inside the mall were either unavailable or ineffective,' 501 F.2d, at 169, and that the Board's General Counsel had met that burden in this case.").

[65] *Hudgens*, 424 U.S. 507, 522 (1976).

[66] *Id.*

[67] Jean Country, 291 N.L.R.B. 11 (1988).

[68] The importance of shopping centers also vindicates the Court's concern in Logan Valley.

[69] *Jean Country*, 291 N.L.R.B. at 14-16.

[70] *Id.* at 15.

violated § 8(a)(1).[71] The Board concluded on the basis of that balancing test that the exclusion was unlawful:

> Taking account of all the factors above, it is apparent that strict maintenance of the privacy of the mall property during business hours is not an overriding concern and in fact is not generally desirable, because the presence of the public in large numbers is intrinsic to the commercial goals of the lessees and Respondent Brook. Accordingly, we find that the private property right asserted by the Respondents in reaction to the Union's picketing is quite weak in the circumstances.[72]

Jean Valley and balancing wouldn't last long.

C. The Lechmere *Decision*

The Supreme Court finally had an opportunity to take on the balancing test issue squarely in *Lechmere Inc. v. NLRB.*[73] *Lechmere* arose as a result of the United Food and Commercial Workers' ("UFCW's") attempts to organize the employees of a retail establishment in Connecticut.[74] Finding it difficult to contact workers by standing on a four-foot grass easement abutting a major arterial road, organizers for the union leafleted employee cars (generally identifiable by where and when they parked); in each instance, management for the store removed the leaflets and ordered the organizers to leave. The UFCW pursued a charge with the NLRB alleging abridgement of § 7 rights.[75] The Board applied the *Jean Country*/*Babcock* balancing test and ruled in the union's favor.[76] Lechmere appealed, and the Court granted certiorari.[77]

[71] *Id.* at 16 ("With the Respondents' interests established, we proceed to an examination of the relative strength of their right to maintain the privacy of the property.").

[72] *Id.* at 17.

[73] Lechmere Inc. v. NLRB, 502 U.S. 527 (1992).

[74] *Id.* at 529.

[75] *Id.* at 529-30.

[76] *Id.* at 531.

[77] *Id.* at 531.

Demonstrating just how much the details of property ownership had crept into determinations of workers' rights under the Act, the Court described in great detail the physical characteristics of the property on which the retailer was located.[78] The Court rejected the Board's use of the *Jean Country* balancing test and created a rather broad and simple categorical rule: an employer may exclude nonemployee organizers from its property where the employer has a property interest sufficient to exclude, and employees may be reached by any other means.[79]

The Court in an opinion by Justice Thomas framed this rule as a simple return to *Babcock*, relegating the "spectrum" language from *Hudgens* to the dreaded dicta dustbin. The Court stiffened *Babcock*'s general preference for employer property rights where any alternative means of contact were available to nonemployee organizers, without concern for the unworkability of employees' § 7 rights absent nonemployees' derivative rights to organize them. However, *Hudgens* did not stand for an eroding of *Babcock;* instead, in its disposition it left *Babcock*'s central holding in place, reiterating that "*Babcock's* language of 'accommodation' was [not] intended to repudiate or modify [the] holding that an employer need not accommodate nonemployee organizers unless the employees are otherwise inaccessible."[80]

[78] *Id.* at 531 ("The store is located in the Lechmere Shopping Plaza, which occupies a roughly rectangular tract measuring approximately 880 feet from north to south and 740 feet from east to west. Lechmere's store is situated at the Plaza's south end, with the main parking lot to its north. A strip of 13 smaller "satellite stores" not owned by Lechmere runs along the west side of the Plaza, facing the parking lot. To the Plaza's east (where the main entrance is located) runs the Berlin Turnpike, a four-lane divided highway. The parking lot, however, does not abut the Turnpike; they are separated by a 46–foot–wide grassy strip, broken only by the Plaza's entrance. Lechmere and the developer of the satellite stores own the parking lot jointly. The grassy strip is public property (except for a 4-foot-wide band adjoining the parking lot, which belongs to Lechmere).").

[79] *Id.* at 538 (Only in scenarios where, for example, employees were wholly isolated or resided on property owned by the employer, as on remote oil rigs or mining operations for example, would the Jean Country balancing test be considered.).

[80] *Id.* at 534.

Lechmere created a stark categorical rule, one crafted in relief against a darkly impermissible alternative: the federal government compelling employers to suffer common law trespass. The Court cast this categorical rule as a commonsensical result: absent such a rule, § 7 would otherwise be interpreted as suborning common law trespass. That is, the Court's reference to "reasonability" of accommodation in earlier cases "was nothing more than a commonsense recognition that unions need not engage in extraordinary feats to communicate with inaccessible employees—*not* an endorsement of the view…. that the Act protects 'reasonable' trespasses."[81] Whereas employee organizers are the employer's invitees or licensees, nonemployee organizers have no such status. Thus, per *Lechmere*, a reading of § 7 requiring some accommodation of *employees'* activities would not unduly interfere with state property rights. The categorical distinction was for the Court an easy one to make; employees have a status under common law that nonemployees do not, thus accommodation commensurate with that status upsets nothing.

As Justices White and Blackmun pointed out in their dissent, however, this seductive bit of argumentation falls flat upon closer inspection of the facts, but at a slightly greater level of generality. That is, whereas the parking lot involved in *Babcock* was for use exclusively by employees and abutting a well-settled area,[82] the parking lot in *Lechmere* existed for the general public, "without substantial limitation."[83]

The analogy to trespass thus doesn't survive when employed to justify a *categorical* distinction between employees and nonemployees; while nonemployees may seem out of place in a parking lot otherwise used *only* by employees and the occasional licensee, as in *Babcock*, in a parking lot that is open to the public without any real limitation,[84] nonemployees are perfectly expected, in fact outright encouraged to be present?. They could hardly be analogized to trespassers. What's more, as the dissenting Justices

[81] *Id.* at 537.
[82] N.L.R.B. v. The Babcock & Wilcox Company, 351 U.S. 105, 113-14 (1956).
[83] *Lechmere Inc.*, 502 U.S. at 543 (White, J., dissenting).
[84] E.g., there is no controlled access to the parking lot.

pointed out, the employees' § 7 rights often rely inextricably on nonemployee organizers, as the *Babcock* decision itself points out.[85]

The Court's categorical distinction between employees and nonemployees[86] and the faulty analogy to trespass has triggered a drift in the jurisprudence that conflates employers' state law-defined "right to exclude" with employees' § 7 organizational rights, giving preference to the former even where the facts of a given case don't raise the specter of compelled trespass.

*D. The Post-*Lechmere *Approach*

The result of *Lechmere* on handbilling and similar organizing activity cases has been to create a fairly simple formal inquiry: did the employer have a property right, as defined by state law, to exclude? If so, *any* exclusion of nonemployees is appropriate. If not, any exclusion violates § 8(a)(1) of the Act (presuming otherwise lawful behavior by the nonemployees).[87] The employer's right to exclude therefore is not a right conferred by the NLRA itself. Instead, the right as defined by state law *defeats* the § 7 rights of employees and the derivative rights of nonemployee organizers.[88]

As the *Roundy's* case shows, the inquiry may be simple in form, but it can be complex in practice. The Board must interpret state common law on property rights, not an area of expertise it has, and reviewing courts must approximate how a state supreme court "would

[85] *Lechmere Inc.*, 502 U.S. at 543 (White, J. dissenting)("Moreover, the Court in Babcock recognized that actual communication with nonemployee organizers, not mere notice that an organizing campaign exists, is necessary to vindicate § 7 rights.") (citing to *Babcock*, 351 U.S., at 113) (emphasis added).

[86] Lechmere is often cited for its proposition that § 7 does not confer rights on nonemployees, only employees (*see e.g.*, Davis Country, Inc. v. NLRB 2 F.3d 1162 (D.C.Cir. 1993)). Because "employee" is a term defined by the NLRA, it is left to the Board to interpret its meaning, *see* N.L.R.B. v. Town & Country Electric, 516 U.S. 85 (1995) (holding that an employee simultaneously employed by a union is still an employee for the purposes of the Act).

[87] Jeffrey M. Hirsch, *Taking State Property Rights Out of Federal Labor Law*, 47 B.C.L.REV. 891, 905 (2006).

[88] *See e.g.*, Thunder Basin Coal v. Reich, 510 U.S. 200, 217, n. 21 (1994).

decide" an issue.[89] The result has been that employees seeking to express their § 7 organizational rights are subject to the sometimes nebulous—sometimes quirky—vagaries of state property law. A few cases can demonstrate this odd drift away from the purpose of the NLRA. That purpose is to comprehensively define and regulate industrial relations and to protect rights of employees to organize. The post-*Lechmere* jurisprudence has drifted towards allowing expression of that purpose only where the employer *must* permit § 7 expression.

After *Lechmere* was handed down, reviewing courts had little trouble disposing with organizer access cases.[90] However, the jurisprudence became more difficult when the property interest was not clear. The Board and reviewing courts could not merely rely on *Lechmere* because the right to exclude was not a NLRA right, but a state common law right.[91] So in cases involving an unclear property interest, the *Lechmere* analysis turns on a reading of state property law, which is inherently unstable for two reasons: first, because the Board lacks expertise in state property law; and second, because reviewing courts do not defer to the Board's interpretation of state property law, but must review the Board's conclusion *de novo*.[92] States' plenary authority to codify property rights by statute also raises the possibility that state legislatures can alter the governing regimes from time to time.[93] Moreover, the fact that federal courts have a

[89] Roundy's Inc. v. NLRB, 674 F.3d 638 at 651 (7th Cir. 2012).

[90] *See e.g.*, Sparks Nugget, Inc. v. N.L.R.B., 968 F.2d 991 (9th Cir. 1992); Frye v. District 1199, Health Care and Social Services Union, Service Employees Intern. Union, AFL-CIO, 996 F.2d 141 (6th Cir. 1993); N.L.R.B. v. Great Scot, Inc., 39 F.3d 678 (6th Cir.1994); Metropolitan Dist. Council of Philadelphia and Vicinity United Broth. Of Carpenters and Joiners of America, AFL-CIO v. N.L.R.B., 68 F.3d 71 (3rd Cir. 1995); Johnson & Hardin Co. v. N.L.R.B., 49 F.3d 237 (6th Cir.1995).

[91] *See e.g.*, Thunder Basin Coal v. Reich, 510 U.S. 200 (1994); N.L.R.B. v. Calkins, 187 F.3d 1080 (9th Cir. 1999).

[92] Hirsch, *supra* note 87, at 906-07 ("The Board's interpretation of a lease, construction of a state's treatment of public rights-of-way, or factual determination of where the organizers were standing will either trigger Lechmere and make the employer's attempt to exclude lawful, or evade Lechmere and make the exact same attempt unlawful. This analysis is frustrating for the parties, as they cannot reasonably predict, ex ante, the Board's determination of the state law issue.").

[93] *See* discussion *infra* Section III.

historical doctrinal aversion to adjudicating land use cases in the first place, diminishing their own expertise, aggravates the situation.[94] Several cases illustrate the challenge for the Board and reviewing courts created by *Lechmere* and its progeny.

In *O'Neil's Markets v. United Food and Commercial Workers' Union, Meatcutters Local 88, AFL-CIO, CLC*, the Eighth Circuit declined to overturn a Board order finding that the employer, a grocer, had violated § 8(a)(1) of the Act, subject to further proceedings on the issue of the employer's property interest.[95] The employer in that case had evicted "area-standards" hand-billers engaged in § 7 activities like those of the hand-billers in *Roundy's*.[96] The *O'Neil's Markets* court began its analysis by looking to the language found in the lease agreements.[97] In its analysis, the court stalled its application of *Lechmere* because of uncertainty as to whether that precedent could be applied directly where the employer "does not *own* the parking lot or sidewalk at issue."[98] Citing to a similar though less thoroughly discussed case from the Sixth Circuit, the court inquired into the precise nature of the employer's property interest as defined by its lease and interpreted by state courts.[99]

The analysis in *O'Neil's Markets* is keen if a bit unwieldy. The court stated that because per the terms of the lease the employer had a "non-exclusive easement of ingress, egress, and parking," more

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[94] *See e.g.*, Note, *Land Use Regulation, the Federal Courts, and the Abstention Doctrine*, 89 YALE L.J. 1134, 1135-36 (1980) ("Although the [Supreme] Court reentered the land use field in the 1970s, its disposition of the recent cases has tended to discourage federal land use litigation. The volume of land use litigation in the lower federal courts has increased in recent years, but a variety of procedural and substantive devices, including abstention, have been invoked to discourage land use litigants from entering federal court."); *see also* Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1973) (Marshall, J., dissenting) (federal courts should not sit as "zoning board[s] of appeal.").

[95] O'Neil's Markets v. United Food and Commercial Workers' Union, Meatcutters Local 88, AFL-CIO, CLC, 95 F.3d 733 (8th Cir. 1996).

[96] *Id.* at 734-35.

[97] *Id.*

[98] *Id.* at 737.

[99] *Id.* at 738-39 (citing to Johnson & Hardin Co., 305 N.L.R.B. 690, *enf'd*, 49 F.3d 237 (6th Cir. 1995).

evidence or law would be needed for the employer to carry its persuasive burden proving that it had a property interest sufficient to exclude the hand-billers.[100] Evidence offered by the employer that it was responsible for maintenance of the common areas was insufficient to create a property interest not otherwise explicit in the lease, at least insofar as no case authority was offered to support that conclusion.[101] Instead, the court looked to a contract interpretation case for the proposition that in cases of ambiguity of interests conferred, only the text of the lease could be relied upon.[102] What's more, Missouri common law explicitly debarred "easement owners" from trespass remedies,[103] which impliedly conflicted with *Lechmere*'s particular concern with suborned or "reasonable" trespass.[104] The court therefore remanded the case for further proceedings on whether the picketing was truly protected activity with the presumption that if it were, the Petitioner would be liable for a violation of § 8(a)(1).[105]

Obviously, different states ascribe different degrees of interest or rights to easement holders. The *Snyder's of Hanover* case[106] demonstrates the quirkiness of this fact. In this unreported and complex case out of the Third Circuit, the court reversed a Board order[107] finding that the employer Snyder's of Hanover, a Pennsylvania pretzel-maker, had violated § 8(a)(1) when it called police to eject UFCW hand-billers from the public right-of-way at the edge of its factory's driveway.[108] The route to that conclusion was a circuitous one.

[100] *Id.* at 739.

[101] *Id.*

[102] *Id.* (citing Washington Univ. v. Royal Crown Bottling Co., 801 S.W.2d 458, 464 (Mo.Ct.App.1990).

[103] *Id.* at 739 (citing Gilbert v. K.T.I., Inc., 765 S.W.2d 289, 293 (Mo.Ct.App.1988).

[104] *See* Lechmere Inc. v. NLRB, 502 U.S. 527, 537 (1992).

[105] *O'Neil's Markets*, 95 F.3d at 740.

[106] Snyder's of Hanover v. N.L.R.B., 39 Fed.Appx. 730 (2002).

[107] Snyder's of Hanover, 334 N.L.R.B. No. 21 (2001).

[108] *Snyder's of Hanover,* 39 Fed.Appx. at 735.

On October 1st, 1998,[109] five union organizers stood at the "edge" of the facility, on a right-of-way that ran "from the middle of [State Route] 116 to a line running tangent to one utility pole near the driveway and a short distance behind the other utility poles located near the edge of the road."[110] The five organizers did not "venture inside the utility poles," thus (apparently) staying in the right-of-way, from where they distributed leaflets to employees in their cars as they drove onto and off of the factory's premises.[111] Hearing about the union activity outside, company management confronted the organizers and, finding none of them to be employees, asked them to leave the property.[112] When the organizers refused, police were called and the organizers were ejected as trespassers.[113] The UFCW filed a complaint for violation of the NLRA with the Board; the Board agreed, and the employer appealed.

The Third Circuit, reviewing the Board's interpretation of Pennsylvania property law *de novo*, reversed the Board. It held that the Board misconstrued the presumption created by the law..[114] In Pennsylvania, property owners own up to the middle of abutting roadways.[115] The court stated that Pennsylvania law, although "checkered," conditioned a property owner's rights over a right-of-way on what the given municipality itself permitted.[116] In other words, a property owner could exclude hand-billers, or other parties, if a municipal ordinance barred that activity in rights-of-way, or could not if that activity was expressly permitted by ordinance, but not otherwise.[117] Even further complicating matters, the case law indicated that the interpretation of the type of expressive activity allowed could

[109] The lag between the incident and a final decision in this case demonstrates how uncertainty as to ultimate conclusions can delay remedy under the Act.

[110] *Snyder's of Hanover*, 39 Fed.Appx. at 731.

[111] *Id*.

[112] *Id.* at 731-32.

[113] *Id*.

[114] *Id.* at 732-33.

[115] *See* Westinghouse Elec. Corp. v. United Elec., Radio & Mach. Workers, 46 A.2d 16, 20 (1946); City of Scranton v. People's Coal Co., 100 A. 818, 819 (1917).

[116] *Snyder's of Hanover*, 39 Fed.Appx. at 733.

[117] *Id.* at 733-34.

vary from an urban to a rural setting.[118] The court ultimately resolved the case on the proposition that the employer did not carry a burden of proving precisely what the municipality permitted—stating that it was a legal question, not a factual question requiring proving up, and the Board had erred in requiring that burden.[119]

Notably, perhaps mercifully, the court declined to undertake a constitutional first amendment analysis of the Pennsylvania law granting municipalities this power to potentially exclude expressive conduct.[120] In any case, it goes without saying that this analysis is a long way from the *Lechmere* Court's concern with suborning trespass. To the contrary; the court went to pains to err on the side of an exclusionary interest in a right-of-way, a form of property that by its very character is non-exclusive—and arguably of the type captured by the so-called *Hague* dictum, that properties that "have immemorially been held in trust for the use of the public," should be considered as bearing expressive conduct.[121]

The explicit and implicit power of state and local governments to determine these property interests, federal courts' doctrinal aversion to adjudicating land use controls, and local governments' powers to confer rights or require exactions related to the uses of property only further discommode the NLRA's purpose of crisply and clearly defining industrial relations.[122] To understand how, however, a treatment of NLRA preemption jurisprudence is necessary.

III. *GARMON* AND *MACHINISTS* PREEMPTION UNDER THE NLRA

Two species of preemption govern state and local government actions vis a vis federal labor law.[123] *Garmon* preemption invalidates

[118] *Id.* at 734.

[119] *Id.* ("The municipality's authorization or non-authorization of handbilling by public ordinance is a legal issue, however, and not an issue of fact for which Snyder's bore the burden of proof ….") (citing to Gary E. Calkins d/b/a/ Indio Grocery Outlet, 323 N.L.R.B. 1138 (1997)).

[120] *Id*.

[121] *Id.* (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).

[122] *See* discussion *infra* § IV.

[123] *See e.g.*, FED. LAB. LAW: NLRB PRAC. § 3:5.

any state regulation of activity that the NLRA otherwise regulates through prohibition or protection. The second, *Machinists* preemption, precludes state regulations of industrial labor relations conduct that Congress otherwise intended to keep unregulated.[124] Generally, a state or local law conflicts with federal legislation, including the NLRA, if that law impedes or interferes with the execution of Congress' objectives in creating the legislation.[125]

In *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, the Court held that a California court had no jurisdiction to award an employer damages for injuries caused by picketing and related concerted activities on state common law tort grounds, *even where* the Board had declined to extend its jurisdiction to the case.[126] The Court held that Congress had, through positive legislation in the form of the language of § 7 and the related enforcement provisions of the NLRA, preempted such a cause of action in state courts, and to hold otherwise would subvert the purpose and efficacy of a national labor relations law rooted in interstate commerce.[127]

In *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Comm'n* (hereafter *Machinists*), the employer filed a charge with the Board, claiming that union members' concerted refusal to work overtime as a tactic to force renewal of an expired collective bargaining agreement violated the NLRA as an unfair labor practice.[128] The NLRB dismissed the claim, which the employer then brought before the Wisconsin Employment

[124] *Id.* at § 3:4.

[125] *See e.g.*, Hines v. Davidowitz, 312 U.S. 52 (1941); St. Thomas-St. John Hotel & Tourism Ass'n. Inc. v. Government of U.S. Virgin Islands ex rel. Virgin Islands Dept. of Labor, 357 F.3d 297 (3d Cir. 2004).

[126] San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236 (1959) (the Board presumably declined jurisdiction because of the minimal interaction with "interstate commerce.").

[127] *Id.* at 246 ("Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of s 7 or s 8 of the Act, the State's jurisdiction is displaced.").

[128] Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976).

Relations Commission, a state agency.[129] The Commission, navigating *Garmon* shoals, held that because a "concerted refusal to work overtime" was neither expressly protected by § 7 nor expressly prohibited by § 8, the Commission had jurisdiction to act on the claim, which it did by issuing a cease-and-desist order to the union.[130]

The Court accepted an appeal from the Wisconsin Supreme Court affirming the decision, and in its analysis laid out the general policy considerations underlying preemption as, first, avoiding multifarious pronouncement from different jurisdictions,[131] and second, a concern that state actions would circumscribe the expression of rights created by the Act.[132] The inquiry in *Machinists* turned on Congressional intent, or more precisely, on Congress' vision of the nature of labor relations and bargaining. Specifically, where Congress envisioned workers and employers using "economic weapons [the] actual exercise (of which) on occasion by the parties, is part and parcel of the system that the [NLRA has] recognized," a state regulation will be preempted as regulating activity meant to be left to free interplay between opposing forces.[133] Concerted activity in the form of refusal to work overtime, while not expressly protected by the Act, was an "economic weapon" deployed as a function of the relative bargaining strength of the union. The Commission's regulation of that activity was thus a substantive interference in the dispute that "would frustrate effective implementation of the Act's processes."[134] In other words, Congress may have wanted no regulation of certain activities in order to let the two sides duke it out. Where that is the case, *Machinists* preemption applies.

The two types of federal labor law preemption are thus not as distinct as they may first appear. Activities left unregulated to be

[129] *Id.* at 133-35.

[130] *Id.* at 135-36.

[131] *Id.* at 138; *see also* Automobile Workers v. Russell, 356 U.S. 634, 644 (1958).

[132] *Lodge 76*, 427 U.S. at 138.

[133] *Id.* (quoting N.L.R.B. v. Insurance Agents, 361 U.S. 477, 488-89 (1960)).

[134] *Id.* at 148 (quoting Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 379 (1969)).

employed freely by the parties to a labor dispute could also be considered activities implicitly protected by the broad language of § 7 of the Act.[135]

It is important to note an express exemption from preemption strictures: namely, the exemption for trespass.[136] This exemption is part of a relatively narrow set of exemptions.[137] The exemption for trespass is a necessary result of *Lechmere*'s holding that the NLRA could not be read as suborning trespass. In *Radcliffe v. Rainbow Const. Co.*, the Ninth Circuit held that *Lechmere*'s core holding that the NLRA did not protect "reasonable trespass," meant that neither *Garmon* nor *Machinists* could preempt state trespassing laws.[138] Circuits have described the narrowness of this exemption by restricting it to trespass cases, for example, in *O'Neil's Market*, where the court stated that an easement owner is "debarred from actions traditionally established for the protection of a possession, such as trespass, writ of entry, and ejectment, because the easement owner does not have the prerequisite possession."[139]

Garmon and *Machinists* are vital doctrines that still greatly limit the power of states to positively or incidentally control industrial relations.

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[135] *See supra* note 129.

[136] *See e.g.*, 2003 A.L.R. FED. 1 (originally published in 2003) (an "employer ordinarily may maintain a trespass action against the union without fear of preemption by the National Labor Relations Act…pursuant to the Garmon doctrine, even though the union's picketing is arguably prohibited or protected by federal law.").

[137] *See e.g.*, 2003 A.L.R. Fed. 1 (originally published in 2003).

[138] Radcliffe v. Rainbow Const. Co., 254 F.3d 772, 784 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 545 (U.S. 2001) ("[W]hen a union's picketing activities trespass on an employer's property, the employer ordinarily may maintain a trespass action against the union; the trespass claim is not preempted even though the union's picketing was arguably prohibited or protected by federal law…The property right underlying the law of trespass, of course, is a matter of state law.") (internal citation omitted).

[139] O'Neil's Markets v. United Food and Commercial Workers, Meatcutters Local 88, AFL-CIO, CLC 95 F.3d 733, 735 (8th Cir. 1996).

A. Preemption Applied: Chamber of Commerce of U.S. v. Brown

In *Chamber of Commerce of U.S. v. Brown*, the Court struck down a California regulation that prohibited recipients of state grants, or state business above $10,000, from assisting, promoting, or deterring union organizing. The Court held that the rule was preempted by the NLRA and Congress' intent to leave expressive activity unregulated.[140] The policy posture contouring the Court's holding was Congress' intent to maximize the free interplay of opposing forces in labor-management expressive activities. Specifically, employer and employee speech regarding unionization is conceptualized as a "zone" Congress meant to keep free of state interference.[141] The mere fact that the state had a proprietary interest in the use of its funds was not sufficient to outweigh Congress's objective of keeping this "zone" free and clear.[142]

Although the Court discusses the fact that the state's purpose was clearly to discourage recipients of state funds from actively opposing unionization, the holding suggests that even if only the incidental (as opposed to intentional) effect of the regulation was to interfere in this competitive zone, it would be preempted. Citing *Wisconsin Dept. of Industry v. Gould*, the Court suggested that wherever a state policy or action created a "potential for conflict," with the NLRA's zone-clearing scheme, it could be preempted by the NLRA under *Machinists* or *Garmon.*[143] *Brown* is an important case because it suggests that a "proprietary interest"—a "total or partial ownership" – is not sufficient grounds to compromise the free interplay zone contemplated by the NLRA and protected by the preemption doctrines.

Understanding the overarching considerations undergirding preemption, and the operation of *Machinists* operation in particular,

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[140] Chamber of Commerce of U.S. v. Brown, 554 U.S. 60, 62-66 (2008).

[141] *Id*. at 69.

[142] *Id*. at 70.

[143] *Id*. at 70 (citing Wisconsin Dept. of Industry v. Gould, 475 U.S. 282, 289 (1986)) ("Wisconsin's choice 'to use its spending power rather than its police power d[id] not significantly lessen the inherent potential for conflict' between the state and federal schemes; hence the statute was pre-empted.").

sheds light on the inapposite application of *Lechmere* in easement cases.

IV. PREEMPTION OF STATE PROPERTY STATUTES AND CAUSES OF ACTION THAT INCIDENTALLY REGULATE EXPRESSIVE ACTIVITY

A. State Definition of Trespass

An employer's showing of an injury to an easement is too permissive and strays too far from *Lechmere*'s concern with suborning trespass. A trespass occurs when one "enters land *in the possession* of the other, or causes a thing or a third person to do so…"[144] Some variant of this definition holds in each of the states in the Seventh Circuit.[145] It is thus generally the case that a trespass action will lie only where there is a possessory interest that gives its holder an absolute power to exclude. The grantor of an easement (in the relevant context for this Comment, typically a lessor) may convey a possessory interest in an easement coextensive with his own right to exclude, but absent such an express granting, a trespass action by definition would not lie.[146]

By illustration, the owner of a strip mall leases a building to a retailer and grants to lessees in the terms of the lease an easement to use the common areas (such as parking lots and berms). The lessees do not *possess* these portions of the property as leaseholders—the property owner (the grantor) possesses these portions of the strip mall. A lease may of course explicitly grant lessees an easement which gives them a right to exclude, though to do so would impliedly (and paradoxically) permit one tenant to exclude the licensees and invitees of another tenant, and vice versa.

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[144] RESTATEMENT (SECOND) OF TORTS § 158 (1965).

[145] *See e.g.*, Miller Mut. Ins. Ass'n of Illinois v. Graham Oil Co., 668 N.E.2d 223 (2d Dist. 1996); Wendt v. Manegold Stone Co., 4 N.W.2d 134, 136 (1942); 23 IND. PRAC., PERSONAL INJURY LAW & PRACTICE § 3:29.

[146] *See generally*, THE LAW OF EASEMENTS & LICENSES IN LAND § 1:28.

B. State property common or positive law granting exclusionary rights to nonexclusive easement holders should be preempted by the NLRA insofar as they apply to § 7 activities.

If there is no chance that the employer could suffer a trespass, *Lechmere* simply should not apply. That a state statute or state common law gives easement-holders some cause of action for interference or injury to those easements should not be germane to a court's review of a § 8(a)(1) charge against an employer for excluding organizers. If the employer is not the owner of the property, and thus lacks a cause of action for trespass, the sole inquiry should be whether the express language of the easement (found typically in the lease) gives them an exclusionary right coextensive with that of the possessor. If they do not, then peaceable, truthful organizing conduct should be protected by § 7.

In deciding the *Roundy*'s case, the Seventh Circuit missed an opportunity to recognize the application of *Chamber of Commerce v. Brown* and the NLRA preemption doctrines to reject the increasingly deferential interpretation of *Lechmere*. *Lechmere*'s animating concern is the destruction of property owners' rights against trespass. That concern would be satisfied by requiring employers to show a trespass action would lie as a defense to an § 8(a)(1) charge for illegal exclusion. Express language in a lease or other instrument that grants an interest sufficient to exclude classes of persons *from easements* would satisfy this requirement. A rightful *Lechmere* exclusion should not otherwise be premised on state positive or common law defining an easement holder's right to exclude in a way that interferes with the "zone" of free interplay between employers and employees.

In *Roundy's v. NLRB,* the employer offered a state statute as a defense to a § 8(a)(1) charge. The employer argued that the statute created a cause of action for nonexclusive easement holders against those who injure their use and enjoyment of the easement.[147] The court analyzed the statute and concluded that it did not create an independent cause of action for those easement holders, but instead

[147] Roundy's v. NLRB, 674 F.3d 638, 651-52 (7th Cir. 2012).

created a process for those instances where a cause of action exists (presumably as a function of the interest granted by the easement).[148] While the court's approach rationally followed the trend in this line of cases, it missed an opportunity to staunch the expansion of state property law into the free and clear zone of expression contemplated by the NLRA per the preemption doctrines.

It would have been appropriate for the court to reject the employer's theory outright on the grounds that any state statute that created an independent cause of action for nonexclusive easement holders to exclude peaceful § 7 organizers would be preempted to the extent it applied to those organizers.[149] The easements created by the lease did not grant the employer a right to exclude *any* party from the non-leased portions of the property—in other words it did not create an interest coextensive with trespass rights. In such scenarios, the language of the easement should be dispositive.

The concepts here are abstract enough to create some confusion, so a concrete example may be helpful. Absent an express agreement otherwise, an easement grants its holder only as much control as is necessary to enjoy the terms of the easement. [150] Pursuant to its police powers to define property rights, a state could in theory grant lessees/easement holders a civil action to exclude those, other than the easement grantor (the property owner), who interfere with their preferred use of an easement—for example, as an alternative to having to defer to, or request action from, the property owner.[151]

In such a scenario, the owner of a shopping mall may grant its lessees an easement to non-leased portions of the property, such as

[148] *Id.* at 652.

[149] While this may seem recursive, it is important to state that such a statute would not be preempted in its totality, as was the case with the statute in Brown, unless it created an independent cause of action specifically against union organizers.

[150] RESTATEMENT (FIRST) OF PROPERTY § 450 (1944) ("Thus, a person who has a way over land has only such control of the land as is necessary to enable him to use his way and has no such control as to enable him to exclude others from making any use of the land which does not interfere with his.").

[151] For a discussion of the basic nature of easements, *see* THE LAW OF EASEMENTS & LICENSES IN LAND § 1:28.

parking lots. This grant would give the lessee an interest in those portions of the property. So if the shopping mall lessee is bothered by the RV owners who park in the lot, and the property owner is unwilling or slow to remove them herself, the lessee could rely on the state statute as grounds to eject the vacationers. Such a statute would be perfectly permissible, and analogous to statutes that give tenants particular rights vis a vis their landlords or outside parties.

However, was that statute used to exclude § 7 organizers it should be preempted by the NLRA because its use would clutter up the free zone *Machinists* preemption is meant to protect. Similarly, a common law rule granting easement holders a right to exclude § 7 organizers, absent an exclusive right to exclude in the language of the easement, should be preempted for the same reason, insofar as it is applied to those organizers.

The Seventh Circuit in *Roundy's* considered the employer's argument that Wisconsin state courts recognized an easement holder's right to exclude those parties who "injure" their enjoyment of the easement. But § 7 organizers peaceably engaged in non-intrusive, truthful handbilling by definition are not injuring a non-exclusive easement, which affords a right to its holder only to use of the grantor's property for a limited purpose, typically access for licensees and invitees. Since the ingress and egress of customers and other invitees is not compromised, no injury that doesn't merely treat union activity qua union activity as injurious takes place.

It is not a normative desire to alter *Lechmere* but application of *Machinists* preemption via *Chamber of Commerce v. Brown* that compels this new posture towards state property law in organizer exclusion cases. In *Brown*, the Court clarified that *Machinists* preemption creates "a zone free from all regulations, whether state or federal."[152] While so doing, the Court also rejected the Ninth Circuit's holding that employer speech was *not* a zone free from "all regulation" because the NLRA regulates what employers may say in the run-up to

[152] Chamber of Commerce of U.S. v. Brown, 554 U.S. 60 at 74 (2008) (quoting Bldg. & Const. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc., 507 U.S. 218, 226 (1993)).

a workplace election for or against a union.[153] The Court was unimpressed with this bit of reasoning because Congress had clearly "denied the [National Labor Relations Board] the authority to regulate the broader category of noncoercive speech encompassed by [the California statute]. It is equally obvious that the NLRA deprives California of this authority,"[154] because under preemption doctrines the states have no more authority than the Board.[155]

It is a simple conclusion to reach then that noncoercive employer/employee speech is a "free zone" that must remain free of state regulation. No state law should interfere with this free zone. *Lechmere* itself creates the outer bound of this preemption limit: trespass. Except for actionable trespass, no state property law can be used as a basis for ejecting otherwise peaceable § 7 organizers.

The proper inquiry where an easement is non-exclusive is solely a fact inquiry into the conduct of the organizers. So long as the purposes and details of the easement are not implicated by the handbilling, no state court interpretation of the rights of easement holders should be read to exclude § 7 organizers. In the *Roundy*'*s* case, the purpose of the easement was access by customers to Roundy's store and reasonable use of common areas. Absent employee conduct that prevented that, the proffered defense is preempted. *Machinists* preemption contemplates keeping such organizing activities unimpeded for the free interplay of opposing sides in labor-management disputes. A mere easement-holder should not be able to rely on that easement to avoid engaging in that interplay. Absent the suborned trespass expressly prohibited by *Lechmere*, an easement-holder employer must either show a trespass-level exclusionary interest or face potential liability for an unlawful exclusion.

[153] *Id.* at 74 (discussing why preemption should apply at all given the *Machinists* requirement that area being regulated has not been regulated by Congress).

[154] *Id.*

[155] *Id.* (citing Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 751 (1985)).

V. CONCLUSION

While inconsistent in terminology and methodology, the evolution of jurisprudence surrounding the exclusion of § 7 organizers by employers considered *trespass* to be the line § 7 could not breach. Unfortunately, the discussion in *Lechmere* of an employer's property interest sparked a drift towards inquiry into state-defined property laws to gauge the rights of union organizers. As is often the case with long threads of case law, each small quantum of decision has culminated over the years in a qualitative change. By the terms of *Lechmere* itself however, courts should be concerned solely with the possibility of trespass. The Seventh Circuit's decision in *Roundy's v. NLRB* came up short, despite ultimately arriving at the correct conclusion through sound reasoning. The defenses raised by the employer afforded an opportunity for the court to simplify the inquiry in § 8(a)(1) organizer exclusion cases and remain faithful to Supreme Court decisions and the intent of the NLRA. – but the court refused to take that opportunity?