

# The Silicon Bullet: Will the Internet Kill the NLRA?

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## *Abstract*

*The National Labor Relations Act's ("Act") increasing obsolescence in the modern workplace is well documented. Nowhere is this problem more apparent than where unions and employees use the Internet and other electronic communications to further employees' collective interests. Electronic communications pose significant challenges to several of the National Labor Relations Board's ("Board") anachronistic rules—challenges so great that, as explained by public choice theory, the Board's failure to adapt sufficiently may result in the Act losing what little relevance it currently possesses. I was hopeful that the Board's recent signal that it would comprehensively address the Act's application to electronic communications was an indication that it recognized the need to adapt to this new technology. Instead, the Board expressly refused to make the changes needed to ensure the Act's effectiveness and relevance in the modern economy. A future Board may revisit the issue, but until it does, the Act's survival is in jeopardy.*

## *Introduction*

Major transformations in the law are, by definition, extraordinary events. One reason for this infrequency is inertia, which resists changes to the course of legal regimes in much the same way it does objects. Inertia is especially prevalent in administrative law, where agency decisionmaking often seems to be based upon little more than historical practice.<sup>1</sup> The force of inertia, however, works in two directions. Although it is difficult to change an already established path, once that change has begun, it is equally unyielding. This dual effect is important because once an administrative law regime changes course, it is very difficult to reverse.

This Article asks whether technological advances in communications represent the rare catalyst that can overcome the seemingly immovable force of an administrative law regime and, if such advances begin to affect the regime, whether an agency can do anything to stem

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<sup>1</sup> See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2263–64 (2001).

the tide. The focus will be the Internet's effect on the National Labor Relations Act's ("NLRA" or "Act")<sup>2</sup> regulation of private-sector unionism.

The NLRA is more than seventy years old and its enforcement by the National Labor Relations Board ("NLRB" or "Board") has for decades been mired in the past. In the words of Cynthia Estlund, the NLRA has become "ossified" as its statutory language and enforcement stagnates despite dramatic changes in the U.S. economy.<sup>3</sup> The result has been the NLRA's increasing loss of relevance in a rapidly developing workplace.

One of the most significant of these changes has been the increased use of the Internet, e-mail, instant messaging, and other electronic communications in the workplace.<sup>4</sup> The ability to communicate electronically has transformed employees' relationships with one another and their employers. As others have noted, however, enforcement of the NLRA has yet to adapt to these advances.<sup>5</sup> What has not been previously considered is whether the challenges posed by electronic communications should prompt the Board to reevaluate generally its interpretations of the NLRA—not just as applied to the Internet—and whether the Board's failure to do so could result in the Act's demise.

Perhaps no other workplace development has so exposed the weaknesses in the Board's current enforcement of labor rights as has the introduction of the Internet. These weaknesses threaten to write the final chapter of the NLRA, as it traverses from near irrelevance to obsolescence. To be sure, the possibility of the NLRA's collapse has been raised before,<sup>6</sup> yet the Act has proven to be resilient, if not pro-

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<sup>2</sup> National Labor Relations Act, 29 U.S.C. §§ 151–169 (2000).

<sup>3</sup> See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530–31 (2002).

<sup>4</sup> These various types of electronic communications will, for the sake of simplicity, be referred to as the "Internet."

<sup>5</sup> See Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. KAN. L. REV. 1, 3–4 (2000); Elena N. Broder, Note, *(Net)workers' Rights: The NLRA and Employee Electronic Communications*, 105 YALE L.J. 1639, 1657 (1996); Miles Macik, Note, "You've Got Mail." *A Look at the Application of the Solicitation and Distribution Rules of the National Labor Relations Board to the Use of E-mail in Union Organization Drives*, 78 U. DET. MERCY L. REV. 591, 604–05 (2001). The Board, however, has recently announced its intent to examine several issues implicated by Internet use at the workplace. See *infra* notes 75–79 and accompanying text.

<sup>6</sup> See, e.g., James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 259–60 (2005); Michael H. LeRoy, *Lockouts Involving Replacement Workers: An Empirical Public Policy Analysis and Proposal to Balance Economic Weapons Under the NLRA*, 74 WASH. U. L.Q. 981, 1057 (1996).

gressive. The Internet, however, has the greatest possibility of becoming the straw that breaks the NLRA's back.

The Internet's effect on the Board's enforcement of the NLRA is characteristic of a "disruptive technology"—an invention so radically different from what existed before that it not only disrupts the relevant commercial markets, but also raises questions about existing legal institutions' competence to regulate the rapidly developing area.<sup>7</sup> Like other disruptive technologies, the Internet's dramatic effect on the workplace demands an equally dramatic response from the relevant governmental regulators. Congress possesses the authority to institute such changes, yet the Board's broad authority to interpret the NLRA could, if exercised, also provide a sufficient response to the Internet's impact on federal labor law. If the Board fails to respond appropriately to these challenges, however, the NLRA could become increasingly irrelevant, thereby losing critical support from regulated entities. For example, unions have already begun to show their willingness to bypass the NLRA representational process by pressuring employers for voluntary recognition rather than waiting for a Board-run election.<sup>8</sup> The Board's failure to adequately protect unions' Internet-based organizing efforts will only intensify this trend and further undermine union support for the NLRA.

As explained through public choice theory, the result of this shift in support could be a disruption in the current political stalemate that places the NLRA's existence, at least in any recognizable form, in jeopardy. Although this final devolution is possible, if not likely, I offer a hopeful prospect. Perhaps the Internet can do what nothing else has: so radically jolt the NLRA that, rather than collapsing, it finally adapts to the modern workplace. In short, the Internet is poised to either revive the NLRA or finish it off.<sup>9</sup>

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<sup>7</sup> See Tim Wu, *The Copyright Paradox*, 2005 SUP. CT. REV. 229, 232, 255 (suggesting that congressional action, rather than incremental judicial decisions, may be required to effectively address certain disruptive technologies).

<sup>8</sup> In the traditional, NLRA-governed representational process, the Board holds a secret-ballot election once a union can show support from thirty percent of the employees. See 29 C.F.R. § 101.18(a)(4) (2007). In contrast, unions engaged in "non-NLRA" organizing shun Board-run elections, relying instead on their ability to pressure employers for voluntarily recognition. See *infra* notes 31–32, 66–69 and accompanying text.

<sup>9</sup> Although, in the interests of simplicity, I refer to the end of the NLRA, the result could, and probably would, be something less than the complete abolition of the Act. For example, the NLRA's regulation of union organizing is particularly vulnerable, see *infra* Part III, which could result in the elimination of NLRA governance of such activity; however, the Act's regulation of unfair labor practices enjoys more union support and could survive. Similarly, the "end" could

Part I of this Article uses public choice theory to explain how the Board's enforcement of NLRA rights has stagnated despite dramatic changes in the workplace and to show how the Internet could break this logjam by either prompting necessary changes in the Act or triggering its downfall. Part II describes the expansion of the Internet in the workplace and its impact on union organizing. Finally, Part III examines the legal challenges posed by Internet-based organizing and recommends how the Board or Congress could adapt the NLRA to this important new technology and ensure the Act's future relevance.

### *I. Public Choice Theory and an End to Stagnation?*

#### *A. The NLRA's Legislative and Administrative Stagnation*

The NLRA is a storied piece of legislation that not only has shaped governmental regulation of labor relations and the overall economy, but also has been a significant influence on American law. Its passage in 1935 was a key development for the New Deal, as the Supreme Court's decision to uphold the NLRA's constitutionality was part of the "switch in time that saved nine."<sup>10</sup> Moreover, the Supreme Court's docket during the middle of the twentieth century was filled with NLRA cases that raised some of the more notable legal issues of their time.<sup>11</sup>

This preeminence, however, has not lasted. Not amended in any significant fashion since 1959,<sup>12</sup> the NLRA has languished. A major problem is that, despite dramatic shifts in the U.S. economy resulting from increased global competition and the growing need for knowledge-based skills, the NLRA's language and enforcement are still based on a view of the workplace as it existed in 1935.<sup>13</sup>

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occur through a dramatic reduction in the NLRB's jurisdiction or budget, rather than the agency's total elimination.

<sup>10</sup> See Paul C. Weiler, *A Principled Reshaping of Labor Law for the Twenty-First Century*, 3 U. PA. J. LAB. & EMP. L. 177, 188 (2001) (describing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)); see also James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 522–23 (2004) (discussing impact of *Jones & Laughlin* on NLRA).

<sup>11</sup> The magnitude of the Supreme Court's NLRA docket is well illustrated by the accomplishment of Norton Come, who as the head of the NLRB's Supreme Court Branch argued the second-most cases before the Court (fifty-six) of any government attorney—a particularly impressive feat for an attorney who did not work in the Solicitor General's office. See *Longtime NLRB Official Dies*, Daily Lab. Rep. (BNA) No. 53, at A-9 (Mar. 19, 2002).

<sup>12</sup> The NLRA was last amended by the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401–531 (2000).

<sup>13</sup> Examples of the Board's anachronistic rules are discussed in more detail below. See *infra* Part III.

The NLRA's legislative stagnation may be explained by public choice theory, which describes how smaller groups with focused interests are able to obtain benefits through the legislative process more effectively than larger groups with more diffuse, or broadly allocated, interests.<sup>14</sup> Cost-benefit analyses for the different types of groups drive this outcome. A smaller group will generally find it advantageous to expend resources to affect political outcomes because those outcomes have a relatively large impact on each of its members.<sup>15</sup> In contrast, a larger group faces more difficulty finding support to expend such resources because the potential benefit is small for each individual member.<sup>16</sup> Smaller groups are also generally more effective in influencing policy because they are better able to organize and act on policy goals than larger groups, which are often more heterogeneous and less able to coordinate activity.<sup>17</sup>

Although public choice theory is typically used to describe the creation of legislation, it may account for the lack of legislative action as well.<sup>18</sup> In the labor context, public choice theory explains why the focused interests of both employers and unions have been able to expend enough political resources to cancel out each other's agendas.<sup>19</sup> Even during periods when one of these groups possessed a numerical political advantage, the other group has been able to oppose the majority's labor agenda by marshaling its focused and intense political interests, resulting in an incredibly stable legislative stalemate.<sup>20</sup>

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<sup>14</sup> See, e.g., Jack M. Beermann, *Interest Group Politics and Judicial Behavior: Macey's Public Choice*, 67 NOTRE DAME L. REV. 183, 184 (1991); see also MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 43–52 (1971) (discussing how smaller organizations are more effective at achieving their goals).

<sup>15</sup> See OLSON, *supra* note 14, at 49–52; Herbert Hovenkamp, *The Limits of Preference-Based Legal Policy*, 89 NW. U. L. REV. 4, 60 (1994).

<sup>16</sup> See OLSON, *supra* note 14, at 49–52.

<sup>17</sup> See Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 250–51 (1992).

<sup>18</sup> As groups having members with a disproportionate interest in an outcome may be able to overcome the political advantages typically possessed by regulated industries following the enactment of regulatory legislation, see RUSSELL HARDIN, *COLLECTIVE ACTION* 85–86 (1982), they may stymie further attempts by the industry to pass amendments detrimental to their interests.

<sup>19</sup> See Estlund, *supra* note 3, at 1543; cf. John T. Addison, *Politico-Economic Causes of Labor Regulation in the United States: Rent Seeking, Alliances, Raising Rivals' Costs (Even Lowering One's Own?), and Interjurisdictional Competition* 20 (Inst. for the Study of Labor, Discussion Paper No. 2381, 2006) (discussing role of compromises between employers, workers, and unions in shaping state workers' compensation statutes).

<sup>20</sup> For example, in the 1970s, employers were able to block prounion reforms by using the Senate's supermajority requirements. See Estlund, *supra* note 3, at 1540–41. Another theory that may explain the NLRA's stagnation is the "tragedy of the anticommons," which Michael A.

This persistent impasse is surprising at first blush, especially given the sharply declining rate of unionization over the past few decades.<sup>21</sup> Public choice theory, however, predicts that as long as unions' strength and interest in maintaining current labor protections do not fall below a minimum level, unions will be able to wield a disproportionate influence on policymaking.<sup>22</sup> For the NLRA, this has generally meant that unions are able to thwart employer-led attempts to weaken the Act's protection of employee and union collective activity.<sup>23</sup> Although this stalemate has hindered the NLRA's regulation of labor relations in the modern economy, a break in the impasse could prove to be far more damaging. In particular, if unions no longer were able or willing to lobby on behalf of the NLRA, employers would likely succeed in eliminating or severely weakening the Act.

The most imminent trigger in this doomsday scenario does not appear to be the currently low level of union membership; this decline has been taking place for decades, while the NLRA has remained static. More important is the continued weakening of unions' support for the NLRA, both politically and legally. The rising belief among some unions that they should shift resources from the political arena

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Heller has described as a situation where a "resource is prone to underuse" because "there are too many owners holding rights of exclusion." Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 624 (1998). Similarly, the ability of both unions and employers to prevent amendments to the NLRA may be an example of exclusory rights that preclude socially beneficial change. Thanks are owed to Benjamin Barton for this insight.

<sup>21</sup> Union membership (or "density") as a percentage of all private wage and salaried workers has fallen from 21.7% in 1977 to only 7.4% in 2006. See BARRY T. HIRSCH & DAVID A. MACPHERSON, UNION MEMBERSHIP, COVERAGE, DENSITY, AND EMPLOYMENT AMONG PRIVATE SECTOR WORKERS, 1973–2006 (2007), <http://unionstats.gsu.edu/Private%20Sector%20workers.htm>; see also Barry T. Hirsch & David A. Macpherson, *Union Membership and Coverage Database from the Current Population Survey: Note*, 56 INDUS. & LAB. REL. REV. 349–54 (2003) (describing method used to compile union membership data); Addison, *supra* note 19, at 27 (noting that although "high union density strengthens the political influence of unions on legislation . . . further reductions in unionism are likely to yield increased reliance on government to define rights at the workplace" through other non-NLRA regulations).

<sup>22</sup> See OLSON, *supra* note 14, at 45; see also William Canak & Berkeley Miller, *Gumbo Politics: Unions, Business, and Louisiana Right-to-Work Legislation*, 43 INDUS. & LAB. REL. REV. 258, 269 (1990) (arguing that some Louisiana businesses did not publicly support antiunion right-to-work legislation when they feared that unions could effectively retaliate).

<sup>23</sup> For example, a Republican-led Congress passed the employer-backed Teamwork for Employees and Managers Act of 1995 ("TEAM Act"), H.R. 743, 104th Cong. (1995), which would have lowered restrictions on employer-sponsored workplace participation groups. Congress, however, did not override the veto of President Clinton, a Democrat. See 142 Cong. Rec. H8816 (1996) (announcing veto of President Clinton). Moreover, despite several years of Republican control of the White House and both branches of Congress in the early 2000s, there were no serious efforts to revive the TEAM Act or other employer-backed labor legislation.

to organizing activity, especially for representation campaigns not governed by the NLRA,<sup>24</sup> may jeopardize the stability of the current legislative impasse.<sup>25</sup> Such a shift represents a corollary to public choice theory's typical explanation of legislative enactments. If unions have been able to wield disproportionate political influence because of their focused interests, an increased diversification of those interests makes it more difficult for them to achieve the legislative successes that have thus far kept the NLRA alive.<sup>26</sup> Thus, absent modifications that enhance unions' support for the NLRA—such as adequate protections for Internet-based organizing—employers may be able to end the legislative stalemate to their advantage.<sup>27</sup>

The lack of legislative progress is not the NLRA's only difficulty. The Board has significant flexibility to interpret the Act's often ambiguous statutory language.<sup>28</sup> Yet save for a few high-profile issues on which the Board's decision has repeatedly alternated depending on which political party has controlled the Board's majority,<sup>29</sup> its precedents frequently appear to be stuck in a bygone era.<sup>30</sup> This intransigence threatens to decrease the relevance of the NLRA to the point that it would cease to have more than a marginal impact on the labor landscape.

Despite the NLRA's former prominence, the path to its ignominious end is already in view, as unions increasingly avoid NLRA procedures that they consider slow and hostile to their interests. In particular, unions have increasingly found it beneficial to organize

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<sup>24</sup> See *infra* notes 31–32 and accompanying text.

<sup>25</sup> Cf. Alan B. Krueger, *The Evolution of Unjust-Dismissal Legislation in the United States*, 44 *INDUS. & LAB. REL. REV.* 644, 658 (1991) (arguing that state unjust dismissal regimes may be more likely to be proposed, and therefore enacted, when employers support legislation because they dislike existing common law rules); Alan B. Krueger, *Reply*, 45 *INDUS. & LAB. REL. REV.* 796, 796–98 (1992) (arguing that lack of employer opposition to unjust dismissal legislation was a significant factor in its passing in certain states).

<sup>26</sup> See *supra* notes 22–23 and accompanying text.

<sup>27</sup> See *infra* notes 36–45 and accompanying text; cf. Estlund, *supra* note 3, at 1542–44 (describing apparent symmetry between unions and employers in the legislative arena, but arguing that employers have more economic and political power, are able to block unions' attempts at reform, and are content to bide their time as unions become weaker).

<sup>28</sup> See, e.g., Raymond N. Hulser, Comment, *The Rejection of Collective Bargaining Agreements in Chapter 11 Reorganizations: The Need for Informed Judicial Decisions*, 134 *U. PA. L. REV.* 1235, 1244–45 (1986).

<sup>29</sup> For example, in *IBM Corp.*, 341 N.L.R.B. 1288, 1288 (2004), the Board concluded that nonunionized employees do not have the right to have a coworker present during investigatory interviews, which reversed its prior ruling in *Epilepsy Foundation of Northeast Ohio*, 331 N.L.R.B. 676, 676 (2000), enforced in relevant part, 268 F.3d 1095 (D.C. Cir. 2001), which in turn had reversed the Board's decision in *E. I. DuPont & Co.*, 289 N.L.R.B. 627, 628 (1988).

<sup>30</sup> See *infra* Part III.

workers by directly negotiating with employers and avoiding the NLRA representation process.<sup>31</sup> Indeed, one of the major causes for the recent AFL-CIO split was the belief of the seceding unions—which formed the new Change-To-Win organization—that the labor movement should spend fewer resources on the political process and focus instead on organizing, with a strong emphasis on non-NLRA campaigns.<sup>32</sup> This shift, coupled with the continuous decline in private-sector union membership,<sup>33</sup> means that the NLRA is at risk of losing its primary client and political supporter.<sup>34</sup> A consistent effort to restrict the Board's enforcement of the NLRA could ultimately escalate into near-total abandonment by unions and elimination of the agency. If the Board is even severely weakened, the NLRA will become virtually worthless, as the majority of its protections are enforceable exclusively through the administrative process.<sup>35</sup>

The Board has already survived several episodes with a hostile Congress, typically Republican led, which has attempted to limit its

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<sup>31</sup> See Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, 45 B.C. L. REV. 125, 136 (2003) (citing unions' push for voluntary recognition by employers); cf. James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 827 (2005) (describing recent drop in NLRA elections despite increase in union organizing activity). The NLRB has reported that the number of initial elections it conducted declined from 2715 to 2296, a significant 15.4%, in fiscal year 2006. NLRB, SUMMARY OF OPERATIONS: FISCAL YEAR 2006, at 7 (2007), available at [http://www.nlr.gov/shared\\_files/Press%20Releases/2006/R-2611.pdf](http://www.nlr.gov/shared_files/Press%20Releases/2006/R-2611.pdf). Although the causes of this decline are unclear, union membership rates held relatively steady during this period. See BARRY T. HIRSCH & DAVID A. MACPHERSON, UNION MEMBERSHIP, COVERAGE, DENSITY, AND EMPLOYMENT AMONG ALL WAGE AND SALARY WORKERS, 1973–2006 (2007), <http://unionstats.gsu.edu/All%20Wage%20and%20Salary%20Workers.htm>. Thus, unions' willingness to engage in non-NLRA organizing was likely an important factor.

<sup>32</sup> Michelle Amber & Fawn Johnson, *Organizing Gets Renewed Emphasis, but Success of Efforts Since Split Unclear*, Daily Lab. Rep. (BNA) No. 171, at C-1 (Sept. 5, 2006); Michelle Amber, *SEIU, IBT Disaffiliate from AFL-CIO, Announce Plan to Set Up New Federation*, Daily Lab. Rep. (BNA) No. 142, at AA-1 (July 26, 2005). Indeed, in 2005, less than ten percent of UNITE HERE's (a member of Change-To-Win) new organizing took place through the NLRA representation process. Rick Valliere, *Unions Turning Away from NLRB Elections as Primary Way of Organizing, Raynor Says*, Daily Lab. Rep. (BNA) No. 8, at C-3 (Jan. 12, 2006).

<sup>33</sup> See *supra* note 21 and accompanying text.

<sup>34</sup> Cf. Eloise Pasachoff, Note, "Head Start Works Because We Do": Head Start Programs, Community Action Agencies, and the Struggle over Unionization, 38 HARV. C.R.-C.L. L. REV. 247, 261 (2003) (noting that employees often favor NLRB jurisdiction because they perceive the NLRA as more employee-friendly than state law); *supra* note 46 and accompanying text (describing negative consequences for employees that would result from elimination of the NLRA). But cf. *infra* notes 47–48 and accompanying text (describing portions of the NLRA benefiting employers).

<sup>35</sup> See Elizabeth Papacek, Comment, *Sexual Harassment and the Struggle for Equal Treatment Under Title VII: Front Pay as an Appropriate Remedy*, 24 WM. MITCHELL L. REV. 743, 761 (1988).



enforcement power, primarily through budget cuts.<sup>36</sup> Union supporters, typically Democrats, have resisted these measures.<sup>37</sup> The result has been a political stalemate under which the Board has faced short-term highs and lows while enjoying long-term survival, if not prosperity.<sup>38</sup> Take away a significant portion of its political support, however, and things look far bleaker for the Board and the NLRA. It would not happen immediately, but one could envision the Board facing continually decreasing budgets until, ultimately, there develops a coalition of support to eliminate the agency. Even if a majority of the public favors its survival, that support may simply be too weak and diffuse to offset the intensity of antiunion interests.<sup>39</sup>

As the public choice model explains, the key to this possible scenario is the intensity of unions' support for the Board and the NLRA. It is this support that is increasingly at risk. To be sure, unions have become disillusioned with the NLRA partly due to years of decisions by Republican-led Boards.<sup>40</sup> But shifting political winds cannot fully explain what looks to be a long-term development. Also relevant are arcane rules that do not reflect the modern economy and often fail to adequately enforce the NLRA.<sup>41</sup> Only by updating its enforcement of the NLRA can the Board recapture the support of unions and others who are interested in seeing robust implementation of the Act.

Although elimination of the NLRA is far from certain, it is not far-fetched. In 1995, Republicans in Congress attempted to abolish the Department of Education ("DOE")—a major, cabinet-level

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<sup>36</sup> William B. Gould, NLRB Chairman, Observations on the Relationship Between Law and Politics as Chairman of the National Labor Relations Board, 1994–1998 and an Admonition About the Epigones Who Would Undo Our Initiatives, Speech to the California Labor Federation (July 21, 1998), *in* Daily Lab. Rep. (BNA) No. 141, at E-11 (July 23, 1998) (describing problems at the NLRB caused by hostile political environment).

<sup>37</sup> *See, e.g., id.* (describing action taken by prounion Congressmen to facilitate NLRB enforcement proceedings).

<sup>38</sup> *See supra* note 11 and accompanying text.

<sup>39</sup> *Cf. supra* notes 14–17 and accompanying text (describing public choice theory).

<sup>40</sup> *See* Am. Fed'n of Labor and Cong. of Indus. Orgs., Complaint to the ILO Committee on Freedom of Association by the American Federation of Labor and Congress of Industrial Organizations Concerning the United States Government's Violations of Freedom of Association and Collective Bargaining by Failing to Enforce the National Labor Relations Act 10–41 (ILO Case No. 2608 filed Oct. 25, 2007), *available at* [http://op.bna.com/dlrcases.nsf/id/mamr-78btn4/\\$File/ILOcomplaint.pdf](http://op.bna.com/dlrcases.nsf/id/mamr-78btn4/$File/ILOcomplaint.pdf) (complaining about a litany of decisions by the second Bush administration's NLRB, including cases expanding the definition of "supervisor," increasing protection of employer property rights, limiting employee speech rights, and refusing to issue bargaining orders).

<sup>41</sup> *See infra* Part III.

agency.<sup>42</sup> Moreover, airline deregulation led to the elimination of the Civil Aeronautics Board (“CAB”) and much of its economic regulation of the airline industry.<sup>43</sup> Interestingly, the CAB’s demise was never a goal for most deregulation supporters; however, at least one member of Congress pushed to eliminate the agency, and no member reliably advocated for its survival.<sup>44</sup> The result, as public choice theory would predict, was that the strongly held, albeit minority, interest prevailed. Although the circumstances surrounding the proposed elimination of the DOE and the elimination of the CAB were different in many ways from the Board’s current situation, they serve as a reminder that agencies may not last forever. A serious push from anti-union forces, combined with a weakened labor movement that shows minimal interest in NLRA protections, could result in a significant, if not total, reduction in the Board’s authority.<sup>45</sup>

An important question, if this were to happen, is whether anyone would care. Elimination of the NLRA would clearly hurt employees. Without the NLRA, employers would be free to retaliate against virtually any type of employee collective action.<sup>46</sup> Unions would also care. Although unions’ diminished support for the NLRA would be an important catalyst for its fall, their position should not be confused with a complete lack of support. Unions may conclude that backing the NLRA is not a cost-effective use of their resources; yet the NLRA’s protections, although far from ideal, still provide unions some benefit.

Employers, in contrast, would likely celebrate the NLRA’s demise, but it would impose costs on them as well. The NLRA places significant restrictions on union activity that many employers may improperly discount.<sup>47</sup> This valuation problem may be the result of the

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<sup>42</sup> See Department of Education Elimination Act of 1995, H.R. 1318, 104th Cong. (1995). Notably, the ultimate survival of the DOE was likely the result of the type of group dynamics that public choice theory espouses. Because opponents of the Department were motivated primarily by general concerns for federalism, there were few direct benefits to that group. Supporters of the Department, however, faced direct costs—for example, loss of federal funding—if the attempt to abolish it succeeded.

<sup>43</sup> See Airline Deregulation Act of 1978, sec. 40(a), § 1601, Pub. L. No. 95-504, 92 Stat. 1705, 1744–47.

<sup>44</sup> See MARTHA DERTHICK & PAUL J. QUIRK, *THE POLITICS OF DEREGULATION* 162–63 (1985).

<sup>45</sup> Cf. *id.* at 163–64 (describing collapse of the airline industry’s opposition to deregulation due to the industry’s fractionalized interests and inability to pursue a coordinated strategy).

<sup>46</sup> See 29 U.S.C. § 158(a)(1) (2000) (provision of the NLRA preventing employers from “interfer[ing] with, restrain[ing], or coer[c] employees” in the exercise of their right to collective action under § 157).

<sup>47</sup> See, e.g., *id.* § 158(b)(4) (prohibiting certain union secondary action intended to

NLRA's partially hidden deterrent against certain union activity. Many employers, particularly those that are nonunion, may be unaware that the NLRA's enforcement mechanisms against unlawful union activity are much stronger than its mechanisms against unlawful employer activity.<sup>48</sup> Accordingly, elimination of the NLRA may provide unions—not employers—with the greatest incentive to engage in conduct that is currently unlawful.

Finally, society should care greatly. The NLRA's explicit purpose was to improve commerce by reducing the serious labor conflicts that had been widespread in the years prior to its enactment.<sup>49</sup> Eliminating the NLRA and its promotion of peaceful labor negotiations would threaten to revive such unrest, which could impose serious economic consequences on the country.

#### B. *The Internet: Savior or Assassin?*

One important factor that may help determine the Board's fate will be its ability to adapt to unions' expanding use of the Internet. Unions have already shown a willingness to organize workers outside of the NLRA process;<sup>50</sup> the Internet accelerates this trend by providing an inexpensive and effective means to communicate with employees that is less dependent on the Board's slower and more traditional organizing rules. The Internet also highlights the NLRA's stagnation. The Board and the NLRA have been surviving—barely—the modernization of the U.S. workplace. The Internet's significant transformation of union organizing, however, is placing old and static NLRB precedents in a new context.<sup>51</sup> Many of these precedents had weak justifications at their inception and attempts to apply them to In-

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threaten, coerce, or restrain an employer). Even if employers undervalue the potential costs of the NLRA's elimination, they may still be correct that the benefits of elimination outweigh the costs.

<sup>48</sup> Employers, for example, may sue in federal court for damages caused by union secondary boycotts that violate the NLRA; neither unions nor the Board may seek damages for employer unfair labor practices. *Compare id.* § 187(b) (providing suit for damages caused by union violation of § 158(b)(4)), *with* *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 235–36 (1938) (holding that the NLRA does not give the Board authority to impose compensatory or punitive damages on an employer). Moreover, the Board's General Counsel *may* seek an injunction in federal court against employer unfair labor practices, but *must* seek an injunction against unlawful union secondary boycotts. *Compare* 29 U.S.C. § 160(j) (Board “shall have power” to file a claim against employer unfair labor practices), *with id.* § 160(l) (Board “shall” file a claim against union secondary boycotts).

<sup>49</sup> *See id.* § 151 (describing NLRA policies).

<sup>50</sup> *See infra* Part II.

<sup>51</sup> *See infra* Part III.

ternet-based organizing activity dramatically magnify their deficiencies.<sup>52</sup> Even rules that may have been warranted in the past now make little sense when Internet use is at issue.<sup>53</sup>

By challenging these precedents, the Internet provides the Board and Congress with an opportunity not only to adapt the NLRA to new organizing techniques, but also to reevaluate general rules that have long outlived their usefulness.<sup>54</sup> Appropriate modifications could solidify unions' interest in using the NLRA; however, it is possible, if not probable, that this opportunity will be squandered. As Internet use in the workplace expands, non-NLRA union organizing will become more effective. This increased attractiveness of organizing outside of the NLRA process, in combination with Board delays and rules that unions perceive as hostile,<sup>55</sup> will continue to reduce political support for the NLRA, possibly giving anti-labor interests a significant legislative advantage.

It is unclear whether this political shift would result in the NLRA's total elimination. Despite the NLRA's inadequate remedies,<sup>56</sup> unions are unlikely to cease filing unfair labor practice charges against employers, as there are currently no suitable alternatives.<sup>57</sup> The more likely scenario is that unions will forgo NLRA regulation of the activity that the Board handles best: representation elections. Continued failure by the Board to protect and promote unions' ability to organize workers under the NLRA will further encourage unions to use non-NLRA organizing methods, which is becoming easier as the Internet's presence in the workplace grows.

Yet unions' increasing use of the Internet also raises new legal questions that provide the Board with an opportunity to adapt many of its rules to the modern economy.<sup>58</sup> It is important, therefore, that the Board take advantage of the opportunity to reevaluate its rules—particularly with regard to organizing—as these questions arise. The

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<sup>52</sup> See *infra* Part III.

<sup>53</sup> See *infra* Part III.

<sup>54</sup> Cf. Benjamin H. Barton, *Tort Reform, Innovation, and Playground Design*, 58 FLA. L. REV. 265, 270 (2006) (arguing that increased tort liability prompted the design of not only safer, but higher quality, playgrounds).

<sup>55</sup> See *supra* note 40.

<sup>56</sup> See Jeffrey M. Hirsch & Barry T. Hirsch, *The Rise and Fall of Private Sector Unionism: What Next for the NLRA?*, 34 FLA. ST. U. L. REV. (forthcoming 2007) (manuscript at 33–36, available at [http://ssrn.com/abstract\\_id=933493](http://ssrn.com/abstract_id=933493)).

<sup>57</sup> See Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355, 374–94 (1990) (discussing the NLRA's strong preemptive jurisdiction).

<sup>58</sup> See *infra* notes 75–79 and accompanying text.

Board's resolution of these issues may prove to be vital in determining whether unions' current push for non-NLRA avenues of representation will remain a small percentage of organizing activity, thereby maintaining the NLRA's relevance, or whether those avenues will become sufficiently prevalent to place the Act's survival in jeopardy.

## II. *The Internet in the Workplace*

The Internet's ability to sharply lower communication costs has changed the way in which people interact. There is perhaps no better place to witness this transformation than the workplace, where e-mail, websites, blogs, and instant messaging have become an essential means of communication for a wide range of groups, including unions, employees, and employers.

Internet usage statistics show the extent of this transformation. Over seventy percent of Americans used the Internet in 2007.<sup>59</sup> This overall usage level is mirrored by employees' use of the Internet in the workplace. A 2003 survey estimated that forty percent of all workers used the Internet or e-mail at work.<sup>60</sup> Employers are well aware of the importance of this development and the potential problems it may cause, as an estimated seventy-six percent currently have some type of policy governing employee e-mail use.<sup>61</sup>

The Internet's growth extends to more than just business-related communications. Widespread Internet availability in the workplace has provided unions with an important tool—which they have actively used—to organize and communicate with employees, especially those who are difficult to reach through traditional means.<sup>62</sup> This trend has

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<sup>59</sup> According to Miniwatts Marketing Group, 70.4% of individuals in the United States used the Internet as of August 2007. See North America: Internet Usage in Bermuda, Canada, Greenland, Saint Pierre et Miquelon, and the United States of America, <http://www.internetworldstats.com/america.htm> (last visited Dec. 15, 2007). This statistic is consistent with 2004 data showing that sixty-three percent of adults in the United States were regular Internet users. Richard B. Freeman, *From the Webbs to the Web: The Contribution of the Internet to Reviving Union Fortunes* 0 n.1 (Nat'l Bureau of Econ. Research, Working Paper No. 11298, 2005) (citing *Has Internet Growth Reached Its Peak?*, THE SOURCE (Mediamark Research, Inc., New York, N.Y.), June 2004, [http://www.mediamark.com/mri/TheSource/sorc2004\\_06.htm](http://www.mediamark.com/mri/TheSource/sorc2004_06.htm) (defining "user" as someone who used the Internet during the past thirty days)).

<sup>60</sup> *BLS Finds 55 Percent of Employees Used Computers at Work in October 2003*, Daily Lab. Rep. (BNA) No. 148, at D-24 (Aug. 3, 2005). Another survey found that thirty-five percent of employees used instant messaging at work. *Survey Finds More Employer Policies Focus on Employees' E-mail than IM, Blogs*, Daily Lab. Rep. (BNA) No. 137, at A-8 (July 18, 2006).

<sup>61</sup> *Id.* (noting also that only thirty-one percent of those employers regulate instant messaging and nine percent regulate blogging).

<sup>62</sup> See Freeman, *supra* note 59, at 2–5, 10–11 (discussing unions' use of the Internet and noting the high quality of major American unions' websites). Examples of difficult-to-reach

occurred, probably not coincidentally, at the same time that unions have increasingly sought to avoid the NLRA representation process, which they often perceive to be unhelpful, if not detrimental, to their organizing activity.<sup>63</sup> The Internet is an important resource in these campaigns, as the capacity to inexpensively and effectively communicate with workers and the public greatly assists union efforts to pressure employers.<sup>64</sup> Moreover, union campaigns frequently rely on employees' ability to use the Internet to instigate or support organizing activity.<sup>65</sup>

One example of Internet-based organizing involves an attempt by the Service Employees International Union ("SEIU") to convince Argenbright Security to voluntarily recognize the union as the representative of a unit of employees at the Los Angeles International Airport.<sup>66</sup> A majority of employees had voted for the SEIU in an election overseen by a mediation service, but Argenbright pushed for an NLRB-run election.<sup>67</sup> In its attempts to avoid the NLRA representation process, the SEIU purchased banner advertisements on the website Yahoo! that targeted customers of Argenbright's parent company and another of the parent's subsidiaries; the Internet ads directed readers to a website that described the labor dispute.<sup>68</sup> The SEIU's efforts were ultimately successful; Argenbright agreed to be bound by a non-NLRA election, which the union won handily.<sup>69</sup>

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employees include salespersons, telecommuters, and other employees who do not spend a significant amount of time at the same worksite. The Board had expressed its intent to consider in *Guard Publ'g Co. (Register-Guard)*, 351 N.L.R.B. No. 70 (Dec. 16, 2007), whether the location of an employee's workplace should affect the NLRA's regulation of Internet communications, but it failed to do so. See *infra* notes 74, 79.

<sup>63</sup> See *supra* note 31 and accompanying text.

<sup>64</sup> Cf. *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1240-43 (1966) (discussing the importance of effective union communications with employees during a Board-run election).

<sup>65</sup> See, e.g., *U-Haul Co. of Cal.*, 347 N.L.R.B. No. 34, slip op. at 11 (June 8, 2006) (organizing drive started by employee distributing information from union website to other employees); *Frontier Tel. of Rochester, Inc.*, 344 N.L.R.B. No. 153, slip op. at 6, 8 (July 29, 2005) (finding unlawful termination of employee who created web page to encourage employee discussions during union organizing campaign), *enforced*, 181 F. App'x 85 (2d Cir. 2006).

<sup>66</sup> See Tom Gilroy, *Union to Conduct 'Virtual Leafleting' Campaign as Part of Airport Organizing Effort*, Daily Lab. Rep. (BNA) No. 12, at A-5 (Jan. 19, 2000).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* Interestingly, Yahoo! cancelled the ads one month into their planned three-month run, apparently because the ads mentioned the name "Yahoo!," which violated the advertising agreement. See Tom Gilroy, *Yahoo! Pulls Union Internet 'Leaflet' on Organizing Drive at Argenbright Security*, Daily Lab. Rep. (BNA) No. 36, at A-3 (Feb. 23, 2000).

<sup>69</sup> See *Baggage Handlers at Los Angeles Airport Vote for Representation by SEIU Local 1877*, Daily Lab. Rep. (BNA) No. 129, at A-7 (July 5, 2000) (reporting a vote of 285 to 50 in favor of union representation).

Another example of the Internet's importance to union organizing is the Association of Pizza Delivery Drivers ("APDD"), which formed out of an Internet chat room discussion and conducted all of its business meetings over the Internet.<sup>70</sup> Although the APDD's successor organization is still fledgling,<sup>71</sup> the ability to create and run a union through the Internet demonstrates its value as a low-cost, yet effective, organizing tool.

Because the Board is virtually the only entity authorized to protect private-sector organizing against employer interference,<sup>72</sup> the agency occupies an especially important role in shaping unions' ability to use the Internet in representation campaigns. The Board's regulation of Internet use, however, has thus far been poorly developed.<sup>73</sup> Although troubling, this failure presents the Board with an opportunity—one that looked promising following its announcement in the *Register-Guard* case<sup>74</sup> that it intended to address several issues involving the NLRA's treatment of Internet communications.<sup>75</sup>

In *Register-Guard*, an administrative law judge ("ALJ") concluded that an employer may lawfully maintain a rule banning all non-work-related solicitations—including messages about unionization—from its computer system as long as it does not enforce the rule in a discriminatory manner.<sup>76</sup> The Board announced that it would review that conclusion and, because it creates policy almost exclusively through adjudication rather than rulemaking,<sup>77</sup> it would also use *Reg-*

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<sup>70</sup> Michelle Amber, *Union Loses First Attempts to Organize Pizza Drivers with Votes in Ohio, Nebraska*, Daily Lab. Rep. (BNA) No. 227, at A-7 (Nov. 26, 2004).

<sup>71</sup> The APDD disbanded and several of its officers moved to the American Union of Pizza Delivery Drivers, which recently achieved its first successful organizing drive and is receiving increased interest from other drivers. See Michelle Amber, *Union That Organized Florida Pizza Drivers Says It Gets Inquiries from Other Drivers*, Daily Lab. Rep. (BNA) No. 186, at A-9 (Sept. 26, 2006).

<sup>72</sup> Exceptions include the National Mediation Board's governance of representation issues under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151–163, 181–188 (2000). See *id.* §§ 154–155.

<sup>73</sup> See *infra* Part III.

<sup>74</sup> *Guard Publ'g Co. (Register-Guard)*, 351 N.L.R.B. No. 70 (Dec. 16, 2007).

<sup>75</sup> See Press Release, Nat'l Labor Relations Bd., NLRB to Hold Oral Argument on Employee Use of Employer's E-mail System (Jan. 10, 2007), available at [http://www.nlr.gov/shared\\_files/Press%20Releases/2006/R-2613.pdf](http://www.nlr.gov/shared_files/Press%20Releases/2006/R-2613.pdf). The full, five-member Board considered the case. See *id.*

<sup>76</sup> See *Register-Guard*, slip op. app. at 27 (McCarrick, A.L.J.). Incidentally, the ALJ found that the employer discriminatorily enforced its Internet use rule and held in favor of the employee. See *id.* at 28. The case also involves several other issues that are not related to Internet communications. See *id.* at 24.

<sup>77</sup> See Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 391–92 (1995).

*ister-Guard* to address several issues not raised in the case.<sup>78</sup> These issues included whether employees and nonemployees have rights under the NLRA to use an employer's computer system for union-related communications and, if such rights exist, to what extent employers may still restrict use of its computer system.<sup>79</sup>

The Board's willingness to consider these issues was a hopeful sign, but the final result was disappointing. In a decision that was released immediately before this Article went to print, the Board concluded that an employer has an absolute right to bar employees' use of a company-owned computer system, unless the employer acts in a manner that discriminates against employees' collective activity.<sup>80</sup> The decision also expressly refused to regard Internet communica-

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<sup>78</sup> See Notice of Oral Argument and Invitation to File Briefs at 1–2, *Register-Guard*, Nos. 36-CA-8743-1, -8849-1, -8789-1, -8842-1 (Nat'l Labor Relations Bd. Jan. 10, 2007), available at [http://www.nlr.gov/shared\\_files/Press%20Releases/2006/R-2613.pdf](http://www.nlr.gov/shared_files/Press%20Releases/2006/R-2613.pdf).

<sup>79</sup> The Board announced that it was "especially interested" in addressing the following questions in *Register-Guard*:

1. Do employees have a right to use their employer's e-mail system (or other computer-based communication systems) to communicate with other employees about union or other concerted, protected matters? If so, what restrictions, if any, may an employer place on those communications? If not, does an employer nevertheless violate the Act if it permits non-job-related e-mails but not those related to union or other concerted, protected matters?
2. Should the Board apply traditional rules regarding solicitation and/or distribution to employees' use of their employer's e-mail system? If so, how should those rules be applied? If not, what standard should be applied?
3. If employees have a right to use their employer's e-mail system, may an employer nevertheless prohibit e-mail access to its employees by nonemployees? If employees have a right to use their employer's e-mail system, to what extent may an employer monitor that use to prevent unauthorized use?
4. In answering the foregoing questions, of what relevance is the location of the employee's workplace? For example, should the Board take account of whether the employee works at home or at some location other than a facility maintained by the employer?
5. Is employees' use of their employer's e-mail system a mandatory subject of bargaining? Assuming that employees have a section 7 right to use their employer's e-mail system, to what extent is that right waivable by their bargaining representative?
6. How common are employer policies regulating the use of employer e-mail systems? What are the most common provisions of such policies? Have any such policies been agreed to in collective bargaining? If so, what are their most significant provisions and what, if any, problems have arisen under them?
7. Are there any technological issues concerning e-mail or other computer-based communication systems that the Board should consider in answering the foregoing questions?

*Id.*

<sup>80</sup> *Register-Guard*, slip op. at 5–7.



tions as deserving of special treatment.<sup>81</sup> Even more disturbing than the Board's analysis in this case,<sup>82</sup> was its failure to address many of the issues that it had raised.<sup>83</sup> That failure highlights the fact that the Board has yet again shown no inclination to reassess broadly its enforcement of the NLRA to reflect the nature of the modern economy. This is unfortunate, for only an extensive questioning of all of its rules—not just those directly regulating Internet communications—will allow the Board to take full advantage of the opportunity that a disruptive technology such as the Internet provides to reassess its doctrines. Such an overhaul cannot occur through a single case; instead, the hope is that a future Board will begin the long process of reevaluation that is necessary to modernize its enforcement of the NLRA.<sup>84</sup>

In essence, the Internet forces the Board to make a choice: risk irrelevance by attempting to apply outmoded precedents to Internet-based organizing or draw unions back into the fold by modifying its rules to reflect the modern workplace, particularly employees' and unions' growing reliance on the Internet. The path taken by the Board could have a profound effect on how unions organize—as well as, perhaps, the NLRA's prospects for survival.

### III. *Internet-Based Union Organizing Under the NLRA*

The NLRA's ability to maintain relevance in the modern economy depends in large measure on the Act's ability to retain a significant level of union support.<sup>85</sup> That support, however, is waning.<sup>86</sup> The reasons for unions' mounting objections to the NLRA representation process are varied, but an increasingly important cause is the Internet.<sup>87</sup> By providing an effective and inexpensive means of organiz-

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<sup>81</sup> *Id.* at 7.

<sup>82</sup> *See infra* notes 117–20 and accompanying text.

<sup>83</sup> The Board addressed at most some of the issues implicated by the first three questions it had earlier posed. *See supra* note 79.

<sup>84</sup> Indeed, the Board indicated in its Notice of Oral Argument and Invitation to File Briefs that it would not reconsider its traditional rules beyond their application to Internet communications. *See supra* note 78 (asking whether it should “apply [its] traditional rules regarding solicitation and/or distribution” to Internet communications or whether it should create a new standard for Internet communications).

<sup>85</sup> *See supra* Part I.A; *cf.* Addison, *supra* note 19, at 23 (stating that unions have had a direct impact on the effectiveness of living wage ordinances, which case studies have shown to be “structured to support union organizing”). Addison also cites the repeal of prevailing wage laws in several states as illustrative of unions' rent-seeking political behavior—that is, the unsurprising notion that unions' support for prevailing wage laws is tied to the level of wage benefits that such laws provide union workers. *See id.* at 25–26.

<sup>86</sup> *See supra* notes 31–35 and accompanying text.

<sup>87</sup> *See supra* Part II.

ing workers and pressuring employers, the Internet makes non-NLRA organizing more appealing.<sup>88</sup> Also fueling unions' growing willingness to avoid the NLRA is the current uncertainty over how the Board will treat Internet-based organizing under its outdated, and often ill-conceived, precedents.<sup>89</sup>

As one would expect from a change of such magnitude, the expansion of Internet use in the workplace has created many new legal issues, often beyond the scope of the NLRA. In particular, questions often arise regarding employers' ability to restrict employee and union use of company-owned computer systems. For example, unauthorized use of a company-owned computer system risks violating the federal Electronic Communications Privacy Act.<sup>90</sup> Moreover, at least one lower state court, although subsequently overruled, has held that unauthorized e-mails sent to employees on a company-owned system constitute unlawful trespasses of private property.<sup>91</sup> An employer's property interest in a computer system is also relevant to federal labor law, as a state property right to exclude generally provides an employer the ability to bar union organizing activity.<sup>92</sup>

There exists, however, a threshold concern for any issue falling under federal labor law: whether the Board will consider Internet-based organizing to be NLRA-protected activity.<sup>93</sup> The question is important given that, in many workplaces, a significant number of employee interactions occur electronically.<sup>94</sup> The answer typically is that

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<sup>88</sup> See *supra* notes 62–71 and accompanying text.

<sup>89</sup> See *infra* Parts III.A–B.

<sup>90</sup> In the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in scattered sections of 18 U.S.C.), Congress enacted the Stored Communications Act (“SCA”), 18 U.S.C. §§ 2701–2711 (2000 & Supp. IV 2004), which prohibits unauthorized access to communications, including e-mails, stored within computer systems. See *id.* § 2701(a)(1) (making it a crime to “intentionally access[ ] without authorization a facility through which an electronic communication service is provided . . . and thereby obtain[ ] . . . access to a wire or electronic communication while it is in electronic storage in such system”); *id.* § 2701(c)(2) (exempting access authorized by user of service with respect to that user’s communication); *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 879–80 (9th Cir. 2002) (holding that employer’s access to employee’s restricted-access website may violate SCA). The SCA also contains an exception in certain instances for employer monitoring of workplace communications. See 18 U.S.C. § 2701(c)(1) (exception for monitoring of one’s own service).

<sup>91</sup> See *Intel Corp. v. Hamidi*, 114 Cal. Rptr. 2d 244, 249 (Ct. App. 2001), *rev’d*, 71 P.3d 296 (Cal. 2003); *infra* notes 187–89 and accompanying text.

<sup>92</sup> See *infra* notes 174–77 and accompanying text.

<sup>93</sup> See *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244, 248–50 (1997) (concluding that employee’s e-mail criticism of vacation benefits was protected); *E. I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 897 (1993) (finding that employer unlawfully barred union literature from company e-mail system).

<sup>94</sup> See Broder, *supra* note 5, at 1657; *supra* note 60.

Internet use is treated the same as more traditional communications; the new technology will have little or no effect on whether the Board finds the activity protected by section 7 of the NLRA.<sup>95</sup> This approach makes sense, as the Internet merely serves as a new method to engage in activity that plainly falls under the protection of the NLRA.

Concluding that the NLRA protects Internet communications is merely the starting point. Although the Internet affects many representation issues under the NLRA—including the classification of workers as employees or independent contractors<sup>96</sup> and the Board's bargaining unit determinations<sup>97</sup>—the most serious problems are related to the conflict between employees' NLRA rights and employers' property interests. The Board has long struggled to reconcile this conflict,<sup>98</sup> and the growth in Internet use at work threatens to disrupt

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<sup>95</sup> See, e.g., *Timekeeping Sys.*, 323 N.L.R.B. at 247–50 (applying pre-Internet precedent to Internet communications). Section 7 of the NLRA protects employees' 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." 29 U.S.C. § 157 (2000). Those rights are enforced through section 8(a)(1), which provides that "[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise" of their section 7 rights. *Id.* § 158(a)(1). Evidence of antiunion intent is unnecessary to show a violation. See *Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1006 (9th Cir. 1995).

<sup>96</sup> This issue is particularly significant for the growing number of telecommuters and other employees who are able to work at remote locations—an increase due in large part to the Internet. *Fifteen Percent of U.S. Workforce Teleworks, but Number Likely to Grow*, *EPF Report Says*, Daily Lab. Rep. (BNA) No. 51, at A-6 (Mar. 17, 2004). The Board's current test for classifying workers as employees or independent contractors relies on factors found in the Restatement of Agency such as the hiring party's right to control the work, the location of the work, and the hiring party's discretion over when and how to work. See *St. Joseph News-Press*, 345 N.L.R.B. No. 31, at 4–5 (2005) (discussing the Board's continued adherence to multi-factor test set forth in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 750–52 (1989)). This issue is important because if the Board fails to recognize the technological advances that allow employers to control the work of telecommuters, those workers are likely to be classified as independent contractors and excluded from the NLRA. See 29 U.S.C. § 152(3) (exempting independent contractors from NLRA definition of employee).

<sup>97</sup> An NLRA "bargaining unit" establishes which employees can be represented together by a union, see 29 U.S.C. § 159(a)–(b), and is based on several factors affected by the Internet, including the employees' similarity in skills, interests, duties and working conditions; the employees' integration and contact within a plant; and the employer's organizational and supervisory structure. See *Mitchellace, Inc. v. NLRB*, 90 F.3d 1150, 1157 (6th Cir. 1996). Under this analysis, the Board typically follows its "single-plant doctrine," which presumes that a bargaining unit consisting of employees from a single location is appropriate. See, e.g., *Prince Telecom*, 347 N.L.R.B. No. 73, slip op. at 4 (July 31, 2006) (describing, and finding evidence to rebut, single-plant presumption). The Board should modify its unit determination analysis by taking into account the common interests that telecommuters may share with other employees despite their physical separation. This change would protect telecommuters' rights to collective representation by ensuring that they are not unjustifiably excluded from a unit.

<sup>98</sup> See *infra* notes 104–05 and accompanying text.

whatever tenuous balance the Board may have achieved. By both dramatically complicating existing problems and creating new difficulties of its own, the Internet could prove to be a turning point in the Board's approach to this conflict.<sup>99</sup>

Existing Board law significantly restricts physical access to an employer's property,<sup>100</sup> yet the extent to which a union or employee has the right to use an employer's computer system is unclear. That analysis is further complicated by the weight traditionally given to the identity and location of organizers; these factors have long created analytical problems, which Internet-based organizing exacerbates. Because resolutions of these questions are important to successful organizing, the Board's future approach will have a significant effect on unions' support of the NLRA and possibly the future of the Act itself.

#### A. *Employee Internet Use at Work*

Employee communications about collective activity—particularly discussions regarding the merits of union representation—occur most frequently in the workplace.<sup>101</sup> As electronic interactions among employees have become increasingly important, many of these discussions take place via e-mail and other types of electronic communications.<sup>102</sup> Indeed, the best, and sometimes only, means to reach a large number of employees will often be through the In-

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<sup>99</sup> An employer's ability to monitor employees' use of its computer system, for example, directly implicates the NLRA's ban on surveillance. To reduce the chilling effect on union activity caused by employer monitoring, the Board has found that an employer, absent sufficient justification, violates the NLRA by observing employees engaged in protected activity or giving employees an impression that it is engaging in such observations. *See Nat'l Steel & Shipbuilding Co. v. NLRB*, 156 F.3d 1268, 1271 (D.C. Cir. 1998) (noting that photographing or videotaping protected activity has tendency to intimidate employees); *cf. Frontier Tel. of Rochester, Inc.*, 344 N.L.R.B. No. 153, slip op. at 6–7 (July 29, 2005) (describing activities failing to give rise to an impression of surveillance violation). Yet restricting an employer's ability to monitor its own computer system may encroach on the employer's property interests. This surveillance issue, however, may present the rare instance in which the Board's current rules could easily accommodate Internet communications. *See Hirsch & Hirsch, supra* note 56, at 51–53. In contrast, the Board's analysis of employer attempts to bar organizing activity is far more troublesome, and best illustrates why unions may abandon the NLRA representation process. *See infra* Parts III.A–C.

<sup>100</sup> *See infra* notes 123, 136–40, 174–83 and accompanying text.

<sup>101</sup> Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 383 (1995); *cf. NLRB v. Magnavox Co. of Tenn.*, 415 U.S. 322, 325 (1974) (“The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees.”).

<sup>102</sup> *See supra* notes 62–71 and accompanying text.

ternet.<sup>103</sup> Yet the best, and at times only, way to reach such employees may be through their employer's computer system. This raises an important issue: whether an employer can bar communications about unionization from its computer system.

To a certain extent, this question is not new to labor law, as the Board and courts have long struggled to balance employees' NLRA right to discuss unionization against employers' property interests.<sup>104</sup> For just as long, the results of that balance have been controversial and have prompted criticisms that the Board's analysis improperly favors one interest over another, is overly complex, and is often nonsensical.<sup>105</sup>

The Internet could be an important means to a better solution. Because this disruptive technology is so distinct from traditional communications, the Board was forced to take a hard look at its approach to this issue in the *Register-Guard* case.<sup>106</sup> Unfortunately, the Board simply shoehorned the Internet into an analysis that clearly does not fit. Hopefully, a later Board will take advantage of subsequent opportunities and seriously consider whether its rules adequately reflect the realities of the modern workforce. At a minimum, the Board should implement special protections for Internet communications; a far superior outcome, however, would be an overhaul of its entire approach to the conflict between employees' NLRA rights and employers' property interests.

The lead doctrine governing workplace communications among employees stems from the Supreme Court's decision in *Republic Aviation Corp. v. NLRB*.<sup>107</sup> Under this doctrine, an employer is generally prohibited from restricting employee discussions about protected top-

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<sup>103</sup> See *supra* note 62 and accompanying text.

<sup>104</sup> See, e.g., *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797–98 (1945) (noting that solicitation restrictions require “an adjustment between the undisputed right of self-organization assured to employees under the [NLRA] and the equally undisputed right of employers to maintain discipline in their establishments”); *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615, 617, 620 (1962) (citing *Republic Aviation*, 51 N.L.R.B. 1186, 1195 (1943)); cf. *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965) (“[I]t is only when the interference with [section] 7 rights outweighs the business justification for the employer's action that [section] 8(a)(1) is violated.”).

<sup>105</sup> See, e.g., Jeffrey M. Hirsch, *Taking State Property Rights Out of Federal Labor Law*, 47 B.C. L. REV. 891, 909–15 (2006) (discussing the Board's difficulty in applying state property law); Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305, 333 (1994) (emphasizing the employer's “near-dictatorial power over the workplace”).

<sup>106</sup> See *supra* notes 75–79 and accompanying text.

<sup>107</sup> *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

ics during nonwork time and in nonwork areas.<sup>108</sup> This ruling arose from an attempt to balance employers' right to control access to their property and employees' NLRA right to discuss unionization—a balance that under *Republic Aviation* generally favors employee rights.<sup>109</sup> However, the unique nature of Internet communications—particularly their differences from the types of workplace discussions that the Board and Supreme Court were addressing sixty years ago—complicates this analysis.

For example, significant questions exist regarding an employer's authority to ban nonwork-related Internet communications. Under a longstanding prohibition against discriminatory restrictions, an employer would normally be forbidden from barring union-related Internet messages while allowing other nonwork-related communications.<sup>110</sup> Many employers have avoided this discrimination problem by instituting broad restrictions that apply to all nonwork-related Internet communications.<sup>111</sup> Yet such policies implicate several other potential hazards for employers.

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<sup>108</sup> See *LeTourneau Co.*, 54 N.L.R.B. 1253, 1260 (1944), *aff'd sub nom. Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Peyton Packing Co.*, 49 N.L.R.B. 828, 843–44 (1943); see also *TeleTech Holdings, Inc.*, 333 N.L.R.B. 402, 403 (2001) (“A no-distribution rule which is not restricted to working time and to work areas is overly broad and presumptively unlawful.”); *supra* note 95 (describing “protected” employee activities under section 7 of the NLRA). Exceptions have always been made for production or disciplinary reasons. See, e.g., *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 110 (1956) (citing *LeTourneau*, 54 N.L.R.B. at 1262).

<sup>109</sup> The balance shifts dramatically in employers' favor when *nonemployee* communications are at issue. See *infra* notes 174–77 and accompanying text.

<sup>110</sup> See, e.g., *Media Gen. Operations, Inc.*, 346 N.L.R.B. No. 11, at 3 (Dec. 16, 2005) (finding that employer unlawfully singled out union e-mails); *E. I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 893 n.4, 919 (1993) (same). The discussion here will refer to union-related communications because these issues most frequently occur in the context of union organizing. The analysis, however, is equally applicable to nonunion, protected communications. See *supra* note 95 (describing employee section 7 rights generally).

<sup>111</sup> One example is a total ban on all nonwork-related e-mail. See, e.g., General Counsel Advice Memorandum, *Union Carbide Corp.*, Case No. 16-CA-20555, 2000 WL 33252021, at \*1 (Nat'l Labor Relations Bd. Nov. 7, 2000), available at [http://www.nlr.gov/research/memos/advice\\_memos](http://www.nlr.gov/research/memos/advice_memos). Employers have also implemented less restrictive, facially neutral restrictions. See, e.g., General Counsel Advice Memorandum, *TXU Elec.*, Case Nos. 16-CA-20576, -20568-2, 2001 WL 1792852, at \*2 (Nat'l Labor Relations Bd. Feb. 7, 2001), available at [http://www.nlr.gov/research/memos/advice\\_memos](http://www.nlr.gov/research/memos/advice_memos) [hereinafter *TXU Elec. Advice Memorandum*] (discussing employer rule that e-mail may be sent to a maximum of five employees, e-mail must be limited in size, and no employer resources can be used to create web pages). The discrimination exception could still be relevant against facially neutral restrictions, however, if the employer adopted the restrictions in an attempt to thwart an organizing drive. See *Youville Health Care Ctr., Inc.*, 326 N.L.R.B. 495, 495 (1998) (finding a presumptively valid no-solicitation rule to have violated section 8(a)(1) because it was created in response to employees' protected activity).

First, an employer must consistently enforce a stated limitation on nonwork-related Internet communications; if a policy is widely ignored, the employer may waive its ability to apply the otherwise valid rule to union-related communications in the future.<sup>112</sup> Second, even when enforcement is not a concern, a nondiscriminatory ban on all nonwork-related Internet communications—particularly in workplaces where Internet use is heavy—could significantly limit employees' ability to discuss the merits of unionization. Therefore, a broad prohibition against all nonwork-related e-mail, although technically within employers' right to control their property,<sup>113</sup> may unlawfully interfere with employees' NLRA right to discuss unionization.<sup>114</sup>

In *Adtranz, ABB Daimler-Benz Transportation, N.A., Inc.*,<sup>115</sup> however, an ALJ cast doubt on the merits of such a claim by stating that employers generally possess the ability to promulgate broad, non-discriminatory bans on nonwork-related e-mails.<sup>116</sup> Although it expressly refused to rely on *Adtranz*, the Board in *Register-Guard* followed the ALJ's conclusion, thereby raising serious concerns about the protection of employee rights under the NLRA and taking Internet communications out of the *Republic Aviation* analysis. This move was unwarranted and ill-advised.

In *Register-Guard*, the Board unjustifiably relied on some of its earlier personal equipment cases. Those cases stated that employers could implement a broad nondiscriminatory ban on the use of per-

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<sup>112</sup> In *Register-Guard*, the Board set forth a new definition of discrimination that makes an employer's prohibition of union-related Internet communications unlawful only if the employer treated them differently than other union-related messages; under the new rule, an employer can prohibit all union-related communications, while permitting all other types of communications. See *Guard Publ'g Co. (Register-Guard)*, 351 N.L.R.B. No. 70, slip op. at 9 (Dec. 16, 2007). A later Board could, and very well may, return to its previous, and much broader, definition of discrimination. See *E. I. du Pont*, 311 N.L.R.B. at 897 (finding that employer unlawfully barred union literature from company e-mail system, while allowing other nonwork-related e-mails); General Counsel Advice Memorandum, *Pratt & Whitney*, Case Nos. 12-CA-18446, -18722, -18745, -18863, 1998 WL 1112978, at \*2 (Nat'l Labor Relations Bd. Feb. 23, 1998), available at [http://www.nlr.gov/research/memos/advice\\_memos](http://www.nlr.gov/research/memos/advice_memos) [hereinafter *Pratt & Whitney Advice Memorandum*] (suggesting that broad nonwork-related e-mail ban was unlawfully enforced against union material because ban was not strictly enforced, employees used e-mail extensively, and union organizing campaign had begun).

<sup>113</sup> See *infra* note 196 and accompanying text.

<sup>114</sup> See *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978) (“[T]he right of employees to self-organize and bargain collectively . . . necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.”).

<sup>115</sup> *Adtranz, ABB Daimler-Benz Transp., N.A., Inc.*, 331 N.L.R.B. 291 (2000), vacated in part by 253 F.3d 19 (D.C. Cir. 2001).

<sup>116</sup> See *id.* at 293. Because the ALJ's treatment of the e-mail rule was not challenged, the Board did not address this issue. *Id.* at 291 n.1.

sonal property, such as telephones, for union-related communications; however, none of them engaged in a substantive analysis of the issue.<sup>117</sup> Such an analysis would have refused to give employers a near-absolute right to govern use of telephones and other types of equipment. Granting such a right is indefensible because employers' interest in preventing intrusions on their equipment is significantly lower than their interest in preventing intrusions on their real property.<sup>118</sup> The Board and Supreme Court have long refused to give employers a near-absolute right to restrict employee use of their real property,<sup>119</sup> and there is no reason to give them greater power over their equipment.

Moreover, the Board's approach in *Register-Guard* will allow employers to completely bar employee communications simply because they occur electronically, rather than orally. That is an extraordinarily dangerous rule; as employees increasingly rely on electronic means to communicate with each other, such bans threaten to frustrate even initial explorations of unionization and other types of collective action. Yet, because this rule flies in the face of the Supreme Court's *Republic Aviation* decision,<sup>120</sup> it is likely to be overruled by an appellate court or future Board. In so doing, the court or Board should be wary of blindly applying old rules to substantially new forms of communication. This path is a dangerous one, as evidenced by the numerous issues that the Board in *Register-Guard* never considered.

The two most significant of these issues are whether an employer may restrict Internet use to specific times and areas, and whether Internet communications should be classified as oral solicitations or written distributions. As explained below, both of these questions result from a growing complexity in the *Republic Aviation* line of cases that have created a set of rules that are confusing, muddled, and often contrary to the aims of the NLRA. This complexity was never appropriate for traditional communications and is even less justifiable in the context of Internet communications.

### 1. *Work Time and Work Areas*

The first issue is whether employers may restrict Internet use to nonwork time or nonwork areas.<sup>121</sup> Under the nondiscrimination

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<sup>117</sup> See *Register-Guard*, slip op. at 5.

<sup>118</sup> See *infra* note 189 and accompanying text.

<sup>119</sup> See *supra* notes 107–09 and accompanying text.

<sup>120</sup> See *Register-Guard*, slip op. at 16, 17–18 (Members Liebman and Walsh, dissenting).

<sup>121</sup> See Macik, *supra* note 5, at 604–05, 609–10. “Nonwork time” refers to time that an



principle, employers may not prohibit the sending or reading of only union-related Internet communications.<sup>122</sup> A restriction against all nonwork-related Internet use during work time or in work areas, however, is not discriminatory and facially satisfies the Board's *Republic Aviation* analysis.<sup>123</sup> Yet the unique nature of Internet communications makes this result unwarranted and impractical.<sup>124</sup>

The balance struck under *Republic Aviation* was based in large part on the environment in manufacturing and other similar industries where employees work in one area and take breaks in another.<sup>125</sup> In these industries, it is easy to distinguish work areas and work time from nonwork areas and nonwork time.<sup>126</sup> This model, however, is no longer dominant in the United States, particularly in workplaces where employee interactions rely heavily on the Internet.<sup>127</sup> At the office, many employees have computer access only in their work areas,<sup>128</sup> which may also be where they take breaks. Moreover, employees may not have strict work and break times.<sup>129</sup> In these situations, it is often difficult to discern when work time begins or ends and impracticable to force employees to move to a nonwork area when reading or sending union-related Internet communications.

A rule permitting union-related Internet use only in nonwork areas or on nonwork time is virtually meaningless in such environ-

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employee is not actually working even if she is physically on the jobsite, such as break or lunch time. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945) (quotation omitted).

<sup>122</sup> See *supra* note 110 and accompanying text.

<sup>123</sup> See *Republic Aviation*, 324 U.S. at 803 n.10 (justifying rule that employers can restrict union solicitations during work time, but not during nonwork time, because “[w]orking time is for work. . . . It is no less true that time outside working hours . . . is an employee’s time to use as he wishes without unreasonable restraint, although the employee is on company property” (quoting *Peyton Packing Co.*, 49 N.L.R.B. 828, 843 (1943))).

<sup>124</sup> Cf. Broder, *supra* note 5, at 1656, 1658 (discussing difficulty in enforcing e-mail restrictions at work).

<sup>125</sup> See *Republic Aviation*, 324 U.S. at 794–95, 803 n.10.

<sup>126</sup> Cf., e.g., *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615, 620 (1962) (comparing a manufacturing plant’s “parking lots, . . . entrances or exits, [and] other nonworking areas” with “the machines or work stations where the employer’s interest in cleanliness, order, and discipline is undeniably greater than it is in nonworking areas”).

<sup>127</sup> See *supra* notes 60–61 and accompanying text; see also, e.g., *Pratt & Whitney Advice Memorandum*, *supra* note 112, at \*4 (describing a computer-dependent workplace environment).

<sup>128</sup> See, e.g., *id.* (“Employer-provided computer networks are work areas since it is on these networks that these employees are productive.”).

<sup>129</sup> See *id.* at \*6 (“While working time has always been somewhat difficult to exactly define, the lines between working time and nonworking time may be even more blurred and doubtful with regard to professional and quasi-professional employees whose work involves extensive use of computers.”).

ments.<sup>130</sup> Employees may have limited personal interactions and communicate with each other primarily through electronic means, even at the same worksite.<sup>131</sup> For these workers, a broad prohibition against nonwork time or nonwork area Internet use would severely infringe their right to communicate freely with one another about unionization.

It is imperative that the Board take into account the importance and unique nature of Internet communications if employees are to retain any real opportunity to pursue unionization or other collective action. An employer should be able to prevent its employees from spending excessive periods of time using the Internet for nonwork-related purposes. It is unreasonable, however, to permit an employer to ban almost all union-related Internet communications pursuant to a rule that lacks any justifiable application in the workplace.

Although *Republic Aviation's* work time and area rule was reasonable at its inception, and is still warranted in some workplaces, it must adapt to the realities of the modern economy. To maintain the NLRA's relevance in this area, the Board should modify its approach to adequately protect employees' ability to use the Internet at work while still allowing employers to establish reasonable restrictions.

One option is to create a rebuttable presumption that all restrictions on Internet use are unlawful; employers could rebut this presumption by showing a reasonable, nondiscriminatory business justification.<sup>132</sup> The facts of any given case would obviously be critical,

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<sup>130</sup> Cf. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 510–11 (1978) (Powell, J., concurring) (“The rule of *Republic Aviation* was adopted in the context of labor relations in industrial and manufacturing plants . . . . The rationality found to exist in *Republic Aviation*, and therefore the validity of the presumption, cannot be transferred automatically to other workplaces [because] [c]onditions in industrial or manufacturing plants differ substantially from conditions in [other] establishments . . . .”).

<sup>131</sup> See, e.g., *Pratt & Whitney* Advice Memorandum, *supra* note 112, at \*4 (noting that at one company, “[e]ngineering department employees have stated that they communicate primarily by [e]-mail”); *infra* note 154 and accompanying text (discussing NLRB Division of Advice description of some computer networks as “virtual work areas”); see also *Survey Finds More Employer Policies Focus on Employees’ E-mail than IM, Blogs*, *supra* note 60, at A-8 (discussing methods of employee Internet interaction at the workplace).

<sup>132</sup> See *TXU Elec.* Advice Memorandum, *supra* note 111, at \*4 (recommending that employers be permitted to implement e-mail restrictions if they show a “likelihood of significant interference with an employer’s use of its computer resources”). But see General Counsel Advice Memorandum, *Computer Assocs. Int’l*, Case No. 1-CA-38933, 2001 WL 34399637, at \*4 (Nat’l Labor Relations Bd. Oct. 26, 2001), available at [http://www.nlr.gov/research/memos/advice\\_memos](http://www.nlr.gov/research/memos/advice_memos) [hereinafter *Computer Assocs. Int’l* Advice Memorandum] (stating that ban on personal e-mails during “working hours”—which includes time at work, but while on break—was unlawful, and suggesting that a ban during only work time should be lawful); Broder, *supra* note

but the Board should have little difficulty in distinguishing an employer that is restricting Internet use to protect its legitimate business interests from an employer that is unreasonably limiting its employees' ability to discuss unionization. This proposal would permit employers in more traditional workplaces to continue following the current work time and area rule, while giving employees in more modern workplaces increased access to the Internet. In short, this proposal would provide a significant benefit to employees interested in unionism, while imposing few, if any, costs on employers.<sup>133</sup> Moreover, by protecting Internet-based organizing, the proposal would foster unions' continued support for the NLRA.<sup>134</sup>

## 2. *Solicitation or Distribution?*

Although *Republic Aviation* was a significant victory for employees' union-related discussions, the Board has since chipped away at that holding. Whether additional restrictions on employee communications were justified after *Republic Aviation* is open to debate; the manner in which the Board implemented those restrictions, however, is far less defensible. The Board's rulings are even more tenuous when Internet communications are involved. Thus, the growing influx of Internet-based organizing cases presents the Board with an excellent opportunity to reevaluate its approach to this issue—in particular, its emphasis on whether employees have communicated with each other via oral solicitations or written distributions.<sup>135</sup>

In determining whether an employee communication is entitled to protection under *Republic Aviation*, the Board classifies the communication as either a "solicitation" or "distribution."<sup>136</sup> An employer cannot, absent special circumstances, bar oral solicitations during nonwork time,<sup>137</sup> yet it can restrict written distributions, even during nonwork time, from all but the most remote areas of the work-

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5, at 1657–58 (arguing that the traditional *Republic Aviation* analysis fails to adequately protect employer interests in limiting e-mail use).

<sup>133</sup> See *infra* notes 145–51 and accompanying text.

<sup>134</sup> Cf. *supra* notes 28–41 and accompanying text (discussing the necessity of union support for the NLRA for its continued survival).

<sup>135</sup> Although the Board indicated that it may address this question in *Register-Guard*, see *supra* note 79, it expressly refused to do so, see *Guard Publ'g Co. (Register-Guard)*, 351 N.L.R.B. No. 70, slip op. at 6 n.9 (Dec. 16, 2007).

<sup>136</sup> See *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615, 616 (1962) (asserting the legal distinction between oral solicitation and distribution of literature).

<sup>137</sup> See *id.* at 617 & n.4.

site.<sup>138</sup> This distinction has never made sense and is even more absurd when the communication is electronic.

A principal rationale for this distinction was that written distributions, unlike oral solicitations, “carr[y] the potential of littering the employer’s premises, [and] raise[ ] a hazard to production.”<sup>139</sup> Moreover, according to the Board, as long as the employer allows some area of its property on which to distribute written material—such as in a parking lot or entryway—employees can read the material at their leisure;<sup>140</sup> thus, in contrast to oral solicitations, the purpose of the distribution is satisfied without the need for any other employee interactions.

The distinction between solicitations and distributions has always had far more legal significance than it deserved.<sup>141</sup> Whatever differences exist between them, both solicitations and distributions are important means for employees to exercise their right to choose freely whether to unionize. As long as employers can protect themselves from abuses and are able to maintain legitimate business restrictions,<sup>142</sup> there is no reason to permit widespread interference with employees’ union-related communications.

The distinction can also be confusing. Nonunion employees, in particular, may be unaware of this rule, thereby allowing unscrupulous employers to place improper restrictions on employee communications or to ensnare unwary employees who are merely trying to exercise their NLRA rights. Applying this analysis to Internet communications makes these problems far worse.

Given the vast discrepancy in employers’ ability to regulate solicitations versus distributions, the classification of Internet communications is crucial. Indeed, the growth of Internet use at work has led many employers to implement policies that limit Internet use to business purposes,<sup>143</sup> which have the potential to severely limit employees’ ability to exercise their rights under the NLRA.

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<sup>138</sup> See *id.* at 620 (noting that an employer may have to allow distributions in parking lots and plant entrances or exits).

<sup>139</sup> *Id.* at 619.

<sup>140</sup> See *id.* at 620.

<sup>141</sup> See *id.* at 628–29 (Fanning & Brown, Members, dissenting in part) (arguing that distributions should be treated the same as solicitations).

<sup>142</sup> The *potential* for litter would not be such an abuse. An employer could implement a rule that employees who distribute written material must pick up any material left behind, but should not be able to ban all written material simply because litter might be a problem.

<sup>143</sup> See Christine Neylon O’Brien, *The Impact of Employer E-Mail Policies on Employee Rights to Engage in Concerted Activities Protected by the National Labor Relations Act*, 106 DICK. L. REV. 573, 583–84 (2002) (discussing examples).

Internet communications, however, do not neatly fit the categories of either oral solicitations or written distributions.<sup>144</sup> E-mail and other Internet material are written, and in that respect are similar to distributions. Nevertheless, the Board's justifications for the distinction provide some support for treating Internet communications as solicitations.<sup>145</sup> Like oral solicitations, electronic messages create no litter problem. Also, in contrast to written distributions, it is impractical to segregate electronic messages to a parking lot or other remote area of the worksite.<sup>146</sup>

The impact of unauthorized Internet communications on business operations also appears closer to that of oral solicitations than written distributions. Some employers have argued that unwanted electronic messages—primarily e-mails—are harmful because they use company resources, take time to filter, and detract from work.<sup>147</sup> These hypothetical problems, however, are generally less significant than the already trivial risk of disruption and physical litter that accompany written distributions. Moreover, the Board's current analysis already permits an employer to ban abusive or disruptive oral solicitations, which could easily apply to Internet communications as well.<sup>148</sup> Absent special circumstances, however, employers will have a difficult time showing that Internet use causes any meaningful disruption.<sup>149</sup>

This difficulty is unsurprising, as the marginal cost of union-related Internet communications would be insignificant for employees who frequently use the Internet and have much experience weeding through spam and other nonwork-related messages.<sup>150</sup> It is also far

<sup>144</sup> See Frederick D. Rapone, Jr., Comment, *This Is Not Your Grandfather's Labor Union—Or Is It? Exercising Section 7 Rights in the Cyberspace Age*, 39 DUQ. L. REV. 657, 670–72 (2001); Macik, *supra* note 5, at 602–04.

<sup>145</sup> See, e.g., *supra* note 139 and accompanying text.

<sup>146</sup> See *infra* notes 158–60 and accompanying text.

<sup>147</sup> See Rapone, *supra* note 144, at 677–78; Macik, *supra* note 5, at 603.

<sup>148</sup> See *infra* notes 167–71 and accompanying text.

<sup>149</sup> For example, in *Stoddard-Quirk*, the Board distinguished authorization cards from other handouts, like prounion literature, suggesting that they should be classified as solicitations because, unlike typical written distributions, the cards are returned and do not remain at the worksite. See *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615, 620 & n.6 (1962); Macik, *supra* note 5, at 604; see also *infra* note 210 (defining authorization cards). It is difficult to imagine that nonabusive Internet communications would be any more disruptive than the distribution and collection of authorization cards. Moreover, even the minor interruptions associated with additional e-mail are unlikely to reduce productivity for individual workers or the firm as a whole. See Broder, *supra* note 5, at 1667.

<sup>150</sup> See *Intel Corp. v. Hamidi*, 71 P.3d 296, 308 (Cal. 2003) (stating that unwanted e-mail did not constitute a trespass because, in part, the sender “did nothing but use the e-mail system for its intended purpose—to communicate with employees. The system worked as designed, deliv-

easier to avoid unwanted e-mails than unwanted conversations with fellow employees. In addition, electronic messages are invisible to customers, a fact that eliminates an often successful defense for employer restrictions on traditional employee communications.<sup>151</sup>

In sum, even if the distinction between oral solicitations and written distributions makes sense, Internet communications do not fit either category well. Thus, if a court or future Board addresses this issue, it should not extend this distinction to Internet messages. If, however, the Board insists on applying the distinction, it should conclude that the Internet's ability to provide employees with significant benefits, while imposing few costs on employers, matches the policy concerns regarding its regulation of solicitations far better than those regarding distributions. Whether the Board will recognize the futility of that application and create a new rule for Internet communications is far from certain. Even less clear is whether the Board will take the opportunity presented by the Internet to reevaluate its continued reliance on the distinction between solicitation and distribution in any circumstance.

The need for a significant modification to the Board's analysis of employee communications in general, as well as the specific problems associated with Internet communications, are well illustrated by the attempt of the NLRB General Counsel's Division of Advice ("Division") to address this issue.<sup>152</sup> Recognizing the need to balance employees' NLRA rights against employers' property interests under *Republic Aviation*,<sup>153</sup> the Division has recommended that the Board adopt a complicated case-by-case analysis for determining whether e-mail messages should be classified as solicitations or distributions.

The recommendation would prohibit broad restrictions on all nonwork-related e-mail messages—regardless of their classification as solicitations or distributions—where employee use of electronic communications is so significant that the employer's computer system con-

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ering the messages without any physical or functional harm or disruption. These occasional transmissions cannot reasonably be viewed as impairing the quality or value of [the employer's] computer system.").

<sup>151</sup> See Broder, *supra* note 5, at 1660–61 (noting that e-mail has no physical presence, is not overheard by customers, and can be regulated to minimize disruption of work); Macik, *supra* note 5, at 602.

<sup>152</sup> The Division's role is to recommend whether the NLRB General Counsel should file unfair labor practice charges in a particular case. This advice generally involves the application of established Board law to novel factual situations; the Division of Advice does not typically recommend that the General Counsel advocate for change in Board law, although it would be justified in doing so here.

<sup>153</sup> See *supra* note 104 and accompanying text.

stitutes a “virtual work area.”<sup>154</sup> Because the Internet plays such a vital role in these workplaces, a general ban on nonwork-related e-mail would unlawfully infringe employee ability to communicate during nonwork time.

Where there is no virtual work area, however, the Division’s analysis would look to the nature and content of the e-mail messages. In particular, the Division would determine whether a specific e-mail is a solicitation or distribution by analyzing whether the e-mail “can reasonably be expected to occasion a response or initiate reciprocal conversation.”<sup>155</sup> If an e-mail anticipates a response, it would be treated as a solicitation under the *Republic Aviation* analysis; if, instead, the e-mail “is intended to be limited to one-way communication and its entire purpose is achieved so long as it is received, it is [a] distribution.”<sup>156</sup> This recommendation is an excellent example of the problems caused by an attempt to fit a novel organizing technique into an outdated rule.

The Division’s rationale is based on the Board’s decision in *Stoddard-Quirk Manufacturing Co.*,<sup>157</sup> which suggested that distributions require less protection than oral solicitations because written materials may be read by employees at a later time and consequently do not need to be distributed at the worksite.<sup>158</sup> E-mail and traditional written distributions, however, are not the same. Although both written literature and e-mail may be read at the recipient’s leisure, e-mail can be delivered in only one manner: to employees’ e-mail addresses. Employees will frequently be able to read e-mail only at work, while at their workstations.<sup>159</sup> In contrast to written distributions, therefore, delivery of e-mail may be impossible to relegate to nonwork time and nonwork areas.<sup>160</sup>

Further, the potential of e-mail to disrupt work sharply conflicts with the traditional distribution analysis involving the dissemination of literature. In its attempt to apply the traditional analysis, the Divi-

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<sup>154</sup> See *Computer Assocs. Int’l* Advice Memorandum, *supra* note 132, at \*3–4; *Pratt & Whitney* Advice Memorandum, *supra* note 112, at \*4–6.

<sup>155</sup> General Counsel Advice Memorandum, Bureau of Nat’l Affairs, Case No. 5-CA-28860, 2000 WL 33941886, at \*3 (Nat’l Labor Relations Bd. Oct. 3, 2000), available at [http://www.nlrb.gov/research/memos/advice\\_memos](http://www.nlrb.gov/research/memos/advice_memos).

<sup>156</sup> *Id.*

<sup>157</sup> *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615 (1962).

<sup>158</sup> See *id.* at 620.

<sup>159</sup> See *supra* note 128 and accompanying text.

<sup>160</sup> This analysis assumes no widespread use of mobile devices capable of receiving e-mail, such as Blackberries or other methods of remote access.

sion would classify e-mails that do not request a response as distributions and e-mails that make such a request as solicitations.<sup>161</sup> Yet the former category would be *less* disruptive than the latter, as e-mail requesting a response may cause employees to stop working and reply.

Even assuming that the Board could actually determine whether an electronic message is intended to initiate a response rather than merely serve as a one-way communication,<sup>162</sup> the Division's analysis is extraordinarily unwieldy. The inability to discern *ex ante* whether a message would be classified as a solicitation or distribution undermines the benefit of the Internet as a low-cost medium for communication. This uncertainty would give employers pause before attempting to regulate use of their computer systems, even if they have legitimate business concerns, for fear that employees will bring costly unfair labor practice allegations. Similarly, employees faced with Internet usage restrictions cannot be sure whether their attempts to organize will be construed as eliciting a response and may therefore simply avoid all Internet-based collective action, including union organizing. These problems would further erode support for the NLRA. Because unions often rely on sympathetic employees to communicate with other workers about organizing,<sup>163</sup> reducing employees' willingness to discuss unionization at work would undermine the NLRA's value to unions. Employers, moreover, would become more hostile to the NLRA because they would face higher transaction costs resulting from the increase in uncertainty and litigation.<sup>164</sup>

The Board, therefore, should reject the Division's recommendation and take the opportunity to reevaluate its current analysis, even as applied to nonelectronic communications. The best outcome would

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<sup>161</sup> See *supra* notes 155–56 and accompanying text.

<sup>162</sup> For example, it may be difficult to classify a typical union organizing e-mail that includes information promoting the union and urging employees to vote for union representation. One could argue that such an e-mail is simply a one-way informative message; one could also argue that the e-mail seeks to initiate conversations about unionism and participation in the organizing drive.

<sup>163</sup> R. Wayne Estes & D. Thomas Triggs, *Lechmere Decision Reshapes Contours of Union Access to Company Property for Purposes of Organization*, 27 BEVERLY HILLS B. ASS'N J. 10, 11 (1993).

<sup>164</sup> Cf. Addison, *supra* note 19, at 8 (citing Krueger, *supra* note 25, at 658) (discussing the hypothesis that large transaction costs and highly variable awards in unjust dismissal suits cause increased attention on unjust dismissal legislation). The Division's recommendation probably would not impose a large marginal cost on employers, yet that cost would exacerbate a broader trend of regulated entities facing higher litigation costs under the NLRA. See Rafael Gely, *A Tale of Three Statutes . . . (and One Industry): A Case Study on the Competitive Effects of Regulation*, 80 OR. L. REV. 947, 984–85 (2001) (stating that the NLRA has higher litigation costs than the RLA).



be for the Board to abandon the distinction between solicitation and distribution in its entirety and instead consider all employer interference with union-related communications to be presumptively unlawful, no matter its form. An employer would be able to rebut this presumption by proving that it had a valid business reason to restrict the communications. For example, a reasonable limitation on union-related distributions may be warranted in the rare instance where the distributions are so aggressive or numerous that they impose a substantial burden on business operations. Even if the Board is unwilling to modify its treatment of all union-related employee discussions, it should at least apply this presumption to Internet communications. The Internet's effectiveness in promoting employees' union-related communications,<sup>165</sup> while imposing minimal costs on employers,<sup>166</sup> begs for particularly strong protection.

To be sure, an employer has an interest in preventing unreasonably disruptive uses of its computer system; thus, as is currently possible, an employer may show that an electronic message was so abusive that it lost protection under the Act or that a valid business reason existed for restricting protected communications. The Board has long concluded that employee activity can lose its protection under the NLRA if it unreasonably interferes with an employer's business interests.<sup>167</sup> This analysis can easily be applied to Internet communications. For instance, in *Washington Adventist Hospital, Inc.*,<sup>168</sup> the Board found that an employee's electronic message, which was critical of the employer, was not protected by the Act because it substantially disrupted the activities of the employer by automatically appearing on all computers and requiring a user to delete the message to remove it from the screen.<sup>169</sup> According to the Board, this e-mail interrupted employees' work during a busy time and took over the system as employees entered important medical information.<sup>170</sup> Although e-mails lacking such a pernicious effect would remain protected,<sup>171</sup> the Board

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<sup>165</sup> See *supra* notes 62–71 and accompanying text.

<sup>166</sup> See *supra* notes 145–50 and accompanying text.

<sup>167</sup> See, e.g., *NLRB v. Local Union No. 1229*, 346 U.S. 464, 474–77 (1953) (permitting discharge based on collective action that was insubordinate, disobedient, or disloyal).

<sup>168</sup> *Wash. Adventist Hosp., Inc.*, 291 N.L.R.B. 95 (1988).

<sup>169</sup> *Id.* at 103.

<sup>170</sup> *Id.* at 102–03.

<sup>171</sup> See, e.g., *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244, 249 (1997) (expressly distinguishing *Washington Adventist* and finding that use of employer's e-mail system to send messages criticizing employer was protected activity, particularly given that personal e-mails had been allowed previously); *Malin & Perritt*, *supra* note 5, at 57 (arguing that employers should have to prove an actual, significant disruption before legitimately restricting employee e-mail solicitations).

properly concluded that the level of interference in *Washington Adventist* was excessive.

Even if Internet communications retain protection under the NLRA, special business concerns may warrant additional restrictions. For example, an excessive volume of e-mail that interferes with an employer's computer system may warrant limits on the number or size of messages.<sup>172</sup> A particular employee's job duties may also be relevant. An employer's prohibition against all nonwork-related Internet communications would be far easier to defend, for instance, if its employees worked with highly secret information. In evaluating the justification for such restrictions, however, the Board must be careful to weigh the employer's business interests against the level of interference with its employees' right to discuss union matters. Accordingly, a ban on all nonwork-related e-mail for employees who have no fixed work location and communicate solely through the Internet will be much more difficult to justify than the same rule at a worksite where employees frequently interact in person.<sup>173</sup>

Barring these special circumstances, an employer should not be permitted to interfere with employees' Internet communications. Expanding protection for these low-cost, yet highly effective, communications is far more likely to protect union organizing in the modern workplace than either the Board's current *Republic Aviation* analysis or the Division of Advice's recommendation, neither of which adequately recognizes the unique and important nature of the Internet. The Board may continue down its current path, but only by risking further alienation of unions and their supporters. Instead, the Board should, at a minimum, expand protections for Internet communications. An even more comprehensive solution would be to conduct a wholesale revision of its entire analysis of employee communications. By doing so, the Board could end decades of stagnation while ensuring the NLRA's future relevance in the modern workplace.

#### *B. Nonemployee Internet Use*

In sharp contrast to the protections afforded *employee* communications, an employer can generally bar from its property all *nonemployee* organizers attempting to communicate with its employees.

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<sup>172</sup> Cf. *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1022–23 (S.D. Ohio 1997) (finding a legitimate claim for trespass against a spammer that sent so much e-mail to plaintiff's servers that it caused an appreciable reduction in system performance).

<sup>173</sup> See *supra* notes 125–31 and accompanying text.

Under the Supreme Court's holding in *Lechmere, Inc. v. NLRB*,<sup>174</sup> an employer's real property interests will trump a union's right to contact employees in most circumstances.<sup>175</sup> Exceptions theoretically exist where an employer's access policy discriminates against union organizers,<sup>176</sup> or in the rare case where organizers lack reasonable alternatives to reach employees.<sup>177</sup>

The *Lechmere* and *Republic Aviation* analyses differ on the notion that nonemployee communications with workers, in contrast to communications among co-workers, are vastly inferior to employers' property interests.<sup>178</sup> Criticisms of *Lechmere's* "balancing" of interests—which is not much of a balance at all—have been widespread.<sup>179</sup> More practically, the Board's attempts to apply this rule have been troublesome. The Board's application of *Lechmere* initially asks whether the employer has a state property right to exclude organizers.<sup>180</sup> If the employer possesses that right, the holding in *Lechmere* applies and the employer can bar organizers in most instances.<sup>181</sup> If the employer lacks a state property right to exclude, *Lechmere* does not apply and, similar to the *Republic Aviation* analysis, employers face significant limitations on their ability to prevent organizing activity.<sup>182</sup> This is an overly complex analysis that requires the Board,

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<sup>174</sup> *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

<sup>175</sup> *See id.* at 541 (holding that an employer may exclude nonemployee organizers from its premises unless the organizers can "establish the existence of any 'unique obstacles' that frustrated access to . . . employees" (citation omitted)). One of the Supreme Court's primary rationales for the distinction between employee and nonemployee communications is that employees' right to discuss collective representation is directly protected by the NLRA, yet nonemployees, such as unions, possess only a "derivative" right to communicate with employees. *See id.* at 533 (citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1955)). A union's right is derivative because it exists solely to assist employees in the exercise of their direct right to make a free and informed decision whether to unionize. *See Babcock & Wilcox*, 351 U.S. at 113. *See generally* Hirsch, *supra* note 105, at 899–905 (discussing *Lechmere*).

<sup>176</sup> The meaning of "discriminate" varies widely among the courts, but at a minimum, an employer should avoid banning only communications by a certain union. *See id.* at 932–35.

<sup>177</sup> *See Lechmere*, 502 U.S. at 537. "Reasonable" is very broadly defined and alternatives rarely fall short, except in extreme circumstances such as when employees work and live in a remote logging camp. *See id.* at 539; Hirsch, *supra* note 105, at 908 n.105.

<sup>178</sup> Compare *supra* note 109 and accompanying text (noting the general subordination of employer property interests to employee organizing interest), with *supra* notes 174–77 and accompanying text (noting the elevation of employer property interests over any nonemployee interest in organization).

<sup>179</sup> *See, e.g.*, Estlund, *supra* note 105, at 330–33. *See generally* Robert A. Gorman, *Union Access to Private Property: A Critical Assessment of Lechmere, Inc. v. NLRB*, 9 HOFSTRA LAB. L.J. 1 (1991).

<sup>180</sup> *See* Hirsch, *supra* note 105, at 906.

<sup>181</sup> *See supra* notes 174–77 and accompanying text.

<sup>182</sup> *See NLRB v. Calkins*, 187 F.3d 1080, 1088 (9th Cir. 1999).

among other difficult questions, to resolve state property law issues—a subject far outside of its expertise. The result is significant delay, uncertainty for both unions and employers, and often inadequate enforcement of the NLRA.<sup>183</sup>

Not surprisingly, as unions have observed these problems, as well as *Lechmere's* dismissive attitude toward the importance of communications between unions and employees, they have increasingly sought to organize workers outside of the NLRA process.<sup>184</sup> The Internet, however, has provided unions hope for a viable NLRA-protected option. Internet communications have proved to be an inexpensive and relatively effective means for unions to reach employees<sup>185</sup>—perhaps the only option remaining post-*Lechmere*. Consequently, if the Board were to mechanically extend *Lechmere* to nonemployee Internet communications, it would likely push unions to further abandon the NLRA recognition process. Internet-based organizing, therefore, provides an apt illustration of the potential for the NLRA to lose its critical mass of support. The Board has ample opportunity to avoid that fate, but to do so it must make significant advances to its jurisprudence.

The primary issue affecting unions' ability to engage in Internet-based organizing is the extent to which the Board's traditional *Lechmere* analysis applies; that is, whether in most instances an employer can bar unions from using its network to communicate with its employees. This question turns on whether an employer's interest in preventing union use of its computer system is as robust as the employer's right to exclude unions from its real property. The Board has not yet addressed this question,<sup>186</sup> and—significant to the Board's *Lechmere* analysis—neither have most states. Indeed, the sole case addressing a nonemployee's unauthorized and nonabusive use of an employer's computer system is the California Supreme Court's decision in *Intel Corp. v. Hamidi*.<sup>187</sup> That case involved a former employee of Intel who sent e-mails critical of the company to current employees; two lower courts held that the e-mails, which were unauthorized by Intel, constituted a trespass onto Intel's computer net-

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<sup>183</sup> See *supra* note 105.

<sup>184</sup> See *supra* note 31.

<sup>185</sup> See, e.g., *supra* notes 66–71 and accompanying text (describing recent union Internet organizing efforts).

<sup>186</sup> Although the Board indicated that it may address this question in *Register-Guard*, it failed to do so. See *supra* notes 74, 79.

<sup>187</sup> *Intel Corp. v. Hamidi*, 71 P.3d 296 (Cal. 2003).

work.<sup>188</sup> The California Supreme Court reversed, holding that a claim of trespass to chattels requires proof of harm to the chattel or the owner's rights to it and that Intel failed to show that the e-mails actually harmed or interfered with its computer system.<sup>189</sup>

Because the Board continues to rely on state property law under its *Lechmere* analysis, state decisions like *Hamidi* are important. Indeed, a state's decision whether to treat an employer's ownership of its computer system as equivalent to its ownership of real property will often be the sole determinant of the employer's ability to bar employee Internet communications under the NLRA.<sup>190</sup> This unnecessary reliance on state property law has created significant problems for the Board, as well as parties,<sup>191</sup> and its potential application to Internet communications will only exacerbate the situation. Thus, in addressing union access to employer computer systems, the Board should eliminate its general reliance on state property law.

The prospect that the Board will do so, however, is low. The Board has yet to signal whether it will conclude that unauthorized e-mails from nonemployees infringe an employer's property interests to the same extent, for example, as unauthorized leafleting at the worksite.<sup>192</sup> The *Hamidi* case notwithstanding, it is likely that the Board will look to the Supreme Court's pro-employer analysis in *Lechmere* and conclude that an employer's computer system is entitled to the same protection as real property.<sup>193</sup> This outcome is also supported by the Supreme Court's heavy emphasis on whether employee or nonem-

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<sup>188</sup> See *id.* at 301–02 (noting that defendant sent six messages to several thousand employees).

<sup>189</sup> See *id.* at 302, 308. Abusive use of Internet resources, such as severe “spamming,” may support a trespass to chattel claim by Internet service providers if there is evidence of an actual negative effect on the computer system. See *Sotelo v. DirectRevenue, LLC*, 384 F. Supp. 2d 1219, 1230 (N.D. Ill. 2005) (citing cases).

<sup>190</sup> See *supra* notes 181–82 and accompanying text.

<sup>191</sup> See Hirsch, *supra* note 105, at 909–16 (describing problems and arguing that the Board should stop considering state property issues in *Lechmere* cases and, instead, focus on whether the manner in which an employer attempts to remove union organizers unlawfully infringes employees' NLRA rights).

<sup>192</sup> Cf. *E. I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 919 (1993) (finding that employer discriminatorily denied union access to its e-mail system, yet reserving question whether union would have had a right to access the system absent employer's discrimination).

<sup>193</sup> In cases involving other types of communications, the Board has concluded that employees do not have an absolute right to access an employer's bulletin boards, copy equipment, or telephones. See *J.C. Penney, Inc.*, 322 N.L.R.B. 238, 238 (1996) (bulletin boards), *enforced in relevant part*, 123 F.3d 988 (7th Cir. 1997); *Champion Int'l Corp.*, 303 N.L.R.B. 102, 109 (1991) (copy machines); *Union Carbide Corp.*, 259 N.L.R.B. 974, 980 (1981) (telephones), *enforced in relevant part*, 714 F.2d 657, 663 (6th Cir. 1983) (noting that, generally, an employer “unquestionably ha[s] the right to regulate and restrict employee use of company property”).

ployee communications are involved.<sup>194</sup> As long as unions' rights to communicate under the NLRA remain substantially inferior to that of employees, the mode of communication will often be overlooked. This is unfortunate, for Internet communications are uniquely suited to satisfy the organizing interests of both unions and employers.<sup>195</sup> Therefore, the best hope for ensuring that Internet-based organizing remains a viable option under the NLRA is for the Board to refuse to apply *Lechmere* to Internet communications.

The Board is limited in its ability to abolish the distinction between employee and nonemployee communications, as it is rooted in Supreme Court precedent that faces little chance of modification by either the Court or Congress. The Board need not, however, treat this distinction as dispositive in all situations, particularly those involving Internet communications. Instead, the Board could provide more protection for unions' use of the Internet by recognizing that electronic communications pose significantly less interference with employers' property interests than do physical invasions.

Permitting unions more freedom to use an employer's computer system makes sense, even under *Lechmere*'s pro-employer analysis. The conflict between union and employer rights is more severe when union organizing takes place on real property rather than via the Internet. Traditional union solicitation is a physical invasion that, no matter how orderly, limits others' use of the property and interferes with the employer's freedom to enjoy its property.<sup>196</sup> Internet communications, however, are not physical invasions—organizers can generally send electronic messages without affecting others' use of the computer system.<sup>197</sup> Moreover, unions' Internet messages will have little impact on business operations, as they may often be directly attributable to the union and therefore easily ignored by a busy or disinterested employee. To be sure, a computer system is property over

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<sup>194</sup> See *supra* note 175; see also *Leslie Homes, Inc.*, 316 N.L.R.B. 123, 129 (1995).

<sup>195</sup> See *supra* notes 145–51 and accompanying text.

<sup>196</sup> See *Malin & Perritt, supra* note 5, at 48–49. The Supreme Court has emphasized that physical invasions of property are akin to deprivation of that property. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 435 (1982) (holding that government authorization of the placement of permanent cable boxes on apartment building was an unconstitutional taking).

<sup>197</sup> Compare *Intel Corp. v. Hamidi*, 71 P.3d 296, 308 (Cal. 2003) (noting that the sending of unwanted e-mails did not cause “any physical or functional harm or disruption”), with *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1019 (S.D. Ohio 1997) (describing assertion of Internet service provider that receiving massive volumes of e-mail can place a significant burden on network equipment).

which an employer, as owner, can typically restrict access.<sup>198</sup> But unlike real property, computer systems can be considered chattels, which are entitled to less protection against trespass.<sup>199</sup>

These property issues do not constitute the end of the inquiry, however, for even when the Supreme Court has emphasized the need to protect employers' property interests, it has recognized that employees' rights to discuss unionization must remain in the mix. *Lechmere*, for example, acknowledged that excluding organizers may negatively affect employees' freedom to choose whether to unionize;<sup>200</sup> the Court merely held that the effect on employee rights paled in comparison to the interference with the employer's property.<sup>201</sup> The Board, therefore, should analyze unauthorized Internet communications, even when sent by nonemployees, under the modified *Republic Aviation* analysis proposed here.<sup>202</sup> This approach does not conflict with the Supreme Court's holding that nonemployees have less right to communicate about unionization than employees. Rather, the proposal merely recognizes that the impact of electronic messages on an employer's property interests is so insignificant that some degree of access to employer computer systems is warranted, even for nonemployees.

If the Board were to analyze employer attempts to bar nonemployee Internet communications in the same manner as attempts to bar employee communications, it could stem, and possibly reverse, the shift toward non-NLRA organizing. The proposal here would accomplish that goal by providing nonemployee Internet communications the protection they deserve under the NLRA, while still allowing employers to preserve their legitimate business interests.<sup>203</sup> Moreover, treating employee and nonemployee Internet communications consistently not only provides greater protection for union-related discussions, but gives parties much-needed *ex ante* clarity as well.<sup>204</sup> Adoption of this proposal would also acknowledge the importance of Internet communications in the workplace, thereby signaling to un-

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<sup>198</sup> See *supra* note 193.

<sup>199</sup> A trespass of chattel claim, unlike real property trespass, requires proof of harm. See *Hamidi*, 71 P.3d at 302–03.

<sup>200</sup> See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539 (1992) (noting that employers may lawfully exclude nonemployees in some situations where “nontrespassory access to employees may be cumbersome or less-than-ideally effective”).

<sup>201</sup> See *supra* note 175 and accompanying text.

<sup>202</sup> See *supra* note 132 and accompanying text.

<sup>203</sup> See *supra* notes 132–33 and accompanying text.

<sup>204</sup> See *Hirsch, supra* note 105, at 921.

ions that the NLRA remains hospitable to their organizing efforts and is worth supporting politically.<sup>205</sup> Whether the Board will capitalize on this opportunity is uncertain. Its failure to adequately protect one of the few remaining effective and inexpensive organizing tactics, however, could prove disastrous to the survival of the NLRA.

### C. *Electronic Access to Employees*

Given the significant restrictions on union organizing that accompany the *Lechmere* regime, the Internet is an extraordinarily valuable means to reach employees. E-mail, in particular, provides an effective method to organize, inform, or otherwise communicate with a targeted group of employees.<sup>206</sup> Yet union organizing attempts face an initial hurdle because of the difficulty in obtaining employees' e-mail addresses without an employer's cooperation.

The Board has traditionally handled this informational issue under its rule handed down in *Excelsior Underwear, Inc.*<sup>207</sup> The intent of the rule is to balance the importance of increasing employee exposure to union organizing information<sup>208</sup> against a general employee interest in restricting access to their personal contact information.<sup>209</sup> *Excelsior* is the Board's compromise, which requires an employer to provide employee names and home addresses to a union that has obtained "authorization cards"<sup>210</sup> expressing a desire for an election

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<sup>205</sup> Cf. *supra* notes 24–27 and accompanying text. In addition to increasing political support for the NLRA, more hospitable access rules could reverse unions' move to non-NLRA organizing by reducing the need for them to contract around Board rules. In particular, some unions form agreements with employers that provide worksite access to employees—and frequently neutrality promises from employers. See, e.g., *Alden N. Shore & Alden Naperville v. Serv. Employees Int'l Union, Local 4*, 120 Lab. Arb. Rep. (BNA) 1469, 1474, 1510 (2004) (Malin, Arb.) (finding that employer violated agreement to provide union access to employer's property). These unions must presumably give up something in exchange. If, however, unions already had access rights under the Board's rules, they would not need to contract around those rules and would have more resources for other NLRA-regulated activities, such as serving already-represented employees. The result would be an NLRA that is more valuable to unions. Thanks are owed to Martin Malin for this insight.

<sup>206</sup> See *supra* Part II.

<sup>207</sup> *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966).

<sup>208</sup> See *supra* note 175.

<sup>209</sup> See *Tech. Serv. Solutions (Tech. Serv. II)*, 332 N.L.R.B. 1096, 1099 (2000) (citing *Textile Workers v. NLRB*, 388 F.2d 896, 906 (2d Cir. 1967); *Excelsior*, 156 N.L.R.B. at 1243).

<sup>210</sup> Authorization cards are signed affirmations by employees indicating that they wish to designate a union as their collective-bargaining representative or that they want an election to determine whether to choose the union as their representative. See *Penn. State Educ. Ass'n—NEA v. NLRB*, 79 F.3d 139, 144–45 (D.C. Cir. 1996) (describing types of authorization cards). Prounion legislators have recently introduced a bill entitled the Employee Free Choice Act, H.R. 800, 110th Cong. (2007), which would require employers to recognize a union that obtains



from thirty percent of employees.<sup>211</sup> Although unions may find it difficult to reach that level of support, this rule justifiably maintains some level of privacy by not disclosing employees' home addresses until a union has enough support to trigger a Board-run election.<sup>212</sup>

The *Excelsior* compromise reflects the Board's view that the disclosure of employees' names and home addresses is important to organizing campaigns and less intrusive than requiring union access to an employer's property.<sup>213</sup> Disclosure of e-mail addresses may be equally valuable and, because employers need not reveal employees' home addresses, will encroach upon employee privacy to a far lesser degree. Indeed, the level of intrusiveness is so low that the Board should require employers to provide employee e-mail addresses to unions that merely express an intent to organize employees—even without requiring an initial showing of employee support for an election or proof that employees are otherwise inaccessible.<sup>214</sup> Such information would allow unions to exercise their NLRA right to communicate with employees without disrupting the employer's business or significantly invading employees' privacy. If employees are interested in the resulting union appeals, they can respond; if not, they can easily ignore the e-mail.

Requiring disclosure of employees' e-mail addresses would also provide a greater level of fairness in organizing campaigns. Currently, for example, employers can hold mandatory, antiunion "captive audience" speeches without providing unions similar access to employees.<sup>215</sup> Union possession of employee e-mail addresses would mitigate—although not eliminate—this disparity by allowing them to respond quickly. Thus, by enhancing the fairness of the NLRA representation process, the Board could increase the NLRA's value to

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cards expressing the desire for representation from a majority of unit employees. *See id.* § 2(a). This bill would eliminate an employer's current right to request an NLRB-run election when faced with authorization cards indicating a union's majority support. *See Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 304–06 (1974).

<sup>211</sup> *Excelsior*, 156 N.L.R.B. at 1239–40, 1244 n.20.

<sup>212</sup> *Id.* at 1244 n.20.

<sup>213</sup> *See Tech. Serv. Solutions*, 324 N.L.R.B. 298, 305 (1997) (Gould, Chairman, concurring). *But see Tech. Serv. II*, 332 N.L.R.B. at 1099 (emphasizing that *Excelsior* does not apply until the Board orders an election, unless there is a finding that employees were inaccessible).

<sup>214</sup> *Cf.* G. Micah Wissinger, Note, *Informing Workers of the Right to Workplace Representation: Reasonably Moving from the Middle of the Highway to the Information Superhighway*, 78 CHI.-KENT L. REV. 331, 344, 347 (2003) (suggesting that e-mail addresses should be part of *Excelsior* information or that employees should be notified of a website supporting a union with a bona fide interest in representing them).

<sup>215</sup> *See Litton Sys., Inc.*, 173 N.L.R.B. 1024, 1030 (1968); *Livingston Shirt Corp.*, 107 N.L.R.B. 400, 409 (1953).

union organizing campaigns, which may be an important factor in determining the Act's future relevance.

### *Conclusion*

The Internet represents both an opportunity and a threat to the NLRA and the Board. The dramatic transformation in workplace communications brought about by the Internet presents the Board with a much-needed occasion to reconsider doctrines that have proven to be outdated and counterproductive. If, instead, the Board continues to follow its present course, it will not only maintain the NLRA's current decline in relevance, but also, with the gaining prevalence of the Internet, help to drastically hasten this trend.

As Internet use expands in the workplace, it has become an increasingly valuable organizing medium for unions. This development creates several issues. Internet communications reveal inadequacies that have long existed in the Board's interpretation of the NLRA, while creating new complexities in the interpretation of its existing doctrines. Moreover, the availability of a low-cost and effective means to communicate with employees provides unions with a further incentive to organize outside of the NLRA process. These legal and practical issues feed on each other. The ambiguity surrounding the law's treatment of Internet communications has deepened the complexity and hostility that has already diminished unions' interest in the NLRA, while also providing them with a valuable means to act on their objections by engaging in further non-NLRA organizing.

The combination of the NLRA's decreasing value to unions and the enhanced ability to organize employees without a Board-run election could be vital in determining the Act's relevance and, perhaps, survival. Public choice theory demonstrates that the stable political balance that has thus far protected the NLRA and the Board from significant legislative changes could disintegrate. Unions have been able to exert a disproportionate political influence in part because of their focused and intense interest in maintaining NLRA protections. As unions become more disaffected with the NLRA organizing process, however, the Act's political support may become too weak and fractionalized to protect it from congressional erosion. This trend could result in minor budget cuts or insubstantial legislative action, but it could also provoke a severe legislative response or drastic cuts in the Board's operations. Under the latter scenario, the NLRA and the Board would likely cease to exist in any recognizable form.

It is doubtful that any of the Internet-based organizing issues discussed here, on their own, seriously threaten the NLRA's survival. Yet taken together, they present a real danger to the current framework of private-sector labor regulations. The hope is that Congress or the Board will recognize the magnitude of the Internet's impact on the NLRA and take advantage of the corresponding opportunity to adapt the Act's governance of labor relations to the modern workplace. If Congress and the Board do nothing, however, they risk accelerating the NLRA's current path to irrelevance and, perhaps, to its ultimate demise.