

## Taking State Property Rights Out of Federal Labor Law

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*The National Labor Relations Board's current analysis of union organizers' right to access employer property relies almost exclusively on an employer's right-to-exclude under state property law. If the employer possesses such a right, an attempt to exclude organizers will generally be lawful; if the employer lacks that right, the exclusions will be unlawful. This scheme makes little sense doctrinally and, perhaps more importantly, the Board's attempts to implement it have been dreadful. An employer's property interests are usually irrelevant to the issue that should be the Board's primary concern in these cases—whether the removal of union organizers interferes with employees' federal labor rights. Employees will tend to view hostile or discriminatory exclusions of organizing activity as coercive, whether or not the employer has a right-to-exclude under state law. Further, because the property rights issue is often complex, an employer cannot be sure of its ability to exclude organizers until litigation has ended. Thus, an employer is forced to decide whether to allow what is arguably a trespass, or protect its property interests and risk a labor law violation.*

*The focus on state property rights has also confounded the Board. The uproar accompanying the 2005 Supreme Court decision in *Kelo v. City of New London* is an illustration of the intense concern for property rights that has long imposed limits on the Board's enforcement of federal labor law. Yet, the Board has no expertise in the wide variety of state property law issues that it must address. This incapability has resulted in protracted litigation and often poorly-reasoned analyses that are ineffective in enforcing the property interests that the Board is supposed to be protecting. I propose, therefore, a new analysis that eliminates consideration of state property rights from the Board's right-to-access cases. Under the proposal, the Board would focus on whether the manner in which an employer excludes organizers chills employee rights, while property issues—such as a trespass claim against organizers—would be determined by state courts. By creating a set of presumptions to guide employer conduct in responding to organizing activity, the proposal would provide clarity for all parties, better protect employees' labor rights, and free the Board from its struggles with state property law.*

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Imagine that you are the manager of a restaurant located, along with several other businesses, on the first-floor of a high-rise building. One afternoon, just before a shift change, several members of a local union stand on the sidewalk near the entrance to the restaurant and distribute flyers to employees encouraging them to join the union. The handbilling is peaceful and does not block the entrance. In the past, the owner has emphasized that solicitors are not welcome and are you confident that union organizing would not be an exception. What should you do?

If you are a typical manager, you would immediately tell the organizers to leave and, if they refuse, pursue other means—such as calling the police or security personnel—to stop the organizing. By doing so, however, you put your employer at risk of violating the National Labor Relations Act (“Act” or “NLRA”).<sup>1</sup> Currently, the only way of knowing whether a violation occurred is to wait for the National Labor Relations Board (“Board” or “NLRB”) to resolve the dispositive issue in almost all such cases: whether the employer had a state property right to exclude the organizers. But even if you were one of the rare managers who was aware of that rule, it often will provide little help when faced with organizing activity. You must know whether your employer or the building owner controls or owns the sidewalk; although the lease would likely provide the answer, few managers would have immediate access to that document. If the building owner controls the sidewalk, you could ask her to remove the organizers, but her right to do so is not clear. For instance, even if the building owner built, maintains, and even owns the sidewalk, she may have obtained the property from the city with conditions requiring public access. Or, as is likely, there may be a public right-of-way on the

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<sup>1</sup> 29 U.S.C. §§ 151-169.

sidewalk. Yet, different states allow varying degrees of control and public access over such easements.<sup>2</sup>

These questions are not far-fetched. Rather, they signify a fairly common set of issues in Board right-to-access cases. Not surprisingly, the Board—whose official expertise is solely the administration of the NLRA—is not well-suited to decide issues of state property law. The result is delay, poor administration of the NLRA, and possible interference with state property rights. Therefore, this Article proposes a rule that eliminates the issue of state property law from the Board’s right-to-access cases and, instead, focuses on the *manner* in which the employer tried to remove the organizers. In short, the Board would no longer consider state property rights; instead, it would presume that an employer’s peaceful request to stop organizing activity on what appears to be its property is lawful, and presume that any action going beyond such a request violates the NLRA.<sup>3</sup> This change would provide both organizers and employers clarity in understanding the consequences of their actions. Moreover, the proposal would allow for better enforcement of labor rights and eliminate a source of federal encroachment on state property law.

Although concern for property interests vis-à-vis government regulation has been strong for several decades,<sup>4</sup> the Supreme Court’s 2005 public use decision in *Kelo v. City of New London*<sup>5</sup> set off a storm of popular criticism indicating that this concern may be

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<sup>2</sup> Moreover, state property law may limit property owners’ ability to exclude organizers under theories such as consent or privilege. See Restatement (Second) of Torts §§ 10, 892A; *infra* note 225.

<sup>3</sup> See *infra* Section II.A.

<sup>4</sup> As early as 1965, Professor Gould—prior to becoming NLRB Chairman—noted that, although “subject to reasonable use in other areas of the law, curiously the concept of property rights has become a rallying cry in the field of labor law” that traditionally provided “an absolute defense against those who would engage in union activity.” William B. Gould, *Union Organizational Rights and the Concept of “Quasi-Public” Property*, 49 MINN. L. REV. 505, 509 (1965).

<sup>5</sup> 125 S. Ct. 2655 (2005).

growing.<sup>6</sup> That potential growth is significant, as attempts to protect property rights have already imposed substantial limits on the enforcement of various areas of law, particularly labor.<sup>7</sup> A series of Supreme Court holdings<sup>8</sup> has used private property rights to circumscribe the Board's ability to protect federal labor rights; ironically, however, the Board's attempt to follow that precedent harms property interests through the delay and inexpert judgments that one would expect from a federal labor agency's interpretation of state law.

The problem with the Board's current analysis is more prevalent and serious than one might imagine. Many employers have worksites that are on, or near, property that they do not fully control. For instance, a mall employer may lack control over nearby walkways and parking lots, as well as the store property itself.<sup>9</sup> Moreover, states have widely differing laws regulating the use of certain types of property. Pennsylvania, for example, allows public use of a public right-of-way only to the extent that the activity is expressly authorized by the relevant municipality and permits an abutting landowner to

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<sup>6</sup> See, e.g., Tresa Baldas, *States Ride Post-'Kelo' Wave of Legislation*, NAT'L L.J. (Aug. 2, 2005) (describing development in various states to prevent use of eminent domain for private development in response to popular criticism of *Kelo*).

<sup>7</sup> As stated by Professor Estlund, "[t]he history of labor law has been, in large measure, the history of property rights." Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305, 306 (1994); see *supra* note 4.

<sup>8</sup> See *infra* Section I.

<sup>9</sup> See *Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd.*, 257 F.3d 937, 942-43 (9th Cir. 2001) (holding that employer lacked right to exclude from sidewalk that it built on its private property, based on terms of agreement with city to widen road in front of casino); *UFCW v. NLRB (Farm Fresh)*, 222 F.3d 1030, 1034-36 (D.C. Cir. 2000) (noting that employer's no-solicitation rule applied to entrances of mall stores with different leases providing varying levels of control, and positing that state would recognize "something akin to an implied easement of necessity" for lessee/employer); *Weis Mkts.*, 325 N.L.R.B. 871, 883-85 (1998) (concluding that Pennsylvania law does not give employer right to exclude union picketers because it had right to use common areas), *enforcement denied in relevant part*, 265 F.3d 239 (4th Cir. 2001); *Great Am.*, 322 N.L.R.B. 17, 20, 22-23 (1996) (picketing near mall parking lot entrance where "record [did] not clearly establish whether the handbillers were standing on public or private property"); *Food for Less*, 318 N.L.R.B. 646, 649-50 (1995) (concluding that employer lacked right-to-exclude under state law, despite maintenance of parking lot under lease), *enforced in relevant part sub nom. O'Neil's Mkts. v. UFCW*, 95 F.3d 733, 739 (8th Cir. 1996). Other examples include entrances or driveways to a worksite that are subject to some public use. See *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237, 239 (6th Cir. 1995) (union handbilling on state property over which employer possessed easement).

exclude any unauthorized activity.<sup>10</sup> In contrast, New Jersey affirmatively provides the right to enter private property to gain access to employees residing on that property.<sup>11</sup> California courts are currently unable to agree on the extent to which the state permits union access to private property.<sup>12</sup> In sum, the complexity of state property laws has bewildered the Board and, perhaps more importantly, has created grave uncertainty for both employers and organizers, who cannot know whether their actions will violate the NLRA until the culmination of years of confusing and protracted litigation.

The proposal seeks to eliminate that confusion by removing state property law issues from the Board's docket. Even under the Court's current right-to-access jurisprudence, an employer's state property rights are generally distinct from federal labor interests. Thus, the proposal intends to focus the Board's attention away from state property law to where it belongs: the effect of an employer's exclusion of organizers on employees' ability to exercise their rights under the NLRA. The Board's failure to distinguish these two distinct rights has led to the quagmire in which it now finds itself. The proposal would free the Board, and federal courts of appeal, from the burden of having to delve into state property law issues in which neither possesses expertise. It would also provide states better control over their own property law, while conserving valuable Board and federal court resources. Further, the proposal would drastically lessen the uncertainty for both employers and organizers in right-to-access cases. Rather than the legality of their actions remaining uncertain pending litigation, the parties would likely know *ex ante* whether the Board would find their conduct permissible. The result

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<sup>10</sup> See *infra* notes 85-87 and accompanying text.

<sup>11</sup> *State v. Shack*, 58 N.J. 297, 308 (1971).

<sup>12</sup> See *infra* notes 97-111 and accompanying text.

would be less litigation resulting from right-to-access disputes that are more peaceful and less likely to infringe employees' NLRA rights.

Part I of this Article discusses the current right-to-access scheme's development and critiques the Board's interpretation of Supreme Court precedent. Part II describes the proposal and its presumptions' application to typical factual scenarios. Finally, Part III shows why Board enforcement of the proposal would not constitute an unconstitutional taking.

## I. THE CURRENT RIGHT-TO-ACCESS ANALYSIS

### A. *The Road to Lechmere*

The starting point for the Board's current right-to-access analysis is *NLRB v. Babcock & Wilcox Co.*<sup>13</sup> At issue in *Babcock* were employer refusals to allow nonemployee union organizers to distribute literature in company parking lots.<sup>14</sup> The Board concluded that the refusals violated Section 8(a)(1) of the Act by "unreasonably imped[ing]" employees' right to self-organization.<sup>15</sup> The Supreme Court reversed, holding that employer private property rights trumped the union's organizational rights.

The Board had found that the refusals to allow distribution of union literature were unlawful because the workplace was the most effective location for employees to

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<sup>13</sup> 351 U.S. 105 (1956).

<sup>14</sup> *Id.* at 106. Although this Article refers to "nonemployees" as individuals who are not employees of the targeted employer, the NLRA protects "any employee," including employees of a union or nontargeted employer. *See* 29 U.S.C. § 152(3); *see also* *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978) (holding that Section 7 applies outside of immediate employment context); Estlund, *supra* note 7, at 326.

<sup>15</sup> *Id.* 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. 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). An employer violates Section 8(a)(1) when its conduct tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *See* *Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1006 (9th Cir. 1995).

receive information necessary to freely choose whether to organize.<sup>16</sup> That finding was based on the *Republic Aviation* line of cases, which held that employers cannot generally restrict discussion of self-organization among employees during non-work time.<sup>17</sup>

*Republic Aviation* was one of the earliest cases addressing the tension between employees' federal labor rights and employers' right to control use of their property.<sup>18</sup>

Although, under certain circumstances, the exercise of labor rights trumped property rights under *Republic Aviation* and its progeny, employers' property interests fared much better in *Babcock*.

The Court rejected the Board's reliance on *Republic Aviation*, holding that its limitations on employer property interests did not apply to nonemployee conduct.<sup>19</sup>

Although employees had a direct right—a right that the Act explicitly grants to them—to discuss self-organization at their workplace, nonemployee union organizers did not.<sup>20</sup>

The only right nonemployee organizers possessed was a “derivative” right to discuss unionization with employees.<sup>21</sup> A derivative right is not expressly protected by the Act and exists only as a means to foster employees' exercise of their direct rights; in *Babcock*,

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<sup>16</sup> *Babcock*, 351 U.S. at 107. The exclusions were made pursuant to non-solicitation policies that were not enforced solely against unions. *Id.*

<sup>17</sup> *Id.* at 110, 113 (citing *LeTourneau Co.*, 54 N.L.R.B. 1253, 1262 (1944), *affirmed sub nom. Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801 (1945); *Peyton Packing Co.*, 49 N.L.R.B. 828, 843-44 (1943)); *see also* *Teletech Holdings, Inc.*, 333 N.L.R.B. No. 56, 2001 WL 209470, at \*2 (2001) (“A no-distribution rule which is not restricted to working time and to work areas is overly broad and presumptively invalid.”). Exceptions have always been made for production or disciplinary reasons. *See Babcock*, 351 U.S. at 110.

<sup>18</sup> *See Estlund, supra* note 7, at 307 & n.6, 347 (citing commentators and noting that *Republic Aviation* essentially created an employee forum at work, as long as discussion did not occur on work time and in work areas).

<sup>19</sup> 351 U.S. at 113 (noting that several courts of appeal had relied on distinction, which the Court held to be one of “substance”) (citing *NLRB v. Lake Superior Lumber Corp.*, 167 F.2d 147, 150 (6th Cir. 1948); *NLRB v. Seamprufe, Inc.*, 222 F.2d 858, 860 (10th Cir. 1955)).

<sup>20</sup> 351 U.S. at 113.

<sup>21</sup> *Id.* at 113 (“The right to self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others.”); *see* R. Wayne Estes & Adam M. Porter, *Babcock/Lechmere Revisited: Derivative Nature of Union Organizers' Right of Access to Employers' Property Should Impact Judicial Evaluation of Alternatives*, 48 SMU L. Rev. 349, 354-56 & n.3 (1995) (supporting and citing criticism of *Babcock's* employee/nonemployee distinction); Gould, *Quasi-Public*, *supra* note 4, at 512-13 (describing importance of union-employee contact at workplace).

the union had a derivative right to inform employees about self-organization, a prerequisite for employees' exercise of their direct right to freely choose whether to pursue collective representation.<sup>22</sup>

Despite its acknowledgement of the derivative right to communicate with employees, the Court severely limited the organizers' ability to exercise that right in the face of employer resistance. According to the Court, an employer's exclusion of nonemployee organizers from employer property is permissible if "reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and the employer's notice or order does not discriminate against the union by allowing other distribution."<sup>23</sup>

This rule, by itself, could have struck an equal balance between labor rights and property interests, but the Court's definition of a reasonable alternative favored the latter. In particular, the Court—disagreeing with the Board—held that contacting employees in public and at their homes through the telephone, letters, and meetings were reasonable alternatives to worksite communications.<sup>24</sup> Because these alternate methods were available to the union, the employer could lawfully stop the parking lot distributions.<sup>25</sup>

The Court acknowledged that the alternatives available to the union in *Babcock* provided a close question given that the balance between employer's property rights and

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<sup>22</sup> *Id.*

<sup>23</sup> 351 U.S. at 112; see generally Note, Jay Gresham, *Still As Strangers: Nonemployee Organizers on Private Commercial Property*, 62 TEX. L. REV. 111, 115-22 (1983) (describing development of reasonable alternatives analysis). Previously, an employer could not exclude organizers from its property if, for example, the property was an in-store public restaurant and the organizing activity was only an "incident to the normal use of" the restaurant. See, e.g., *Montgomery Ward & Co.*, 288 N.L.R.B. 126, 127 (1988) (*Montgomery Ward II*). However, the Board has overruled that precedent as unsustainable under *Lechmere*. See *Farm Fresh*, 326 N.L.R.B. 997, 999 (1998) (overruling *Montgomery Ward II* and rejecting dissent's argument that it survives *Lechmere* because it was based on antidiscrimination exception to employer's right-to-exclude), *petition for review granted on different grounds sub nom.* *UFCW v. NLRB (Farm Fresh)*, 222 F.3d 1030, 1033-34 (D.C. Cir. 2000).

<sup>24</sup> 351 U.S. at 111.

<sup>25</sup> *Id.* at 112.

employees' organization rights "must be obtained with as little destruction of one as is consistent with the maintenance of the other."<sup>26</sup> Yet, the Court suggested that its concern for employees' rights did not extend far.<sup>27</sup> In noting that the plants at issue were close to "well-settled" communities, the Court expressly recognized nonemployees' right to access employer property only in the very limited circumstances in which both the workplace and employees' living quarters were beyond the union's reach—such as a remote logging camp.<sup>28</sup>

For several decades following *Babcock*, the Board attempted to reconcile the decision with its right-to-access analysis.<sup>29</sup> Finally, in *Jean Country*,<sup>30</sup> the Board settled upon a test that it believed to be consistent with *Babcock*. The Board read *Babcock* and intervening Supreme Court decisions<sup>31</sup> as requiring the accommodation of property and labor rights to reflect the strength of the two interests in a given case; the test, therefore, balanced "the degree of impairment of the Section 7 right if access should be denied" with "the degree of impairment of the private property right if access should be granted."<sup>32</sup> Thus, an employer's attempt to exclude will more likely be lawful if the property is not generally open to the public.<sup>33</sup> Moreover, a significant factor in determining the impairment of labor rights was the "availability of reasonably effective

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 113; see generally William B. Gould, *The Question of Union Activity on Company Property*, 18 VAND. L. REV. 73, 102-03 (1964) (providing early analysis of "reasonable efforts" inquiry).

<sup>29</sup> See, e.g., *Fairmont Hotel*, 282 N.L.R.B. 139 (1986); see Estlund, *supra* note 7, at 316-19 (discussing post-*Babcock* development of Board law).

<sup>30</sup> 291 N.L.R.B. 11 (1988).

<sup>31</sup> See *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976) (holding that accommodation between Section 7 and property rights "may fall at differing points along the spectrum depending on the nature and strength of the respective . . . rights asserted in any given context"); *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972) (holding that Board's role is to seek proper accommodation between Section 7 rights and private property rights).

<sup>32</sup> *Jean Country*, 291 N.L.R.B. at 12, 14. The Board also emphasized that the Court had extended its *Babcock* rule to right-to-access cases that involved non-organizational activity. *Id.*

<sup>33</sup> *Id.* at 14, 16.

alternative means” of reaching the intended audience.<sup>34</sup> According to the Board, the availability of newspapers, radio, or television would constitute reasonable alternatives to direct contact only in exceptional cases.<sup>35</sup>

The *Jean Country* test reflected the Board’s regular practice of balancing employee and employer interests.<sup>36</sup> That balance, however, was short-lived. In *Lechmere, Inc. v. NLRB*,<sup>37</sup> the Court eliminated virtually any notion of balance by deeming nonemployee labor interests inferior to employer property rights in all but the most extraordinary circumstances.

In *Lechmere*, a union attempted to organize a retail store located in an open shopping mall.<sup>38</sup> After a full-page newspaper advertisement elicited little response, organizers placed handbills on cars parked in the mall lot most used by the store’s employees.<sup>39</sup> The mall owner immediately told the organizers to leave, citing its no-solicitation and handbilling rule.<sup>40</sup> Following more handbilling attempts that prompted the same response, the organizers moved to a nearby strip of publicland and distributed handbills to cars entering and exiting the parking lot before the mall opened and after it closed.<sup>41</sup> The handbilling, in addition to contacting employees via the state’s license-plate database, yielded only one employee-signed card seeking union representation.<sup>42</sup>

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<sup>34</sup> *Id.* at 14; *see also id.* at 13 (discussing other factors, such as Section 7 right at issue, type of property at issue, identity of target audience, possibility of affecting neutral employers, dilution of message, and costs of alternative means).

<sup>35</sup> *Id.* at 13 (citing *NLRB v. United Aircraft Corp.*, 324 F.2d 128, 130 (2d Cir. 1963) (emphasizing superiority of direct contact, and noting high costs of media alternatives)).

<sup>36</sup> *See, e.g., NLRB v. Gissel Packing Co.*, 393 U.S. 575, 617 (1969) (determining lawfulness of employer statements by balancing employer and employee rights).

<sup>37</sup> 502 U.S. 527 (1992).

<sup>38</sup> *Id.* at 529-30.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 530 & n.1.

<sup>41</sup> *Id.* at 530.

<sup>42</sup> *Id.*

The Board, acting on the union’s unfair labor practice charge alleging that the mall owner unlawfully barred the organizational activity from its property, applied the *Jean Country* test and found a violation of Section 8(a)(1).<sup>43</sup> The First Circuit enforced the Board’s order.<sup>44</sup> The Court reversed, however, holding that *Jean Country* was impermissible under the NLRA.

Although the Court recognized that nonemployee organizers possessed derivative Section 7 rights,<sup>45</sup> it emphasized *Babcock’s* distinction between employees’ right to discuss unionism among themselves and nonemployee attempts to inform employees about unionism.<sup>46</sup> According to the Court, under *Babcock*, “an employer cannot be compelled to allow distribution of union literature by nonemployee organizers on his property,” unless no reasonable alternatives are available.<sup>47</sup> Despite acknowledging its own line of cases citing *Babcock’s* emphasis that both employee and employer rights should be accommodated,<sup>48</sup> the Court held that this precedent did not curb “*Babcock’s* holding that an employer need not accommodate nonemployee organizers unless the employees are otherwise inaccessible.”<sup>49</sup>

This interpretation of *Babcock* struck down the Board’s *Jean Country’s* balancing test. Where, as in *Republic Aviation*, an employer attempts to prevent employee -only discussions, the Court conceded the Board’s authority to balance employees’ right to

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<sup>43</sup> *Lechmere, Inc.*, 295 N.L.R.B. 94, 94, 98-99 (1988) (concluding also that attempts to exclude union from public property were unlawful).

<sup>44</sup> 914 F.3d 313 (1st Cir. 1990).

<sup>45</sup> *Lechmere*, 502 U.S. at 532.

<sup>46</sup> *Id.* at 533, 537; *see supra* note 19; *infra* note 55.

<sup>47</sup> 502 U.S. at 533.

<sup>48</sup> *Id.* at 534, 535 (citing *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 205 (1978); *Hudgens*, 424 U.S. 521-22 (“[T]he locus of that accommodation . . . may fall at differing points along the spectrum depending on the nature and the strength of the respective § 7 rights and private property rights asserted in any given context.”); *Central Hardware*, 407 U.S. at 544; *Babcock*, 351 U.S. at 112 (holding that accommodation of different rights “must be obtained with as little destruction of one as is consistent with the maintenance of the other”)). *See supra* note 31

<sup>49</sup> 502 U.S. at 534.

discuss to unionization against an employer's right to control use of its property.<sup>50</sup>

However, where communication with nonemployees was involved, "the Board [is] not permitted to engage in that same balancing."<sup>51</sup> Rather, the *Lechmere* Court construed *Babcock* as proscribing any balance or accommodation of nonemployees' derivative right to contact employees as long as reasonable alternatives exist—"[i]t is *only* where access is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees' and employers' rights."<sup>52</sup>

*Lechmere* has become the foundation for all subsequent right-to-access cases. One reason is its reaffirmation that nonemployees have a derivative right to discuss unionization with employees.<sup>53</sup> More important, however, is its conclusion that this derivative right is vastly inferior to employees' direct right to discuss unionization. The stated rationale for this disparity was simply that employee activity is fundamentally different from nonemployee conduct.<sup>54</sup> The Court's failure to explain this distinction further is not surprising, as it is a difficult holding to defend.<sup>55</sup>

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<sup>50</sup> *Id.* at 537.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 537-38 (stating also that "reasonable" means anything that did not require "extraordinary feats to communicate with inaccessible employees"). In the face of *Lechmere's* broad construction of reasonable means, others have noted that most alternatives are often vastly inferior to direct contact with employees at work. See *infra* note 74. Moreover, one of the major alternatives cited in *Lechmere*—obtaining employee information from license-plates—is now illegal under the federal Driver's Privacy Protection Act of 1994. See 29 U.S.C. § 2724(a) (stating that it is generally unlawful to "knowingly obtain[] . . . personal information, from a motor vehicle record"); *Judge Allows Cintas Workers To Bring Class Action Against UNITE HERE, Not IBT*, 105 DAILY LABOR REPORT (BNA), June 2, 2005, at AA-2 (discussing class action suit against union for obtain home addresses from employee license-plates). Eliminating that option further undermines *Lechmere's* conclusion that alternative means, such as signs in a nearby public area or advertisements, would be sufficient to communicate with workers of a particular employer. See *Lechmere*, 502 U.S. at 540.

<sup>53</sup> *Id.* at 532; see also *UFCW v. NLRB*, 74 F.3d 292, 298 (D.C. Cir. 1996) (holding that derivative access rights result "entirely from on-site employees' § 7 organizational right to receive union-related material").

<sup>54</sup> 502 U.S. at 532.

<sup>55</sup> See Alan L. Zmija, *Union Organizing After Lechmere, Inc. v. NLRB—A Time To Reexamine the Rule of Babcock v. Wilcox*, 12 Hofstra Lab. L.J. 65, 101 (1994) (criticizing employee/nonemployee distinction). The Board, pre-*Lechmere*, distinguished workers who were on an employer's property pursuant to a working relationship versus individuals who were "strangers to the property." See *S. Servs.*, 300 N.L.R.B.

The difference cannot be whether a trespass occurred, for both employee and nonemployee organizers can be trespassers.<sup>56</sup> Nor can the distinction rely on employees' regular access to the employer's worksite, as nonemployees possess similar access to employer property regularly open to the public. One might think, given the context and reasoning of *Babcock*, that the distinction is based on derivative versus direct rights.<sup>57</sup> The Board's post-*Lechmere* cases, however, have made clear that nonemployee activity, even if directly protected, receives less protection vis-à-vis property rights than employee activity.

*Lechmere* did not address whether its analysis applied to nonorganizational union activity such as area standards, recognition, or publicity picketing—conduct, unlike

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1154, 1155 (1990) (concluding that subcontractor's employee could not be barred from principal employer's property), *enforced*, 954 F.2d 700, 705 & n.5 (11th Cir. 1992). *But see* New York New York, LLC v. NLRB, 313 F.3d 585, 589 (D.C. Cir. 2002) (questioning continued viability of *Southern Services* after *Lechmere's* "express reaffirmation of the employee/nonemployee distinction"). *New York New York* stated that distinction works because Section 7 provides employees with a limited property right to engage in organizational activity on their employer's property. 313 F.3d at 589. That right to organize means that employees are not trespassers; nonemployees, however, lack that right and are considered trespassers. *Id.* This begs the question, however, of *why* Section 7 provides employees, but not nonemployees, that right. *See infra* notes 58-66 and accompanying text.

<sup>56</sup> The Court, in a different context, has distinguished employees and nonemployees based on the argument that only nonemployees trespass. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 571 (1978). But, as then-Justice Rehnquist noted in dissent, the *Republic Aviation* employees could be considered trespassers if they violated the employer's conditions for entry. *Id.* at 581-82 (Rehnquist, J., *dissenting*); *see also New York, New York*, 313 F.3d at 589 (noting that employee could be trespasser because "conditional or restricted consent to enter land creates a privilege to do so only in so far as the condition or restriction is complied with") (quoting Restatement (Second) of Torts § 168); *First Healthcare Corp.*, 336 N.L.R.B. 646, 649 (2001) ("[A]ny employee engaged in activity to which the employer objects on its property, might be deemed a trespasser, not an invitee: the employer arguably is free to define the terms of its invitation to employees."), *enforced*, 344 F.3d 523 (6th Cir. 2003); Gresham, *supra* note 23, at 165 (stating that both employee and nonemployee conduct can be "trespassory; the important question is whether both or neither" should be privileged by NLRA).

<sup>57</sup> *See supra* notes 19-21 and accompanying text; *ITT Indus., Inc. v. NLRB*, 413 F.3d 64, 72-73 (D.C. Cir. 2005) (enforcing Board's conclusion that off-duty employee activity is covered by *Republic Aviation* because off-duty employees have "nonderivative" access rights). Another possible explanation is employees' economic dependency on their employer; thus, limits on employee discussions at the workplace more seriously threaten labor rights than limits on nonemployee activity. *Cf. NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (holding, with regard to employer threats, that Board must consider "the economic dependence of the employees on their employers, and the necessary tendency of the former . . . to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."). The Board's failure to regularly examine the effect of employers' exclusionary activity on employee rights suggests that this concern does not underlie the current analysis.

organizing, in which unions have a direct right to engage.<sup>58</sup> The Board ultimately concluded that *Lechmere* applied to virtually all nonemployee activity, even conduct that is directly protected.<sup>59</sup> According to the Board, the choice between the *Lechmere* or *Republic Aviation* analyses is based solely on whether employees or nonemployees were being excluded, no matter whether they were exercising a direct or derivative right.<sup>60</sup> This conclusion rested on the Board's view that, given *Lechmere's* refusal to protect nonemployee organizers, it would be odd to require greater access for nonemployees engaged in less respected nonorganizational activity.<sup>61</sup> Thus, under the Board's analysis,

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<sup>58</sup> See *Great Am.*, 322 N.L.R.B. 17, 18 & n.5 (1996) (consumer boycott and area standards picketing,—which attempts to convince employer to raise wages and work conditions to union norm for area); *Leslie Homes, Inc.*, 316 N.L.R.B. 123, 125, 127 (1995) (area standards handbilling); *Bristol Farms, Inc.*, 311 N.L.R.B. 437, 438 n.8 (1993) (publicity picketing—which informs public about union's dispute with employer) (citing *NLRB v. Teamsters Local 639 (Curtis Bros.)*, 362 U.S. 274, 281-282 (1960) (recognitional picketing—which attempts to convince employer to recognize union as employees' representative without Board election)); Robert A. Gorman, *Union Access to Private Property*, 9 HOFSTRA LAB L.J. 1, 22-23 (1992) (suggesting that *Lechmere* was not applicable to union appeals to customers).

<sup>59</sup> See *O'Neil's Mkts. v. UFCW*, 95 F.3d 733, 737 (8th Cir. 1996); *Leslie Homes*, 316 N.L.R.B. at 125, 127. The construction industry often presents a special case. The use of subcontractors may limit a private property owner's ability to restrict union access more than usual—for example, where a union representative is trying to contact members who are working for a subcontractor at the site. See *Wolgast Corp. v. NLRB*, 2003 WL 22146137, at \*6 (6th Cir. Sept. 16, 2003) (Table); see also Roger D. Hughes *Drywall*, 344 N.L.R.B. No. 49, at 17 (2005) (stating that coercive employer conduct against unions interferes with rights of unrepresented employees, “even if those individual's interest are not congruent with, and even may be antithetical to, the interest of the [represented employees]”) (internal quotation marks omitted).

<sup>60</sup> *Metro. Dist. Council v. NLRB*, 68 F.3d 61, 75 (3d Cir. 1995); *Leslie Homes*, 316 N.L.R.B. at 129; see *UFCW v. NLRB (Oakland Mall II and Loehmann's Plaza II)*, 74 F.3d 292, 298-99 (D.C. Cir. 1996) (explicitly rejecting derivative versus direct rights distinction); Estlund, *supra* note 7, at 323-25, 350-52 (arguing that *Republic Aviation* should apply to union conduct directly protected by Act).

<sup>61</sup> *Leslie Homes*, 316 N.L.R.B. at 129 (stating that *Sears*, 436 U.S. at 206 & n.42, suggests that nonemployee area standards picketing is less favored than nonemployee organizational activity). The D.C. Circuit, in an opinion by Judge Edwards, agreed with this analysis. See *UFCW*, 74 F.3d at 293-94 (holding, in consumer boycott and area standards picketing cases, that “[u]nder established caselaw, it would make no sense to hold that nonemployees have a greater right of access when attempting to communicate with an employer's customers than when attempting to communicate with an employer's employees.”). *UFCW* reflects a hierarchy under which nonemployees' interest in communicating with customers is considered weaker than the nonemployees' interest in communicating with employees. *Id.* at 298 & n.5. Indeed, some courts have expressed doubt whether *Babcock's* discrimination exception applies to nonemployees engaged in nonorganizational activity. See *Central Hardware Co. v. NLRB*, 407 U.S. 539, 545 (1972) (stating that “the principle of accommodation announced in *Babcock* is limited to labor organization campaigns”); *Be-Lo Stores v. NLRB*, 126 F.3d 268, 284 (4th Cir. 1987) (citing *UFCW*, 74 F.3d at 300; *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457, 465 (6th Cir.1996)). But see Stephanie Goss John, *Oakland Mall, Ltd.: A Further Limitation of Union Access to Private Property*, 57 La. L. Rev.

nearly all protected employee activity is shielded from employer interference pursuant to *Republic Aviation*.<sup>62</sup> Nonemployee conduct, whether directly or derivatively protected, is subject to employer interference under the *Lechmere* scheme.

By refusing to focus on derivative versus direct rights, the Board has put itself in a logical bind. The Board has felt constrained by the Court's statement that directly protected nonemployee conduct such as publicity picketing is given less weight than nonemployee organizational activity.<sup>63</sup> A derivative/direct analysis would therefore give the "weaker" nonorganizational conduct, although a direct right, more protection against employer property interests than derivative, organizational activity.<sup>64</sup> Rather than questioning the efficacy of this hierarchy rationale,<sup>65</sup> the Board has embraced a circular logic under which nonemployee organizational activity has little protection because it is a derivative right, but directly protected nonemployee conduct also lacks protection because the hierarchy places it below organizational activity. There may be good reasons for this employee/nonemployee analysis,<sup>66</sup> but the Board has yet to express any.

This failure is all the more frustrating because the employee/nonemployee distinction is increasingly problematic in the modern workforce. The growing use of

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361, 375 (1996) (criticizing extension of *Lechmere* to non-organizational activity); Zmija, *supra* note 55, at 127-28 (same).

<sup>62</sup> See *infra* note 67 (discussing off-duty employees).

<sup>63</sup> *Sears*, 436 U.S. at 206 & n.42.

<sup>64</sup> See *supra* note 61.

<sup>65</sup> The hierarchy theory does not fit well with *Lechmere*. If *Lechmere* was based upon a hierarchy of rights, *Jean Country's* balancing test—which expressly considered the strength of the Section 7 interests at stake—should have been appropriate. Instead, *Lechmere* held that no balancing was required because the union's derivative rights were satisfied as long as reasonable alternatives exist. See *supra* note 52. Moreover, although organizing activity is obviously a primary concern of the NLRA, the basis provided for the hierarchy distinction—that area standards, recognition, and publicity activity were recognized later than organizational activity—makes little sense. The date a right was recognized under the Act should not govern the respective strength of that right.

<sup>66</sup> See *Hudgens v. NLRB*, 424 U.S. 507, 521 n.10 (1976) (distinguishing nonemployee organizing from *Republic Aviation* employee activity because under former, "employer's management interests rather than his property interests were . . . involved. This difference is 'one of substance.'" (quoting *Babcock*, 351 U.S. at 113).

contractors, telecommuters, and other novel work relationships blur the distinction between employees and nonemployees, particularly where access to property is at issue.<sup>67</sup> Yet, no matter its justification, the employee/nonemployee distinction is undeniably the basis for post-*Lechmere* right-to-access cases. The distinction's significance is critical because it suggests that the Board's primary consideration in right-to-access cases should be determining whether excluded organizers<sup>68</sup> are employees, *not* the extent of the employer's property interests under state law. The Board's current analysis, however, has proved otherwise.

#### B. *The Board's Current Analysis*

The Board's struggle to apply *Lechmere* has led to a right-to-access analysis that makes little sense doctrinally or practically. The Board's approach generally consists of a single inquiry: did the employer possess a state private property right that entitled it to exclude the nonemployee organizers? For most cases, if the employer possessed such a right, no violation of the NLRA occurred. If the employer lacked that right, then it automatically violated Section 8(a)(1).

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<sup>67</sup> For example, although a telecommuter may clearly be an employee, should she receive the same right to access a worksite as nontelecommuters? Also, should a contractor who works alongside other employees at a site be given the same access rights? See *New York New York*, 313 F.3d at 585 (holding that issue is uncertain because "[n]o Supreme Court case decides whether a contractor's employees have rights equivalent to the property owner's employees . . . because their worksite, although on the premises of another employer, is their sole place of employment"). Off-duty employees are another source of confusion. Currently, an employer is able to restrict off-duty employees' access only with respect to the inside of a facility or other working areas, where the restriction is clearly disseminated to employees, it applies to all activities, and it is justified by valid business reasons. See *Teletech Holdings, Inc.*, 333 N.L.R.B. No. 56, at 4 (2001); *Tri-County Med. Ctr.*, 222 N.L.R.B. 1089, 1090 (1976). In contrast to nonemployee organizers, the Board considers off-duty employees, even those who do not work at the site in question, to have a nonderivative right to access the property. See *First Healthcare Corp.*, 336 N.L.R.B. 646, 648 (2001), *enforced*, 344 F.3d 523 (6th Cir. 2003); *accord ITT Indus., Inc. v. NLRB*, 413 F.3d 64, 72-73 (D.C. Cir. 2005). However, an employer's property concerns will be given more weight where the off-duty employee works at a different site. *First Healthcare*, 336 N.L.R.B. at 650.

<sup>68</sup> This Article will generally refer to excluded activity as organizational. Although other nonemployee conduct may be involved and similarly analyzed, organizational activity is more common. See *supra* notes 58-67 and accompanying text.

It makes little sense to require the Board—and reviewing federal courts of appeal—to rest their decision on an often complicated area of state law. The Board’s expertise does not encompass state property issues and its treatment of those issues bears out that reality. The resulting delay, and frequently inadequate analysis, harms not only the labor interests at stake, but state property interests as well. Even beyond these practical concerns, the current analysis appears wrong as a matter of law. Although ostensibly derived from *Lechmere*, the scheme runs counter to the analytical underpinnings of that decision. The proposal here attempts to reconcile the right-to-access inquiry with *Lechmere*, while also mitigating these practical concerns.

The Board’s response to *Lechmere* has been to create a strict dichotomy. Where nonemployee organizers are engaged in activity on property that the employer controls, *Lechmere* applies. In those circumstances, virtually any attempt by the employer to remove the organizers will be lawful, as long as reasonable alternatives to reach employees exist and the employer does not discriminatorily enforce its no-solicitation policy. The initial question for the Board, therefore, is whether state law provides the employer the right to remove the organizers from the property at issue.

The importance of this state law issue is heightened by the other side of the dichotomy. If the organizers are on property over which the employer lacks a right-to-exclude—a situation that *Lechmere* did not address—the Board has determined that the *Lechmere* analysis does not apply.<sup>69</sup> Thus, virtually any attempt by the employer to remove organizers from such property will automatically be unlawful.<sup>70</sup>

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<sup>69</sup> *NLRB v. Calkins*, 187 F.3d 1080, 1088 (9th Cir. 1999). However, even where the employer fails to show that it possesses a right-to-exclude, there are instances where the removal of nonemployee organizers does not violate the NLRA—for example, where the organizers are blocking access to the employer’s retail store or causing traffic problems. *See In re CSX Hotels, Inc.*, 340 N.L.R.B., No. 92, 2 (2003) (justifying

The significance of this analysis is its requirement that the Board address state property law in every case. That determination, moreover, is almost always dispositive.<sup>71</sup> The Board's interpretation of a lease, its construction of a state's treatment of public rights-of-way, or its factual determination of where the organizers were standing will either trigger *Lechmere* and make the employer's attempt to exclude lawful, or evade *Lechmere* and make the exact same attempt unlawful. This analysis is frustrating for the parties, as they cannot reasonably predict, *ex ante*, the Board's determination of the state law issue.

In addition to the practical concerns raised by the Board's reliance on state law, its current dichotomy makes little sense under *Lechmere*. The problem does not lie with *Lechmere*'s holding that employers need not permit access as long as reasonable alternative means to communicate with employees exist. Rather, the difficulty arises with the Board's categorical refusal to acknowledge the logic of this holding—if the existence of reasonable alternatives satisfies nonemployee organizers' derivative right to contact employees, then that right is satisfied no matter where organizing activity is located when the employer tries to stop it. The derivative right analysis should be the same whether the organizers are standing on property that the employer controls or on property, such as the public grassy strip in *Lechmere*, over which the employer lacks

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exclusion based on traffic problems); *Great Am.*, 322 N.L.R.B. 17, 20-21 (1996) (justifying exclusion based on traffic blockage and impeding customers' entry and exit).

<sup>70</sup> See, e.g., *Calkins*, 187 F.3d at 1088 (“Where state law does not create [an interest allowing the employer to exclude organizers], access may not be restricted consistent with Section 8(a)(1).”).

<sup>71</sup> See *O’Neil’s Mkts. v. UFCW*, 95 F.3d 733, 738-39 (8th Cir. 1996) (stating that “*Lechmere* leaves undisturbed previous Board holdings that an employer lacking the right to exclude others from certain property violates Section 8(a)(1) when it removes section 7 actors from those areas”) (citing *Johnson & Hardin Co.*, 305 N.L.R.B. 690 (1991), *enforced*, 49 F.3d 237 (6th Cir. 1995)); *Bristol Farms, Inc.*, 311 N.L.R.B. 437, 437-38 (1993) (concluding that it is “beyond question” that, under *Lechmere*, an employer’s exclusion of organizers from public or private property over which it lacks state right- to-exclude violates Section 8(a)(1)).

control. Simply put, if reasonable alternatives exist that satisfy the organizers' derivative right, no employer attempt to exclude them can infringe that right under *Lechmere*.

The Board's continued insistence that employers automatically violate Section 8(a)(1) by excluding organizers from property over which they lack a right-to-exclude under state law<sup>72</sup> purports to respect both state property law and labor law. In practice, however, neither interest is served.

To be sure, property rights were a major concern of *Lechmere*. Yet, if one takes seriously the Court's statement that "[Section] 7 simply does not protect nonemployee union organizers *except* in the rare case where" reasonable alternatives are unavailable,<sup>73</sup> the Board's analysis is incorrect. Where Section 7 does not protect union organizing, any employer interference with that activity is, by itself, lawful —no matter its location.

This Article concedes that holding<sup>74</sup> and argues that the Board, instead of looking to state property law, should focus on the whether the *manner* in which an employer excludes organizing activity interfered with employees' right to freely choose whether to

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<sup>72</sup> See *supra* note 71. The analysis reflects the Board's view that *Lechmere* is applicable only where there is a conflict between employer property interests and labor rights. See *Indio Grocery Outlet*, 323 N.L.R.B. 1138, 1141 (1997), *enforced*, 187 F.3d 1080 (9th Cir. 1999). As shown, however, *Lechmere* limited the scope of union's derivative right—and, therefore, an employer's ability to interfere with that right—even where employer property interests are not present.

<sup>73</sup> *Lechmere*, 502 U.S. at 537.

<sup>74</sup> This concession is not an endorsement. Because *Lechmere* is likely to remain for the foreseeable future, this Article accepts it as settled law; however, the decision, particularly its extraordinarily broad view of "reasonable alternatives," has been widely criticized. See *id.* at 542-44 (arguing that *Babcock's* definition of reasonable efforts was not limited to remote logging camp situations) (White, J., *dissenting*); Estes & Porter, *supra* note 23, at 363-66 (criticizing holding that employee notice of organizational campaign satisfies derivative right); Estlund, *supra* note 7, at 332 (arguing that effective organizing requires worksite communication with employees); Zmija, *supra* note 55, at 113-16 (criticizing *Lechmere's* reasonable-alternatives test); Gorman, *supra* note 58, at 12 (stating that "the *Babcock & Wilcox* Court did not at all state that the [reasonable alternatives] standard was well-nigh impossible to satisfy, as the Court now portrays it in *Lechmere*"). But see Comment, Michael L. Stevens, *The Conflict Between Union Access and Private Property Rights: Lechmere, Inc. v. NLRB and the Question of Accommodation*, 41 Emory L.J. 1317, 1340-47 (1992) (arguing that *Lechmere* properly rejected *Jean County's* balancing approach and reasonable-alternatives analysis).

pursue collective representation.<sup>75</sup> This proposal more accurately reflects *Lechmere* and avoids the myriad problems associated with the current practice of making an employer's state property rights dispositive. Indeed, the proposal would eliminate state law from the Board's analysis of right-to-access cases.<sup>76</sup> The Board's past treatment of state property law shows that this change would significantly benefit the enforcement of federal labor rights, the administration of the Board and federal courts' adjudicatory processes, and the independence of state property law.

### C. *The Board's Difficulties with State Property Law*

Although the Board's task in applying *Lechmere* is not enviable,<sup>77</sup> its designation of state property law as the dispositive issue makes little sense. The Board's expertise is solely in federal labor law and does not include the vagaries of over fifty different property regimes. It is not surprising, therefore, that Board resolution of these cases is much slower than usual.<sup>78</sup> The reason for this delay, as well as the possibility of federal interference with state property law, are well-illustrated by the following two cases.

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<sup>75</sup> The Board, on occasion, has suggested that it would consider the effect on employees' general Section 7 rights, but its analyses ultimately fail to provide any consideration of non-derivative rights. *See, e.g.,* Home Depot, U.S.A., Inc., 317 N.L.R.B. 732, 733 (1995) (stating issue as "whether the rights of employees were affected by the actions taken by" employer, but finding no effect solely because employer possessed right to exclude organizer, did not deny employees access to union information, and did not discriminatory apply no solicitation rule).

<sup>76</sup> The proposal would not leave union organizers without recourse. Rather, it would require the Board to look not to state property law, but to whether the employer's attempt to remove the union infringed on employees' labor rights. *See infra* Section II.

<sup>77</sup> *See* Estlund, *supra* note 7, at 341.

<sup>78</sup> The Board consistently takes substantially longer to decide *Lechmere*-related unfair labor practices cases than normal. The median number of days from the filing of the charge to a Board decision in *Lechmere* cases compared to all Board unfair labor practice cases (including *Lechmere* cases) over the most recently reported ten-year period is as follows: Fiscal Year 2004 (865 median days for *Lechmere* cases; 690 median days for all cases); FY2003 (1132 *Lechmere*; 647 all); FY2002 (812 *Lechmere* (only one case); 889 all); FY2001 (1502 *Lechmere*; 1144 all); FY2000 (1351 *Lechmere*; 878 all); FY1999 (1128 *Lechmere*; 747 all); FY1998 (1212 *Lechmere*; 658 all); FY1997 (928 *Lechmere*; 557 all); FY1996 (943 *Lechmere*; 591 all); FY1995 (1725 *Lechmere*; 586 all); FY1994 (755 *Lechmere*; 503 all). 59-69 NLRB ANNUAL REPORTS (1995-2005).

At issue in *Snyder's of Hanover v. NLRB*,<sup>79</sup> was the employer's attempt to exclude union organizers from a public right-of-way located next to the entrance of its snack-food plant. Before arriving at the plant, the organizers called the state department of transportation and local township—both of which confirmed that the organizers could distribute handbills from the right-of-way.<sup>80</sup> Subsequently, as the organizers distributed handbills to employees from the right-of-way, the employer demanded that the organizers leave and, after they refused, called the police.<sup>81</sup> The responding officer contacted an assistant district attorney, who stated that the organizers had a right to handbill in the right-of-way as long as they were peaceful and did not interfere with traffic.<sup>82</sup>

The union subsequently filed an unfair labor practice charge with the Board alleging that the employer violated Section 8(a)(1) by prohibiting organizers from handbilling on the right-of-way and by calling the police to remove them.<sup>83</sup> At first blush, this appeared to be an easy case. The organizers were told by government officials that they could handbill in a public right-of-way. Thus, the employer seemed to lack a property interest sufficient to invoke *Lechmere* which, under the Board's current analysis, meant that the attempt to stop the handbilling was unlawful. What developed during litigation, however, reveals how state property law issues can be far more complex than they first appear—and why those issues are best left to state courts rather than a federal agency specializing in labor law.

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<sup>79</sup> 334 N.L.R.B. 183 (2001), *enforcement denied in relevant part*, 39 Fed.Appx. 730 (3d Cir. 2002).

<sup>80</sup> *Id.* at 185.

<sup>81</sup> 39 Fed.Appx. at 731-32.

<sup>82</sup> *Id.* at 732.

<sup>83</sup> 334 N.L.R.B. at 183; *see infra* note 121 (discussing whether calling police still violates NLRA). The union also charged the employer with unlawfully engaging in surveillance of employees receiving the handbills; the Third Circuit enforced the Board's finding that the surveillance violated Section 8(a)(1). *See* 39 Fed.Appx. at 735-37; *infra* notes 166-175 and accompanying text (discussing surveillance).

As the employer itself failed initially to realize, Pennsylvania’s treatment of the public’s right to use a right-of-way is counter-intuitive.<sup>84</sup> In Pennsylvania, a landowner owns to the middle of an abutting street, “subject only to an easement of public use.”<sup>85</sup> The scope of that easement is defined entirely by the relevant municipality’s authorization of a given use by the public.<sup>86</sup> Any use not expressly permitted by the municipality may be stopped by the landowner.<sup>87</sup> In *Snyder’s*, the Board found that the employer’s attempt to stop the handbilling was unlawful because it failed to provide any evidence of such authorization and thereby failed to satisfy its burden to show that it possessed a right-to-exclude.<sup>88</sup> The Third Circuit—via a panel including then-Judge Alito—disagreed, holding that the employer did not bear the burden of proving what the municipal code permitted, and that the court’s interpretation of the code showed no express authorization of union handbilling on public rights-of-way.<sup>89</sup>

The convoluted nature of this analysis illustrates the difficulties encountered by the Board and courts when they have to examine state property law. Indeed, the issue in *Snyder’s* was more complicated than either the Board or court acknowledged, as neither addressed whether the permission to handbill given to the organizers by local and state officials constituted “authorization” under Pennsylvania law.<sup>90</sup>

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<sup>84</sup> 334 N.L.R.B. at 187 n.8 (noting that employer raised issue after hearing).

<sup>85</sup> *Id.* at 183 n.4 (quoting *City of Philadelphia v. Street*, 63 Pa. D. & C.2d 709 (1974)).

<sup>86</sup> *Id.*; *accord* 46 S. 52nd St. Corp. v. Manlin, 398 Pa. 304, 312, 157 A.2d 381, 386 (1960).

<sup>87</sup> 39 Fed.Appx. at 733; *see* *Westinghouse Elec. Corp v. United Elec., Radio & Machine Workers*, 353 Pa. 446, 455-56 (1946).

<sup>88</sup> 334 N.L.R.B. at 184.

<sup>89</sup> 39 Fed.Appx. at 734.

<sup>90</sup> 334 N.L.R.B. at 184.

Moreover, as the court noted, Pennsylvania’s expansive view of landowners’ control over public rights-of-way also raised constitutional concerns.<sup>91</sup> Accurately noting that the Board did not address this constitutional issue,<sup>92</sup> the court used this omission to justify its own avoidance of the issue.<sup>93</sup> That holding, alone, aptly demonstrates why state property law should not be resolved in federal labor cases. A serious constitutional right was at stake—whether a municipality can allow a landowner to stop expressive activity in a public right-of-way—yet the Board was unable, and the court unwilling, to address the issue. The court’s decision, in particular, was troubling, for it willingly approved interference with organizers’ expressive activity pursuant to a rule about which it had obvious constitutional misgivings. Eliminating state property law from the Board’s analysis would produce a far better outcome. Under the proposal here,<sup>94</sup> the Board would have examined only whether the employer’s actions chilled employees’ labor rights; any attempt to invoke or challenge Pennsylvania’s public rights-of-way rule would be determined by a state court that presumably would not be hesitant to entertain the constitutional issue.

A further issue in *Snyder’s* illustrates another complication in tackling state property law. Although the employer was named “Snyder’s of *Hanover*” and stated

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<sup>91</sup> 39 Fed.Appx. 733-34 (noting question whether municipality could prohibit leafleting in public right-of-way given that leafleting may be constitutionally protected) (citing *Manlin*, 398 Pa. at 313; Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 484 U.S. 568, 575-76 (1988)).

<sup>92</sup> What the court failed to recognize was that the Board could not address the issue, as it lacks the power to declare laws unconstitutional. *See Tressler Lutheran Home for Children v. NLRB*, 677 F.2d 302, 304 (3d Cir. 1982) (“We agree with the Board that it has no authority to rule on constitutional questions . . .”) (citing *Califano v. Sanders*, 430 U.S. 99, 109 (1977)); *see also Johnson v. Robison*, 415 U.S. 361, 368 (1974).

<sup>93</sup> 39 Fed.Appx. at 734. The court was not warranted in avoiding an issue that the Board could not address. *See Overstreet v. United Bhd. of Carpenters*, 409 F.3d 1199, 1209 (9th Cir. 2005) (holding that “because constitutional decisions are not the province of the NLRB . . . the tasks of evaluating the constitutional pitfalls of potential interpretations of the Act and of interpreting the Act to avoid those dangers are committed *de novo* to the courts”).

<sup>94</sup> *See infra* Part II.

throughout litigation that its plant was in Hanover Township, it argued for the first time in its reply brief to the court that its plant was actually in Penn Township.<sup>95</sup> The almost comical nature of this issue should not obscure the serious concern that it raises. If the dispositive property boundaries in a case are so confusing that the landowner itself is perplexed, we cannot expect an agency that specializes in federal labor law to accurately and efficiently resolve the matter. Enforcement of the NLRA and Pennsylvania property law would have been far better had a Pennsylvania court, not the Board, delved into these complicated state law issues.<sup>96</sup>

The extraordinarily limited ability to use a public right-of-way in Pennsylvania sharply contrasts with the broad right to access certain private property in California. In particular, California's prohibition against landowners barring uninvited expressive activity on private property that is generally open to the public provides further support for the elimination of state law questions from federal labor cases. This rule was implicated in *Walmart Foods*,<sup>97</sup> where to an even greater degree than *Snyder's*, the Board's current analysis led to a significant federal intrusion into state property law.

At issue in *Walmart* was whether California provided an employer the right to exclude union handbilling in front of its supermarket. Organizers, standing in the employer's parking lot, distributed handbills to customers urging them to boycott the store.<sup>98</sup> The employer responded by asking the organizers to leave and calling the

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<sup>95</sup> Compare Petitioner's Rely Brief, 2001 WL 34545824, at \*n.2 (Dec. 19, 2001), with Petitioner's Opening Brief, 2001 WL 34401696 (Sept. 18, 2001). The court took judicial notice of the fact that the facility was in Penn Township. 39 Fed.Appx. at 733.

<sup>96</sup> *Id.* at 734 n.1 (stating that Board possessed "specialty in labor law only . . . [but] issues of labor law are intricately tied to issues of state law . . . [and] the Board routinely plies its hand at interpreting state law, an area of law in which it has no expertise," yet holding that, unlike foreign law, Board should not require parties to prove state law as issue of fact).

<sup>97</sup> 337 N.L.R.B. 289 (2001), *enforcement denied*, 354 F.3d 870 (D.C. Cir. 2004) (*Walmart II*).

<sup>98</sup> 354 F.3d at 871.

police.<sup>99</sup> Acting on the union’s subsequent Section 8(a)(1) charge, the Board found that the employer’s conduct was unlawful because it lacked a right-to-exclude under California property law.<sup>100</sup> That finding was based upon state court decisions holding that landowners could not unreasonably bar expressive activity on privately-owned shopping areas.<sup>101</sup>

The D.C. Circuit’s initial review of the Board’s decision noted that these cases were based on either a California statute, the California Constitution, or the federal Constitution.<sup>102</sup> The problem, according to the court, was that an intervening U.S. Supreme Court decision had undermined the federal constitutional rationale, and that subsequent California appellate courts had cast doubt on whether state law protected expressive activity on property near private, stand-alone stores.<sup>103</sup> The court, therefore, certified to the California Supreme Court two questions: whether California law permitted the employer to prevent expressive activity on its parking lot and walkways; and, if the employer generally possessed that right, whether California law carved out an

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<sup>99</sup> *Id.*

<sup>100</sup> 337 N.L.R.B. at 289 (citing *Sears, Roebuck & Co. v. San Diego District Council of Carpenters*, 25 Cal.3d 317 (1979) (*Sears II*)). See *infra* notes 191-208 and accompanying text for discussion of the case prior to remand.

<sup>101</sup> 354 F.3d at 872-73 (citing *Sears II*, 599 P.2d at 682) (holding that California’s “Moscone Act,” Cal. Civ. Proc. Code § 527.3, precluded injunctions against peaceful picketing on privately owned sidewalks); *Robins v. PruneYard Shopping Ctr.*, 592 P.2d 341, 347 (1979) (holding that California Constitution protected speech in private shopping centers), *affirmed*, 447 U.S. 74, 83-84 (1980); *In re Lane*, 475 P.2d 561, 565 (1969) (holding that union handbilling at stand-alone grocery store protected by federal First Amendment), *abrogated in relevant part by* *Hudgens v. NLRB*, 424 U.S. 507, 518-21 (1976); *Schwartz-Torrance Inv. Corp v. Bakery & Confectionery Workers’ Union*, 61 Cal. 2d 766 (1964) (suggesting state law rationale)).

<sup>102</sup> *Waremart Foods v. NLRB*, 333 F.3d 223, 225-27 (D.C. Cir. 2003) (*Waremart I*).

<sup>103</sup> *Id.* at 226 n.2, 227 (citing *Hudgens v. NLRB*, 424 U.S. 507, 518-21 (1976); *Albertson’s, Inc. v. Young*, 107 Cal. App.4th 106 (2003) (distinguishing *Robins* because private supermarket not like traditional public forum); *Young v. Raley’s, Inc.*, 107 Cal. Rptr. 2d 172, 179-82 (Cal. Ct. App. 2001) (same); *Waremart, Inc. v. Progressive Campaigns, Inc.*, 102 Cal. Rptr. 2d 392 (Cal. Ct. App. 2000) (same); *Trader Joe’s v. Progressive Campaigns, Inc.*, 86 Cal. Rptr. 2d 442, 448-49 (1999) (same)); see also *Golden Gateway Ctr. v. Golden Gateway Tenants Ass’n*, 29 P.3d 797, 809 & n.11 (Cal. 2001) (holding that *Lane* and *Schwartz-Torrance* based on federal, not California, Constitution)). *Young* and *Progressive Campaigns* were “depublished” by the California Supreme Court’s initial grant, then dismissal, of review. See *Waremart II*, 354 F.3d at 874 n.3.

exemption allowing union expressive activity related to a labor dispute with the landowner.<sup>104</sup>

Given California's own confusion, the D.C. Circuit's desire for clarification was understandable, but ultimately fruitless. The California Supreme Court refused to accept the certification, thereby forcing the federal court to make its own determination of state property law.<sup>105</sup> The court concluded that the primary California Supreme Court decision cited by the Board relied on a state anti-labor injunction statute, rather than the state constitution's protection of expressive activity.<sup>106</sup> Because two U.S. Supreme Court decisions had since ruled that special exemptions for labor picketing violated the First Amendment, the D.C. Circuit concluded that this state decision "cannot reflect current California law."<sup>107</sup> Thus, according to the D.C. Circuit, California no longer gave special protection to expressive activity occurring on property owned by the targeted employer.

The court then rejected the Board's argument that California generally limited a landowner's right to restrict expressive activity on its property. According to the court, the California Supreme Court decision supporting that argument was based on a federal constitutional interpretation that the U.S. Supreme Court later abandoned.<sup>108</sup> Particularly interesting was the D.C. Circuit's reliance on two California appellate courts that came to the same conclusion,<sup>109</sup> despite a Ninth Circuit decision to the contrary.<sup>110</sup>

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<sup>104</sup> *Walmart I*, 333 F.3d at 227-28 (questioning whether *Sears II* plurality established general right to expressive activity or special rule for labor activity).

<sup>105</sup> *Walmart II*, 354 F.3d at 871.

<sup>106</sup> *Id.* at 874 (holding that *Sears II* relied on *Moscone Act*).

<sup>107</sup> *Id.* at 875 (holding that "[w]e believe that if the meaning of the *Moscone Act* came before the California Supreme Court again, it would either hold the statute unconstitutional or construe it to avoid unconstitutionality") (citing *Carey v. Brown*, 447 U.S. 455 (1980); *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92 (1972)).

<sup>108</sup> *Id.* at 875 (citing *In re Lane*, 475 P.2d at 565; *Hudgens*, 424 U.S. at 518-21).

<sup>109</sup> *Id.* (citing *Albertson's*, 131 Cal. Rptr. 2d at 735, and *Trader Joe's*, 86 Cal. Rptr. 2d at 450).

Regardless of one’s view of the substance of the D.C. Circuit’s interpretation of California law, the analysis itself is disturbing. *Walmart* involved an initial construction of state law by a federal agency with expertise solely in labor law. That interpretation was reversed by a federal court that overruled a state supreme court decision based in large part on the holdings of two state appellate courts—even though the federal appeals court that hears most California federal cases ruled the other way.<sup>111</sup> It is hard to imagine a worse method to analyze state property law, yet this process is essentially required by the Board’s current right-to-access scheme.<sup>112</sup> Most seriously, ambiguities in state law are being resolved by federal agencies and courts, rather than state courts. Thus, the Board’s reliance on state law causes not only delay and unnecessary variance in the enforcement of federal labor rights, but also inexpert federal interference with state law.

The proposal here would drastically improve this situation by having the Board and federal courts look solely to federal labor issues, while leaving state property questions to state courts. There is little, if any, benefit from federal interpretation of state property law, particularly when originated by the Board. Moreover, federal labor policy suffers when its enforcement varies depending on geography. No labor policy is served by having an identical action considered lawful in some states, yet unlawful in others.

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<sup>110</sup> *Id.* at 875-76 (citing *NLRB v. Calkins*, 187 F.3d 1080, 1089-93 (9th Cir. 1999)). The D.C. Circuit also rejected the application of *Robins* because, unlike the shopping center there, the *Walmart* supermarket—a stand-alone store—could not constitute a traditional public forum. *See id.* at 876.

<sup>111</sup> *Walmart* also raises the threat that federal courts will limit state attempts to protect labor speech. *See* Aron Fischer, Comment, *Is the Right To Organize Unconstitutional?*, 113 *Yale L. J.* 1999, 2002 (2004) (“Taken at face value, the D.C. Circuit’s reasoning would seem to invalidate all state laws expanding the rights of nonemployee organizers.”); *cf.* Estlund, *supra* note 7, at 309 (arguing that, under *Lechmere*, NLRA cases may override state limits on landowners’ right-to-exclude) (citing *Rum Creek Coal Sales, Inc. v. Caperton*, 966 F.2d 353 (4th Cir. 1991)).

<sup>112</sup> *See supra* note 9 (citing complicated state property law issues); *see also* *Corporate Interiors, Inc.*, 340 N.L.R.B. No. 85 (2003) (concluding that employer unlawfully removed union picketers from public easement near employer’s office, because agreement with city to maintain area did not include right-to-exclude).

The proposal removes that inconsistency, thereby strengthening both the enforcement of federal labor policy and the autonomy of state property law.

## II. THE NEW PARADIGM: *HOW*—NOT *WHERE*—THE EMPLOYER EXCLUDES

Under the Board’s right-to-access dichotomy, employer interference with nonemployee activity on property that the employer controls is almost always lawful. If the activity is nontrespassory, virtually all employer interference is unlawful. The rationale of *Lechmere*, however, belies that framework. Under *Lechmere*, interference with organizing activity *never* violates nonemployees’ derivative rights unless the interference is discriminatory or eliminates all reasonable means to communicate with employees.<sup>113</sup> Accordingly, the proposal deems nonemployees’ derivative rights satisfied wherever reasonable alternatives exist.

Although a substantial modification of the Board’s current analysis, the proposal is consistent with both *Lechmere* and the Board’s reliance on the employee/nonemployee distinction. It would also respect *Lechmere*’s intent to protect employers’ property interests where organizers have other means of achieving their goal. Most important, it would eliminate the Board’s ineffective forays into state property law. Instead, the Board would concentrate on the issue it should have been addressing all along—whether the manner in which an employer tried to stop nonemployee activity infringed employees’ rights under the Act.

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<sup>113</sup> See *Waldbaum, Inc. v. United Farm Workers*, 383 N.Y.S.2d 957, 975 (N.Y. Sup. 1976) (holding that union’s picketing targeting one employer in shopping mall had no reasonable, alternative location to area in front of employer’s store); *supra* Section I.B.; *infra* notes 177-190 and accompanying text.

### A. *Presumptions of Interference*

With few exceptions,<sup>114</sup> the Board has not regularly examined whether the manner in which an employer attempts to exclude nonemployee activity would tend to chill employee rights. This omission is curious, as it is easy to imagine that an employer's exclusion of organizers would often hinder employees' willingness to seek collective representation. Indeed, a major shortcoming of *Lechmere* is its failure to acknowledge that virtually all exclusions negatively impact employees' Section 7 rights in some fashion.<sup>115</sup> However, recognizing *Lechmere* as controlling law, the proposal accepts its disregard of the derivate infringement of employee rights caused by an employer's elimination of an important source of information about collective representation. Yet, the proposal attempts to address the possible direct impact on Section 7 rights left untouched by *Lechmere*—where the employer's exclusion interferes with employees' willingness to pursue unionization.

Section 8(a)(1) prohibits any action by the employer that tends to coerce, restrain, or interfere with employees' Section 7 right of self-organization.<sup>116</sup> The central question for such a violation is whether the employer's conduct tends to be coercive; the existence of animus or actual coercion is irrelevant.<sup>117</sup> Given the lack of a good-faith defense, as well as employees' economic dependence on their employer, it is safe to assume that

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<sup>114</sup> See *infra* note 155.

<sup>115</sup> See Estlund, *supra* note 7, at 330-33.

<sup>116</sup> See *supra* note 15.

<sup>117</sup> The Supreme Court has long held that “[a] violation of [Section] 8(a)(1) alone . . . presupposes an act which is unlawful even absent a discriminatory motive.” *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965); *accord Retlaw Broad. Co. v. NLRB*, 53 F.2d 1002, 1006 (9th Cir. 1995) (holding that “[a]nti-union motive is not required” under Section 8(a)(1)).

certain attempts to bar organizing activity would tend to make an employee reasonably believe that a decision to unionize would be met with harsh consequences .<sup>118</sup>

The question, then, is what type of exclusionary conduct would tend to interfere with employees' rights? The Board addresses this kind of issue regularly and is well-equipped to do so in right-to-access cases. Although the Board could use a case-by case analysis, it seems far better to provide the parties, especially employers, with clear guidelines.<sup>119</sup> Employers would no longer face the unenviable choice of either allowing what may be a trespass on its property or attempting to protect its perceived property interest by risking a violation of the NLRA. Thus, instead of a case-specific analysis, the proposal would create a set of presumptions to guide employer and union conduct.<sup>120</sup>

First, the Board should deem as presumptively lawful any action by the employer that does not go beyond simply and peacefully requesting nonemployees to stop organizing on property that, from the employees' perspective, is clearly or questionably under the employer's control. Asking law enforcement to remove the organizers will typically constitute such a request.<sup>121</sup>

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<sup>118</sup> See *supra* note 57.

<sup>119</sup> See Zmija, *supra* note 55, at 117-18 (describing costs of ambiguity under *Babcock*). Indeed, things have not improved much since Professor Gould, writing before he became NLRB Chairman, emphasized that parties needed deliverance from the "morass" of no-solicitation rulings and that, "[m]ore than anything else, the law must have clarity and a practical appreciation for the parties' needs." Gould, *Question, supra* note 28, at 146.

<sup>120</sup> The Board frequently uses such presumptions, which courts have readily accepted. Indeed, an excellent example is employee solicitations on employer property. See *supra* note 17.

<sup>121</sup> Although calling the police to remove organizers could easily chill employee rights, recent Supreme Court decisions have limited the Board's ability to regulate employers' First Amendment right to redress the government. See *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 744-45 (1983) (holding that Board could enjoin state lawsuit only if it lacked a reasonable factual or legal basis); see also *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 536-37 (2002) (clarifying standard). These cases may also restrict the Board's ability to find an unfair labor practice based on a call to the police. Indeed, despite suggestions by the Board that calling the police is not covered by *Bill Johnson's*, the Board's General Counsel has begun treating such calls as protected by the First Amendment. Compare *Corporate Interiors, Inc.*, 340 N.L.R.B. No. 85, 2003 WL 22295366, at \*25-\*26 (2003) (finding unfair labor practice for calling police to remove union from public easement), and *In re Wild Oats Mkts., Inc.*, 336 N.L.R.B. 139, 182 (2001) (stating that, if employer "had called the police to request [the union's] removal, the Board would have found [it] in

The rationale for this presumption is that Board should not police the parties' conduct as long as the dispute remains simply a question of control and use of the property.<sup>122</sup> Organizers, however, could justify Board action by rebutting the presumption—showing, for example, that employees would view a nominally peaceful request as coercive or threatening because of a recent pattern of unlawful employer resistance to unionism.<sup>123</sup> Similarly, an employer could answer that union violence, or interference with business, justified a stronger response.<sup>124</sup>

The other side of this presumption is that any actions by the employer that goes beyond a peaceful request would be viewed as coercive. Conduct such as threats, harassment, and violence can be assumed to inform employees that the employer's concern extends beyond its property interests and that attempts to unionize will result in harmful consequences.<sup>125</sup> The employer could rebut this presumption by showing that extra measures were needed to respond, for example, to organizers who refused to stop

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violation of Section 8(a)(1)”), with NLRB Advice Memorandum, United States Postal Service, Case 30-CA-15830(P) (March 24, 2003) (stating that calling police is covered by *Bill Johnson’s*). Therefore, the proposal will treat a call to the police as presumptively lawful unless it is without basis. Cf. *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237, 242-43 (6th Cir. 1995) (filing of criminal trespass charges against union lawful because of genuine issue of material fact over merits of trespass suit); *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 785 (9th Cir. 2001) (permitting state tort claims for false imprisonment, false arrest, and malicious prosecution based on calls to police). This issue, however, is unlikely to be resolved soon, as it raises significant questions about the Board’s ability to enforce the Act and the treatment of First Amendment conduct in different contexts. Compare *Bill Johnson’s*, 536 U.S. at 536-37 (permitting lawsuit against union unless it lacks reasonable factual or legal basis), with *Roger D. Hughes Drywall*, 344 N.L.R.B. No. 49, at 3 n.4 (2005) (finding call to police to be unlawful because employer did not have “good faith, albeit erroneous, belief” that union misconduct had occurred). Moreover, the Board’s treatment of this issue further indicates why its current right-to-access analysis does not work. The Board has previously found calls to police to be lawful if the employer had control over the property and unlawful if it lacked control. See *Corporate Interiors*, 2003 WL 22295366, at \*25-\*26. Yet, whether subsequent litigation determines that the employer had a state right-to-exclude says little about the reasonableness of the employer’s call to the police.

<sup>122</sup> See *supra* note 145.

<sup>123</sup> See *infra* note 160.

<sup>124</sup> See *infra* notes 147-149.

<sup>125</sup> Indeed, the Board has found that such conduct can violate Section 8(a)(1) even if it was not witnessed by employees. See *Hughes Drywall*, 344 N.L.R.B. No. 49, at 3 (citing, in case involving threats and physical attack on picketers, *Corporate Interiors*, 2003 WL 22295366, at \*14-\*16; *Bristol Farms*, 311 NLRB 437 (1993)).

blocking traffic or harassing customers. Like its traditional Section 8(a)(1) interference analysis, the Board would resolve such questions by looking for hostile conduct by either party, discriminatory exclusions by the employer, and other relevant factors.

This scheme would apply no matter what the employer's state property interests turn out to be. If organizers are on a public right-of-way that is arguably under the employer's control, the Board's analysis would be the same, regardless of how a state court would ultimately resolve the trespass issue. In short, the Board would remain focused solely on whether the employer behaved in a way that tended to infringe employees' labor rights, and leave the state trespassory issue to state courts. There is simply no reason for the Board to delve into complicated state law to determine whether the NLRA has been violated.

The location of the organizing is not totally irrelevant, however. The presumption analysis would apply where organizing occurs on property over which the employer clearly, or questionably, has a right-to-exclude. Alternatively, if the organizing takes place on property that employees would clearly view as outside of the employer's control—for instance, a public park near the worksite—*any* employer attempt to exclude would be presumptively unlawful. In such instances, the employer's conduct would likely send the message to employees that its aim is to interfere with union activity, not to protect its property interests. Importantly, the determination whether the property is clearly not under employer's control is based solely on reasonable employees' viewpoints, not state property law.

This scheme covers the entire spectrum of employer control over property. Employees' belief that an employer clearly lacks control over property creates a

presumption against employer interference; conversely, where the employer clearly controls the property, the presumption favors the employer. In the remaining middle ground—where the employer’s control is less certain—the employer again enjoys a presumption of lawfulness for all peaceful attempts to stop organizing. This middle ground may, depending on the circumstances, provide a benefit over current law for one of the parties. For instance, there will be some peaceful employer interference on property in this middle ground that the proposal would deem presumptively lawful, but that the Board would currently regard as unlawful if it ultimately found no right-to-exclude under state law. Similarly, if the employer engaged in coercive interference on property that is later determined to be under its control, the proposal would treat the interference as presumptively unlawful, while the Board would currently find the same conduct to be lawful.

This difference is not as extreme as it may appear, for the Act has long proscribed even good-faith employer conduct that tends to infringe employees’ labor rights.<sup>126</sup> The proposal merely seeks to correct the Board’s omission in not regularly looking at the issue. Indeed, the Board has sporadically found that an employer’s exclusion of nonemployee organizers unlawfully chilled employee rights.<sup>127</sup> The proposal merely regularizes that inquiry and, much like *Republic Aviation*, creates a presumption that

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<sup>126</sup> See *supra* note 117.

<sup>127</sup> See *Marshall Field & Co.*, 98 NLRB 88, 104 (1952) (finding violation based on employer “forcibly” removing organizers from public gathering in employees’ presence), *enforced in relevant part*, 200 F.2d 375, 382 (7th Cir. 1952); *Central Hardware Co.*, 181 N.L.R.B. 492, 492 (1970) (unlawful to expel, in employees’ presence, organizers who acted solely as store customers because expulsion motivated by “antiunion considerations”), *enforcement denied in relevant part*, 439 F.2d 1321 (8th Cir. 1971), *vacated*, 407 U.S. 539 (1972); *Heck’s, Inc.*, 156 N.L.R.B. 760, 761 (1966).

employer conduct extending beyond a peaceful request for nonemployees to stop organizing, or for government assistance, tends to interfere with employee rights.<sup>128</sup>

A major benefit of the proposal is that the Board would no longer have to examine state property law and would instead focus on what it does best—examining whether conduct tends to interfere with rights under the Act. The proposal’s superiority over the current analysis is illustrated by a hypothetical case where an employer peacefully asks union organizers to vacate a public easement over which employees generally believe the employer has a right-to-exclude. Even if state law ultimately reveals that the employer did not have a right-to-exclude, the employer’s request would not chill employee rights because employees would tend to view the employer’s conduct as a reasonable attempt to protect its property interest. If the employer tried to stop the organizing through harassment and violence, however, employees would tend to feel that their rights were being threatened, even where the employer had a right-to-exclude. The proposal takes these realities into account, in contrast to the current analysis, which would mechanically find that the employer violated the Act in the former instance and acted lawfully in the latter.

This improvement also exists where employees reasonably believe that organizers are on public property. Even if that belief is incorrect,<sup>129</sup> an employer’s exclusion of organizers from that area is likely to have a deleterious effect on employees’ freedom to choose collective representation. This analysis, moreover, creates little hardship for an

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<sup>128</sup> Cf. Estlund, *supra* note 7, at 333 (“[A]n employer’s power to single out union organizers for exclusion . . . demonstrates the employer’s near-dictatorial power over the workplace, power it can use to keep the agents of unions, and perhaps unionization itself, at bay.”).

<sup>129</sup> See *supra* notes 79-82 and accompanying text (describing organizers who were told by government officials that they could solicit or public right-of-way abutting employer’s plant, but state property law suggested that employer had right-to-exclude over right-of-way).

employer, which has a great deal of control over employees' perceptions of its property. Any employer that wants to protect its ability to peacefully exclude nonemployees from property it controls needs only to ensure that its employees are aware of that control.<sup>130</sup>

The benefit to the parties of *ex ante* clarity should not be underestimated. Forcing parties to act based on guesses as to the future consequences of their actions may chill the exercise of legitimate labor and property rights. Further, Board delay in resolving property disputes may prompt harmful self-help measures, particularly where time-sensitive organizing is involved.<sup>131</sup>

The proposal recognizes that employer conduct beyond a peaceful request is likely to undermine the NLRA. Allowing such activity weakens the Act's ability to lessen labor strife and its resulting impact on commerce.<sup>132</sup> Moreover, nonpeaceful employer exclusions directly threaten the Act's fundamental protection of employees' freedom to choose whether to seek collective representation. The Board's failure to regularly address these concerns ignores the full impact of nonpeaceful attempts to stop organizing activity—attempts that “cause[] employees to weigh the possibility of

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<sup>130</sup> Posting no-solicitation signs, or similar information, would presumably be sufficient. Of course, an employer could take advantage of this rule by posting no-solicitation signs on property over which it lacks a right-to-exclude. A union could counter such an attempt by using the property and informing employees that the signs are wrong. Similarly, the Board could find that an employer violates the Act by knowingly misleading employees about its property rights. To avoid the Board having to delve into property issues on even a peripheral matter, if such a violation were permitted it would have to be limited to the rare situations where the employer was able to deceive employees about an unambiguous property issue.

<sup>131</sup> One state justice has described the potentially violent risk of delay and self-help in right-to-access cases: [A] possibility, of course, is for the employer to go out and hire some very large and very mean lads to persuade the picketers in the good old-fashioned way that they had made a mistake coming on private property. Justice Powell referred to this as “self-help”, and labor lawyers sometimes refer to it as the “ungood” way of handling picketers. In fact, nine out of ten labor lawyers of my acquaintance advise their business clients that beating up picketers with baseball bats, particularly when the Union reciprocates by dynamiting the employer's premises, can create the mother of all labor disputes.

Riesbeck Food Mkts., Inc. v. UFCW, 185 W.Va. 12, 21 (1991) (Nelly, J., *dissenting*) (arguing against preemption of state trespass claims because of risks from Board delay).

<sup>132</sup> See 29 U.S.C. § 151 (describing NLRA policies).

incurring reprisals or other hostile employer reaction before under-taking to exercise their rights secured by the Act.”<sup>133</sup> The proposal does not make the same omission.

#### 1. What is Presumptively Lawful Conduct?

It is difficult to characterize precisely when an employer’s request for organizers to leave is peaceful enough to trigger the Board’s presumption of lawfulness. The Board would have significant leeway in establishing the boundaries for this presumption; therefore, the following suggestions are merely a possible starting point for its analysis.

The employer’s request in *Montgomery Ward & Co. v. NLRB* is an archetype of presumptively lawful conduct.<sup>134</sup> There, the employer attempted to remove union organizers who were meeting employees in the employer’s public cafeteria.<sup>135</sup> Store managers told the organizers that they were trespassing and violating the store’s no-solicitation policy, and said that if the organizers did not leave, they would call the police.<sup>136</sup> The lawfulness of this conduct is complicated under the current scheme, as it requires the Board to determine whether, under state law, the employer had a right to exclude the organizers from property open to the public.<sup>137</sup> The proposal’s analysis is far simpler. No matter the ultimate determination of the employer’s state property rights, the peaceful demand that the organizers leave would be presumptively lawful, particularly given the employer’s stated belief that the organizers’ violation of the no-solicitation policy constituted a trespass. Under such circumstances, reasonable employees would not tend to view the request as chilling their freedom to pursue collective activity. The

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<sup>133</sup> *NLRB v. H.R. McBride*, 274 F.2d 124, 127 (10th Cir. 1960) (holding that employer violated Section 8(a)(1) by physically assaulting and verbally abusing pickets).

<sup>134</sup> 692 F.2d 1115 (7th Cir. 1982) (*Montgomery Ward II*).

<sup>135</sup> *Id.* at 1117-18.

<sup>136</sup> *Id.* at 1118-19.

<sup>137</sup> *Id.* at 1124-28 (holding that no-solicitation policy was too broad and noting that trespass question depended on employer’s view of organizer’s activity in public cafeteria); *see supra* note 23.

only remaining question for the Board would be a possible union rebuttal—for example, a challenge to the no-solicitation policy’s validity or, if valid, a claim that the employer enforced the policy in a discriminatory manner.<sup>138</sup>

A union may rebut the presumption of lawfulness by pointing to circumstances showing that employees would reasonably tend to view the employer’s ostensibly innocuous conduct as threatening. Common rebuttal factors would include evidence of the employer’s open union animus, contemporaneous unfair labor practices, the timing of the employer’s actions, and treating the union activity more harshly than other, similar conduct.<sup>139</sup> An employer, for instance, may build a fence around its property which has the effect of preventing access by nonemployee organizers. The fence, by itself, raises no labor law concerns and would be presumptively lawful. The circumstances leading to the erection of the fence may belie that presumption, however. If the fence suddenly appeared after a union organizing campaign began, the Board would be justified in finding interference with employees’ rights.<sup>140</sup> Similarly, if employer comments suggested that the fence was intended to keep out union organizers,<sup>141</sup> it would impact employee rights in a manner that a fence intended to stop a rash of burglaries would not. Although there are numerous other scenarios that would rebut a presumption of

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<sup>138</sup> See *Montgomery Ward II*, 692 F.2d at 1122 (holding that employer discriminatorily enforced policy, which tended to “coerce[], restrain[], and interfere[] with the exercise of protected rights”).

<sup>139</sup> See *infra* notes 160, 177-190 and accompanying text.

<sup>140</sup> See, e.g., *Four B Corp. v. NLRB*, 163 F.3d 1177, 1183-84 (10th Cir. 1998) (holding that employer’s new no solicitation policy—“hastily implemented in the face of the Union’s organizing effort”—was unlawful discrimination); *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1366 (7th Cir. 1983) (holding that no-distribution rule created in response to organizing campaign was unlawful); *Mini-Togs, Inc.*, 304 N.L.R.B. 649, 651 (1991) (concluding that, in response to organizing campaign, employer unlawfully prohibited nonemployees from handing out union literature from parking lot), *enforcement granted in part and denied in part*, 980 F.2d 1027 (5th Cir. 1993). The remedy for such a violation may be limited, however, as it is not certain that the Board would, or could, order the fence taken down.

<sup>141</sup> The Section 8(a)(1) violation is still not dependent on the employer’s intent; rather, expressions of the employer’s motive are relevant only to the extent that they affect how a reasonable employee would tend to view the situation. See *supra* note 117 and accompanying text.

lawfulness, the underlying question always focuses on whether the employer's seemingly unthreatening conduct would tend to interfere with employee rights.

This analysis promotes behavior by both organizers and employers that serve the Act's objective to promote industrial peace and protect employees' freedom to choose whether or not to organize.<sup>142</sup> Where employer attempts to stop organizing are done in a limited and peaceful fashion on property over which it has at least questionably has control, the effect on union organizing and other labor rights is small or nonexistent. Employees would view such conduct, absent countervailing circumstances, as an attempt to protect property interests rather than an attack on unionization. Moreover, organizers who believe they are on property out of the employer's control can simply refuse to leave with the knowledge that more strident employer attempts to stop the organizing would presumptively violate the Act.<sup>143</sup> Finally, as it can do currently, an employer may press the property law issue—in response, for example, to organizers' rejection of a peaceful request to leave—through a state trespass claim.<sup>144</sup>

These paths best promote the interests of the NLRA and state property law. Where the crux of a dispute is control of property, the state should resolve the issue; if the dispute centers on the infringement of employee rights, the NLRB is the best forum. The Board's current scheme, however, requires it to decide the state property law issue, even where the case ultimately fails to implicate federal labor policy. In particular, under *Lechmere*, federal labor rights are not at stake where an employer exercises its state property interests in a manner that does not tend to chill labor rights. The Board should

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<sup>142</sup> See *supra* note 132.

<sup>143</sup> Employer attempts to remove organizers from property that is obviously out of its control will be unlawful. See *infra* notes 121-126 and accompanying text.

<sup>144</sup> See *infra* note 227.

leave such disputes where they belong—in courts of the state from which the property rights originate.<sup>145</sup>

## 2. What is Presumptively Unlawful Conduct?

Presumptively unlawful activity is defined as any conduct that goes beyond a peaceful request for organizers to leave.<sup>146</sup> Because that definition covers a broad range of circumstances, the following are merely examples of actions that the Board would deem presumptively unlawful under the proposal. The examples are not exclusive; rather, they are intended to illustrate the type of employer conduct that represents a threat to employees' labor rights.

An employer, of course, may rebut the presumption that its attempt to stop organizing activity was unlawful. Typical rebuttals include special characteristics of the property,<sup>147</sup> organizing that causes safety problems<sup>148</sup> or harms the employer's business,<sup>149</sup> and violence.<sup>150</sup> Moreover, if employees view the property in question as clearly under the employer's control, organizers' resistance to a peaceful and

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<sup>145</sup> This argument is consistent with the NLRA's role in right-to-access cases. As noted by the Ninth Circuit, the Supreme Court has explained "that employers may exclude union organizers in deference to state common law, but not because the NLRA itself restricts access. 'The right of employers to exclude union organizers from their private property emanates from state common law, and while this right is not superceded by the NLRA, nothing in the NLRA expressly protects it.'" *NLRB v. Calkins*, 187 F.3d 1080, 1087-88 (9th Cir. 1999) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 n.21 (1994)). Like the Court, the proposal attempts to prevent NLRA interference with state property law.

<sup>146</sup> Repeated requests for the union to leave, especially where law enforcement has confirmed the union's right to continue can be viewed as unlawful harassment. *Cf. In re CSX Hotels, Inc.*, 340 N.L.R.B., No. 92, 2 (2003) (concluding that employer's repeated requests that police remove union organizers showed that its concern was stopping union, not traffic problems), *enforcement denied*, 377 F.3d 394 (4th Cir. 2004).

<sup>147</sup> For example, increased limits on union activity may be appropriate if it disturbs hospital patients. *See Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978); *NLRB v. S. Md. Hosp. Ctr.*, 916 F.2d 932, 935 (4th Cir. 1990).

<sup>148</sup> *See supra* note 146; *CSX Hotels*, 377 F.3d at 400-01 (holding that call to police was lawful because of traffic hazard); *Great Am.*, 322 N.L.R.B. 17, 20-21 (1996) (justifying exclusion based, in part, on traffic blockage).

<sup>149</sup> *See Great Am.*, 322 N.L.R.B. at 20-21 (justifying exclusion based, in part, on interference with customers' entry and exit); *Estlund, supra* note 7, at 334, 352 (citing conduct that interferes with customers, creates safety hazards, or undermines security).

<sup>150</sup> *See infra* note 155.

nondiscriminatory attempt to remove them may warrant some additional measures by the employer.<sup>151</sup>

A useful guide in assessing the type of conduct that would commonly trigger the presumption of unlawfulness is the Board's decision in *Corporate Interiors, Inc.*<sup>152</sup> The case involved a union campaign to organize workers by, among other things, picketing on a public easement in front of the employer's office.<sup>153</sup> The Board later determined that the employer, a construction contractor, lacked a right to exclude picketers from the easement.<sup>154</sup> That finding governed most of the Board's analysis of whether the employer's numerous attempts to stop the union organizing were lawful. The wide range of employer conduct in *Corporate Interiors*—including threats, harassment, and surveillance—provides an excellent illustration of why, in right-to-access cases, the Board should regularly address possible interference with employees' rights, instead of looking to state property law.

a. Threats

One of the most obvious forms of employer resistance to organizing activity is the use of threats. Indeed, even currently, the Board typically recognizes that threats, particularly involving violence, are serious enough to infringe employees' freedom to choose whether to unionize.<sup>155</sup>

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<sup>151</sup> For example, otherwise unlawful surveillance might be justified in such a situation. *See infra* notes 166-175 and accompanying text.

<sup>152</sup> 340 N.L.R.B. No. 85, 2003 WL 22295366 (2003).

<sup>153</sup> *Id.* at \*5, \*24-\*25 (noting employer's arrangement with city to maintain easement area).

<sup>154</sup> *Id.* at \*25.

<sup>155</sup> Actual violence is plainly illegal as well. *See* NLRB v. Village IX, Inc., 723 F.2d 1360, 1365 (7th Cir. 1983) (assaulting union leafletter near employees); NLRB v. H.R. McBride, 274 F.2d 124, 126-27 (10th Cir. 1960) (physically assaulting and verbally abusing picketers); Batavia Nursing Inn, 275 N.L.R.B. 886, 889 (1985) (punching union representative in front of employees as election ballots were to be counted); Kelco Roofing, 268 N.L.R.B. 456, 463 (1983) (repeatedly bumping union agent soliciting employees for

*Corporate Interiors* provides several examples of such threats.<sup>156</sup> For instance, the Board, disagreeing with the administrative law judge, found that the employer violated Section 8(a)(1) because its threat to “blow [the picketer’s] head off” if he did not leave reasonably tended to “interfere with the free exercise of employee rights.”<sup>157</sup> Such extreme threats are not necessary to invoke the presumption of unlawfulness however. Milder comments—like the *Corporate Interiors* official who, while talking to employees about the union, stated that “[o]ne of these days I’m going to snap and when I do, I don’t know what is going to happen”<sup>158</sup>—may also chill employee rights.

These comments are exactly the sort of behavior that the Act was intended to prevent, and they should be considered unlawful absent a satisfactory rebuttal by the employer. Yet, the Board’s current right-to-access analysis frequently ignores such threats if it determines that the employer had a right to exclude the organizers.<sup>159</sup> The organizers’ presence on the employer’s private property, however, does not reduce the likelihood that employees would tend to believe that they would be a target of the official “snapping” should they seek to unionize.

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authorization cards); *Martin Arsham Sewing Co.*, 244 N.L.R.B. 918, 922 (1978) (hitting union agent during strike with employees watching).

<sup>156</sup> 2003 WL 22295366, at \*26-27.

<sup>157</sup> *Id.* at \*2 (quoting *Unbelievable, Inc.*, 323 N.L.R.B. 815, 816 (1997)). The ALJ found that the comment was lawful because it was directed to another company official, not a union picketer or employee. *Id.* at \*26. The Board appropriately disagreed, concluding that a threat of violence against a union picketer, made in the presence of employees, tended to interfere with employees’ rights, no matter the officials’ intent. *Id.* at \*1; *see supra* note 117 and accompanying text (noting that intent is not necessary element of Section 8(a)(1) violation). This issue implicates the Board’s “small-plant doctrine,” which recognizes that most employees of a plant with less than 100 employees will hear about, and have their rights chilled by, threats and other coercive conduct that they did not personally witness. *See Schaeff, Inc. v. NLRB*, 113 F.3d 264, 268 n.8 (D.C. Cir. 1997); *Roger D. Hughes Drywall*, 344 N.L.R.B. No. 49, at 4 (2005) (finding violations based on employer’s actions against union “without reference to whether these actions were witnessed by any of the employer’s statutory employees”).

<sup>158</sup> 2003 WL 22295366, at \*27. The Board did not address the ALJ’s finding that this comment was not serious enough to constitute an unlawful threat. *Id.* at \*1 n.6, \*26-27.

<sup>159</sup> *See infra* note 163 and accompanying text.

Similarly, an employer trying to stop organizing activity could more directly threaten employees by stating or implying that contact with organizers would be met with negative employment consequences. Such threats, although not violent, are aimed at work conditions and are clearly the type of conduct that the NLRA seeks to eliminate.<sup>160</sup> Accordingly, any employer attempt to stop organizing activity—even on property under its control—that directly or implicitly threatens organizers or employees should be presumptively unlawful.

b. Harassment

Similar to threats, but often viewed as less serious, is the harassment of organizers attempting to contact employees. For example, on several occasions in *Corporate Interiors*, the employer turned on the sprinkler system or aimed a hose at the union organizers.<sup>161</sup> The employer also spread horse manure where the organizers were picketing and allegedly drove a car at them.<sup>162</sup>

Although the Board found that these harassing acts violated Section 8(a)(1), the basis for that finding is an apt illustration of the need to change the current analysis. The Board found the use of sprinklers to be unlawful because it was an attempt to remove the organizers from an area over which the employer had no right-to-exclude—not because

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<sup>160</sup> The Court has long held that an employer violates Section 8(a)(1) by stating or implying that opting for collective-bargaining would cost them existing benefits. *See* *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-19 (1969). In determining the threatening nature of such statements, the Board looks to the context in which the statement was made. *See* *UAW v. NLRB*, 834 F.2d 816, 822 (9th Cir. 1987). For example, other unfair labor practices may make a seemingly innocuous statement appear threatening to employees. *See id.* at 822 (holding that other Section 8(a)(1) violations are relevant in determining whether employees would tend to view employer’s statement as threat); *accord* *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1365 (D.C. Cir. 1997) (finding unlawful coercion because of context in which statement was given).

<sup>161</sup> *Id.* at \*28. Although the employer argued that it frequently watered the area pursuant to its agreement to maintain the easement, testimony showed that the employer turned off the sprinklers when it called the police to the scene. *Id.*

<sup>162</sup> *Id.* at \*29. Depending on the manner in which the employer was driving, this could be considered violence or a threat of violence, rather than harassment. In *Corporate Interiors*, it appears that the employer did not intend to hit the picketers; rather, it merely wanted to move them out of the way. *Id.*

the harassment infringed employee rights.<sup>163</sup> This is an excellent example of why the current scheme poorly serves the NLRA. Because the organizers in *Corporate Interiors* had numerous alternative means to contact employees, the employer's harassment could not infringe the organizers' derivative right to communicate with employees.<sup>164</sup> Thus, it should not matter whether the employer had a state law right to exclude the organizers—either way, they possessed no federal labor right to contact employees from that particular location. Yet, the Board's decision suggests that had the organizing been on property that the employer controlled, the Board would have regarded the harassment as lawful. This makes little sense if the Board is focused on the infringement of derivative rights. Moreover, regardless of where the organizers were located, a typical employee would view these acts as a clear signal that pursuing union representation would not be a wise career choice.

Instead of state property law, the Board's concern should be whether the harassment affected the employees' freedom to exercise their labor rights. Under the proposal, this type of harassment would trigger a presumption that the employer unlawfully interfered with employees' rights. Any reasonable employee, for example, would consider spraying water or spreading manure near organizers as an unnecessary provocation if the employer was merely attempting to protect its property interests. The employer, therefore, should bear the burden of rebutting the presumption that employees would tend to view its conduct as targeting organizing activity and chilling their freedom

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<sup>163</sup> *Id.*; see *Marshall Field & Co.*, 98 NLRB 88, 103-04 (1952) (finding Section 8(a)(1) violation based on employer "forcibly" removing organizers because it evidenced improper attempt to exclude), *enforced in relevant part*, 200 F.2d 375, 379, 382 (7th Cir. 1952).

<sup>164</sup> See *supra* notes 71-74 and accompanying text.

to pursue unionization.<sup>165</sup> Absent such evidence, the Board should find that harassment of union organizers violates Section 8(a)(1).

c. Surveillance

Another major source of presumptively unlawful activity is an employer's surveillance, or impression of surveillance, of employees' interaction with organizers. In safeguarding employees' freedom to choose whether to unionize, the Board has long been sensitive to the dangers posed by employer conduct that may lead employees to fear that special efforts are being taken to monitor their involvement in protected activity.<sup>166</sup> Accordingly, absent sufficient justification, an employer's observance of employees engaged in protected activity, or making an impression of such observance, will normally interfere with employees' labor rights.<sup>167</sup>

As the Board noted in *Corporate Interiors*, however, the lawfulness of employer surveillance will often depend on whether the organizers are trespassing or the employer has an objective basis for believing that the organizers will trespass.<sup>168</sup> This is due to a generally available defense that the employer can satisfy with evidence that it conducted

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<sup>165</sup> The employer could argue, hypothetically, that employees reasonably believed that the property was clearly the employer's and that the union had resisted peaceful requests to leave recently sodded ground that had to be watered.

<sup>166</sup> See *Nat'l Steel & Shipbuilding Co. v. NLRB*, 156 F.3d 1268, 1271 (D.C. Cir. 1998) (holding that photographing or videotaping protected activity has tendency to intimidate employees); *Belcher Towing Co. v. NLRB*, 726 F.2d 705, 708 (11th Cir. 1984) (holding that, although surveillance is not per se unlawful, it has "natural, if not presumptive, tendency to discourage [union] activity"); *Corporate Interiors*, 2003 WL 22295366, at \*27 (concluding that, absent proper justification, photographing or videotaping employees has "tendency to intimidate employees and plant a fear of reprisal"); *Cook Family Foods, Ltd.*, 311 NLRB 1299, 1301 (1993), *enforcement denied on other grounds*, 47 F.3d 809 (6th Cir. 1995).

<sup>167</sup> See *Snyder's of Hanover v. NLRB*, 39 Fed.Appx. 730, 736-37 (3d Cir. 2002) (watching employees take handbills); *NLRB v. CWI of Md., Inc.*, 127 F.3d 319, 325-26 & n.3 (4th Cir. 1997) (impression of surveillance); *United States Steel Corp. v. NLRB*, 682 F.2d 98, 101-02 (3d Cir. 1982); *Ingram Book Co.*, 315 NLRB 515, 518 (1994).

<sup>168</sup> Compare *Corporate Interiors*, 2003 WL 22295366, at \*27 ("The Board has . . . recognized that the taking of pictures or videotaping to document trespassory activity for the purpose of making out a trespass claim is an acceptable justification."), with *NLRB v. Colonial Haven Nursing Home, Inc.*, 542 F.2d 691, 701 (7th Cir. 1976) (holding that "anticipatory photographing of peaceful picketing in the event that something might happen does not justify an employer's conduct").

the surveillance to establish a valid trespass claim.<sup>169</sup> Mirroring the current right-to-access analysis, this trespassing defense is tied to the Board's determination of state property law. In *Corporate Interiors*, therefore, the Board's conclusion that the organizers were not trespassing meant that the employer's surveillance was unlawful.<sup>170</sup> The corollary is that a Board determination that the organizers were trespassing signifies that the surveillance would be valid. This is illogical, for the question whether the organizers were trespassing under state law says nothing about the surveillance's effect on employees.<sup>171</sup> The proposal, therefore, would make all surveillance presumptively unlawful, as employees will tend to view such conduct,<sup>172</sup> no matter where it occurs, as an attempt to monitor and interfere with their participation in organizing activity.<sup>173</sup>

An employer may attempt to rebut this presumption. Under current Board law, employers can justify surveillance where there is a reasonable threat of union violence or other misconduct that would affect the employer's business.<sup>174</sup> Moreover, some employer surveillance may be easier to defend where the organizing is on property that, from the employees' perspective, is clearly the employer's. For example, organizing

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<sup>169</sup> See *Corporate Interiors*, 2003 WL 22295366, at \*27; *Hoschton Garment Co.*, 279 NLRB 565, 566-67 (1986) (distinguishing surveillance of trespassory versus nontrespassory union handbilling).

<sup>170</sup> 2003 WL 22295366, at \*27 (suggesting that reasonable basis for believing that trespass may occur could justify surveillance).

<sup>171</sup> See *Mike Yurosek & Son*, 229 NLRB 152, 152 n.3 (1977) (stating that employer's right-to-exclude is not relevant to surveillance issue), *rejected as dictum by Hoschton Garment*, 279 N.L.R.B. at 567.

<sup>172</sup> Surveillance requires more than the mere incidental observations that occur when an employer asks organizers to leave or engages in its normal work routine. However, videotaping, photographing, or posting someone to watch the organizing would be considered surveillance. See *supra* notes 167-168.

<sup>173</sup> See *Nat'l Steel*, 156 F.3d at 1271 (holding that Section 8(a)(1) violation depends on tendency to coerce, regardless of actual impact); *Colonial Haven*, 542 F.2d at 701 (holding that actual coercion is unnecessary for Section 8(a)(1) violation; rather, "it is the tendency to interfere or coerce which is determinative").

<sup>174</sup> See *Nat'l Steel*, 156 F.3d at 1271 (holding that "reasonable, objective justification," such as legitimate security interests, gathering evidence for legal proceeding, or reasonable anticipation of misconduct, will mitigate tendency to coerce). Explaining to employees why the surveillance is necessary will be an important part of this rebuttal. Cf. *Teletech Holdings, Inc.*, 333 N.L.R.B. No. 56, 2001 WL 209470, at \*3 (2001) (concluding that employer must clarify for employees a facially overbroad no-distribution rule to rebut presumption of unlawfulness).

activity inside a store—like other unusual activity—would be expected to trigger some observation by the employer and would be unlikely to coerce employees. In contrast, organizing in a more remote area, such as a distant parking lot, would be less likely to warrant similar monitoring and employees may view surveillance there as a signal of employer hostility against unionization. Similarly, if the employer asks organizers to leave property that is arguably under its control and they refuse, employees would likely view the employer’s documentation of the possible trespass as an attempt to protect its property rights, not to chill their own rights. Observations beyond that needed for a trespass claim—for instance, videotaping for an extended period of time, using more intrusive means than previously employed for non-union trespassers,<sup>175</sup> or adopting other measures that employees would reasonably view as excessive<sup>176</sup>—would be insufficient to rebut the presumption.

The Board’s approval of coercive surveillance based on its *post hoc* determination that a questionable state trespass claim was valid yields improper results and avoids the real issue at stake in these cases. The proposal corrects this problem by focusing solely on employees’ reasonable perceptions of the surveillance, rather than state property law. Also, the proposal would permit a defense for employer monitoring of organizing activity in certain circumstances. Under this defense, an employer may engage in limited surveillance to protect against conduct that employees reasonably, albeit mistakenly, perceive as a debatable trespass. The surveillance however, must be targeted only to the

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<sup>175</sup> See *infra* Section III.A.2.d. Moreover, if the surveillance occurs in a context that suggests more sinister motives, such as contemporaneous unfair labor practices, the rebuttal will likely fail. See *supra* note 160.

<sup>176</sup> For example, observations accompanied by an increase in security could undermine an employer’s rebuttal. Cf. *6 W. Ltd. Corp. v. NLRB*, 237 F.3d 767, 779 (7th Cir. 2001) (holding that increased security was lawful because of reliable information about past union disturbances).

possible trespass and must not occur in a context in which employees would tend to believe that the observations were interfering with their labor rights.

d. Discrimination

An employer that exercises its right -to-exclude in a discriminatory fashion—such as a no-solicitation rule that applies only to union conduct—has presented special difficulties for the Board. *Babcock* long-ago noted discrimination, along with the lack of reasonable alternatives to reach employees, as exceptions to its broad grant of employer authority to exclude nonemployee organizers. Discrimination, however, is a markedly different concern than the lack of reasonable alternatives.

Although discrimination is an obvious target for Board regulation, the current practice of making it a categorical exception to the *Babcock/Lechmere* framework ill-serves the Board’s ability to prevent truly harmful discrimination . Rather than considering why discriminatory exclusions should be unlawful, the Board and courts have struggled to come up with a definition of discrimination which automatically triggers the exception. A far better approach would involve a more disciplined analysis that focuses on the labor law consequences of actions purported to be discriminatory. Therefore, instead of myopically determining whether a disparate exclusion policy qualifies as a categorical “exception,” the proposal treats discrimination as a potential signal to employees that collective activity is not favored by their employer.

The problems in addressing discriminatory exclusions result from *Babcock*, which carved out an exception to an employer’s right to remove organizers where it “discriminate[s] against the union by allowing other distribution.”<sup>177</sup> The Court never

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<sup>177</sup> *Babcock*, 351 U.S. at 112; accord *Lechmere*, 502 U.S. at 535. The discrimination exception applies also to nonorganizing activity such as area standards and publicity picketing. See Note, Deborah L. Stein, *Keep*

explained the basis for this exception<sup>178</sup> and the two main possibilities under the Board's current analysis are unsatisfying.

One rationale states that an employer's refusal to allow labor organizing, while permitting other solicitations, so weakens its property interests that they no longer trump the organizer's derivative right to communicate with employees.<sup>179</sup> Doctrinally, this is nonsense. Whether organizer's derivative rights are satisfied has nothing to do with the employer's property interests.<sup>180</sup> Moreover, discriminatory access is perfectly consistent with the enforcement of an employer's property interests.<sup>181</sup> Deciding whom to grant access is an important right associated with property ownership. Thus, unequal access does not diminish an employer's property interests.

The other reasoning is based on an employer's union animus. This explanation, however, is no more defensible than the property rights rationale. Under *Babcock*, an employer's discriminatory exclusion is a violation of Section 8(a)(1), which does not rely on intent.<sup>182</sup> Quite simply, whether an employer's discriminatory exclusion is motivated by good faith or by virulent hatred against unionization should not matter under Section 8(a)(1). The proposal recognizes this important point.

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*Off the Grass: Prohibiting Nonemployee Union Access Without Discriminating*, 73 N.Y.U. L. REV. 2029, 2047-49 (1998) (citing cases).

<sup>178</sup> See Stein, *supra* note 177, at 2049-54.

<sup>179</sup> Cf. *Be-Lo Stores v. NLRB*, 126 F.3d 268, 284 (4th Cir. 1997) (stating that "[b]ecause nonemployees' claims to access to an employer's private property are at their nadir when the nonemployees wish to engage in protest or economic activities, as opposed to organizational activities, we seriously doubt, as do our colleagues in other circuits, that the *Babcock & Wilcox* disparate treatment exception, post-*Lechmere*, applies to nonemployees who do not propose to engage in organizational activities") (internal citation omitted) (citing *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457, 465 (6th Cir. 1996)).

<sup>180</sup> See Stein, *supra* note 177, at 2051 (noting that *Lechmere* appeared to forbid balancing of property interests against derivative rights); Estlund, *supra* note 7, at 322.

<sup>181</sup> See *supra* note 56.

<sup>182</sup> See *supra* note 117; Stein, *supra* note 177, at 2053-54; see also Zmija, *supra* note 55, at 126 (stating that discrimination may also violate Section 8(a)(3), which requires finding that employer had antiunion motive).

Under the proposal, an employer’s discriminatory exclusion of organizers—even from property that is clearly the employer’s or where the organizers have reasonable alternatives for reaching employees—would be presumptively unlawful . That violation does not rely on the employer’s property interests or motives. Rather, illegality is presumed because barring organizing from the property, while allowing other types of solicitation, will tend to interfere with employees’ rights. To be sure, such discrimination is often accompanied by an employer’s union animus, but even where it is not, the discrimination will tend to inform employees that negative consequences will follow if they pursue collective representation. This analysis is consistent with Section 8(a)(1)’s concern for the effect on employees no matter the employer’s intent, and does not make the mistake of tying a violation to the employer’s property interests.

The proposal allows for a variety of definitions of discrimination while also providing assistance in choosing the most appropriate definition. The Board and courts have struggled to define discrimination, providing wildly differing interpretations including: giving access to all groups but unions;<sup>183</sup> allowing only work-related or isolated charitable solicitations;<sup>184</sup> allowing all charitable solicitations;<sup>185</sup> and favoring

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<sup>183</sup> See *Sandusky Mall Co.*, 329 N.L.R.B. 618, 620 (1999) (concluding that “an employer that denies a union access while regularly allowing nonunion organizations to solicit and distribute on its property unlawfully discriminates against union solicitation”), *enforcement denied in relevant part*, 242 F.3d 682 (6th Cir. 2001); *Great Am.*, 322 N.L.R.B. 17, 24 (1996) (finding discrimination where employer excluded union, but allowed gift-wrapping fundraisers, Salvation Army solicitations, auto sales, circus fliers, Chamber of Commerce information, and heart and cancer fund solicitations).

<sup>184</sup> See *Lucille Salter Packard Children’s Hosp.*, 97 F.3d 583, 588-90 (D.C. Cir. 1996) (holding that excluding unions while allowing employee fringe-benefit program solicitations was not discriminatory, but permitting solicitations about home and automobile insurance, child and family services, and credit union membership was discriminatory); *Four B Corp. v. NLRB*, 163 F.3d 1177, 1183 (10th Cir. 1998); *Be-Lo Stores*, 318 NLRB 1, 13-15 (1995), *enforcement denied in relevant part*, 126 F.3d 268 (4th Cir. 1997).

<sup>185</sup> See *6 West Ltd. Corp. v. NLRB*, 237 F.3d 767, 780 (7th Cir. 2001) (holding that employer did not discriminate by allowing “innocent” employee solicitations for Girl Scout cookies, Christmas ornaments, and other purposes that “can be seen as beneficial to all employees,” but not allowing union solicitation by employees); *Lucille Salter*, 97 F.3d at 588 n.4 (noting that frequent charitable solicitations may provide

one union over another or allowing distributions by employers, but not unions.<sup>186</sup> An employer’s facially neutral no-solicitation rule may also be deemed unlawful because it was adopted for a discriminatory purpose.<sup>187</sup>

These conflicting views derive largely from the Board and courts’ differing appreciation of employers’ property interests. Yet, as noted, discriminatory access is entirely consistent with the lawful exercise of property rights.<sup>188</sup> The proposal, therefore, focuses only on whether the discrimination tended to infringe employees’ labor rights. That focus should also shape the boundaries of unlawfully discriminatory exclusions—in particular, exclusions that tend to chill employees’ rights. An appropriate rule would regard an employer’s refusal to allow union access, while permitting access to any other group—even charities—as presumptively unlawful discrimination.<sup>189</sup> Absent an employer’s rebuttal, this disparate treatment would tend to interfere with employees’ rights by sending them the message that the employer is not concerned about solicitations generally, but is instead targeting union messages.<sup>190</sup>

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basis for discrimination finding); *NLRB v. Pay Less Drug Stores NW, Inc.*, 1995 WL 323832, at \*1 (9th Cir. May 25, 1995).

<sup>186</sup> See *Cleveland Real Estate Partners*, 95 F.3d at 464-65; Stein, *supra* note 177, at 2046. The Board has applied its non-acquiesce policy to the Sixth Circuit’s narrow interpretation of discrimination by refusing to follow *Cleveland Real Estate Partners*. See *Sandusky Mall*, 329 N.L.R.B. at 620-21 & n.10; *cf.* *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 320 (7th Cir. 1995) (suggesting “discrimination” depends on whether other activities with similar “character” as unions are permitted).

<sup>187</sup> See, e.g., *Youville Health Care Ctr.*, 326 N.L.R.B. 495, 495 (1998) (finding presumptively valid no-solicitation rule to have violated Section 8(a)(1) because it was created in response to employees’ protected activity); Gould, *Question*, *supra* note 28, at 118-19 (proposing rule that looks to whether employer had previously announced solicitation limits). Such cases may blur the line between violations of Section 8(a)(1), which do not focus on intent, and Section 8(a)(3), which requires a finding of intent. See 29 U.S.C. § 158(a)(1), (a)(3); *supra* note 117. If, from the employees’ point of view, the employer creates a rule in apparent response to protected activity, the rule will violate Section 8(a)(1) no matter the employer’s actual motive. *Cf. Youville*, 326 N.L.R.B. at 495 (stating that “[t]here is no evidence that any rule restricting employee discussions of working conditions was previously imposed or made known to the employees”).

<sup>188</sup> See *supra* note 56.

<sup>189</sup> See *supra* note 183. Despite this recommendation, the proposal could incorporate any interpretation of “discrimination.”

<sup>190</sup> For example, the policy in *American Postal Workers Union v. NLRB*, 370 F.3d 25 (D.C. Cir. 2004), not only prohibited all commercial and charitable solicitations, but also expressly proscribed solicitations either

Although the Board’s current discriminatory exclusion scheme, almost uniquely among right-to-access issues, does not require an examination of state law, it has been illogical and confusing. The proposal will not fully resolve the differing interpretations of discrimination, yet it assists that determination by providing a far more consistent framework that turns the Board’s attention to where it should have been all along—determining whether the employer’s disparate exclusion tends to infringe employee rights.

### B. Preemption

By keeping labor matters before the Board and property questions in state court, the proposal implicates the issue of labor preemption. The Board’s current analysis, which fails to maintain the dichotomy between the federal and state interests, has made the preemption question especially confusing. Although the proposal does not dramatically alter the preemption analysis, it does simplify it under many circumstances.

Labor preemption of state trespass claims is governed by the Supreme Court’s decision in *Sears, Roebuck & Co. v. San Diego District Council of Carpenters*.<sup>191</sup> Under traditional *Garmon* preemption, the NLRA will generally preempt state lawsuits involving either conduct that is clearly protected or prohibited by the NLRA, or conduct that is arguably protected or prohibited where there is a danger to national labor policy in allowing a state, rather than the Board, to examine the issue.<sup>192</sup> The Court in *Sears*,

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for or against unionization. *Id.* at 28-29. Maintaining a general no-solicitation policy that also includes union solicitations helps protect against employees believing that union discussions are singled out. However, if the employer’s policy targeted only union solicitations—even if it required neutrality—it would have been far more likely to violate the Act. Prohibiting only union material, even in an ostensibly neutral manner, sends a signal to employees that union activity is disfavored. *Id.* at 28.

<sup>191</sup> 436 U.S. 180 (1978).

<sup>192</sup> *Id.* at 187-88 & n.11 (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959)). *Garmon* preemption can also occur against a federal Section 1983 claim, which is known as *Golden State II* preemption. *See Golden St. Trans. Corp. v. City of Los Angeles*, 493 U.S. 103 (1989)). The second major

however, modified this analysis by holding that there is a substantive difference between preemption of state trespass claims directed at conduct that is *prohibited*, as opposed to *protected*, by the NLRA.<sup>193</sup>

*Sears* made clear that no significant conflict existed between a federal claim that union activity was prohibited by the NLRA and a state claim that the union was trespassing under state law; preemption of the trespass claim is not warranted in such a case because it is completely independent of the NLRA issue.<sup>194</sup> What is less clear is whether the state and federal claims are distinct where the potential NLRA violation is an employer's response to an alleged trespass. The better outcome would hold that unfair labor practice charges against the employer will not preempt a state trespass claim. Especially given *Lechmere's* concern for state property interests, it makes little sense for a federal labor claim that relies entirely on state property law to preempt a state trespass claim. Federal labor preemption seeks to prevent state litigation from interfering with a unified federal labor policy; where that policy hinges solely on state property law, such interference is nonexistent.<sup>195</sup>

The only occasion when state resolution of a trespass claim will conflict with federal labor law is where the union argues that the NLRA protects otherwise trespassory

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type of preemption is *Machinists*, a "dormant preemption" that precludes state regulation where the Act intends parties to freely engage in economic conflict. *See* *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 366 (4th Cir. 1991) (holding that broad state exemption for labor-related trespass was preempted under *Machinists*) (citing *Lodge 76, Int'l Ass'n of Machinists v. Wisc. Employment Relations Comm'n*, 427 U.S. 132 (1976)).

<sup>193</sup> *Sears*, 436 U.S. at 188-90.

<sup>194</sup> *Id.* at 185-86 (citing NLRA claims under Section 8(b)(4)(D) and 8(b)(7)).

<sup>195</sup> *Sears*, 436 U.S. at 188; *cf.* Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355, 416-17 (1990) (arguing, pre-*Lechmere*, that state trespass actions will not be preempted where union does not allege that reasonable-alternatives exception applies).

conduct.<sup>196</sup> Absent such a claim, an unfair labor practice charge that challenges an employer's exclusion of organizing activity should not preempt the employer's state trespass claim against the union. This allows the claims to be heard in their appropriate forums—the Board determines the federal labor issue and state courts address the state property question.

In spite of this logic, some courts have suggested that an NLRA charge against an employer will preempt a claim involving a traditional state area of regulation such as trespass.<sup>197</sup> The influence of those cases is unclear, particularly after the Supreme Court's recent holding that a federal statute's express preemption rule—which blocks differing state requirements—will not preempt state suits that impose obligations at least equivalent to the federal requirements.<sup>198</sup> That holding suggests a view that is unlikely to justify preemption of a state trespass claim where the federal labor question turns on state property law.<sup>199</sup>

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<sup>196</sup> This would occur where the union argues that no reasonable alternative means to contact employees exist. *Cf. Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 786 (9th Cir. 2001) (holding that “because the Board ordinarily leaves to the State the question whether non-employee union activity may be conducted on the employer's property,” and there is little risk of interference with NLRA's enforcement, state claims for false arrest, false imprisonment, and malicious prosecution will not be preempted); *NLRB v. Calkins*, 187 F.3d 1080, 1094-95 (9th Cir. 1990) (rejecting employer's claim that NLRA, post-*Lechmere*, preempts state laws that prevent employers from excluding union activity, because such laws are not inconsistent with NLRA).

<sup>197</sup> *See, e.g., Imondi v. Bar Harbor Airways*, 1983 WL 2036, at \*5-\*6 (D. Me. June 1, 1983) (stating, in Railway Labor Act case, that NLRA would preempt state malicious prosecution for trespass claim, even where reasonable-alternatives exception does not provide union right-of-access). *Imondi* was based in part on the questionable conclusion that malicious prosecution is not a state concern that is “deeply rooted in local feeling in responsibility.” *Compare id.*, 1983 WL 2036, at \*6, and *Geske & Sons, Inc.*, 317 N.L.R.B. 28, 53 (1995) (concluding that state claims for trade libel and tortious interference with contractual relations and prospective advantage was preempted by NLRA because Board, which filed complaint, may find that state action would hinder federally protected union activity), with *Pa. Nurses Ass'n v. Pa. State Educ. Ass'n*, 90 F.3d 797, 803 (3rd Cir. 1996) (holding that trespass is “deeply rooted” and not preempted), and *Radcliffe*, 254 F.3d at 785 (holding that false arrest, false imprisonment, and malicious prosecution are “deeply rooted”).

<sup>198</sup> *Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788, 1804 (2005).

<sup>199</sup> *Bates* is only the most recent in a somewhat tortured series of federal preemption cases involving state law, particularly in the area of torts. Thus, the long-term impact of *Bates* is unclear. *See* Jennifer S. Hendricks, *Preemption of Common Law Claims and the Prospects for FIFRA: Justice Stevens Puts the*

To the extent that confusion exists, the proposal simplifies the issue. Because the Board will not look to state property law, there is no potential for conflict between state and federal law.<sup>200</sup> It also eliminates the argument that warrants preempting state trespass claims because union access to an employer's property is a central interest of the NLRA and the Court "has gone to some lengths to state exactly what [it] entails."<sup>201</sup> Under the proposal, the NLRA is unconcerned with the possibility that the union was trespassing. Rather, the proposal recognizes the consistency in a state court determining that union activity constituted a trespass under state law, and the Board finding that the employer's attempt to remove the union violated the NLRA. Accordingly, absent a union claim that it is entitled to access under the reasonable-alternatives exception, an unfair labor practice charge based on an employer's exclusion should not preempt a state trespass claim.<sup>202</sup>

The analysis changes where the labor claim is based not on prohibited conduct, but on federally protected activity—such as union organizers defending a trespass claim by arguing that they had a right-to-access under the reasonable-alternatives exception.<sup>203</sup> The NLRA will generally preempt state trespass claims where clearly protected labor activity is at issue<sup>204</sup>; yet, the validity of a reasonable-alternatives claim is rarely, if ever, clear *ex ante*. Thus, prior to *Sears*, preemption of a state trespass suit that involved a reasonable-alternatives defense was murky.

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*Genie Back in the Bottle*, 15 DUKE ENVTL. L. & POL'Y FOR. 65 (2004) (discussing pre-*Bates* FIFRA-preemption).

<sup>200</sup> The exception being a reasonable-alternatives claim. *See infra* note 203.

<sup>201</sup> *I mondi*, 1983 WL 2036, at \*6.

<sup>202</sup> *Sears*, 436 U.S. at 198.

<sup>203</sup> If no other reasonable alternative means to communicate with workers exists, the NLRA gives organizers a derivative right to access an employer's property, which serves as a trespassing defense. *See supra* note 52 and accompanying text.

<sup>204</sup> *See supra* note 192.

Because this defense initially requires an examination of federal labor law to determine whether reasonable alternatives existed, *Sears* recognized that preemption may be required to avoid state interference with a matter that is generally within the Board's exclusive jurisdiction.<sup>205</sup> Under *Sears*, therefore, a Board complaint alleging that an employer unlawfully excluded organizers that lacked reasonable alternative means to contact employees will preempt the employer's state trespass action.<sup>206</sup>

Board procedures further complicate the analysis, however. The union in *Sears* never invoked the Board's jurisdiction by filing an unfair labor practice charge; instead it raised its reasonable-alternatives claim only as a defense to the state trespass suit. Yet, as *Sears* emphasized, an employer is unable to invoke the Board's jurisdiction to determine whether the NLRA provided the union with a right-to-access. According to the Court, it is inappropriate to preempt an employer's state trespass action based on a defense that the union refused to raise before the Board, as it would deprive the employer an opportunity to have the issue heard at all.<sup>207</sup> Preemption will be warranted only where the union filed a charge with the Board and alleged that the lack of reasonable alternatives gave it a right

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<sup>205</sup> *Sears*, 436 U.S. at 200-01.

<sup>206</sup> *Id.* at 207. *Sears* did not answer whether preemption is triggered by a union charge raising the reasonable-alternatives defense, or whether the Board must first issue a complaint—which requires a finding that prima facie evidence of a violation exists. Compare *id.* at 209 (arguing that “[t]he logical corollary of the Court’s reasoning is that” once union files charge, state trespass claim is preempted until Board refuses to issue complaint or rules against union) (Blackmun, J., *concurring*), with *id.* at 214 (arguing that filing charge is not enough to preempt state cases, but leaving open whether Board’s issuance of complaint would suffice) (Powell, J., *concurring*). The Board has avoided conflict by stating that, in cases implicating arguably protected activity, “preemption does not occur in the absence of Board involvement in the matter, and . . . upon the Board’s involvement, a lawsuit directed at arguably protected activity is preempted.” *Loehmann’s Plaza I*, 305 N.L.R.B. 663, 669-70 (1991) (defining “involvement” as issuing complaint); accord *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1179 (D.C. Cir. 1993) (approving *Loehmann* because it was more conservative than *Sears* majority, which “strongly suggested that the union’s filing of an unfair labor practice charge is sufficient in and of itself to trigger preemption”); *Hillhaven Oakland Nursing Ctr. v. Health Care Workers Union*, 49 Cal. Rptr. 2d 11, 18 & n.9 (Cal. App. 1996). Many courts have suggested that filing a charge with the Board is sufficient to initiate preemption. See *Davis*, 2 F.3d at 1179; *Reisbeck Food Mkts. v. UFCW*, 185 W.Va. 12, 18-19 (1991) (citing cases). Even if the Board issues a complaint, however, a union’s obstructive or violent conduct—issues that touch deeply rooted local responsibility—will not be preempted. See *Reisbeck*, 185 W.Va. at 19-20.

<sup>207</sup> 436 U.S. at 202.

to access the employer's property. If the Board ultimately agrees with the union, the employer's exclusion was unlawful and preemption will continue; if the Board rejects the union's argument, the union loses its federal right-of-access defense and the employer can then pursue a state trespass claim.

The proposal maintains *Sears*' preemption analysis where union organizers raise a reasonable-alternatives claim. However, the proposal clarifies the preemption question where organizers challenge the manner in which an employer tried to stop organizing activity. Unlike the confusion wrought by the Board's current analysis of an exclusion through the prism of state property law, the proposal's elimination of the state law issue obviates any question of preemption. This allows the state to resolve whether the organizers were trespassing and the Board to address the manner in which an employer excluded the organizers. The dichotomous jurisdiction encourages behavior that advances both state and federal interests. Allowing states to address trespass claims quickly, and without the Board interference that may currently occur, discourages trespassing by organizers. Similarly, permitting the Board to remedy unlawful employer conduct without getting bogged down in state law promotes the exercise of property interests in a manner that respects employees' labor rights. The result should be fewer trespasses and fewer coercive attempts to stop organizing activity.<sup>208</sup>

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<sup>208</sup> State claims under the proposal would also coincide with state anti-labor injunction laws that mirror the federal Norris-LaGuardia Act. *See* 29 U.S.C. §§ 101-115; N.Y. Labor Law § 807. Although many state laws, such as the Norris-LaGuardia Act, prohibit injunctions against union organizing, an employer can generally seek to enjoin a union from trespassing while engaging in such activity. *See Sears*, 436 U.S. at 185 (emphasizing that employer's attempt to obtain state injunction against trespass may proceed if it targeted only the location of union's picketing and "asserted no claim that the picketing itself violated any state or federal law"); *Waldbaum, Inc. v. United Farm Workers*, 383 N.Y.S.2d 957, 968 (N.Y. Sup. 1976) (holding that, under state anti-labor injunction statute, "[w]here illegal acts have been committed in the course of [otherwise lawful and protected] picketing . . . injunctive relief may be warranted" if statute's procedural requirements are satisfied).

### C. *A New Conception of Unions' Derivative Rights*

One incident in *Corporate Interiors* nicely distills the proposal's advantages over the current scheme. At issue was the union's attempt to communicate with employees working on a roof.<sup>209</sup> The union obtained permission from the general contractor to be on the roof, but the employer later told union organizers that they would have to leave because the access ladder needed to be removed.<sup>210</sup> Currently, the dispositive issue is whether the employer had a property interest that allowed it to exclude others from the roof. That makes little sense. If employees were aware that the employer had a legitimate reason to remove the ladder—a safety concern, for instance—there should be no violation of the Act. Absent circumstances that would lead employees to view the removal as threatening, or show that the union had no other reasonable means to communicate with employees, there were simply no labor interests at stake. Conversely, if the Board found that the employer lacked a right-to-exclude under its current analysis, the employer would have automatically committed an unfair labor practice.<sup>211</sup> This forces the employer to choose whether to enforce its arguable property rights or to avoid risking an NLRA violation by doing nothing—a decision made more difficult by the fact that the property determination will generally take several years of litigation to resolve.<sup>212</sup>

The proposal eliminates this dilemma. By looking to the circumstances of the removal, rather than the employer's state property rights, the test focuses on the pertinent

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<sup>209</sup> *Corporate Interiors*, 2003 WL 22295366, at \*30.

<sup>210</sup> *Id.*

<sup>211</sup> In *Corporate Interiors*, the Board found that the employer lacked a right to exclude the union because the general contractor gave the union permission to be on the roof; thus, the employer violated Section 8(a)(1). *Id.*

<sup>212</sup> The current analysis's focus on state property rights also forces unions farther away from the targeted business—for instance, encouraging picketing at a mall entrance, rather than near the targeted store. This may enmesh neutral employers into the labor dispute if customers think that the dispute involves the entire mall. See *Jean Country*, 291 N.L.R.B. 11, 18 (1988).

issue in right-to-access cases—the effect on employees’ labor rights. If employees would tend to perceive legitimate reasons for the removal, no NLRA violation exists. If, however, the employees had reason to believe that the removal was an attempt to target unionization,<sup>213</sup> a Section 8(a)(1) violation would be warranted.

Because employers would no longer face the uncertain choice of either allowing what may be a trespass or risking an unfair labor practice, the proposal allows them to pursue property rights claims<sup>214</sup> as long as employees’ labor rights are not chilled. A union, in turn, has an strong incentive to ensure *ex ante* that it engages in organizing activity without trespassing. That certainty allows the union to simply refuse an employer’s request to stop because it is assured that further attempts by the employer to interfere with the organizing will violate the Act. Moreover, where the union organizes on property over which control is unclear, it is likely to keep its activity peaceful and unobtrusive, as such conduct can be met at most by an equally unthreatening response by the employer. This should reduce labor tensions—a major goal of the Act.<sup>215</sup>

Although an employer may still pursue its trespass claim, the inquiry takes place where it belongs—in state court, not before the Board. It makes no sense to require a federal agency specializing in labor law to resolve state property issues. Moreover, under *Lechmere*, where organizers have reasonable alternatives to reach employees and the employer’s attempt to remove the organizers is peaceful, the dispute does not implicate federal labor concerns. The issue, instead, is purely a question of state property law.

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<sup>213</sup> For example, *Corporate Interiors* involved numerous contemporaneous unfair labor practices, the employees apparently knew that the union had permission to be on the roof, and after the union organizers left, the employer stated: “The only reason the ladders were taken was to get those fucking union guys off the roof.” *Id.*, at \*33. Each of those factors, alone, would be sufficient to support a finding that the employer’s conduct would tend to infringe employee rights.

<sup>214</sup> See *supra* notes 191-208 and accompanying text.

<sup>215</sup> See *supra* notes 131, 142.

Consequently, allowing state courts to resolve the dispute without Board involvement protects states' interest in enforcing their own property laws and removes a frustrating and delay-ridden area from the Board's docket.

The proposal also has advantages over other suggested alternatives to the current system. Professor Cynthia Estlund, for example, has argued that the *Lechmere* analysis should be replaced with a "good reasons" test. This test would essentially use a *Republic Aviation* analysis for both employee and nonemployee activity on employer property.<sup>216</sup> Although sensible, this would require an explicit reversal of *Lechmere*, which is not a realistic possibility in the near future. Moreover, Estlund's test would apply only where the employer possessed a right-to-exclude; she would maintain the current analysis where the employer lacks that right.<sup>217</sup> The test, therefore, still suffers the ills of the Board's reliance on state property law.<sup>218</sup>

To be sure, the proposal would create more uncertainty in cases where the property right issue is clear. Yet, the questions raised in such cases are the Board's forté—unlike state property rights inquiries. More important, the current regime ignores the effect that an employer's exclusion of organizers may have on employees' freedom to exercise their labor rights. The proposal avoids that shortcoming by protecting employees from interference by even well-meaning employers.

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<sup>216</sup> Estlund, *supra* note 7, at 309, 348-49 (arguing that, to exclude protected activity from its private property, employer should be required to show "that the speakers' presence or activity would actually interfere with continuing production, the delivery of services, physical safety or security of individuals on the premises, or to provide other substantial functional justifications"); *see also* Note, Sarah Korn, *Property Rights and Job Security: Workplace Solicitation by Nonemployee Union Organizers*, 94 YALE L.J. 374, 384, 393 (1984) (arguing for rule that focuses on employer's legitimate managerial interests).

<sup>217</sup> Estlund, *supra* note 7, at 343-44.

<sup>218</sup> In Estlund's defense, the Board's reliance on state property law, and the problems associated with the analysis, were not necessarily apparent immediately after *Lechmere*.

Finally, the proposal may be implemented without changes to either the NLRA or Supreme Court precedent. That the Board has not made a consistent policy of addressing the effect of employers' conduct on employees does not mean that it cannot do so. The Board's authority to examine whether employer conduct tends to infringe employee rights is well-established.<sup>219</sup> Indeed, the proposal's focus on employee rights is more consistent with the NLRA and *Lechmere* than the current analysis.<sup>220</sup> In the end, this easily implemented change would provide better enforcement of federal labor rights and state property law, while eliminating a significant administrative problem for the Board and federal courts.

### III. DOES UNION ACCESS CONSTITUTE A TAKING?

The Board's right-to-access cases have long raised the issue whether federal labor rights risk unconstitutionally taking employers' property. Particularly where the Board determines that the Act provides organizers a right to access employer property, the threat of a taking is pronounced. Even while expanding the scope of takings, however, the Supreme Court has been careful to exclude labor right-to-access cases. The proposal here would not alter those holdings.

Although granting access to organizers obviously limits an employer's absolute authority over its property, takings jurisprudence has always acknowledged that not all regulation of property must be compensated. Indeed, property ownership rarely grants unfettered control, especially where other rights are at issue; as the Court emphasized in *Babcock*, "[o]rganizational rights are granted to workers by the same authority, the

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<sup>219</sup> See *supra* note 15.

<sup>220</sup> See *supra* notes 74-76 and accompanying text.

National Government, that preserves property rights.”<sup>221</sup> It is far from clear, therefore, that takings considerations are relevant in right-to-access cases.

The proposal does nothing to alter the current right-to-access scheme’s treatment under takings law. The most likely prospect of finding a physical taking remains the same under either analysis: where the Board requires unauthorized, nonemployee access to employer property because no other reasonable alternatives to communicate with employees exist. Although property rights frequently trump other rights, the NLRA’s limited right-of-access requirement provides an exception under takings law.<sup>222</sup>

Federal supremacy, alone, should make NLRA restrictions on state property rights uncontroversial.<sup>223</sup> Moreover, it has never been the case that ownership provided unlimited rights over property.<sup>224</sup> Indeed, labor access rights are but one of many limitations on owners’ autonomy over their property.<sup>225</sup>

Soon after its enactment, the NLRA was interpreted to require unauthorized access to employer property under certain conditions.<sup>226</sup> Some states incorporated these

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<sup>221</sup> 351 U.S. at 112. Moreover, as Chairman Gould noted, Justice Frankfurter long ago emphasized that property rights do not control the right-to-access issue. *Leslie Homes, Inc.*, 316 N.L.R.B. 123, 131 (1995) (Chairman Gould, *concurring*) (citing *Marsh v. Alabama*, 326 U.S. 501, 511 (1946) (reversing Jehovah’s Witness’s criminal trespass conviction in company town) (Frankfurter, J., *concurring*)); *see also* *Republic Aviation*, 324 U.S. 793, 802 (1945) (holding that “[i]nconvenience or even some dislocation of property rights[] may be necessary in order to safeguard the right to collective bargaining”) (internal quotation marks omitted); *State v. Shack*, 58 N.J. 297, 305 (1971) (“A man’s right in his real property of course is not absolute.”).

<sup>222</sup> *See supra* notes 4-7.

<sup>223</sup> *See Estlund, supra* note 7, at 311.

<sup>224</sup> *See, e.g., Winget v. Winn-Dixie Stores, Inc.*, 130 S.E.2d 363, 367 (S.C. 1963) (holding, in nuisance case, that “[a]n owner of property even in the conduct of a lawful business thereon is subject to reasonable limitations”).

<sup>225</sup> Numerous statutes, regulations, and common law doctrines limit a property owner’s right-to-exclude without constituting a taking. *See, e.g., Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 n.21 (1994) (noting that mining regulations may justify limits on private property interests); Joseph William Singer, *INTRODUCTION TO PROPERTY* 34-39, 45-85 (2d ed. 2005) (discussing common law and legislative public accommodation limitations); Zmija, *supra* note 55, at 105-10 (noting employment, zoning, safety, and other types of laws that shape scope of property rights); Powell, *The Relationship Between Property Rights and Civil Rights*, 15 *Hastings L.J.* 135, 148 (1963) (describing examples of valid limits on property rights).

<sup>226</sup> *See supra* Section I.

rulings by defining property rights as lacking a right-to-exclude where labor law grants access. In California, for example, it is a misdemeanor to refuse to leave private property following the owner's request, except where state or federal labor law permits access to the property.<sup>227</sup>

Perhaps reflecting this history, as well as the fact that the reasonable-alternatives exception was its own invention, the Court has expressly stated that the Board's current right-to-access analysis does not constitute a taking.<sup>228</sup> Importantly, nonemployee access under this rule is temporary and is not permitted to interfere with the owner's, or its invitees', use of the property.<sup>229</sup> As the Court has emphasized, intrusion is allowed only to the limited extent necessary to help employees exercise their right to communicate with organizers during a representational campaign.<sup>230</sup> Thus, access under the reasonable-alternatives exception is rare and "the 'yielding of property rights it may require is both temporary and minimal.'"<sup>231</sup>

The limited nature of organizers' right-to-access is vital to the conclusion that it does not run afoul of the Fifth Amendment's restrictions on permanent, physical intrusions.<sup>232</sup> The Court made this point clear in *PruneYard Shopping Center v. Robins*,

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<sup>227</sup> Cal. Penal Code § 602(n); see also W.Va. Code § 61-3B-3 (exempting labor disputes from criminal trespass liability). Some of these statutes may have been a direct response to *Sears* and other Supreme Court cases addressing conflicts between state law and federal labor law. See *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 355-56 & n.2, 363-64 (4th Cir. 1991) (discussing West Virginia statute and comparing laws in California, Hawaii, Louisiana, and New Mexico).

<sup>228</sup> See *infra* note 236.

<sup>229</sup> Cf. *Quietflex Mfg. Co.*, 344 N.L.R.B. No. 130 (2005) (finding that employer lawfully fired employees who engaged in peaceful work stoppage in employer's parking lot because 12-hour stoppage was too long).

<sup>230</sup> *Central Hardware Co. v. NLRB*, 407 U.S. 539, 544-45 (1972) (stating also that contact can be restricted to nonwork areas). As noted, the Board's current analysis has since been applied to nonorganizational union activity that is directly protected, such as area standards handbilling. However, this extension of *Babcock* represents more, not less, protection for employer property rights. See *supra* notes 58-62 and accompanying text.

<sup>231</sup> *Central Hardware*, 407 U.S. at 545.

<sup>232</sup> See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 435 (1982) (holding that placing permanent cable boxes on apartment building was a taking); *Kaiser Aetna v. United States*, 444

where it upheld a state prohibition against excluding expressive activity from shopping centers open to the public because, in part, the invasion of property was temporary.<sup>233</sup> Although the proposal here would apply to public and non-public property,<sup>234</sup> the temporary nature of the access is crucial. Even where organizers seek access to a worksite that is closed to the public—for instance, a remote logging camp—the need to protect employees’ labor rights easily fits under well-established law allowing limited, temporary intrusions onto private land.<sup>235</sup> Indeed, shortly after *PruneYard*, the Court expressly distinguished NLRA-mandated access and permanent physical intrusions, stating that the latter constituted takings but labor access rights did not.<sup>236</sup>

Organizer access also fails to constitute a taking under the *Penn Central* regulatory takings test, as it does not deprive the owner of all economic use of the property; the economic impact of access is low; its interference with reasonable investment-backed expectations is not significant; and the character of the Board’s grant

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U.S. 164, 176 (1979) (holding that permanent public access requirement for a pond connected to navigable water was a taking).

<sup>233</sup> 447 U.S. 74, 84 (1980).

<sup>234</sup> *PruneYard* downplayed the significance of the property’s openness, noting that past cases stressing the open nature of the property were no longer good law. *Id.* at 81 (holding that private character of store and its property does not change by being in shopping center) (citing overruling of *Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968), by *Hudgens v. NLRB*, 424 U.S. 507 (1976)). *But see* Stevens, *supra* note 74, at 1360-61 (suggesting that this type of access may be a taking).

<sup>235</sup> *See, e.g.*, *State v. Shack*, 58 N.J. 297, 305 (1971) (holding that property owner lacked right to exclude government and nonprofit organizations trying to contact farmworkers living on property because it is an example of a “necessity . . . [that] may justify entry upon the lands of others”) (citing Prosser, *TORTS* § 24, 127-29 (3d ed. 1964); 6A AM. LAW OF PROPERTY § 28.10, 31 (A. J. Casner ed. 1954); 52 Am. Jur., *TRESPASS*, §§ 40-41, 867-69); *cf.* *Lingle v. Chevron U.S.A., Inc.*, 125 S. Ct. 2074, 2082 (2005) (holding that regulatory takings jurisprudence “aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain”).

<sup>236</sup> *Loretto*, 458 U.S. at 434 & n.11 (holding that cable company’s “reliance on labor cases requiring companies to permit access to union organizers is . . . misplaced” because labor access is temporary and limited) (citing *PruneYard*, 447 U.S. at 84; *Hudgens*, 424 U.S. 507; *Central Hardware*, 407 U.S. at 545; *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956)).

of access is confined to very limited circumstances.<sup>237</sup> Moreover, the economic use of the property is preserved because employers may always impose reasonable time, place, and manner limitations and the NLRA will protect organizer access only if it is orderly and does not interfere with business.<sup>238</sup> In short, access does not force an employer to shoulder a burden that the public as a whole should bear.<sup>239</sup> Accordingly, preventing employers from excluding organizers' attempt to communicate with workers where no reasonable alternatives exist does not impose an unconstitutional burden on employers' property rights.<sup>240</sup>

The primary change under the proposal is to impose more restrictions on the *means* by which employers may try to exclude nonemployees. However, this modification is less of a takings concern than the access provided under the reasonable-alternatives exception. A rule that permits employer attempts to oust organizers from what is arguably its property, but only if it does so in a peaceful manner, does not begin to approach the substantial threshold of a regulatory taking.<sup>241</sup> Rather, the rule is similar to the numerous limitations on the use of property that do not impose unconstitutional burdens.<sup>242</sup> If the temporary, physical intrusion required under the reasonable-alternatives exception is not a taking, then the proposal's restrictions on the manner in

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<sup>237</sup> See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); accord *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (2001); *supra* note 52.

<sup>238</sup> *PruneYard*, 447 U.S. at 84; *supra* notes 147-149.

<sup>239</sup> *Lingle*, 125 S. Ct. at 2081-82; *PruneYard*, 447 U.S. at 82; Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 8-9 (1995).

<sup>240</sup> See *PruneYard*, 447 U.S. at 83-84 (noting that, unlike permanent physical taking or requirement that expensive private marina must admit the public, requiring property owner to permit free speech in shopping mall did not infringe right that was "so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking'") (citing *Kaiser Aetna*).

<sup>241</sup> See *supra* notes 237-239.

<sup>242</sup> See *supra* notes 7 and 224.

which an employer can exclude organizing activity must surely be acceptable.<sup>243</sup>

Consequently, the proposal's limitations on private property rights do not raise a serious takings issue.

#### CONCLUSION

The struggle between labor rights and property concerns has been arduous. The ascension of property law has increasingly dominated the balance between the two competing interests. The importance given to property rights, however, has resulted in a regime in which not only is the enforcement of labor rights impaired, but vindication of property rights is hindered as well.

The proposal attempts to rectify this situation through a logical scheme that remains consistent with the Supreme Court's right-to-access holdings. The new analysis would move the Board's focus away from its skewed interpretation of organizers' derivative rights in favor of a much more traditional and appropriate concern—the employees' freedom to exercise their labor rights. Through this shift, the Board would no longer have to examine state property law, thereby eliminating delayed and often ill-conceived decisions by the Board and federal courts. Instead, those issues would be decided in the forum where they belong—state court.

Similarly, the right of employees to choose freely whether or not to pursue collective representation is far better served by the proposal. This fundamental goal of the NLRA has often been ignored by the Board's current analysis, under which property rights are determinative. By looking to the manner in which an employer attempts to exercise its property interests, the proposal would ensure that employees' labor rights are

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<sup>243</sup> *Loretto*, 458 U.S. at 436 (holding that potential physical taking is “qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion”).

protected. Employees' ability to learn about unionization would also be enhanced, as coercive attempts to exclude union organizing would be prohibited, even on company property. Employers benefit as well, for they no longer have to face the choice between protecting an arguable property interest and risking a violation of the NLRA; instead, they would be free to test their property claim as long as they do so without infringing employee rights. The potential for conflict would also be alleviated, as unions that peacefully organize are assured that an employer would respond in kind or face an unfair labor practice finding.

Although state property law and federal labor law have become inexorably entwined, they are discrete interests that can be independently resolved. Whether organizing activity constitutes a trespass is a question best left to state courts, and the answer is generally unrelated to contemporaneous labor issues. Further, except in limited circumstances, the locus of the organizing does not affect the question whether the employees' labor rights were infringed. That issue requires an examination of the manner in which the employer reacted to the organizing, which the Board has inexplicably disregarded more often than not. By correcting this oversight, the proposal offers significant benefits for the enforcement of both federal labor policy and state property rights.