

KEEP OFF THE GRASS: PROHIBITING NONEMPLOYEE UNION ACCESS WITHOUT DISCRIMINATING

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INTRODUCTION

Notice to the Public: Do Not Patronize This Establishment. Its Employees Will Probably Not Tell Anyone About Their Company's Selling Food Not Fit for Human Consumption, Because They Have No Union to Protect Them. Shop at These Fine Neighborhood Stores Where Members of the Union Make Sure the Products You Buy Are Fresh and Wholesome.¹

When several members of a union distributed a handbill containing this statement to potential customers of a store located in a shopping mall, the managers of the mall and the store informed the picketers that they would be arrested for trespassing if they did not leave the property. However, in the past, the store had allowed members of the Girl Scouts, the Salvation Army, and the American Cancer Society to solicit donations in front of the store; the mall had permitted similar activities, as well as a raffle for a car provided by a local automobile dealer to attract customers.

The union subsequently filed an unfair labor practice charge, claiming that the store and the mall violated § 8(a)(1) of the National Labor Relations Act (NLRA or Act)² by discriminatorily enforcing their no-solicitation policy against the union. The owners of the store and mall responded by arguing that they should be able to contribute to the community and foster goodwill without having to open their property to protesters seeking to harm their business—especially since the handbillers were not even employed by them. Unlike the union

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¹ The wording of the handbill used for this hypothetical is based on one at issue in *Cleveland Real Estate Partners*, 316 N.L.R.B. 158, 160 (1995), enforcement denied, 95 F.3d 457 (6th Cir. 1996).

² 29 U.S.C. § 158(a)(1) (1994). For information regarding the purpose of the Act, see *infra* note 19 and accompanying text.

protesters, the charities authorized by the store and the mall play a crucial role in attracting business.³

The National Labor Relations Board (NLRB or Board)⁴ would likely view this dispute as an open and shut case for the union, drawing some support from the Supreme Court decisions in *NLRB v. Babcock & Wilcox Co.*⁵ and *Lechmere, Inc. v. NLRB*.⁶ These two cases stand for the proposition that an employer may exclude nonemployee union organizers⁷ from its property if reasonable efforts by the union will enable it to reach the employees with its message through other available channels, *provided the employer does not discriminate against the union by allowing "other distribution."*⁸ Consequently, in the hypothetical case, the Board would likely find the store's denial of access to the outside union, in light of its granting access to other groups, amounted to discrimination, thereby failing the Court's test. However, this application of *Babcock* and *Lechmere* is only possible because the Court has neither clarified what constitutes "discrimination" nor addressed whether this standard should apply to access cases involving nonemployee union *protesters*, such as the ones above, who are not engaged in organizational activities.⁹ Rather, *Babcock* and *Lechmere* dealt with organizational activity, i.e., solicitations of an employer's employees to elect the union as their bargaining representative.¹⁰

³ The business importance of fostering customer goodwill by promoting civic and charitable activities should not be underestimated. See Maria Halkias, A Season of Rewards, Dallas Morning News, Dec. 11, 1997, at 3C (reporting on importance of charitable activities in malls to business plans of stores); Scott Malone, Sold on a Heart of Gold, Footwear News, May 19, 1997, at S11 (citing Cone Communications/Roper study's conclusion that 76% of consumers "would be likely to switch from one retail store to another store associated with a good cause"); see also Mickey H. Gramig, Atlanta J. & Const., Oct. 27, 1997, at 7E (noting increased sales at mall that hired community relations director to build community ties).

⁴ For further explanation of the role of the NLRB, see *infra* notes 20 and accompanying text.

⁵ 351 U.S. 105 (1956).

⁶ 502 U.S. 527 (1992).

⁷ Throughout this Note, the terms "nonemployee union organizers," "nonemployee union representatives," and "nonemployee union protesters" will be used when referring to members of a union who are engaged in various union activities on the property of an employer by whom they are not employed.

⁸ *Babcock*, 351 U.S. at 112. This holding was reaffirmed by the Court's decision in *Lechmere*, 502 U.S. at 534-41 (insisting that rule from *Babcock* had not been modified by Court in intervening years). For further discussion of *Lechmere*, see *infra* notes 41-51 and accompanying text.

⁹ Note that in both *Babcock* and *Lechmere*, no claims of discrimination were before the Court. See *infra* notes 28-35, 41-51 and accompanying text.

¹⁰ Protest activities, in contrast, involve consumer boycotting such as that in the hypothetical, as well as the picketing of an employer to raise wages to meet local standards. See *infra* notes 53-59 and accompanying text.

In the absence of a clear definition by the Court, the Board broadly defines "discrimination." For example, it takes the position that an employer who allows various charitable appeals to the public on its property must grant access to nonemployee union organizers and protesters.¹¹ Several federal courts of appeals, however, disagree with the premise that permitting charitable solicitations while excluding nonemployee union activities should result in a finding of discrimination. Furthermore, courts have been reluctant to uphold Board findings of discrimination where nonemployee union representatives were engaged in protest activities.¹²

The Board's expansive grant of access to nonemployee union representatives further erodes the ability of employers to protect their business interests. Employers resist unions primarily for economic reasons, since a unionized labor force raises an employer's costs without generally increasing its profits.¹³ Despite the fact that union activity can be economically threatening to a company, however, it is greatly protected by the NLRA.¹⁴ Nonetheless, the Court has recognized a need to preserve rights of employers as well, especially where weak statutory interests of the employees are at stake.¹⁵ Thus, the employer should be allowed to deny access to nonemployee union protesters who seek to harm an employer's business and who do not take affirmative steps to actually target and organize the employees of the business. The Board should take this position regardless of any nonprotesting individuals or groups to whom the employer grants access.

This Note will examine what the Board and the courts have determined constitutes "discrimination" and the rationales behind their

¹¹ See *infra* Part I.A (discussing very narrow categories of employer-approved activities that will not result in finding of discrimination where nonemployee union access is denied).

¹² See *infra* Part II.B (describing cases where courts of appeals refused to grant access to nonemployee union protesters despite employer's permitting various charitable activities).

¹³ See Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 *Tex. L. Rev.* 921, 948, 962-63 (1993) (admitting that "[e]mployers generally have good economic reasons for seeking to avert unionization or to minimize its scope"); see also Paul Barron, *A Theory of Protected Employer Rights: A Revisionist Analysis of the Supreme Court's Interpretation of the National Labor Relations Act*, 59 *Tex. L. Rev.* 421, 432 (1981) (explaining that employer's antiunion activities are motivated by desire to enhance profits).

¹⁴ See Estlund, *supra* note 13, at 922-24 (explaining that higher labor costs and inability to interfere with union activities may result in unionized firms having difficulty competing with nonunionized firms). For further discussion of the NLRA, see *infra* notes 18-18 and accompanying text.

¹⁵ See *infra* Parts I, III.C (discussing Court's recognition of strength of employer property rights as compared to weaker statutory interests of nonemployee union protesters).

conclusions. It will argue for a narrow view of "discrimination" and, in keeping with the Court's assertion of employer property rights,¹⁶ advocate that nonemployee union protest activities be viewed differently than nonemployee union organizational activities.

Part I of this Note provides a brief background of the applicable provisions of the NLRA and traces the development of the case law on nonemployee union access rights to an employer's private property. Part II discusses the application of these cases by the Board and several federal courts of appeals. Part III highlights the lack of a clear rationale behind the no-discrimination rule in the nonemployee context and concludes that only a narrow definition and application of the *Babcock* discrimination exception can be justified.¹⁷ It argues that an excluded nonemployee union activity must be sufficiently similar in nature to the employer-sanctioned activity for there to be a finding of discrimination. Consequently, an employer who allows charitable appeals to the public on its property should not be required to grant access to nonemployee union representatives for any purpose. Further, recognition of this lack of similarity between protest and employer-sanctioned activities, as well as the weak employee interests at stake when nonemployee union representatives target the public, leads to the conclusion that the discrimination exception should not apply in the protesting context.

I

THE RIGHTS OF NONEMPLOYEE UNION REPRESENTATIVES UNDER THE NATIONAL LABOR RELATIONS ACT

Congress passed the NLRA in 1935 to prevent "industrial strife or unrest" that would obstruct or burden commerce.¹⁸ The Act seeks to minimize such unrest by ensuring employees the right to self-organization and by encouraging collective bargaining.¹⁹ The Board, cre-

¹⁶ The *Babcock* and *Lechmere* decisions are widely viewed as a victory for employer rights. See, e.g., Alan L. Zmija, *Union Organizing After Lechmere, Inc. v. NLRB—A Time to Reexamine the Rule of Babcock & Wilcox*, 12 Hofstra Lab. L.J. 65, 86-87 (1994) (explaining how *Babcock* and *Lechmere* Courts increased strength of employer's position); Michael L. Stevens, Comment, *The Conflict Between Union Access and Private Property Rights: Lechmere, Inc. v. NLRB and the Question of Accommodation*, 41 Emory L.J. 1317, 1361 (1992) (describing *Lechmere* as "retrenchment" of protection of private property rights).

¹⁷ The *Babcock* discrimination exception refers to the caveat carved out in *Babcock* whereby an employer may only prohibit nonemployee union organizational activities if the employer does not discriminate by allowing "other distribution." *Babcock*, 351 U.S. at 112. For detailed discussion of *Babcock*, see *infra* notes 28-36 and accompanying text.

¹⁸ National Labor Relations Act of 1935, Pub. L. No. 198, ch. 372, § 1, 49 Stat. 449 (codified as amended at 29 U.S.C. § 151 (1994)).

¹⁹ See 29 U.S.C. § 151 (1994), which states that the Act's purpose is:

ated by the Act, adjudicates violations of the Act ("unfair labor practices") committed by employers or unions.²⁰ The NLRA limits more significantly an employer's ability to control its workforce than any federal law before or since its passage.²¹ Additionally, the NLRA's restrictions on employers operate in a different manner than other statutes. For example, statutes that prohibit discrimination based on factors such as race and sex aim to "correct deviations from rational employer behavior," thereby regulating an employer without necessarily imposing any costs.²² The NLRA differs in that it seeks to *modify* rational employer behavior and "countermand . . . powerful market forces in the employment setting," thus imposing a burden on the firm's efficient operation.²³

[T]o eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection.

²⁰ The Board is comprised of five members, each appointed to a five-year term by the President, and is supervised by the General Counsel of the Board, also appointed by the President. See 29 U.S.C. § 153 (1994); see also 2 *The Developing Labor Law* 1772-75 (Patrick Hardin ed., 3d ed. 1992); Michael C. Harper & Samuel Estreicher, *Labor Law* 117-18 (4th ed. 1996).

An unfair labor practice charge is filed at a regional office of the Board, which investigates it to determine whether it has merit. If it does, the Regional Director will issue a complaint which, absent a settlement, places the matter for a public hearing before an independent Administrative Law Judge (ALJ). The ALJ's decision resolves the case if no exceptions are filed. Otherwise the Board will hear and decide the matter. See *The Developing Labor Law*, *supra*, at 1791-1800.

The Board's order is not self-enforcing. Consequently, the Board may petition an appropriate court of appeals for enforcement of its order, or a respondent may petition for review of that order. Such a petition may be filed with the federal court of appeals that has jurisdiction based on the location of the alleged unfair labor practice or the residence or business location of a party; in addition, a petition for review may be filed in the Court of Appeals for the District of Columbia. See *id.* at 1882. Note that a reversal by a court of appeals on an issue of law does not necessarily compel the Board to change its position on that issue and that, generally, courts must give great deference to the Board's decision. See, e.g., *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 507 (1978) ("It is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy . . . subject to limited judicial review."); see also *Babcock*, 351 U.S. at 112 (stating that Board's rulings, "when reached on findings of fact supported by substantial evidence on the record as a whole, should be sustained by the courts unless its conclusions rest on erroneous legal foundations") (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951)).

²¹ See Estlund, *supra* note 13, at 922-24 (distinguishing NLRA from other federal legislation regulating employers).

²² *Id.* at 923-24.

²³ *Id.* at 924.

The rights of union organizers to solicit employees for membership stem in large part from § 7 of the NLRA, which grants employees, *inter alia*, the right "to self-organization, to form, join, or assist labor organizations."²⁴ Thus, a rule preventing such solicitations may be a violation of § 8(a)(1), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§] 7."²⁵ Nonemployee union representatives receive some protection with respect to access rights because the Act defines the term "employee" to "include any employee . . . not . . . limited to the employees of a particular employer,"²⁶ unless the Act explicitly states otherwise.

The nature and breadth of such protections differ for employees and nonemployee union representatives. The Board, recognizing an employer's interest in maintaining production or discipline, allows limited restrictions on workplace solicitation by an employer's own employees. The Board's approach, sustained by the Supreme Court, presumes invalid a rule prohibiting union solicitation by employees outside working time but presumes valid a rule that forbids such solicitation during working time, absent evidence of discrimination.²⁷

While it applies this presumption of invalidity to employee organizers, the Supreme Court has declined to apply this standard to nonemployee union representatives. The Court first addressed the issue of excluding nonemployee organizers from private property in its

²⁴ 29 U.S.C. § 157 (1994) ("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 . . .").

²⁵ 29 U.S.C. § 158(a)(1) (1994).

²⁶ 29 U.S.C. § 152(3) (1994).

²⁷ See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 & 804 (1945) (enforcing Board's rule that prohibiting solicitation outside of working hours "is presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline"). *Republic* had discharged an employee who violated the employer's rule against all solicitation in its factory or offices by soliciting union membership and passing out application cards to employees in the Republic plant on his own time. See *id.* The Board subsequently clarified that such restrictions on workplace solicitations by employees apply during "working time," that is, during periods of actual work. It views the phrase "working hours" as also including lunch and break periods. See *Our Way, Inc.*, 268 N.L.R.B. 394, 394-95 (1983) (distinguishing between "working time" and "working hours" and holding that rules using former are presumptively valid and those using "working hours" are presumptively invalid). Note that the approach set forth in *Republic* is generally viewed as a balancing test between the property interest of the employer and the right of self-organization of the employees. For a discussion on the § 8(a)(1) balancing test, see Rebecca Hanner White, *Modern Discrimination Theory and the National Labor Relations Act*, 39 Wm. & Mary L. Rev. 99, 106-08 (1997).

1956 decision *NLRB v. Babcock & Wilcox Co.*²⁸ Here, union organizers distributed handbills to factory employees in the company parking lot.²⁹ The employer, enforcing its no-solicitation policy, removed the organizers;³⁰ the union subsequently filed an unfair labor practice charge with the Board.³¹ The Board found that prohibiting the nonemployee union organizers from distributing union literature on the property interfered with the employees' right to self-organization because of the difficulty in reaching employees off of the property.³² After the Fifth Circuit refused to enforce the Board order, the Supreme Court heard the appeal.³³

The Court, while noting that the determination of the proper balance between the organizational rights of employees and the property rights of an employer lies with the Board, held that

the Board failed to make a distinction between the rules of law applicable to employees and those applicable to nonemployees. No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline. . . . But no such obligation is owed nonemployee organizers. Their access to company property is governed by a different consideration.³⁴

Furthermore, the Court ruled that the Act requires only that an employer refrain from "interference, discrimination, restraint or coercion" with respect to the employees' exercise of their *own* rights.³⁵ Thus, the Court also held that:

²⁸ 351 U.S. 105 (1956). The *Babcock* Court issued rulings on three separate cases. However, since these cases are substantially similar in nature, this Note will only discuss the facts of *Babcock & Wilcox Co.*, 109 N.L.R.B. 485 (1954).

²⁹ See *Babcock*, 109 N.L.R.B. at 492.

³⁰ See *id.* (recounting that personnel manager once told organizer to remove himself from company property and twice telephoned highway patrol to remove organizers).

³¹ See *Babcock*, 351 U.S. at 106-07.

³² See *id.* (basing its decision on lack of public property adjacent to factory on which organizers could assemble).

³³ See *id.* at 108.

³⁴ *Id.* at 113. That "consideration," explained the Court, is based in large part on the ability of the nonemployee union organizers to access the employees:

The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. Consequently, if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property.

Id.

³⁵ *Id.* at 113-14 (holding that Act thus "does not require that the employer permit the use of its facilities for organization when other means are readily available").

the employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution.³⁶

With this holding, the Court opened the door for nonemployee union access by way of the discrimination exception, while leaving the decision as to what constituted discrimination to the NLRB.³⁷

With the exact scope of nonemployee union access not yet resolved, the Board experimented with different tests, such as the one announced in its famous *Jean Country*³⁸ decision in 1988. In *Jean*

³⁶ See *id.* at 112. It is the latter half of this holding on which this Note focuses—it will examine when this discrimination exception should apply and what constitutes “other distribution.” Despite the frequency and purported authority with which this proposition is cited, the issue of discrimination was not squarely before the *Babcock* Court since there was no claim that other outside groups or individuals had been granted access.

The *Babcock* Court justified its position with an accommodation principle. Since it is the same national government that grants organization rights to workers that also preserves property rights, “[a]ccommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.” *Id.* Thus, the inaccessibility exception is a situation where property rights must yield to the right to organize. See *id.* The Court did not comment on how the discrimination exception fits into this rationale.

³⁷ After *Babcock*, it appeared employers had won the legal fight, and unions thus turned to First Amendment principles for protection. Such protection was initially granted in 1968. See *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 310-13, 319 (1968) (holding that “because the shopping center [where nonemployee union members were picketing] serves as the community business block ‘and is freely accessible and open to the people in the area and those passing through,’” State may not use trespass laws to prevent people from expressing their First Amendment rights on such property (quoting *Marsh v. Alabama*, 326 U.S. 501, 508 (1946))). However, that protection was eventually overruled in *Hudgens v. NLRB*, 424 U.S. 507, 520-21 (1976) (overruling *Logan Valley* and holding that First Amendment did not guarantee employees right of access to privately owned shopping center where employees were staging economic strike and shopping center property was owned by party against whom picketing was not directed).

Hudgens is known in large part for its reaffirmation of the *Babcock* accommodation principle, i.e., the idea that both § 7 and property rights present valuable rights that must be accommodated when they come into conflict. See *id.* at 522 (“The locus of that accommodation . . . may fall at different points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context.”). The Board later misapplied this principle in *Jean Country*, 291 N.L.R.B. 11 (1988). See *infra* notes 38-41 and accompanying text.

³⁸ 291 N.L.R.B. 11 (1988). The test announced here replaced the Board's earlier test for nonemployee union access established in *Fairmont Hotel Co.*, 282 N.L.R.B. 139, 142 (1986) (requiring balancing of employer's property interest and § 7 interest at stake and looking at effective alternative means of communication only where two interests are “relatively equal”). The *Jean Country* decision was in large part responsible for the Court's need to reexamine the nonemployee union access issue in *Lechmere*. See *infra* note 41 (explaining problem with *Jean Country* decision).

Country, the Board instituted a balancing test of the conflicting property and § 7 interests.³⁹ This decision was inconsistent with the Supreme Court's holding in *Babcock*, which did not allow the Board to balance the conflicting § 7 rights of nonemployees with the property interests of an employer.⁴⁰

Following the Board's decision in *Jean Country*, the Court found a need to reaffirm its *Babcock* holding and took the opportunity to do so in its 1992 decision *Lechmere, Inc. v. NLRB*.⁴¹ This case involved an organizational campaign in which nonemployee union organizers entered Lechmere's parking lot and began placing handbills on the windshields of cars.⁴² Lechmere's manager informed them that solicitation or handbill distribution of any kind was prohibited on its property and asked them to leave.⁴³ The union subsequently filed an unfair labor practice charge.⁴⁴ The Board, applying its *Jean Country* balancing test, found that there were no reasonable alternative means available for the union to communicate with Lechmere's employees,

³⁹ See *Jean Country*, 291 N.L.R.B. at 14. In this case, nonemployee union representatives picketed at the entrance to the Jean Country store located in an open-air shopping mall; their signs informed the public that the Jean Country employees were not union workers, and thus the store was a "threat to wages, hours and conditions established by the union." *Id.* at 21-22. Believing that the *Hudgens* Court's reference to a "spectrum" of § 7 and property rights required the application of a balancing test in cases involving picketing by nonemployee union representatives, the *Jean Country* Board held that:

[I]n all access cases our essential concern will be the degree of impairment of the § 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted. We view the consideration of the availability of reasonably effective alternative means as especially significant in this balancing process.

Id. at 14.

⁴⁰ See *Babcock*, 351 U.S. at 109-13 (holding that access to company property by non-employee union organizers requires different analysis than balancing test applied in employee context); see also *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992) (stating that "[i]n cases involving nonemployee activities (like those at issue in *Babcock* itself) . . . the Board [is] not permitted to engage in that same balancing [as in cases involving employee activities] (and we reversed the Board for having done so)").

⁴¹ 502 U.S. 527 (1992). The *Lechmere* Court stated that *Jean Country* "misapprehends [a] critical point." *Id.* at 538. *Jean Country*, relying on the "locus of accommodation principle" from *Hudgens*, see *supra* note 39, concluded that all access cases require balancing § 7 rights against property rights, with alternative means of access "thrown in as nothing more than an 'especially significant' consideration." *Lechmere*, 502 U.S. at 538. However, *Hudgens* "did not purport to modify *Babcock*, much less to alter it fundamentally in the way *Jean Country* suggests. To say that our cases require accommodation . . . is a true but incomplete statement, for the cases also go far in establishing the locus of that accommodation where nonemployee organizing is at issue." *Id.*

⁴² See *id.* at 529.

⁴³ See *id.* at 529-30. Lechmere's official policy against solicitation was posted on the store's door; it was enforced consistently against, among others, the Salvation Army and the Girl Scouts. See *id.* at 530 n.1.

⁴⁴ See *id.* at 531.

and therefore the § 7 interest in distributing the handbills outweighed Lechmere's interest in excluding such activity.⁴⁵

On appeal, however, the Supreme Court ruled that *Babcock* required the following analysis: In cases involving *employee* solicitations, the Board should balance the interests of the employees and employers; in cases involving *nonemployee* solicitations, though, no such balancing is permitted.⁴⁶ Despite the Court's past announcement that the right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others,⁴⁷ the *Lechmere* Court concluded that an employer's exclusion of *nonemployee* union organizers does not directly implicate § 7 rights, stating: "By its plain terms . . . the NLRA confers rights only on employees, not on unions or their nonemployee organizers."⁴⁸ Consequently, *Lechmere* leaves union organizers with only a "derivative" § 7 right based on the rights of employees to hear their message.⁴⁹

⁴⁵ See *Lechmere, Inc.*, 295 N.L.R.B. 92, 92-94 (1989) (noting that adjacent public area was unsafe locale for union activity, and it was expensive and ineffective for union to try to communicate message in local newspapers).

⁴⁶ See *Lechmere*, 502 U.S. at 537.

⁴⁷ See *Thomas v. Collins*, 323 U.S. 516, 533-34 (1945) (stating that worker's right to organize freely includes right to discuss and be informed of collective bargaining choice).

⁴⁸ *Lechmere*, 502 U.S. at 532. The Court maintained that § 7 does not protect nonemployee union organizers, except in rare cases where "the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels." *Id.* at 537 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)).

In these rare cases, the union bears the heavy burden of establishing "isolation," which is not satisfied by "mere conjecture" or the "expression of doubts" concerning the effectiveness of nontrespassory means of communication." *Id.* at 540 (defining "isolation" as situation where, due to inaccessibility of employees, nonemployees cannot communicate with them through usual channels). In *Lechmere*, because the Union failed to establish the existence of any "unique obstacles" that frustrated access to Lechmere's employees, there was no unfair labor practice. *Id.* at 541. Examples where the Court might find such obstacles to communication with employees include logging camps, mining camps, and mountain resort hotels. See *id.* at 539.

⁴⁹ See *id.* at 533 (stating that § 7 rights apply to nonemployees only "derivatively"). Some commentators disagree with the view that only derivative § 7 rights are implicated. Rather, because the Act defines "employee" broadly, stating that the term "shall not be limited to the employees of a particular employer," and § 8(a)(1) prohibits employers from interfering with the § 7 rights of "employees," the protections of § 7 extend beyond an employer's own employees. See, e.g., Cynthia L. Estlund, Labor, Property, and Sovereignty After *Lechmere*, 46 Stan. L. Rev. 305, 326 (1994) (opposing interpretation that "primary employee interests at stake [in *Lechmere*] were those of Lechmere's unorganized employees, and those interests were being asserted only 'derivatively'"). However, while the Supreme Court does grant some protection to nonemployees, its explicit refusal in *Babcock* and *Lechmere* to interpret the Act so broadly as to put nonemployees on equal footing with employees, in the access context, makes this argument somewhat moot. This Note accepts the Supreme Court view that, in the organizing context, nonemployee union

The *Lechmere* Court limited the Board's ability to circumvent the rule articulated in *Babcock* and held that the language in its decisions following *Babcock* was not intended to "repudiate or modify *Babcock's* holding."⁵⁰ In other words, the rule regarding nonemployee union organizers stated in *Babcock* still stands: As long as an employer enforces its no-solicitation policy nondiscriminatorily, the employer's property rights are presumed to outweigh the derivative § 7 rights of the nonemployee union organizers, provided there are other reasonable means for the union to gain access to the employees.⁵¹

Despite the appearance of a bright-line rule, many questions remain after *Lechmere*, in large part due to the failure of the Court to define its rationale for proscribing discrimination in the nonemployee union context. Consequently, it is unclear what outside groups an employer can allow on its property while lawfully excluding nonemployee union representatives. Further, the Board, as well as many courts, has conflated all nonemployee union conduct when examining access rights, so that no distinction is made between organizational and protest activities.⁵²

The remainder of this Note will first explore the Board's application of *Babcock* and *Lechmere* and its judicial reception. It will then examine what discrimination means and why it is forbidden. In particular, it will describe the Board's extension of the *Babcock* discrimination exception to protest activities and highlight the reticence of certain courts of appeals to enforce such decisions. Finally, Part III of this Note will suggest and explore a comprehensive method for applying the *Babcock/Lechmere* principles.

representativeness only have derivative § 7 rights; it also accepts the Board's position that nonemployee union protesters only have derivative § 7 rights. See *infra* notes 53-57 and accompanying text.

⁵⁰ *Lechmere*, 502 U.S. at 534. Here the Court was referring to its decision in *Hudgens* as well as in *Central Hardware Co. v. NLRB*, 407 U.S. 539, 544-45 (1972) (discussing principle in *Babcock* that emphasizes importance of accommodating organization and property rights).

⁵¹ See *Lechmere*, 502 U.S. at 535 ("To gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation." (quoting *Sears, Roebuck and Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180, 205 (1978))).

⁵² See *infra* Part II.A.

II

HOW THE BOARD AND THE COURTS APPLY
BABCOCK AND LECHMERE

The Board has extended *Lechmere's* presumption against nonemployee union access beyond the organizational context to protest and economic activities including "area standards" picketing⁵³ and consumer boycott activities. It has also extended its application of the *Babcock* discrimination exception. In other words, the Board limits the access rights of nonemployee union protesters, as *Lechmere* did with respect to nonemployee union organizers, by allowing employers to exclude them from their property. However, this apparent protection of employer property interests in fact has amounted to very little real protection for employers since the Board has afforded nonemployees engaged in such activities the benefit of the *Babcock* discrimination exception.

In its 1995 *Leslie Homes, Inc.*⁵⁴ decision, the Board considered for the first time how *Lechmere* affected an employer's right to exclude from its property nonemployee union representatives engaged in area standards handbilling.⁵⁵ The Board, finding that the employer could so exclude, ruled that *Lechmere* applied to area standards picketing or handbilling activities—because the interests at stake of the nonemployee union protesters should not receive more protection than the derivative § 7 interests of nonemployee union organizers, the Board concluded that *Lechmere's* presumption against nonemployee union access to an employer's property should apply.⁵⁶ Subsequently,

⁵³ Such activity stems from complaints that an employer is failing to meet the union's area standards for wages or other benefits. See Hardin, *supra* note 20, at 1176 (explaining that area standards picketing is "aimed at causing the picketed employer to adopt employment terms . . . commensurate with those prevailing in his locale'" (quoting Bernard Dunau, *Some Aspects of the Current Interpretation of Section 8(b)(7)*, 52 Geo. L.J. 220, 227 (1964))).

⁵⁴ 316 N.L.R.B. 123 (1995).

⁵⁵ See *id.* at 123. The union in this case had appealed to the general public not to buy from Leslie Homes, which had been paying carpenters below the area standards. See *id.* at 124.

⁵⁶ See *id.* at 127-28. The Board rejected the union's argument that the handbillers were exercising their own § 7 rights and were engaging in "other concerted activities for the purposes of collective bargaining or other mutual aid or protection." *Id.* at 127. Given the *Lechmere* Court's concern with protecting the property rights of employers, the fact that the "other concerted activities" theory could also apply to organizational activity (which the *Lechmere* Court found to implicate only derivative § 7 rights), and that *Lechmere* focused on organizing and not protesting simply because it was an organizing case, the Board decided it made little sense to protect area standards picketing over organizational activity. See *id.* at 128-29.

the Board also extended *Lechmere* to apply to nonemployee union consumer boycott activities in *Oakland Mall, Ltd.*⁵⁷

In neither case did the Board decide whether the *Babcock* discrimination and inaccessibility⁵⁸ exceptions apply to nonemployee union protest activities. In discussion of the inaccessibility exception, one member of the Board did note that there is "substantial support for the argument that the exception should not be applied to trespassory area standards activity."⁵⁹ He argued that the test for area standards activity may be more strict than the test for organizational activity because, while the latter lies at "the very core" of § 7, the former does not.⁶⁰ Also, while the latter is aimed at the employees of the property owner, the former is on behalf of employees elsewhere.⁶¹

Despite the inherent differences between nonemployee union organizational and protest activities, the Board does not seem to distinguish between them for the purpose of nonemployee union access. In particular, the Board applies the *Babcock* discrimination exception to all nonemployee union access cases.⁶²

Several courts of appeals, however, have refused to enforce Board decisions in which the Board found discriminatory enforcement of no-solicitation policies.⁶³ These differing outcomes are often the

⁵⁷ 316 N.L.R.B. 1160 (1995), enforced, 74 F.3d 292 (D.C. Cir. 1996). In *Oakland Mall*, union members began handbilling in front of Sears stores at several shopping malls after Sears canceled its contract with Ryder, causing Ryder to lay off union trucking employees. The handbills asked shoppers not to shop at Sears: "Sears no longer uses a Company that employs Local 243 Members to deliver merchandise. As a result (100) One Hundred Members of Local 243 have lost their jobs. Our Members need your help to get their jobs back." Id. at 1160-61.

⁵⁸ See supra note 48 for a brief explanation of inaccessibility. This exception is generally beyond the scope of this Note but has relevance where the wisdom of applying it to nonemployee union protest activities is questioned. See infra text accompanying notes 57-60.

⁵⁹ *Leslie Homes*, 316 N.L.R.B. at 129 n.18 (stating Member Cohen's view).

⁶⁰ Id.

⁶¹ See id.; see also *Oakland Mall*, 316 N.L.R.B. at 1163 n.14 ("Like area standards handbilling, secondary consumer boycott handbilling is a less favored Sec[ti]on 7 right under the *Babcock* analysis.").

⁶² See, e.g., *Be-Lo Stores*, 318 N.L.R.B. 1, 11-12 (1995) (finding that Be-Lo disparately enforced its no-solicitation rule); *Cleveland Real Estate Partners*, 316 N.L.R.B. 158 (1995); *Riesbeck Food Mkts., Inc.*, 315 N.L.R.B. 940, 942 (1994) (holding that Riesbeck's permission of civic and charitable solicitations but refusal of union protesting was discriminatory); *Pay Less Drug Stores Northwest, Inc.*, 312 N.L.R.B. 972, 974 (1993) (holding Pay Less's ejection of picketers from sidewalk to highway discriminatory). The Board has yet to decide explicitly whether the "inaccessibility" exception applies.

⁶³ See, e.g., *Be-Lo Stores v. NLRB*, 126 F.3d 268 (4th Cir. 1997); *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457 (6th Cir. 1996); *Riesbeck Food Mkts., Inc. v. NLRB*, Nos. 95-1766, 95-1917, 1996 WL 405224 (4th Cir. July 19, 1996) (unpublished disposition); *NLRB v. Pay Less Drug Stores Northwest, Inc.*, No. 94-70279, 1995 WL 323832 (9th Cir. May 25, 1995) (unpublished disposition).

result of distinctions drawn by the courts that the Board has not recognized. First, as discussed below, the courts seem to differentiate between organizational and protest activities.⁶⁴ Second, and relatedly, the courts make a greater distinction than does the Board as to what constitutes "similar" activity.⁶⁵ Finally, the courts tend to give more discretion to employers with respect to what is necessary for their business.⁶⁶

A. *The Board's Broad Application of the Babcock Discrimination Exception*

The Board does not differentiate between organizational and protest activities for the purpose of applying the discrimination exception. Rather, it requires an employer who grants access to other groups to allow nonemployee union protesters on its property. As discussed below, only two very narrow categories of employer-approved activities will not result in a finding of discrimination where nonemployee union access is denied.⁶⁷

*Victory Markets, Inc.*⁶⁸ illustrates the Board's willingness to apply the *Babcock* discrimination exception outside the organizational context. Here, nonemployee union representatives engaged in handbiling on Victory's property to protest nonunion and substandard wages paid to employees by contractors remodeling one of Victory's stores.⁶⁹ The manager of the mall in which this Victory store was located had the police threaten to arrest the protesters for trespass if they did not leave.⁷⁰ Other organizations, however, which were principally nonprofit or charitable, were given access to the property for fundraising or public awareness programs; Concord Asset Management, which managed the mall, permitted numerous outside activities to be conducted in the mall.⁷¹

⁶⁴ See *infra* Part II.B.

⁶⁵ See *infra* Part II.B.

⁶⁶ While the Board does allow an employer to permit access to outside groups related to its business without thereby triggering access for nonemployee union representatives, the Board has a very narrow view as to what is "work-related." See, e.g., *Rochester Gen. Hosp.*, 234 N.L.R.B. 253, 258 (1978) (finding that Red Cross poster and blood collection, poster for sales of nonprofit group for benefit of hospital, and displaying pharmaceutical products and medical books were "work related"); see also *infra* notes 74-78 and accompanying text.

⁶⁷ See *infra* notes 74-82 and accompanying text.

⁶⁸ 322 N.L.R.B. 17 (1996). See *infra* Part II.B for other Board cases broadly applying the *Babcock* discrimination exception.

⁶⁹ See *Victory Markets*, 322 N.L.R.B. at 17.

⁷⁰ See *id.*

⁷¹ See *id.* at 23-24. Union representatives reported observing activities such as: sales of Christmas gift wrapping to raise money for musical societies; vehicle sales by area automo-

The Board found discrimination since Concord repeatedly "permitted the use of its property for a wide range of charitable activity, and even some commercial activity . . . but . . . prohibited the Union from engaging in the protected handbilling activity in question."⁷² The Board, in its application of the discrimination exception to area standards picketing, found no merit to Concord's argument that "the Union was 'different' from those other organizations, because the Union was 'protesting' and handing out union materials."⁷³

Despite its proclivity to find discrimination, the Board has carved out two caveats to the *Babcock* discrimination exception: It permits employers to allow "work-related activities" or "isolated beneficial acts" on their property while forbidding nonemployee union access.⁷⁴ For example, in *Rochester General Hospital*,⁷⁵ the Board applied the "work-related" exception. In this case, security personnel ejected nonemployee union organizers engaged in soliciting and distributing union literature to hospital employees in various hospital parking lots.⁷⁶ The union maintained that the hospital discriminatorily applied its no-solicitation/no-distribution policy—the hospital had allowed the Red Cross to poster and conduct a blood drive; a volunteer group to advertise sales proceeding the hospital; and outside companies to display pharmaceutical products and medical books.⁷⁷ The Board, however, found no discrimination because "these were work-related activities that assisted the hospital in carrying out its community health care functions and responsibilities."⁷⁸

bile and motorcycle dealerships; and solicitation or literature distribution by the Salvation Army and the Chamber of Commerce as well as either the Heart Fund or the Cancer Fund. See *id.*

⁷² *Id.* at 24. An example where the Board found discrimination in the organizational context is *Lucile Salter Packard Children's Hosp.*, 318 N.L.R.B. 433, 433 (1995), enforced, 97 F.3d 583, 589-90 (D.C. Cir. 1996) (upholding Board's finding that employer discriminated against union in applying its no-solicitation policy). Here the employer refused access to nonemployee union organizers but had regularly allowed nonemployee representatives of certain outside groups to solicit hospital employees from tables and booths in the hallway adjacent to the hospital's public cafeteria; it also permitted solicitations by a voluntary association of employees and hospital administrators that sponsored recreational events for hospital employees and purchased gifts for employees on significant occasions. See *id.* at 586. This case can be distinguished from those discussed in Part II.B in that the solicitations here were aimed at the employees rather than the general public.

⁷³ *Victory Markets*, 322 N.L.R.B. at 24.

⁷⁴ See *Be-Lo Stores*, 318 N.L.R.B. 1, 11 (1995) (noting failure of "isolated beneficial acts" test); *Rochester Gen. Hosp.*, 234 N.L.R.B. 253, 259 (1978) (finding no discrimination because employer-sanctioned activities were "work-related").

⁷⁵ 234 N.L.R.B. 253 (1978).

⁷⁶ See *id.*

⁷⁷ See *id.* at 258.

⁷⁸ *Id.* at 259. But see *Lucile Salter Packard Children's Hosp.*, 318 N.L.R.B. 433, 433 (1995) (finding that solicitations by credit, insurance, and family services organizations

Under its “isolated beneficent acts” exception, the Board permits an employer to allow some charitable solicitations on its property without running afoul of the no-discrimination rule, but the Board limits the amount of such activity. This exception stems from an employee access case, *Hammary Manufacturing Corp.*⁷⁹ In *Hammary*, an employer, faced with employees engaging in union activities, enforced a no-solicitation policy, which made an exception on its face for the United Way campaign. The Board found that the stated exception was not enough to find discriminatory enforcement of the no-solicitation rule:

The Board and the courts consistently have held that an employer does not violate Sec. 8(a)(1) by permitting a small number of isolated “beneficent acts” as narrow exceptions to a no-solicitation rule. Thus, rather than finding an exception for charities to be a *per se* violation of the Act, the Board has evaluated the “quantum of . . . incidents” involved to determine whether unlawful discrimination has occurred.⁸⁰

Had the employer only allowed the United Way Campaign, it could have prohibited the union activities.⁸¹ The Board has lifted this “isolated beneficent acts” concept from the employee context and applied it to the nonemployee union activity context without further comment.⁸²

The Board decisions illustrate a broad interpretation of what constitutes discrimination. Several courts of appeals, however, endorse a narrower view.

were not “an integral part of the [employer’s] necessary functions”), enforced, 97 F.3d 583 (D.C. Cir. 1996).

⁷⁹ 265 N.L.R.B. 57 (1982).

⁸⁰ *Id.* at 57 n.4 (citations omitted). Recall that, in the employee context, the Board conducts a balancing test to determine the relative strengths of the employer’s and employee’s interests. See *White*, *supra* note 27, at 106. Thus, the Board seems to be acknowledging that an employer does not necessarily have a weak property interest merely because it allows charitable groups onto its property.

⁸¹ See *Hammary*, 265 N.L.R.B. at 57 (concluding employer can make exception on face of no-solicitation rule for annual United Way campaign). The Board, however, did find discriminatory treatment of union activity because the employer permitted employees during working time to sell numerous products, conduct a raffle, and collect for a flower fund. See *id.*

⁸² See, e.g., *Be-Lo Stores*, 318 N.L.R.B. 1, 11 (1995) (finding disparate treatment of union activity because “‘quantum of . . . incidents’ in the present case . . . [is] not limited to the ‘tolerance of isolated beneficent solicitation’ contemplated in *Hammary* . . .”), enforcement denied, 126 F.3d 268 (4th Cir. 1997). For further discussion of this case, see *infra* notes 110-15 and accompanying text.

*B. Indications of Disagreement with the Board by Several Courts of Appeals*⁸³

The *Babcock* and *Lechmere* Courts both dealt with solicitations by nonemployee union representatives in the context of organizational campaigns. The Board's extension of *Lechmere*'s presumption against nonemployee union access to protest activities has not engendered dispute in the courts. However, recent decisions by courts of appeals suggest a disinclination to uphold Board findings of discrimination where employers have excluded protesting nonemployee union representatives but have allowed solicitations by other groups directed at the public. Further, these courts suggest that an employer's barring nonemployee union solicitations while permitting charitable solicitations, regardless of frequency, does not constitute discrimination.

The Sixth Circuit, in *Cleveland Real Estate Partners v. NLRB*,⁸⁴ attempted to limit the *Babcock* discrimination exception by defining "discrimination" very narrowly. In this case involving nonemployee union protesters, the union began a do-not-patronize handbilling campaign against Marc's, a retail store located in a strip mall managed by Cleveland Real Estate Partners.⁸⁵ After its requests to leave went unheeded, the property manager contacted the police to remove the handbillers.⁸⁶ The ensuing unfair labor practice proceeding resulted in the Board's adoption of the ALJ's finding of discrimination.⁸⁷

The court, reversing the Board's decision, found that the strip mall manager did not engage in an unfair labor practice by forbidding the union's informational handbilling of mall customers on mall premises even though it allowed solicitation of mall customers by charitable organizations.⁸⁸ The court stated its belief that the Board had misinterpreted *Babcock*: "To discriminate in the enforcement of a no-solic-

⁸³ The term "indications" is used because some of the decisions discussed in this Note are unpublished dispositions and have no precedential value. Their importance to this Note lies not in the weight of the decisions but in the points of view expressed.

⁸⁴ 95 F.3d 457 (6th Cir. 1996).

⁸⁵ See *id.* at 459. The campaign urged customers not to patronize Marc's because the store employed nonunion workers; without a union to protect them, the picketers claimed, the employees would be too intimidated to tell the public that Marc's food was not fit for human consumption. They also claimed that the store had violated child labor laws. See *id.*

⁸⁶ See *id.* at 460-61.

⁸⁷ See *id.* at 461 ("The ALJ concluded that 'by excluding the union handbillers, while casually, haphazardly, and lackadaisically policing with respect to other solicitation/distribution activity . . . , [Cleveland Real Estate Partners] discriminated against the union handbilling. . . .").

⁸⁸ See *id.* at 461-62. Past solicitors that had not been asked to leave include the Salvation Army, the Girl Scouts, the Knights of Columbus, a mayoral candidate, the Boy Scouts,

itation policy cannot mean that an employer commits an unfair labor practice if it allows the Girl Scouts to sell cookies, but is shielded from the effect of the Act if it prohibits them from doing so.”⁸⁹ Rather, “the term ‘discrimination’ as used in *Babcock* means favoring one union over another, or allowing employer-related information while barring similar union-related information.”⁹⁰ The court argued that “[n]o relevant labor policies are advanced by requiring employers to prohibit charitable solicitations in order to preserve the right to exclude nonemployee distribution of union literature when access to the target audience is otherwise available.”⁹¹

The Ninth Circuit took a similar position in *NLRB v. Pay Less Drug Stores Northwest, Inc.*⁹² In this case, nonemployee union representatives picketed in front of the Pay Less store to publicize its non-union status and to urge the public not to patronize the store.⁹³ Pay Less, along with Wandermere (the owner of the strip shopping mall in which Pay Less was located), had the picketers removed by the police.⁹⁴ The Board found that the ejection of the union from the property constituted discrimination because of the prior access granted to other groups for use of the mall unrelated to the business of the mall.⁹⁵

The Ninth Circuit, rejecting the position that Pay Less and Wandermere engaged in disparate treatment of the union, denied enforcement of the Board’s order.⁹⁶ Rather, it held that a “business should be free to allow local charitable and community organizations to use its premises, whether for purely altruistic reasons or as a means of cultivating good will, without thereby being compelled to allow the

veterans, and school children selling candy to benefit various school projects. See *id.* at 462.

⁸⁹ *Id.* at 464-65.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² No. 94-70279, 1995 WL 323832 (9th Cir. May 25, 1995) (unpublished disposition).

⁹³ See *Pay Less Drug Stores Northwest, Inc.*, 312 N.L.R.B. 972, 972 (1993) (giving more comprehensive statement of facts).

⁹⁴ See *id.* at 973 n.9.

⁹⁵ See *id.* at 974. Pay Less had once allowed a bloodmobile to park in front of the store to solicit blood donations from members of the public, and Wandermere granted permission to allow Girl Scout cookie sales inside another store in the mall. See *id.* at 973 n.9 & 974. Other outside activities on the mall’s property included a bike ride sponsored by a school or athletic group; a carwash fundraiser; and meetings and a competition by a classic car club. While it is unclear whether Wandermere granted permission to these groups, there is no evidence of its issuing them any warning to leave or making any attempts to have them removed. See *id.* at 974.

⁹⁶ See *NLRB v. Pay Less Drug Stores Northwest, Inc.*, No. 94-70279, 1995 WL 323832, at *2 (9th Cir. May 25, 1995) (unpublished disposition).

use of those same premises by an organization that seeks to harm that business."⁹⁷

The Sixth and Ninth Circuits did not actually take issue with whether the discrimination exception should apply in the protest context. Instead, they just refused to find that allowing certain activities while barring nonemployee union protests constitutes discrimination. The Fourth Circuit, though, attempted to explain why such selective access does not constitute discrimination, in its 1996 decision, *Riesbeck Food Markets, Inc. v. NLRB*,⁹⁸ and later, explicitly raised doubts as to whether the exception should apply to nonemployee union protesting, in *Be-Lo Stores v. NLRB*.⁹⁹

In the former case, Riesbeck Food Markets prohibited nonemployee union picketers and handbillers from distributing on its property do-not-patronize literature, which informed customers that Riesbeck did not employ union labor.¹⁰⁰ Upon the union's refusal to leave the property, Riesbeck got a preliminary injunction prohibiting the union's activities on its premises; the union then filed an unfair labor practice charge.¹⁰¹

The ALJ held that Riesbeck discriminated against union solicitation because it "'permitted all kinds of civic and charitable solicitation for a total of almost 2 months a year at its stores.'"¹⁰² The Board affirmed the ALJ's determination, finding also that Riesbeck's solicitation policy was "inherently discriminatory" against union solicitation.¹⁰³ The Board argued that the screening process for allowing group activities was problematic since it involved a practice by which Riesbeck reviewed and evaluated each message sought to be distributed.¹⁰⁴

⁹⁷ Id. at *1.

⁹⁸ Nos. 95-1766, 95-1917, 1996 WL 405224 (4th Cir. July 19, 1996) (unpublished disposition).

⁹⁹ 126 F.3d 268 (4th Cir. 1997).

¹⁰⁰ See *Riesbeck*, 1996 WL 405224, at *1. The union, which had disclaimed its interest in organizing Riesbeck's employees, represented employees of a number of Riesbeck's competitors. See id.

¹⁰¹ See id.

¹⁰² Id. Solicitations included "candy sales by volunteer fire departments, poppy sales by the Veterans of Foreign Wars, bell ringing by the Salvation Army, and other solicitations by youth sport groups, a school band, and the Easter Seals." Id.

¹⁰³ Id. at *2. The policy allowed charitable organizations limited access to customers whenever Riesbeck thought it would enhance its business. See id. at *2.

¹⁰⁴ See *Riesbeck Food Mkts., Inc.*, 315 N.L.R.B. 940, 942 (1994) ("A practice that distinguishes among solicitation based on an employer's assessment of the message to be conveyed is discriminatory within the meaning of *Babcock & Wilcox* and its progeny, because in every instance the employer must specifically approve the solicitation of messages protected by the Act."), enforcement denied, Nos. 95-1766, 95-1917, 1996 WL 405224 (4th Cir. July 19, 1996).

The Fourth Circuit refused to enforce the Board's order.¹⁰⁵ Since discrimination claims require a finding that an employer treated similar conduct differently,¹⁰⁶ the court found there was a legally significant difference between charitable solicitations and a union's "do-not-patronize" solicitation.¹⁰⁷ The court was not especially concerned with union animus; rather, it emphasized that "an employer must have some degree of control over the messages it conveys to its customers on its private property."¹⁰⁸ Furthermore, it distinguished the union's message from the charitable solicitations by recognizing the fact that the former directly undermined Riesbeck's purposes (the sale of goods and services) while the latter encouraged business activity.¹⁰⁹

More recently, in its 1997 *Be-Lo Stores v. NLRB*¹¹⁰ decision, the Fourth Circuit explicitly indicated its reluctance to apply the *Babcock* discrimination exception to economic protesters, i.e., those engaged in activities designed not to organize the target employer's employees, but rather to exert economic pressure on that employer. In this case, Be-Lo confined nonemployee union picketers and handbillers to public sidewalks outside sixteen of its stores claiming it was enforcing its no-solicitation rule.¹¹¹ However, nonunion groups and individuals had accessed the property, both before and after the picketing.¹¹²

While the Board found discrimination because of the disparate enforcement of the no-solicitation rule and because the frequency of activities by nonunion groups went beyond the limited exception for

¹⁰⁵ See *Riesbeck Food Mkts., Inc. v. NLRB*, Nos. 95-1706, 95-1917, 1996 WL 405224, at *4 (4th Cir. July 19, 1996) (unpublished disposition).

¹⁰⁶ See *id.* at *3.

¹⁰⁷ See *id.* ("Riesbeck could reasonably be seen to have allowed civic and charitable solicitations out of feelings of altruism or civic duty; such motivations . . . would not allow for the union's do-not-patronize distribution.").

¹⁰⁸ *Id.* The court did note, however, that there was no evidence indicating that Riesbeck was targeting union literature for special *adverse* treatment: It had allowed the union to disseminate membership information at an earlier time; it consistently had forbidden other noncharitable solicitations; and its policy stated that do-not-patronize messages are not allowed on its premises. See *id.* at *4. Thus, the court appeared concerned, to some extent, about employer motivations. For a discussion of union animus as it relates to the discrimination bar, see *infra* Part III.A.2.

¹⁰⁹ See *Riesbeck*, 1996 WL 405224, at *4.

¹¹⁰ 126 F.3d 268 (4th Cir. 1997).

¹¹¹ See *Be-Lo Stores*, 318 N.L.R.B. 1, 10 (1995). Note that the union had just lost an election to make it the official bargaining representative for Be-Lo employees, see *id.*, placing this case plainly outside the organizational realm.

¹¹² See *Be-Lo Stores*, 126 F.3d at 284-85. Such groups and individuals included: Muslims selling oils and incense on a "pretty constant" basis; an "occasional" Jehovah's Witness distributing magazines at one store; a local Lions Club soliciting at one store on one occasion; two Lyndon Larouche followers, on a "couple of occasions," handing out literature at two stores; a person selling cookbooks inside one store; and occasional individuals selling Girl Scout cookies and greeting cards inside one store. See *id.*

"isolated beneficent acts," the Fourth Circuit disagreed.¹¹³ It cast doubts on the applicability of the *Babcock* discrimination exception when nonemployees are engaging in protest activities as opposed to organizational activities, noting that nonemployee access claims to an employer's private property "are at their nadir when the nonemployees wish to engage in protest or economic activities."¹¹⁴ Moreover, the court reiterated the Sixth Circuit's view that "[n]o relevant labor policies are advanced" by prohibiting an employer from allowing charitable solicitations if it excludes nonemployee union distributions.¹¹⁵

These decisions reflect the courts' reluctance to grant access to nonemployee union representatives engaged in appeals to the public by finding a discriminatory access policy. This reluctance suggests the need to examine more deeply the underlying rationale for the discrimination exception.

III CREATING A FRAMEWORK

While *Lechmere* responded to some unanswered questions and reaffirmed the principles recognized in *Babcock*, great uncertainty remains as to what constitutes "discriminat[ing] against the union" and "other distribution,"¹¹⁶ despite the Board's attempts at clarification. Does allowing solicitations of any kind, even charitable, while preventing nonemployee union activity discriminate against § 7 activity? Should the *Babcock* discrimination exception apply to protest activities? Can an employer be at all selective with regard to whom it allows on its private property without discriminating unlawfully under the NLRA?

These lingering questions stem in large part from the lack of a stated rationale by the Board and the courts as to what statutory interests are implicated by discriminatory application of no-solicitation rules in the *Babcock/Lechmere* context. In *Babcock*, the Court used the accommodation principle to justify the inaccessibility exception,

¹¹³ See *id.* at 284.

¹¹⁴ *Id.*

¹¹⁵ *Id.* (quoting *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457, 465 (6th Cir. 1996)). The court also gave Be-Lo leeway in that it did not view the quantity of solicitations as enough to open the door to the union since they occurred in only a few of Be-Lo's thirty stores and "are no more than could be expected at any large retail chain that was zealously defending its property rights." *Id.* at 285. Note that there was no evidence that Be-Lo's owners, executives, or store-level management knew or approved of the activities of the outside groups and individuals. See *id.* at 284.

¹¹⁶ *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). For the holding of *Babcock*, see *supra* note 36 and accompanying text.

yet remained silent as to the reasoning for the discrimination exception.¹¹⁷ Without an underlying rationale, there is little guidance for determining what constitutes discrimination.

Part III.A critiques the *Babcock* discrimination rule by examining two possible rationales for the exception. It concludes that only a narrow application of the rule can be doctrinally justified. Based upon Part III.A's determination that a broad definition of discrimination cannot be reconciled with *Lechmere* principles, Part III.B advocates the importance of conducting a similarity inquiry as a prerequisite for finding discrimination; such an inquiry would entail a comparison between the activities allowed by the employer and the excluded union conduct since the term discrimination generally suggests differential treatment of similarly situated entities.¹¹⁸ This analysis, when employed with respect to charitable solicitations, should result in the Board's moving beyond the "isolated beneficent acts" rule. A similarity inquiry also lays the foundation for why the *Babcock* discrimination exception should not apply outside the organizational context. Part III.C furnishes additional justification for this limitation: The § 7 interests at stake with respect to appeals to the public are weaker than in organizational cases involving the solicitation of employees, and the employers have far more to lose.

A. *Inadequate Support for Broad Application of Discrimination Bar*

There are two possible explanations for the *Babcock* discrimination bar. It may serve to indicate that an employer has a sufficiently weak property interest that even a derivative § 7 interest should outweigh it. Alternatively, discrimination may be frowned upon because it evidences possible union animus, i.e., specific targeting of a union for adverse treatment. However, neither of these rationales provide adequate support for the Board's broad definition of discrimination and blanket application of the discrimination exception.

1. *Weak Property Interest*

Despite the fact that a fundamental aspect of one's property rights is the ability to exclude selectively,¹¹⁹ the "weak property inter-

¹¹⁷ See *Babcock*, 351 U.S. at 112 (emphasizing that accommodation between organizational rights of workers and property rights of employers "must be obtained with as little destruction of one as is consistent with the maintenance of the other"). For a discussion of the *Babcock* Court's accommodation principle, see *supra* note 36.

¹¹⁸ See *infra* text accompanying notes 140-45.

¹¹⁹ Property rights fundamentally "'embrace[] the absolute right to exclude' . . ." and therefore restrictions upon "exclusive possession of land constitute a partial taking."

est" theory devalues this interest. According to this theory, the Board, when dealing with potential § 8(a)(1) violations, does not look for union animus since no animus is required for such violations.¹²⁰ Rather, evidence of allowing some solicitations while prohibiting others serves to delegitimize a property owner's stated business reason for not allowing solicitation.¹²¹ Thus, by weakening the purported interest of the employer, discrimination tips the balance in favor of the § 7 right that is being compromised by the employer's policy.

In the *employee* context, this argument works because access is often based on the legitimacy of an employer's professed business interest.¹²² In the *nonemployee* context, however, the relevance of a weak employer interest is less clear. Since *Lechmere* prohibits the balancing of employer property interests and the statutory rights of nonemployees,¹²³ probing whether an employer has acted in a discriminatory manner to prove a weak property interest seems inconsistent as employers do not need a business reason for excluding nonemployees. Rather, employers can exclude nonemployee union representatives for any reason or for no reason at all,¹²⁴ because employers do not owe this group the obligation it owes to employees.¹²⁵ If in fact an employer does not need a business justification for excluding nonemployees from access with its no-solicitation rule, the traditional rationale behind the prohibition on discrimination under § 8(a)(1)—that discrimination undermines the legitimacy of an em-

Harry G. Hutchison, *Through the Pruneyard Coherently: Resolving the Collision of Private Property Rights and Nonemployee Union Access Claims*, 78 Marq. L. Rev. 1, 37 (1994) (quoting Richard A. Epstein, *Takings* 65 (1985)).

¹²⁰ See White, *supra* note 27, at 109; see also *Peyton Packing Co.*, 49 N.L.R.B. 828, 843-44 (1943) (describing requirements of proof necessary for finding of discrimination against union solicitations by *employees*).

¹²¹ See Paul N. Cox, *A Reexamination of the Role of Employer Motive Under Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act*, 5 U. of Puget Sound L. Rev. 161, 172 (1982) (examining assumptions underlying proposition that inconsistent treatment undermines employer interest).

¹²² See *supra* note 27 and accompanying text.

¹²³ See *Lechmere*, 502 U.S. at 537 (explicitly prohibiting Board from "'balanc[ing] the conflicting interests of employees to receive information on self-organization on the company's property . . . with the employer's right to control the use of his property'") (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 109-10 (1956)).

¹²⁴ See Estlund, *supra* note 49, at 308 (arguing that *Lechmere* allows employers to exclude "not only for 'good reasons,' but for 'bad reasons' or for no reason at all," and this "broad right to exclude confers sovereignty over others beyond what any legitimate business interest would warrant").

¹²⁵ See *Lechmere*, 502 U.S. at 533 (reiterating that "[n]o restriction may be placed on the employees' right to discuss self-organization *among themselves*, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline . . . [but] *no such obligation is owed nonemployee organizers*" (citations omitted) (emphasis added)).

ployer's business reason for why it does not want solicitation—appears weak.

It could be argued that the Court is saying that union solicitations always compromise operational interests to some extent, but the NLRA simply does not require an employer to demonstrate such impingement in the case of nonemployee union access. However, the *Lechmere* framework is not about who bears the burden of proof—even if an employer (who nondiscriminatorily enforces its no-solicitation policy) openly admits that it has no legitimate business interest in denying access to nonemployee union representatives, it still may exclude them. Since the Board may not engage in a balancing test of competing interests in the nonemployee context, it is unclear why there is discussion of impeaching interests.

Additionally, the discrimination exception raises the question: How can the Board limit an employer's property rights by permitting the exclusion of all or none but barring the exclusion based on subject-matter?¹²⁶ Such a position conforms with the idea that an employer's interest in excluding outsiders altogether is worthy of protection while determining the form of a solicitation is not.¹²⁷ Yet such a policy is problematic in that an employer may have a strong business interest in allowing selective access, but since no balancing is permitted under *Lechmere*, there is no opportunity to so demonstrate. Thus, if the discrimination bar is nothing more than an attempt to perform a kind of automatic balancing test of property interests and § 7 rights, it seems particularly important for the Board to define discrimination narrowly by examining the similarity of the activities in question. This approach would protect the business interests of employers, as per *Lechmere*.

To some extent, the *Babcock* discrimination bar appears to be in place because of a distaste for an employer's singling out union activity for adverse treatment. However, this rationale, as discussed below, also falls short of justifying the rule.

¹²⁶ See *Riesbeck Food Mkts., Inc.*, 315 N.L.R.B. 940, 942 (1994), enforcement denied, Nos. 95-1766, 95-1917, 1996 WL 405224 (4th Cir. July 19, 1996):

A practice that distinguishes among solicitations based on an employer's assessment of the message is discriminatory . . . because in every instance the employer must specifically approve the solicitation of messages protected by the Act. Thus, [an employer] may under [such a] practice permit the distribution on its property of a wide range of messages while at the same time forbidding the distribution of messages that are protected under the Act.

¹²⁷ See *White*, supra note 27, at 112-13 (arguing that prohibition of discriminatory application of no-solicitation rule cannot be explained on animus grounds but rather "can be explained by a ranking of property rights that views the employer's property right to determine what forms of solicitation may take place on its property as a weaker property right than the right to exclude outsiders from soliciting or distributing on its property").

2. *Hidden Animus*

Another theory is that the discrimination bar exists not merely to impeach a purported employer interest but also to indicate motive.¹²⁸ In a case where the finder of fact must examine the interests of a particular employer, such an inquiry is "properly undertaken as a matter of credibility, and it is with respect to the matter of credibility that employer motive is an element of 8(a)(1)."¹²⁹

Given the choice, many, if not most, employers would choose to exclude union solicitations or pickets.¹³⁰ The *Babcock/Lechmere* framework allows such an exclusion in the nonemployee context, without looking at motive, unless the employer grants access to other groups.¹³¹ The Board and the courts do not explicitly base the discrimination bar on a view that discrimination suggests an improper employer motive. That may be because, in the nonemployee context, an employer *can* have an antiunion reason for not allowing solicitations. In fact, there is some authority that an employer can promulgate a blanket no-solicitation rule *in response to* nonemployee union organizational efforts.¹³² Since the Board allows these blanket no-solicitation policies without inquiring into an employer's potential union animus, the discrimination exception is arguably a poor tool for catching cases of improper motive.

Moreover, an employer's motive does not come into play, as it does in the employee context, when assessing the legitimacy of the employer's interests in maintaining production or discipline. The reason? In the nonemployee context, no such assessment is ever made. If, in fact, the *Babcock* Court asserted there could be no discrimination in order to prevent adverse treatment for union activity, such a

¹²⁸ See Cox, *supra* note 121, at 172-73 (suggesting that "[m]otive, in the sense of true basis of employer decision, would seem invariably to constitute an [§] 8(a)(1) element"); see also White, *supra* note 27, at 110 (stating that § 8(a)(1) discrimination "reveals the hidden animus motivating an otherwise lawful rule").

¹²⁹ Cox, *supra* note 121, at 175.

¹³⁰ Recall that employers have strong economic reasons for averting unionization. See *supra* notes 13-14 and accompanying text.

¹³¹ See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). Alleged disparate treatment may give rise to an inquiry into how strong the employer's interest is in asserting its property rights, but the Board only looks into this question to see if the permitted activities were work-related. See *supra* notes 74-78.

¹³² See *Dorment & Carter Enter.*, NLRB Advice Memorandum, 19 A.M.R. ¶ 29098, at 155 (Oct. 30, 1992) (distinguishing nonemployee organizational efforts from those of employees in that promulgation of no-solicitation rule in response to *employee* organizational efforts would constitute unlawful retaliation under NLRA). Note that Advice Memoranda are issued by the General Counsel of the Board pursuant to a Regional Director's request for advice. Where the memorandum discusses the decision to decline a union's charge (as was the case in *Dorment & Carter*), the Advice Memorandum is considered a "final opinion." See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 141-42, 147-48 (1975).

position is difficult to reconcile with *Lechmere's* prohibition on balancing, which seems to be aimed at avoiding such an inquiry.

Defending the *Babcock* discrimination bar on the basis that discrimination evidences union animus thus does not have doctrinal support. Yet the rule appears to be based, at least partially, on a concern that employers not treat unions unfairly; to some extent, the weak property interest and hidden animus theories are inextricably intertwined. The justification seems to go something like this: "Discrimination is bad because it shows that an employer is purposely preventing unions from doing something that it's letting other groups do." Thus, even though an employer can promulgate a no-solicitation rule for the sole purpose of keeping out nonemployee unions, the law does not want to let employers have their cake and eat it too. In other words, the Board will give employers the benefit of the doubt by not inquiring into employer interests or motives for having a no-solicitation rule. However, if the employer discriminates, the Board will presume a weak interest or improper motive and grant access.

The problem with this rationale is that just because an employer is allowing only selective access does not necessarily mean that the employer has a weak property interest and was only keeping off the nonemployee union representatives because it does not like unions. Some courts have argued that an employer should be allowed to exclude selectively for this reason. For example, the Fourth Circuit in *Riesbeck* allowed the employer to assess the message to be conveyed on its property and have control over which messages it wanted to allow.¹³³ The court emphasized the need to examine closely the similarity between the permitted and excluded activities in order to find discrimination.¹³⁴ Such an inquiry recognizes that an employer may simply be distinguishing between activities that are bad for business and those that help the business. The Board's approach essentially provides a justification to grant a permanent easement for nonemployee union activities if an employer wants to allow *any* (as opposed

¹³³ See *Riesbeck Food Mkts., Inc. v. NLRB*, Nos. 95-1706, 95-1917, 1996 WL 405224, at *3-*4 (4th Cir. July 19, 1996) (unpublished disposition) (quoting *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 49 (1983)):

"Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property."

¹³⁴ See *id.* at *3.

to only similar) outside groups on its property—which is precisely what *Lechmere* was designed to prevent.¹³⁵

Part III.B explains why a similarity inquiry, though often disregarded by the Board, is an essential element for a finding of discrimination. As discussed below, applying a similarity test suggests two outcomes: (1) The Board should abandon the “isolated beneficent acts” test because the similarity inquiry will make it unnecessary, and (2) the *Babcock* discrimination exception should not apply to protest activities.

B. The Importance of “Similarity” for a Finding of Discrimination

The Board’s broad view of what constitutes discrimination and its application of the *Babcock* discrimination exception to all nonemployee union activity is inconsistent with the assertion of employer property rights demonstrated in *Lechmere* and many of the courts of appeals cases.¹³⁶ Allowing access only to certain groups does not necessarily suggest a weak property interest; it also does not mean an employer is targeting union activities for adverse treatment. Mere access alone to select outsiders should not render a no-solicitation or no-access policy void without deeper analysis.

Babcock defines discrimination as allowing “other distribution.”¹³⁷ Courts generally have looked for the permitted activity to be similar to the prohibited nonemployee union activity before making a determination of discrimination.¹³⁸ Yet no court has given clear guidelines as to what constitutes similar activity without stepping beyond the spirit of the NLRA and previous cases involving 8(a)(1) discrimination, as the Sixth Circuit appeared to do in *Cleveland Real Estate*.¹³⁹ It seems that cases in which courts of appeals have disagreed with the Board as to the presence of discrimination involve fundamental disputes over this issue, but fall short of providing a comprehensive framework for dealing with it.

An examination into similarity of activities seems to derive from a belief that one can only be discriminating if choosing between simi-

¹³⁵ See Brief of Amicus Curiae for Food Marketing Institute at 8, *Lechmere, Inc.*, 295 NLRB 92 (1988), No. 15, enforced, 914 F.2d 313 (1st Cir. 1990) (explaining that Board decisions had been creating impermissibly a permanent easement for unions). The Supreme Court ultimately denied enforcement of the Board order. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 541 (1992).

¹³⁶ See *supra* Part II.B.

¹³⁷ *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

¹³⁸ See, e.g., *infra* notes 150-51 and accompanying text.

¹³⁹ See *infra* text accompanying notes 159-61.

larly situated things. Judge Easterbrook, writing for the Seventh Circuit in *Guardian Industries Corp. v. NLRB*,¹⁴⁰ explained that:

Discrimination is a form of inequality, which poses the question: "equal with respect to what?". A person making a claim of discrimination must identify another case that has been treated differently and explain why that case is "the same" in respects the law deems relevant or permissible as grounds of action.¹⁴¹

Guardian involved a situation where an employer refused to allow its employees to post notices of union meetings on the firm's bulletin board during an organizational campaign.¹⁴² However, *Guardian Industries* would post, on behalf of its employees, for-sale announcements for items such as used cars, and thus the union filed an unfair labor practice charge.¹⁴³ The Board, adopting the opinion of the ALJ, held that if an employer allows employees the slightest access to a bulletin board, its forbidding the posting of union notices discriminates against the employees' right to organize.¹⁴⁴ Reviewing the case on appeal, Judge Easterbrook disagreed with the Board, stating that:

The Board asks us to accept an understanding of "discrimination" that has been considered, and found wanting, in every other part of the law that employs that word. . . . Distinguishing between for-sale notices and announcements of all meetings, of all organizations, does not discriminate against the employees' right of self-organization.¹⁴⁵

Thus, the Seventh Circuit highlights the need for a finding of similarity between the activities and moves away from the Board's view that, with a few exceptions, granting access to one means opening the door to all.

This approach is not necessarily inconsistent with the position of the Board, despite the fact that the Board's recent approach to finding discrimination has not involved an inquiry into similarity. For example, in *Jean Country*, the Board held that "denial of access for [§] 7 activity may constitute unlawful disparate treatment where . . . a property owner permits similar activity in similar relevant circumstances."¹⁴⁶ Nevertheless, the Board appears to apply a broader

¹⁴⁰ 49 F.3d 317 (7th Cir. 1995).

¹⁴¹ *Id.* at 319 (emphasis omitted).

¹⁴² See *id.* at 318.

¹⁴³ See *id.*

¹⁴⁴ See *id.*

¹⁴⁵ *Id.* at 320-22.

¹⁴⁶ *Jean Country*, 291 N.L.R.B. 11, 12 n.3 (1988) (citations omitted). More recently, in *Farm Fresh, Inc.*, 1998 NLRB LEXIS 633, 362 NLRB No. 81 (Aug. 27, 1998), the Board stated that "a finding of unlawful discrimination or disparate enforcement of a no-access rule requires a showing of treating similar conduct differently." *Id.* at *19. The Board

definition of discrimination than this *Jean Country* language would suggest.¹⁴⁷ If an employer enforces without exception a no-solicitation policy, the Board presumes that the employer's reasons are legitimate. However, if an employer opens up its property to outside organizations, the Board will find discrimination because, according to the Board, an employer cannot pick and choose the groups to whom it grants access.¹⁴⁸

Several decisions and unpublished dispositions issued by federal courts of appeals inform this discussion. The similarity inquiry used by the Fourth, Sixth, and Ninth Circuits leads to a higher tolerance than the Board exhibits for the exceptions an employer may recognize to its no-solicitation policy and, likewise, a narrower view of the "discrimination" that triggers a union right of access. In *Riesbeck*, *Cleveland Real Estate*, and *Pay Less*, each of the courts moved beyond the "isolated beneficent acts" rule.¹⁴⁹ These courts suggest that charitable activities are significantly different legally from union activities,¹⁵⁰ thereby allowing an employer to be altruistic or cultivate goodwill without having to allow organizations onto its property that may harm its business.¹⁵¹ This view recognizes that the "isolated beneficent

found a difference between granting entry to the public for a grocery store snack bar and permitting a group to solicit money or memberships. See *id.* Thus, the Board does seem willing doctrinally to apply a similarity test.

¹⁴⁷ Likewise, the D.C. Circuit, in *Lucile Salter*, quoted the Board's similarity language from *Jean Country*, but engaged in no such analysis with respect to the charitable solicitations. Rather, it relied on *Hammary* (an *employee* case) and applied the "isolated beneficent acts" rule. See *Lucile Salter Packard Children's Hosp. v. NLRB*, 97 F.3d 583, 587 (D.C. Cir. 1996) (adhering to Board's view).

¹⁴⁸ See, e.g., *Riesbeck Food Mkts., Inc.*, 315 N.L.R.B. 940, 942 (1994) (holding employer may not allow numerous charitable and civic solicitations to enhance goodwill while forbidding union messages it believes bad for business).

¹⁴⁹ See *supra* notes 79-82 and accompanying text for discussion of "isolated beneficent acts" rule.

¹⁵⁰ See *Riesbeck Food Mkts., Inc. v. NLRB*, Nos. 95-1766, 95-1917, 1996 WL 405224, at *3 (4th Cir. July 19, 1996) (unpublished disposition) (emphasizing that discrimination claims require a finding of dissimilar treatment of similar conduct).

¹⁵¹ See *NLRB v. Pay Less Drug Stores Northwest, Inc.*, No. 94-70279, 1995 WL 323832, at *1 (9th Cir. May 25, 1995) (unpublished disposition) (finding no similarity between charitable and civic solicitations and union picketing).

Note that White argues that the Fourth, Sixth, and Seventh Circuits incorrectly use the disparate treatment analysis routinely applied in Title VII claims. See White, *supra* note 27, at 115-17 (referring to *Riesbeck*, *Cleveland Real Estate Partners*, and *Guardian Industries*). By looking for similarity between the activity allowed by an employer and the excluded union conduct, the courts, according to White, are introducing disparate treatment theory into § 8(a)(1). White finds such an approach problematic because, while § 8(a)(1) requires no finding of an improper motive, disparate treatment theory is "founded on an intent to discriminate, with disparate application of a neutral rule evidencing the forbidden motive." *Id.* at 117. Thus, White criticizes § 8(a)(1) analyses where courts allow selective access rules that can be explained on a "union neutral" basis or

acts" rule furthers no relevant labor policy and, instead, impinges on property rights beyond the intentions of the Court.¹⁵²

Furthermore, the fact that the Court has required a similarity inquiry in the constitutional access context may indicate the Court's inclination toward such an approach. In *Perry Education Ass'n v. Perry Local Educators' Ass'n*,¹⁵³ the Court found no discrimination in an employer's exclusion of a union from the internal mail system of a public school even though "some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations use the facilities."¹⁵⁴ Its rationale was not based on the "quantum" of use by such groups;¹⁵⁵ rather, the Court noted that these organizations were not similar in character to a union:

[E]ven if we assume that by granting access to the Cub Scouts, YMCA's, and parochial schools, the School District has created a "limited" public forum, the constitutional right of access would in any event extend only to other entities of similar character. While the school mail facilities thus might be a forum generally open for use by the Girl Scouts, the local boys' club, and other organizations that engage in activities of interest and educational relevance to students, they would not as a consequence be open to an organization . . . concerned with the terms and conditions of . . . employment.¹⁵⁶

Thus, if solicitations by charitable organizations are not similar to union solicitations, the quantum of such solicitations should not be considered in the evaluation. Furthermore, the incentive system that

where courts note that there was no animus since the union activity was not similar in kind to the solicitations permitted. See *id.* at 117-18.

White suggests that, because the courts looked into the motives of the employers, they improperly applied § 8(a)(1). However, as White herself points out, although union animus is not *necessary* to establish such a violation, its existence is cause for an unfair labor practice finding. See *id.* at 109. Thus, as long as a court does not conflate a test for discrimination with a test for antiunion motive (i.e., it does not require animus for a § 8(a)(1) violation but looks for evidence of animus if there is otherwise no independent reason for finding a violation), there is no doctrinal problem. Moreover, if in fact the rationale behind the *Babcock* discrimination exception is to uncover union animus, see *supra* Part III.A.2, then a court's reference to employer motive is not inappropriate as long as it does not require an actual finding of animus to prove discrimination.

¹⁵² See *Cleveland Real Estate v. NLRB*, 95 F.3d 457, 465 (6th Cir. 1996) ("*Babcock* and its progeny, which weigh heavily in favor of private property rights, indicate that the Court could not have meant to give 'discrimination' the import the Board has chosen to give it.").

¹⁵³ 460 U.S. 37 (1983).

¹⁵⁴ *Id.* at 47. While *Perry* was a First Amendment case, it was relied on by the courts in both *Guardian* and *Riesbeck*. It is relevant in that it shows the Court's rationale for why it required similarity between activities in order to find discrimination.

¹⁵⁵ Recall that the applicability of "isolated beneficent acts" exception hinges on the "quantum" of charitable activities an employer allowed. See *supra* notes 79-81 and accompanying text.

¹⁵⁶ *Perry*, 460 U.S. at 48.

a rule allowing only isolated beneficent acts sets up is contrary to public policy interests since employers are likely to limit charitable activities rather than open their property to unions.¹⁵⁷ Consequently, the "isolated beneficent acts" approach ends up furthering neither labor nor social policy.¹⁵⁸

The Sixth Circuit's attempt at a similarity inquiry in *Cleveland Real Estate* came close to a suitable framework for analysis. The court held that "*Lechmere's* access analysis applies to informational consumer handbilling and that *Babcock's* 'discrimination' principle does not nullify *Lechmere's* application, but only addresses situations where an employer discriminates against the union in favor of other union or employer-related distribution."¹⁵⁹ Thus, it seemed at first blush that the court was establishing a rule that allowing access to outside groups will rarely open the door to nonemployee union protesters. However, it appears to apply this rule to organizational efforts as well, holding generally that "the term 'discrimination' as used in *Babcock* means favoring one union over another, or allowing employer-related information while barring similar union-related information."¹⁶⁰ While such a narrow definition may be justifiable in the customer appeal context given the weak § 7 right involved, no rationale is given for this interpretation in the organizational context.

Thus, the Sixth Circuit appears to take the similarity examination too far. Professor Rebecca Hanner White points out that "[t]he discriminatory impact of a rule that permits much solicitation but forbids that which encompasses union activity is properly viewed as the interference § 8(a)(1) is designed to guard against."¹⁶¹ Accordingly, the Sixth Circuit's decision to allow employers to keep out harmful

¹⁵⁷ Charitable activities generally have been viewed as being in the public interest. Historically, the government has encouraged charitable activities, most notably through tax exemptions, because they serve public needs. See, e.g., Oliver A. Houck, *With Charity for All*, 93 Yale L.J. 1415, 1422 (1984) (noting consensus in Anglo-American history that charities were public services that should be "encouraged, perpetuated, and exempt from taxation").

¹⁵⁸ Some argue that the Supreme Court in *Lechmere* suggested that the employer would have discriminated had it allowed charitable solicitations. See, e.g., Estlund, *supra* note 49, at 322 & n.110 (noting that *Lechmere* seemed to preserve "little-used exception for nonemployee access" which limits employer's right to post against nonemployee distribution of literature where employer allows other distribution). They base this argument on the fact that Justice Thomas indicated in a footnote that *Lechmere* had enforced its no-solicitation policy against the Salvation Army and the Girl Scouts. However, he made this point while illustrating that *Lechmere* consistently enforced its policy, thus removing any issue of discriminatory application. His mere statement of this fact seems a weak ground for concluding that the Supreme Court would agree with the Board.

¹⁵⁹ *Cleveland Real Estate v. NLRB*, 95 F.3d 457, 465 (6th Cir. 1996).

¹⁶⁰ *Id.*

¹⁶¹ White, *supra* note 27, at 118.

messages, while still permitting access to some groups to foster goodwill, would be better reconciled with the NLRA if the *Babcock* discrimination exception did not apply to protest activities but remained in place with respect to organizational activities.

C. Justifying the Distinction Between Nonemployee Union Organizational and Protest Activities

Limiting the discrimination exception to organizational cases makes sense in light of the weak § 7 interests at stake in the protest context and the strong property interests of the employer in being able to cultivate goodwill while keeping harmful messages off its property. Courts and members of the Board have repeatedly asserted that nonemployee union picketing interests are weaker than organizing interests. In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*,¹⁶² for example, although the issue was not squarely before it, the Supreme Court cast doubt on whether *Babcock* should apply outside of the context of organizational solicitation, maintaining that area standards picketing “has no . . . vital link to the [rights of the] employees located on the employer’s property.”¹⁶³

Thus, the *Sears* Court suggested that protest activity by nonemployee union members may not implicate even a derivative § 7 right.¹⁶⁴ Even members of the Board have suggested that trespassory area standards activity should be treated more strictly than organizational activity since organizational interests are more central rights under § 7.¹⁶⁵ Also, decisions by several courts of appeals reflect a dis-

¹⁶² 436 U.S. 180 (1978). Here the Court held that federal labor laws did not preempt state trespass laws except where the trespassory activity is clearly protected on private property by the NLRA. See *id.* at 202-07 (allowing state court adjudication of arguably protected trespass involving area standards picketing by nonemployee union representatives on Sears’s private property).

¹⁶³ *Id.* at 206 n.42. The court argued that several factors made trespassory area standards picketing less worthy of protection than trespassory organizational solicitation:

First, the right to organize is at the very core of the purpose for which the NLRA was enacted. Area-standards picketing, in contrast, has only recently been recognized as a § 7 right. . . . Second, *Babcock* makes clear that the interests being protected by according limited-access rights to nonemployee, union organizers are not those of the organizers but of the employees located on the employer’s property. . . . Area-standards picketing, on the other hand, has no such vital link to the employees located on the employer’s property. While such picketing may have a beneficial effect on the compensation of those employees, the rationale for protecting area-standards picketing is that a union has a legitimate interest in protecting the wage standards of its members who are employed by competitors of the picketed employer.

Id.

¹⁶⁴ See *id.*

¹⁶⁵ See *supra* text accompanying notes 59-60.

inclination to protect trespassory picketing, outside the context of an organizational campaign, even where an employer grants access to other charitable or commercial groups.¹⁶⁶ If the NLRA does not afford any protection in this context, then there is no reason why an employer cannot discriminate with respect to whom it allows on its property and exclude nonemployee union protesters, as long as it does so within the framework of other laws. Regardless, any § 7 rights of the employees that may be infringed upon are indeed very weak; it is possible that even a weak employer property interest (such as one evidenced by disparate enforcement of a no-solicitation policy) could defeat the slight § 7 interest of the actual employees.

Proponents of increasing the access rights of nonemployee union representatives, such as Professor Cynthia Estlund, disagree. Estlund maintains that appeals to the public and to customers, although perhaps less central to the Act than the protection of unionization and collective bargaining, are still crucial to employees' ability to exercise power within the employment relationship.¹⁶⁷ Thus, Estlund argues that for such a right to be meaningful, it must be allowed at the place of patronage because it is a "crucial forum."¹⁶⁸

While Estlund's position regarding the effectiveness of the employer's private property as a forum is important to keep in mind, this Note is not suggesting that the Board disregard the *Babcock inaccessibility* exception in situations involving nonemployee union protesting.¹⁶⁹ Rather, permitting access to other groups should not be viewed automatically as discrimination if an employer does not allow nonemployee union appeals to customers, unless the permitted activities are similar in nature, such as other protests regarding the business.¹⁷⁰ Alternatively, even if allowing access to other groups but denying it to nonemployee union representatives desiring to protest is considered presumptively discrimination, there should be some opportunity by the employer to rebut this finding. Especially where the

¹⁶⁶ See, e.g., *Be-Lo Stores v. NLRB*, 126 F.3d 268, 284 (4th Cir. 1997) (expressing "doubt . . . that the *Babcock & Wilcox* disparate treatment exception, post-*Lechmere*, applies to nonemployees who do not propose to engage in organizational activities").

¹⁶⁷ See Estlund, *supra* note 49, at 351 ("Unions have traditionally sought to bring community and consumer pressure to bear on recalcitrant employers . . .").

¹⁶⁸ *Id.* Estlund proposes to overturn *Lechmere*, replacing it with the notion that employer property rights that interfere with any rights under the Act should not be accommodated unless the employer has "a substantial business reason independent of the desire to inhibit protected communication." *Id.* at 353.

¹⁶⁹ For an explanation of the inaccessibility exception, see *supra* note 48 and accompanying text (explaining that if employees are beyond reach of reasonable union efforts to communicate with them, employer must allow union to approach its employees on its property).

¹⁷⁰ See *supra* Part II.B.

property owner, such as the shopping mall manager in the opening hypothetical, is distant from the labor dispute, there are a number of legitimate business reasons why it would want to keep picketing off its property, such as maintaining decorum, yet fewer reasons to be suspicious of its motives since it is not the targeted employer.

When not in the realm of organizational activities, the courts seem more concerned than the Board with protecting the legitimate business interests of the employers.¹⁷¹ Where messages are being sent to the public, the property owner has a strong interest in preventing the picketing in order to maintain decorum and its business in general. Moreover, the owner has an interest in fostering the goodwill of the community (and perhaps other businesses) by allowing access to outside organizations.¹⁷² The fact that an employer selectively excludes does not necessarily mean that its property interests are weak—several courts have acknowledged the strong interest of the employer in preventing protesting and have indicated that prohibiting nonemployee union picketing based on its message is a legitimate end.¹⁷³

An employer's interest in keeping out unwanted messages should not be disregarded because of its desire to allow other activities on its property to enhance its business. This notion makes sense in light of the *Babcock* and *Lechmere* Courts' desire to protect the property

¹⁷¹ The Board does allow an employer to exclude nonemployee union representatives while permitting activities that are "an integral part of the [employer's] necessary functions." *Lucile Salter Packard Children's Hosp.*, 318 N.L.R.B. 433, 433 (1995), enforced, 97 F.3d 583 (D.C. Cir. 1996). However, this exemption does not satisfy the courts' desire to allow an employer to prohibit harmful picketing while granting access to activities that, although not central to its business, are important for attracting customers or serve a charitable purpose.

¹⁷² See *supra* note 3 and accompanying text (explaining financial importance to businesses of promoting charitable activities).

¹⁷³ See, e.g., *Riesbeck Food Mkts., Inc. v. NLRB*, Nos. 95-1766, 95-1917, 1996 WL 405224, at *4 (4th Cir. July 19, 1996) (unpublished disposition) (maintaining that employer "had a strong interest in preventing the use of its property for conduct which directly undermines its purposes, i.e., the sale of goods and services to [employer's] customers, which was implicated by the union's solicitations but not by the charitable solicitations"). The court found support for its argument in the Ninth Circuit's decision in *Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991 (9th Cir. 1992), which gave an employer leeway in the messages it allowed on its property. In *Sparks Nugget*, a hotel evicted nonemployee union agents from picketing on its property. The union claimed that Sparks Nugget discriminated against union distribution by paying employees to distribute antiunion handbills. The court (without explanation) held, however, that "[t]he holding in *Lechmere* is consistent with the employer's right to distribute literature on his own property, while keeping others out. This is not discriminatory." *Id.* at 998; see also *NLRB v. Pay Less Drug Stores Northwest*, 1995 WL 323832, at *1 (9th Cir. May 25, 1995) (unpublished disposition) (maintaining that employers should be permitted to cultivate goodwill by granting access to charitable and community organizations, without thereby being forced to allow use of its premises by organization seeking to harm business).

rights of the employers. Where an employer makes a calculated decision to open its property to groups because it thinks doing so will help business, this behavior does not indicate a weak property interest and thus should not dilute the employer's right to exclude nonemployee union protesters.

CONCLUSION

Currently, an employer may exclude nonemployee union representatives from its property as long as a reasonable alternative means of access to the employees exists and the employer does not discriminate by allowing other distribution. While the Board has adopted a very broad view as to what constitutes discrimination and "other distribution," several courts seem to have taken different positions. The Fourth and Sixth Circuits, in particular, have placed a much greater emphasis on examining the nature of the conduct that had been allowed on the property. For example, finding that charitable activities are not similar in nature to union activities, these courts do not look at the quantum of charitable solicitations permitted since, regardless of their frequency, permitting such acts cannot constitute disparate treatment.

Furthermore, disagreement exists regarding whether to extend the *Babcock* principles to protest activities. While the Board subjects such activities to the same standard as organizational activities, there are some indications that the courts feel less inclined to find discrimination when dealing with nonemployee union protests. As the Fourth Circuit recently stated in *Be-Lo Stores*, claims to access by nonemployees to an employer's private property are "at their nadir" when the nonemployees are looking to engage in protest or economic activities rather than organizational activities.¹⁷⁴

In refining the analysis in nonemployee union access cases, the first step to be taken should be a decision not to extend the *Babcock* discrimination exception to protest activities. Second, the Board should construe discrimination more narrowly. It should require a finding of similarity between the permitted and proscribed conduct in order to conclude disparate enforcement of a no-solicitation rule. This nuanced analysis would still afford nonemployees the benefit of the *Babcock* discrimination exception in the organizational context, but it calls upon the Board to rethink its application of the exception in order to protect the property interests of employers who wish to open their property for publicity or charitable purposes.

¹⁷⁴ *Be-Lo Stores v. NLRB*, 126 F.3d 268, 284 (4th Cir. 1997).