

LISTEN TO YOUR STATE: RESOLVING THE NONEMPLOYEE UNION REPRESENTATIVE ACCESS DEBATE THROUGH STATE PROPERTY LAW

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Abstract:

Unions have lost the once strong position they held in the American workplace. Academics have long debated how to restore the National Labor Relations Act's relevance in today's global marketplace. Congress's preferred solution seems to be the Employee Free Choice Act, which would reform the unionization voting process, but this proposal does not strike at the heart of the matter. Labor is losing the debate on the benefits of unionization for the average worker because it is operating on an uneven playing field where employers can exert undue influence on employees to prevent them from organizing, with no real opportunity for nonemployee union representatives to respond.

*True reform must focus on the ability of union representatives to access employer property, which is currently governed by the Supreme Court's decision in *Lechmere v. NLRB*.¹ Recognizing the importance of access to employer property, Professor Jeffrey Hirsch has recently proposed changes to the *Lechmere* test that would eliminate consideration of state law from the analysis.² However, rather than protest its consideration, Labor should embrace state property law as an answer to the access dilemma. In order to support this claim, this article presents a unique analysis of the different ways in which state property law can provide a means for nonemployees to access private property. Thus, the article concludes with a proposal to reform the *Lechmere* analysis by emphasizing state property law, and also calls for Congress to eliminate discrimination against Labor viewpoints in employers' decisions to open their property to nonemployees.*

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¹ *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

² Jeffrey M. Hirsch, *Taking State Property Rights Out of Federal Labor Law*, 46 B.C. L. REV. 891 (2006).

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I. INTRODUCTION

America's workforce is struggling to make ends meet more than ever before, but politicians are ignoring a possible solution. The end of 2009 saw the official unemployment rate close in double digits at 10%.³ Through the better part of 2010, the jobless rate remains in a dire situation.⁴ The job market is so bad that some have likened obtaining employment to getting into Harvard.⁵ Further, American families are earning less today than they were a decade ago.⁶ Proponents of unions and organized labor ("Labor" or "Labor advocates") believe an answer to many of these problems lies in one of our country's oldest federal laws, the National Labor Relations Act ("NLRA" or the "Act").⁷ This viewpoint advocates that unions can help employees by providing job security and increased wages. So why are union membership rates not higher? Many labor experts debate the cause of dwindling union membership and find numerous reasons to explain the decline.⁸ These commentators also propose solutions that suggest the need to internally reform union structures or externally change the rules governing union representation.⁹ Congress, for its part, is spending valuable political capital on a contentious

³ Peter S. Goodman, *U.S. Job Losses in December Dim Hopes for Quick Upswing*, N.Y. TIMES, Jan. 9 2010.

⁴ Catherine Rampell, *Public Jobs Drop Amid Slowdown in Private Hiring*, N.Y. TIMES, Oct. 8, 2010 (through September 2010, the unemployment rate was 9.6%).

⁵ Samuel Sherraden, *Landing a Job Like Getting into Harvard*, CNN, Nov. 6, 2009, <http://www.cnn.com/2009/OPINION/11/06/stimulus.jobs/index.html>.

⁶David Leonhardt, *A Decade With No Income Gains*, N.Y. TIMES, Sept. 10, 2009, <http://economix.blogs.nytimes.com/2009/09/10/a-decade-with-no-income-gain> (citing U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2008* (Sept. 2009)).

⁷ 29 U.S.C. § 151 *et seq.*

⁸ *See infra* Part II(A).

⁹ *See infra* Part II(A).

modification to labor law in the Employee Free Choice Act (the “EFCA”).¹⁰

The solution to Labor’s dilemma must target reforming nonemployee union representative access to employer property. The controlling analysis from the Supreme Court’s watershed opinion in *Lechmere v. NLRB* grants nonemployee union representatives few rights to access employer property.¹¹ The conflict between employee rights to organize and join a union under § 7 of the Act¹² and private property rights to exclude other individuals is resolved heavily in favor of the employer.¹³ To bring balance to the union debate, this article will argue that Congress and the Supreme Court should grant nonemployee union representatives fair access to employer property.

The recent opinion in *Fremont-Rideout* presents a new threat to the capacity of employees to exercise their § 7 rights under the Act.¹⁴ This article is the first to consider the impact of this 2009 Administrative Law Judge (“ALJ”) decision, pending before the National Labor Relations Board (the “NLRB”), on nonemployee access rights to employer property. The *Fremont-Rideout* ruling extended the NLRB’s *Register-Guard*¹⁵ discrimination analysis to real property.¹⁶ This interpretation of the Act means that an employer unlawfully denies nonemployees access to its property only where the employer provides disparate access privileges between unions, without regard to how the employer treats solicitations by non-labor organizations.¹⁷ For those concerned about the continuing vitality of the Act, this standard threatens to further reduce the already diminished presence of unions in the American workforce.

In a leading treatment of this topic before *Fremont-Rideout*, Professor Jeffrey Hirsch argued the NLRB should adopt a new standard that disregards state property

¹⁰ See *infra* Part II(D).

¹¹ *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

¹² 29 U.S.C. § 157 (commonly referred to as § 7).

¹³ See *Lechmere*, 502 U.S. 527.

¹⁴ The *Fremont-Rideout Health Group (Fremont-Rideout)*, 2009 N.L.R.B. LEXIS 20 (N.L.R.B. Jan. 29, 2009).

¹⁵ The *Guard Publ’g Co. (Register-Guard)*, 351 N.L.R.B. 1110 (2007).

¹⁶ See *Fremont-Rideout*, 2009 N.L.R.B. LEXIS 20.

¹⁷ *Id.* at *8-13.

rights to restore equality for union viewpoints in the marketplace of ideas.¹⁸ Although Hirsch presents a novel approach to enhance union access to employer property, two critical flaws in his proposal suggest the need for a better solution. First, Hirsch trades a concrete, objective basis for recognizing rights for a test that depends on each party's subjective version of events. Second, Hirsch complicates the dispute resolution process for the parties by requiring them to concurrently litigate two separate lines of cases. In one action, union advocates must litigate before the NLRB against a property owner to enforce § 7 rights under the Act. At the same time, the parties must engage in a trespass action before state courts to determine the extent of property access rights.

Rather than dispose of state property law in the NLRB's analysis, Labor should embrace the potential to influence access rights for nonemployee union representatives through state property law. This article presents a unique contribution to the nonemployee-access discussion by analyzing the different types of state law that Labor can rely on to provide a nonemployee union representative with access to employer property. State constitutions, statutes and regulations, and common law all afford individuals the right to access private property. Therefore, state property law presents an answer to Labor's problems.

In light of the weaknesses of Hirsch's standard and the advantages of a solution based on state law, I propose a different approach for Labor advocates to improve access rights to private property and restore employees' § 7 rights. The Supreme Court must revisit the *Lechmere* analysis to ensure that state property rights control whether a nonemployee has access to employer property. Additionally, Congress should restore free speech principles by ending discrimination against union viewpoints. These measures would go far for Labor advocates seeking to reintroduce equality to the union debate.

This article proceeds as follows. Part II describes unions in the United States and efforts to revive their place in the national labor policy. Part III lays out the current state of nonemployee access rights to employer property under the Act, federal court precedent, and NLRB precedent. The discussion also includes analysis of the *Fremont-Rideout* decision. Part IV describes Hirsch's solution and explains why Labor should embrace, rather than discount, state property law as a solution to the diminishing presence of unions. In Part V, I propose a two-pronged solution for

¹⁸ See Hirsch, *supra* note 2.

Labor to restore greater balance to union representative access rights. First, the Supreme Court should return state property rights to the forefront of nonemployee access rights to employer property. Second, I propose legislation in the form of the Labor Rights Act of 2010 to end discrimination against labor viewpoints.

II. THE DIRE SITUATION OF UNIONS IN AMERICA AND EFFORTS TO REVIVE THEIR PRESENCE IN THE WORKPLACE

Labor unions traditionally enjoyed strong popularity in the United States, but their membership is now at an all-time low. Congress is currently considering the Employee Free Choice Act to return unions to the position of prominence they once held in the United States.¹⁹ The EFCA, however, will not achieve the success Labor advocates foresee. If union proponents want to see true reform, their efforts must also enhance the rights of nonemployees to access employer property and help employees exercise their § 7 rights under the Act.

A. Popularity That Does Not Match Practice

Labor advocates can present convincing arguments that union membership has numerous benefits for the average worker.²⁰ Federal reports show individuals belonging to a union make around 20% more than their non-union counterparts.²¹ If the employee is a woman or African American, the salary discrepancy is closer to

¹⁹ H.R. 1409, 111th Cong. (2009).

²⁰ In 1993, President Clinton's administration formed the Dunlop Commission to investigate what changes should be made to American labor law "to enhance work-place productivity" and "cooperative behavior" and reduce collective bargaining conflicts. U.S. COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, THE DUNLOP COMMISSION FINAL REPORT 3 (1994). Based on testimony, studies, and hearings presented to the Commission, the subsequent Dunlop Commission Report found that "[t]he evidence presented to the Commission is overwhelming that employee participation and labor-management partnerships are good for workers, firms, and the national economy." *Id.* at 4, 8.

²¹ U.S. Dept. of Labor, Median Weekly Earnings of Full-Time Wage and Salary Workers by Union Affiliation and Selected Characteristics, Jan. 22, 2010, <http://www.bls.gov/news.release/union2.t02.htm>. This statistic refers to the 2008 weekly salary of individuals ages 25 and up where a union member made a weekly average of \$903 while a non-union member made a weekly average of \$736. *Id.*

30%.²² Union members are more likely to receive health benefits from their employer than non members.²³ Unions typically negotiate for “just cause” protection of jobs so that an employee cannot be terminated “at will.”²⁴ Additionally, unions help secure other vital interests of employees.

In the wake of the financial collapse of the late 2000s, anti-union advocates came out strongly to oppose increasing union membership in America. While the union employee benefits from higher wages, labor costs are greater for employers with a unionized workforce.²⁵ To overcome the costs of unions, Labor critics claim, employers must rely on more machines to do the work of employees or outsource positions overseas.²⁶ These alternatives result in fewer jobs for Americans out of work. Related to costs are complaints that union workers are less efficient because they know the union will always protect them from an employer’s attempt at discipline.²⁷ Further, union assailants argue that unions are prone to coerce potential members and employers through violence and other acts of cruelty.²⁸ Fueling such allegations are reports of union supporters stabbing an employee who crossed the picket line,²⁹ burning nonunion housing camps,³⁰ and withholding health insurance

²² *Id.* In 2008 a non-union woman, 25 or older, made \$645 per week compared to her union-member counterpart who made \$825 per week. Additionally, a non-union African American aged 16 or older made \$564 per week compared to his or her union member counterpart who made \$720 per week. *Id.*

²³ Paul Fronstin, *The Relationship Between Union Status and Employment-Based Health Benefits*, 30 EMP. BENEFIT RES. INST. NO. 10, 15-21 (Oct. 2009).

²⁴ See United Food and Commercial Workers International Union, Union Benefits, http://www.ufcw.org/about_ufcw/why_union/benefits.cfm (last visited Mar. 3, 2010).

²⁵ Kevin Hassett, *Manager’s Journal: Why Big Labor Keeps Getting Smaller*, WALL ST. J., Aug. 3, 1998, at A14.

²⁶ See *id.*

²⁷ See EmployerReport, *Lazy Union Workers ‘a Cancer’: Are Union Bosses Finally Getting It?*, <http://employerreport.blogspot.com/2008/05/lazy-union-workers-cancer-are-union.html> (May 19, 2008).

²⁸ See Editorial, *The Teamster Promise*, WALL ST. J., Sept. 30, 2003, at A20.

²⁹ See Editorial, *Union Casualties*, WALL ST. J., Sept. 2, 1997, at A18.

³⁰ James Bovard, *Union Goons’ Best Friend*, WALL ST. J., June 2, 1994, at A14.

from sick children.³¹

Despite these arguments, unions historically enjoyed broad support among Americans. In the 1950s, unions had an approval rating around 75%.³² Although membership rates are currently at their lowest point in American history, approximately 59% of Americans approved of labor unions as recently as 2006.³³ Public polling in the same year showed most Americans believed unions helped their members (71%) and the U.S. economy in general (53%).³⁴ Only in 2009 did unions see their popularity among Americans dip below 50% for the first time, to 48%.³⁵ This low percentage may well be a short-term effect of media coverage following the financial collapse of the “Big Three” automakers in 2009.³⁶ Still, unions continue to enjoy a positive perspective from a significant percentage of Americans.

Although public support for unions remains near 50%, the percentage of Americans who are union members barely hovers over 10% and is at its lowest point in the history of the Act. In 2009, just 12.3% (or 15.3 million) of the total workforce population (“total” includes both the private and public sectors) were union members.³⁷ By comparison, 20.1% (or 17.7 million) of the workforce population

³¹ Union Casualties, *supra* note 29, at A18. Allegedly the Teamsters cut off William West’s health insurance, which was part of his union pension arrangement. West, whose daughter Callie suffered from epilepsy and kidney problems, decided not to strike with his fellow UPS drivers.

³² Lydia Saad, *Most Americans Approve of Labor Unions*, GALLUP NEWS SERVICE, Sept. 1, 2006, <http://www.gallup.com/poll/24343/Most-Americans-Approve-Labor-Unions.aspx>.

³³ *Id.* In 2006, 59% of Americans approved of unions.

³⁴ *Id.*

³⁵ Lydia Saad, *Labor Unions See Sharp Slide in U.S. Public Support*, GALLUP NEWS SERVICE, Sept. 3, 2009, <http://www.gallup.com/poll/122744/Labor-Unions-Sharp-Slide-Public-Support.aspx#1>. Thus, the 2009 results of Gallop’s poll may be a knee-jerk reaction by the public dealing with a struggling economy rather than a true indicator of individual perceptions of labor unions.

³⁶ *Id.*

³⁷ U.S. Dept. of Labor, *Union Members Summary*, <http://www.bls.gov/news.release/union2.nr0.htm> (Jan. 22, 2010).

belonged to a union in 1983,³⁸ 24% (or 18 million) in 1973,³⁹ and 28.3% in 1954.⁴⁰ Additionally, the statistics are even lower for private sector employees. In 2009, just 7.2% of private sector employees were union members.⁴¹ This number compares to 37.4% of public sector employees that were union members in 2009.⁴² If Labor advocates hope to bring the presence of unions into line with public support of unions, the NLRB needs to embrace reform.⁴³

B. Attempts to Explain and Solve the Union Membership Dilemma

Labor observers have long debated how to explain the downfall of union membership.⁴⁴ Samuel Estreicher classified the leading academic explanations of Labor's decline into four categories.⁴⁵ First, the efforts of employers to oppose unionization have generally succeeded in deterring supporters.⁴⁶ Second, employees themselves have shifted their attitudes from achieving goals through collective action to individualism.⁴⁷ Third, the structural changes of economies that focus on providing services over manufacturing have left unions at a loss to maintain

³⁸ *Id.*

³⁹ Unionstats.com, Union Membership, Coverage, Density, and Employment Among All Wage and Salary Workers, 1973-2009, <http://unionstats.gsu.edu> (follow "All Wage & Salary Workers" link under "U.S. Historical Tables" heading) (last visited Mar. 3, 2010).

⁴⁰ Gerald Mayer, Congressional Research Service, Union Membership Trends in the United States, CRS-12 (Aug. 31, 2004), available at <http://digitalcommons.ilr.cornell.edu/>.

⁴¹ U.S. Dept. of Labor, *supra* note 37.

⁴² *Id.*

⁴³ For a discussion on modern NLRB decisions that have contributed to its own downfall, see James J. Brudney, *The National Labor Relations Board in Comparative Context: Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221 (2005).

⁴⁴ See Samuel Estreicher, *"Think Global, Act Local": Employee Representation in a World of Global Labor and Product Market Competition*, 4 VA. L. & BUS. REV. 81(2009).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 83. See also Sharon Rabin Margalioth, *The Significance of Worker Attitudes: Individualism as a Cause for Labor's Decline*, 16 HOFSTRA LAB. & EMP. L.J. 133, 134 (1998) (using survey and study data to demonstrate that American workers' traditional preferences for collective action have given way to more recently favored individualism).

membership counts.⁴⁸ Finally, unions have not found a way to achieve their goals in a global marketplace, instead driving individuals away from membership.⁴⁹

No matter the source of the union membership problem, the academic literature is rich with ways to increase the presence of unions in the 21st Century.⁵⁰ Commentators recognizing the benefits that unions bring to the workplace propose solutions focusing on either internal or external changes.⁵¹ Proponents of the internal change viewpoint argue that unions need to change their structure, goals, and methods to remain relevant.⁵² For example, Estreicher advocates for unions “to reorient themselves in order to develop a package of services that appeals to mobile, educated workers and that promotes worker voice without detriment to firm economic performance.”⁵³ Estreicher proposes that unions should take the firm’s competitive position into greater consideration when promoting worker objectives and begin to act as “career-based organizations,” to provide benefits for short-term employees.⁵⁴

Other commentators arguing for external changes suggest the decline of

⁴⁸ Estreicher, *supra* note 44, at 83.

⁴⁹ *Id.* Some of these traditional union goals included wage increases, shorter work weeks, and staffing rules.

⁵⁰ Margalioth, *supra* note 47, at 133-34 (Many theories explaining the decline of union membership have been discussed. Some factors considered are competitive markets, employer resistance to unions, structural change, and legal challenges).

⁵¹ *See generally* Estreicher, *supra* note 44 (Four primary explanations for the decline of union memberships have emerged. Both institutional reforms and reevaluation of the goals and actions of unions are required to increase trade union representation and participation).

⁵² *See* Michael C. Harper, *A Framework for the Rejuvenation of the American Labor Movement*, 76 IND. L.J. 103, 124 (2001) (proposing a two-tier representational system of collective bargaining). Arguably the formation of the Change to Win coalition represents some unions acknowledging that new strategies are necessary to reverse the trend of their decline. *See* Keith J. Gross, *Separate to Unite: Will Change to Win Strengthen Organized Labor in America*, 24 BUFF. PUB. INTEREST L.J. 75, 107-08 (2006).

⁵³ Estreicher, *supra* note 44, at 91. *But see* Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827, 829 (1996) (arguing for deregulation of labor markets).

⁵⁴ Estreicher, *supra* note 44, at 92.

unionism in America is due to Congress' failure to modernize labor laws.⁵⁵ This view starts with the understanding that employees potentially subject to a representation election are basing their decision on imperfect information, which leads to unbalanced results.⁵⁶ Thus, labor laws and precedent must change so that employees hear information from both sides of the debate and are able to make a more educated decision.⁵⁷ These proposed changes to laws include ending captive audience meetings,⁵⁸ applying the Act liberally to internet communications in the workplace,⁵⁹ and allowing easier access to employee contact information.⁶⁰

C. *Face-to-Face Communication Versus Internet Communication*

To address imperfect information concerns, communication through the Internet can provide a significant means of reaching potential union members where face-to-face communication is not possible. Even today, after almost three decades

⁵⁵ See *The Guard Publ'g Co. (Register-Guard)*, 351 N.L.R.B. 1110, 1121 (2007) (Liebman and Walsh dissenting) (critiquing the Majority's opinion for turning the NLRB into the "Rip Van Winkle of administrative agencies" for failing to keep up with changing technology while analyzing e-mail systems) (quoting *NLRB v. Thill, Inc.*, 980 F.2d 1137, 1142 (7th Cir. 1992)).

⁵⁶ See generally Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1, 45-69 (2008) (arguing for union representation decisions to be viewed as an economic decision rather than as a "scientific laboratory" or a "political decision," as traditionally believed).

⁵⁷ *Id.* at 78.

⁵⁸ A captive audience meeting is where an employer requires employees to attend a meeting during working hours so the employer may espouse their views on unions. As this paper later discusses, unions do not enjoy similar privileges to address any employer arguments. See generally Paul M. Secunda, *The Captive Audience: United States: Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. & POL'Y J. 209 (2008) (discussing the risk in Worker Freedom Acts designed to end captive audience meetings and arguing such laws should not be preempted by federal law).

⁵⁹ See Jeffrey M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLRA?*, 76 GEO. WASH. L. REV. 262, 278-303 (2008) (applying NLRA rights and precedent to employee internet use at work, nonemployee internet use, and electronic access to employees); see also Christine Neylon O'Brien, *Employees on Guard: Employer Policies Restrict NLRA-Protected Concerted Activities on E-mail*, 88 OR. L. REV. 195, 249-50 (2009) (advocating to apply a disparate impact analysis to employer prohibitions of work e-mail uses by employees).

⁶⁰ Rafael Gely and Leonard Bierman, *Labor Law Access Rules and Stare Decisis: Developing a Planned Parenthood-Based Model of Reform*, 20 BERKELEY J. EMP. & LAB. L. 138, 181 (1999) (arguing that unions should be able to obtain the names and addresses for all employees from an employer upon showing that 10% of employees are interested in union representation).

since the birth of the modern Internet in 1983,⁶¹ Internet use continues to grow at an astounding rate.⁶² Approximately 75% of all homes have a computer with access to the Internet.⁶³ Americans are also connected to the Internet at a higher speed than ever before, with 57% of American homes accessing high-speed connections.⁶⁴ Currently, federal efforts are underway to see these numbers expand even more, with \$7.2 billion in American Recovery and Reinvestment Act of 2009 grants and loans dedicated to bringing high-speed internet to rural communities.⁶⁵

Despite widespread access to the Internet, physical face-to-face contact remains Labor advocates' preferred means of communicating between unions and potential members for three reasons. First, while the Internet is widely available, its actual use falls dramatically among those with lower education and income levels.⁶⁶ For example, an individual making between \$15,000-\$25,000 is less than half as likely to use the Internet as an individual making over \$75,000.⁶⁷ Further, an individual who has completed college is approximately six times as likely to use the Internet as one who did not graduate from high school.⁶⁸ However, individuals in lower income, lower educated classes are the types of individuals that unions are most likely to recruit because union representation has the most to offer in increasing wages, benefits, and job protections.⁶⁹

Second, while most people have access to the Internet through public or

⁶¹ ROBERT KLOTZ, *THE POLITICS OF INTERNET COMMUNICATION* 9 (2004).

⁶² *Id.* at 30.

⁶³ The Nielsen Company, *An Overview of Home Internet Access in the U.S.* 1, Dec. 2008, <http://blog.nielsen.com/nielsenwire/wp-content/uploads/2009/03/overview-of-home-internet-access-in-the-us-jan-6.pdf>.

⁶⁴ *Id.*

⁶⁵ Press Release, Office of the Vice President, Vice President Biden Kicks Off \$7.2 Billion Recovery Act Broadband Program (Dec. 17, 2009) (on file with the author).

⁶⁶ *See* KLOTZ, *supra* note 61, at 22.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *See* Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1544-45 (7th Cir. 1987) (Easterbrook concurring) (finding the Fair Labor Standards Act protects migrant workers as "employees" because their lack of human capital makes those workers the type of employees that Congress intended the Fair Labor Standards Act to protect).

private sources, individuals may not find information online about unions to the extent they could with face-to-face interaction. The three most common online activities rank in order as e-mail, entertainment, and commerce.⁷⁰ Not until the fourth most common online activity does one see political activity.⁷¹ Moreover, if a union election campaign is analogized to a political election campaign, Internet use likely offers a low rate of accidental exposure to union information.⁷²

Undeniably, the Internet has the power to connect and mobilize individuals with shared interests. In fact, a recent survey showed that 84% of Internet users “engage in some group activity.”⁷³ However, involvement in online “group activity” does not necessarily translate into mobilized political action. Internet users are unlikely to stumble on a given website without intentionally seeking it out, which makes it difficult for unions to reach unknowing, uneducated, or undecided individuals and convince them of the benefits of union membership.⁷⁴

Finally, face-to-face contact with individuals is likely to result in higher interest to vote on representation by a union than interest that the Internet alone can garner. Studies examining whether face-to-face contact increases voter turnout in a political election show that a potential voter who is contacted face-to-face by a canvasser is significantly more likely to go to the polls than an individual who is not contacted.⁷⁵ Presumably, a similar analysis would apply to the context of union elections. Nonemployee representatives seek to discuss the benefits of union membership with employees who can petition to vote on the matter of organization, and considering studies on the effects of face-to-face contact on voter turnout, union representatives may be more successful in portraying the benefits of union membership when addressing employees in person, rather than merely supplying

⁷⁰ KLOTZ, *supra* note 61, at 32.

⁷¹ *Id.*

⁷² *Id.* at 64.

⁷³ *Id.* at 42.

⁷⁴ *See id.*

⁷⁵ David Niven, *The Mobilization Solution? Face-to-Face Contact and Voter Turnout in a Municipal Election*, 66 J. POLS. 868, 875-76 (2004). *See also* Alan S. Gerber & Donald P. Green, *Does Canvassing Increase Voter Turnout? A Field Experiment*, 96 PROCS. NAT'L ACAD. SCIS. U.S. AM. 10939, 10941-42 (1999) (“[T]he magnitude of the canvassing effect we observe lends credence to the thesis . . . that falling rates of voter turnout reflect a decline in grass-roots political activity.”).

information online. Thus, while the amount of information available on the Internet to individuals is extensive, the above studies suggest that face-to-face interaction uniquely spurs interest in seeking out that information.

D. Current Congressional NLRA Reform Efforts Focus on the Employee Free Choice Act

The most recent Congressional effort to reform the Act and expand union membership in the United States is the Employee Free Choice Act.⁷⁶ The EFCA, in its proposed form, makes it easier to recognize a union as the official collective bargaining representative of employees.⁷⁷ Instead of holding a secret-ballot election after employees present a petition for recognition, the EFCA allows a union to become certified as the official bargaining representative when “a majority of employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization . . . as their bargaining representative.”⁷⁸ Thus, the EFCA limits the potential for undue influence that employers can have over any vote between the time when a vote date is announced and when the vote is held,⁷⁹ like employers’ use of captive audience meetings.⁸⁰

While the EFCA takes progressive steps to revitalize America’s union movement, pro-union advocates may not realize the dramatic gains in union membership they expect if the EFCA is implemented in its current form. The EFCA does not include language dedicated to strengthening the ability of union proponents to educate potential employee members of the advantages of joining a union. Although one way to increase union membership is to make certifying a union as the bargaining representative of employees an easier process, reform efforts aimed at increasing union membership must make sure relevant individuals are able

⁷⁶ H.R. 1409, 111th Cong. (2009).

⁷⁷ *See id.*

⁷⁸ *Id.* at § 2.

⁷⁹ American Rights at Work, *Why Workers Want Majority Sign-Up*, http://www.americanrightsatwork.org/dmdocuments/ARAWReports/why_workers_want_majority_sign-up.pdf (last visited Feb. 18, 2010); American Federation of Labor-Congress of Industrial Organizations, *The System for Forming Unions is Broken*, <http://www.aflcio.org/joinaunion/voiceatwork/efca/brokensystem.cfm> (last visited Feb. 18, 2010); United Automobile, Aerospace and Agricultural Implement Workers of America, *Employee Free Choice Act Questions and Answers*, <http://www.uaw.org/efca/facts/030609FACTSQA.cfm> (last visited Feb. 18, 2010).

⁸⁰ *See Secunda, supra* note 58.

to learn the impact that union representation has on their employment conditions.

The best source of positive information about unions is union representatives.⁸¹ Unions train representatives to understand and communicate the advantages and benefits employees can expect from membership.⁸² When these trained individuals are able to access employer property and discuss why employees should be organized, the nonemployee union representative is able to directly respond to questions and concerns an employer has about unions. A discussion between a nonemployee union representative and an employee can include addressing any allegations an employer may have made regarding union representation at the place of employment during a captive audience meeting. This interaction can provide a more personalized experience for the employee, who is then able to make a better educated decision about whether they want to be represented by a union. However, the current judicial analysis for nonemployee union representatives to gain access to employer property favors an employer's ability to exclude such individuals from the employer's property.⁸³ If Labor advocates want to see true reform, their efforts should focus on changing this analysis to allow nonemployee union representatives reasonable access to employer property.⁸⁴

⁸¹ One only needs to visit the websites of the leading union organizations to see the strength of union advocacy efforts in action. For example, see the UAW Home Page, <http://www.uaw.org>; AFL-CIO Home Page, <http://www.aflcio.org>; and SEIU Home Page, <http://www.seiu.org>.

⁸² For example, the National Labor College in Silver Spring, Maryland is an accredited higher education institution devoted to strengthening member education and organizing skills. National Labor College, Who We Are, <http://www.nlc.edu/about/who-we-are> (last visited Feb. 26, 2010).

⁸³ See *infra* Part III.

⁸⁴ Some efforts to increase nonemployee access to employees on employer property are taking shape. In September of 2009, Sen. Arlen Specter announced several compromises discussed on EFCA to guarantee it passes. Alec MacGillis, *Specter Unveils Revised EFCA Bill*, WASH. POST, Sept. 15, 2009, http://voices.washingtonpost.com/capitol-briefing/2009/09/specter_unveils_prospective_de.html. The proposed changes include "guarantee[ing] access to workers if employers h[o]ld mandatory anti-union meetings on company time." This proposal is a direct response to captive audience meetings discussed in note 58. While such provisions are better than nothing, more should be done.

III. THE ANALYSIS REGARDING NONEMPLOYEE ACCESS RIGHTS TO EMPLOYER PROPERTY

The NLRB first considered the right of nonemployees to gain access to employer property over fifty years ago. In *NLRB v. Babcock & Wilcox Co.*,⁸⁵ the Supreme Court confirmed a longstanding policy requiring the NLRB to accommodate § 7 rights and private property rights “with as little destruction of one as is consistent with the maintenance of the other.”⁸⁶ An employer could “validly post his property against” union distribution if it “[did] not discriminate against the union by allowing other distribution.”⁸⁷ However, if employees were beyond the reach of the union’s “reasonable attempts . . . to communicate,” the nonemployees gained a right to access the employer’s property.⁸⁸ Essentially, this means the NLRB will not force employers to provide access to union representatives if they had any reasonable alternative means of accessing the employees (the “*Babcock* standard”).

For nearly four decades the NLRB relied on the *Babcock* standard to analyze such questions of access. However, the Supreme Court narrowed the already limited *Babcock* standard for nonemployee access in its 1992 *Lechmere v. NLRB* decision.⁸⁹ The rights union organizers enjoy through the Act are under further scrutiny as courts struggle to uniformly apply *Lechmere*.⁹⁰ These inconsistencies of lower court decisions demand a new analysis that respects the policies promoted by the Act and respects the role of state law in determining property rights.

A. *The National Labor Relations Act*

The Act is the governing law for private sector labor policy in the United States, and the NLRB administers the Act as an independent federal agency.⁹¹ The NLRB has two essential functions: first, it conducts representation elections to determine whether employees want to join a union; and second, it hears and

⁸⁵ *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

⁸⁶ *Id.* at 112.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *See Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *infra* Part III.B.

⁹⁰ *See, e.g., Pichler v. UNITE*, 542 F.3d 380 (3d Cir. 2008).

⁹¹ 29 U.S.C. § 153(a) (establishing that the NLRB administers the NLRA as an independent agency).

remedies unfair labor practice charges brought under the Act.⁹² The NLRB's General Counsel investigates and prosecutes unfair labor practice cases before the NLRB for violations of the Act.⁹³ Employees enjoy certain rights under § 7 of the Act, including:

the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.⁹⁴

The Act protects against certain “unfair labor practices” committed by employers or unions.⁹⁵ Among the unfair labor practices, an employer commits a § 8(a)(1) violation if it “interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in § 7.”⁹⁶

The battle over access to employer property for nonemployee union representatives revolves around the above-mentioned provisions of the Act. When an employee receives information regarding union membership, the employee is exercising his or her § 7 rights.⁹⁷ However, § 7 grants *employees* this right, so nonemployee union representatives only have a “derivative right.”⁹⁸ These derivative rights are based on those rights granted to employees under § 7 but not explicitly defined anywhere. Courts and the NLRB are therefore required to interpret the scope of these derivative rights when they are claimed under the Act. A significant amount of time is spent litigating the scope of nonemployees implied, derivative rights under the Act.⁹⁹

⁹² National Labor Relations Board Fact Sheet, http://www.nlr.gov/About_Us/Overview/fact_sheet.aspx (last visited Sep. 1, 2010).

⁹³ *Id.*

⁹⁴ 29 U.S.C. § 157 (2006).

⁹⁵ *Id.* at §158(a)(1).

⁹⁶ *Id.* (commonly referred to as § 8(a)(1) from the original National Labor Relations Act).

⁹⁷ *Id.* at § 157.

⁹⁸ *See infra* Part III(C).

⁹⁹ *See Id.*

Interpreting the scope of employee and nonemployee § 7 rights presents a challenge, which is exacerbated because both the NLRB and the Supreme Court have offered different interpretations of the Act. This conflict, created by the lack of a single, unified interpretation of the Act, is problematic for courts and litigants. The following cases demonstrate the back-and-forth struggle between courts and the NLRB in attempting to define the limits of nonemployee rights to access employer property.

B. *The NLRB's Interpretation of Babcock in Jean Country*

The NLRB attempted to apply the *Babcock* balance of private property rights and § 7 rights in *Jean Country* and *Brook Shopping Centers, Inc.*¹⁰⁰ *Jean Country* involved ideal conditions to explore the numerous issues percolating through the established case law. Specifically, *Jean Country* addressed how to appropriately consider possible alternative means of communication between nonemployee union representatives and non-union employees.¹⁰¹ Brook Shopping Centers, Inc. (“Brook”) operated a large shopping center in New York.¹⁰² *Jean Country* was a new clothing store located in Brook’s mall.¹⁰³ Although other *Jean Country* stores were unionized, the store at issue was not.¹⁰⁴ Gaetano Mangano, a union representative, and two other retired union members began a picket line outside the non-unionized *Jean Country* store to inform the public of the site’s non-union status.¹⁰⁵ Subsequently, mall officials notified Mangano that the picketers would be arrested for trespassing unless

¹⁰⁰ *Jean Country & Brook Shopping Centers Inc.*, 291 N.L.R.B. 11 (1988).

¹⁰¹ In *Fairmont Hotel Co.*, the NLRB initially announced a test balancing § 7 rights and property rights that only considered alternative means of exercising those rights if the § 7 rights and property rights were determined to be equal. *Id.* at 11 (citing *Fairmont Hotel Co.*, 282 N.L.R.B. 139, 142 (1986)). In *Jean Country*, the NLRB recognized that in post-*Fairmont* decisions, the availability of alternative means of communication should always be considered in access cases. *Id.* (citing *Browning's Foodland Inc.*, 284 N.L.R.B. 939 (1987); *Sisters International Inc.*, 285 N.L.R.B. 796 (1987)). Additionally, the NLRB’s decision in *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976) suggested that the appropriate alternative means of communication could depend on the nature and strength of the § 7 and property rights asserted. *Id.* at 12.

¹⁰² *Jean Country*, 291 N.L.R.B. at 14.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 15.

they moved to a public road beyond the mall property.¹⁰⁶ Mangano then filed charges alleging Brook and Jean Country violated § 8(a)(1).¹⁰⁷

The NLRB embarked on a balancing of private property rights and § 7 rights and found the appropriate analysis must also consider the alternative means of communicating the union's message.¹⁰⁸ As the NLRB noted, *Babcock* held that the importance of the "alternative means to communicate available to nonemployees" depends on the strength of the property right asserted by the employer.¹⁰⁹ The NLRB attempted to formulate a standard that continued to consider alternative means of communication when determining access rights a nonemployee enjoys. This standard, however, opened the door for greater nonemployee access rights because of the expansive classes of individuals the NLRB used to describe its rule. *Jean Country* described discrimination against nonemployee access in general terms when it concluded, "[A] property owner who has closed his property to nonemployee communications, on a nondiscriminatory basis, cannot be required to grant access where reasonable alternative means exist."¹¹⁰ Although the NLRB recognized that a strongly protected property right could overcome any access claims maintained by unions, any access granted by the employer to nonemployees could not make distinctions between nonemployee groups.¹¹¹ Rather, the NLRB recognized a broad dichotomy between employees and nonemployees.

The NLRB went on to find that Jean Country and Brook violated § 8(a)(1) by stopping Mangano's picketing efforts.¹¹² First, the NLRB recognized that Jean Country and Brook satisfied the threshold inquiry and had a real interest in the property they claimed.¹¹³ Next, the NLRB determined the property interest at stake was relatively weak because the mall was open to the public and allowed non-

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* As described in *supra* Part III.A, a § 8(a)(1) violation occurs when the employer interferes with, restrains, or coerces employees in the exercise of § 7 rights.

¹⁰⁸ *Id.* at 11.

¹⁰⁹ *Id.* at 12.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 19.

¹¹³ *Id.* at 16.

commercial interests, such as photography exhibits, to use its space.¹¹⁴ Further, the NLRB found there were no factors to suggest the claimed § 7 rights were worthy of enhanced protection.¹¹⁵ Therefore, the NLRB's final step required analyzing the alternative means of communication.¹¹⁶

The NLRB determined the Union's only legitimate alternative means to communicate its message to customers of the Jean Country store was on a point of public property adjacent to the entrances to the mall.¹¹⁷ While *Jean Country* and *Babcock* argued that mass media communication was available to the picketers as an alternative means of communication, the NLRB dismissed this idea because it would remove the picketers' message from the awareness of Jean Country customers as they approached the store.¹¹⁸ Further, this alternative would have come at great cost to the union in the New York City media market.¹¹⁹ Thus, the NLRB was left to compare the union's attempted means of communication with placing their representatives on the public property adjacent to the mall's private property to communicate its message.

The NLRB was primarily concerned that forcing the picketers to move to public property near one of the mall's entrances would dilute their message.¹²⁰ The Jean Country store was one of over a hundred specialty shops centrally located on private property and one-quarter mile from the nearest entrance next to public property.¹²¹ The NLRB was not satisfied with this proposed alternative because it would be less effective.¹²² The union's message would not register as strongly with potential "impulse shoppers" deciding to stop at Jean Country only while passing the store if the union was forced to communicate its message at such a great distance.¹²³

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 17.

¹¹⁶ *Id.* at 18.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 18, n.18.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 18.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

Further, passersby might unintentionally confuse the union's message as being directed at neutral stores, or even the entire mall.¹²⁴ The negative consequences of following this alternative form of communication led the the NLRB to order Jean Country and Brook to allow the union access to picket in front of the Jean Country store.¹²⁵

C. Lechmere "*Clarifies*" Babcock *But Leads to Divergent Lower-Court Interpretations*

The Supreme Court was not satisfied with the NLRB's *Jean Country* opinion. In *Lechmere v. NLRB*, the Supreme Court issued its watershed decision on nonemployee access in NLRA-related situations.¹²⁶ Members of the United Food and Commercial Workers Union, AFL-CIO attempted to organize workers at a store owned by Lechmere, Inc.¹²⁷ The union took out a full-page advertisement in the local newspaper, passed out handbills to cars entering the parking lot, and recorded the license plate numbers of employee cars to obtain their home contact information.¹²⁸ These efforts proved largely unsuccessful, but management prevented the union from otherwise accessing the employees on the employer's property.¹²⁹ The union filed charges alleging Lechmere violated the Act.¹³⁰ The NLRB ruled in the union's favor, and the First Circuit Court of Appeals upheld that decision.¹³¹

The Supreme Court clarified that nonemployee access rights to employer property under the Act involves a two-layer analysis.¹³² First, for a nonemployee to gain a right to access employer property the nonemployee must not have "reasonable access" to the employees outside of the employer's property.¹³³ Second, where the

¹²⁴ *Id.*

¹²⁵ *Id.* at 19.

¹²⁶ *See* *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

¹²⁷ *Id.* at 529.

¹²⁸ *Id.* at 529-30.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 531.

¹³² *Id.* at 538.

¹³³ *Id.*

nonemployee cannot reasonably access the employees outside of the employer's property, the NLRB should balance the employer's private property rights with the NLRA § 7 rights.¹³⁴ When the Court applied this standard to the facts presented in *Lechmere*, it dismissed the nonemployee union representative's claimed right to access the employer's property under the first step.¹³⁵ The Court cited the union's "success" in retrieving 20% of employees' home addresses through license plate numbers as evidence of the union's ability to reasonably access employees.¹³⁶

The Supreme Court reached this conclusion by relying on a narrow interpretation of the *Babcock* standard and its definition of reasonable access.¹³⁷ The Court explained that the NLRB failed to distinguish the rights of employees and nonemployees under the Act when the NLRB granted nonemployees access to the employer's property.¹³⁸ Because nonemployees only have derivative rights under the Act, "an employer cannot be compelled to allow distribution of union literature by nonemployee organizers on his property," subject to an exception.¹³⁹ The court established an exception, developed from dicta in *Babcock*, providing nonemployee access to employer property "[w]here 'the location of the plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them.'"¹⁴⁰ Only in this limited situation, where

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 530, 540. In *Pichler v. UNITE*, 542 F.3d 380 (3d Cir. 2008), the Third Circuit interpreted the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-25, to further restrain a union organizing campaign's ability to use license plate numbers in acquiring employee contact information. A union collecting this information argued that it was in connection with a civil investigation proceeding to investigate unlawful employment practices. *Id.* at 394-95. The Third Circuit found against the union because it could not separate the permissible activity, investigating unlawful employment practices, from the impermissible activity of using the information for union organizing. *Id.* at 394-96. Thus, one of the few alternative reasonable means cited in *Lechmere* for nonemployee union representatives to establish direct contact with employees while respecting the private property rights of the employer was negated by federal legislation.

¹³⁷ See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532-41 (1992).

¹³⁸ *Id.* at 533.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 533-34. This analysis contrasts with the NLRB's explanation, on remand, of the *Babcock* accommodation balance in *Scott Hudgens*, 230 N.L.R.B. 414 (1977). When the NLRB applied the straight *Babcock* analysis in *Hudgens*, it rejected Hudgens' argument that mass media provided an

nonemployee union representatives had no reasonable access to communicate with employees, could the NLRB compel an employer to allow nonemployees access to the employer's property.¹⁴¹ This exception effectively redefined "reasonable access" to mean "ability to communicate by any possible means" with employees off of the employer's property, and it significantly undermined nonemployee efforts to reach employees.

Although not recognized by the *Lechmere* Court, one can distinguish two classes of property from the *Lechmere* analysis to evaluate nonemployee access rights: private property and quasi-public property. Private property refers to an employer's property that is not open to nonemployees under any circumstances.¹⁴² The Court maintained its previous holding from *Babcock*, at least in the context of private property, that an employer can keep nonemployees off its premises for organizational purposes if it does so in a uniform manner.¹⁴³ In such a case, the NLRB cannot compel an employer to allow nonemployees on its private property.¹⁴⁴

Quasi-public property is that which an employer opens to the public in some respect to do business. A town shopping mall is one example of quasi-public property. Neither the NLRB nor courts have interpreted *Lechmere* uniformly when dealing with cases where an employer's property is open to nonemployee access in some form. The *Lechmere* two-part analysis includes an implicit assumption that the

adequate, reasonable means of reaching the audience with its information. *Id.* at 416. Such a perspective would "undercut NLRB and Court precedent recognizing and protecting such picketing as the most effective way of reaching those who would enter a struck employer's premises, including situations in which the entrance to the employer's property is on land owned by another." *Id.* at 416-17.

¹⁴¹ *Id.* at 539-40. As this description suggests, the *Lechmere* Court focused on whether nonemployees could gain access to employer property where there was no reasonable means to communicate with nonemployees. In reaching its conclusion, the Court quoted a passage from its *Sears, Roebuck & Co. v. Carpenters* opinion, which suggested there might be another path to access rights where "the employer's access rules discriminate against union solicitation." *Id.* at 535 (quoting *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 205 (1978)). The Court did not directly address this alternative in *Lechmere*.

¹⁴² Though business related, nonemployee access is a limited exception to this definition.

¹⁴³ *Lechmere*, 502 U.S. at 537.

¹⁴⁴ See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). The only exception to this is where an employee lives on the employer's property. In that unique case, the employer must provide some access. *Id.* at 113.

employer will have a right to exclude under state property law. This assumption has led courts to confuse whether the employer's right to exclude from its property should be scrutinized as an initial matter. Thus, courts addressing nonemployee union representative claims to access employer property under *Lechmere* are not sure whether the threshold inquiry is the employer's ability to exclude under state property law or the *Babcock* exception cited in *Lechmere*.¹⁴⁵

The Second Circuit followed the latter approach in *Salmon Run Shopping Center LLC v. NLRB*.¹⁴⁶ In *Salmon Run*, the union sought permission from the owners of a large shopping mall to distribute materials outside of a store that was using non-union carpenters to remodel their retail space.¹⁴⁷ The mall eventually denied the union's requests, though it previously allowed requests for other unions conducting charitable activity.¹⁴⁸ The court acknowledged two exceptions to the *Babcock* standard restricting rights to employer property: "where (1) the organizational activity was directed at employees who are inaccessible through other means; and (2) 'the employer's notice or order does not discriminate against the union by allowing other distribution'" (the "inaccessibility exception" and the "discrimination exception," respectively).¹⁴⁹ The Second Circuit held that consideration of these two exceptions (together the "*Babcock* exceptions" and each a "*Babcock* exception") is a threshold question explaining "[o]nly where the facts establish one of these two exceptions" should the NLRB engage in a balance of § 7 and private property rights.¹⁵⁰ The court went on to define discrimination based on distinctions made on § 7 grounds and held the union had no right to access the mall property.¹⁵¹

The Ninth Circuit followed a starkly different approach in *NLRB v. Calkins*.¹⁵² There, a grocery store owner excluded nonemployee union

¹⁴⁵ In his proposed model discussed below, Hirsch begins by presuming these cases ask a threshold question of whether the employer had a state property right to exclude nonemployees from its property. Hirsch, *supra* note 2, at 905.

¹⁴⁶ *Salmon Run Shopping Ctr., LLC v. NLRB*, 534 F.3d 108 (2d Cir. 2008).

¹⁴⁷ *Id.* at 111.

¹⁴⁸ *Id.* at 112-13.

¹⁴⁹ *Id.* at 114 (quoting *Babcock*, 351 U.S. at 112).

¹⁵⁰ *Id.* at 114.

¹⁵¹ *Id.* at 116-18.

¹⁵² *NLRB v. Calkins*, 187 F.3d 1080 (9th Cir. 1999).

representatives seeking to picket and distribute literature aimed at organizing the store employees.¹⁵³ The Ninth Circuit emphasized the importance of the employer's state property right to exclude.¹⁵⁴ Unlike in *Salmon Run*, the extent of the employer's right to exclude under state property law was the threshold issue for the Ninth Circuit's understanding of *Lechmere*.¹⁵⁵ Applying this version of the *Lechmere* analysis, the court found a narrow right to exclude the nonemployees under California law because California incorporated its broad constitutional free speech protections into property access rights.¹⁵⁶ Therefore, the store owner violated § 8(a)(1) of the Act by excluding the nonemployees from the store property.¹⁵⁷

D. *Explaining and Resolving the Confusion Over Lechmere*

The confusion over how to apply *Lechmere* is apparent but it is important to understand the reasons for the differing opinions among the circuits to formulate a better standard. One can understand why the circuits follow different approaches to applying the *Lechmere* standard when that opinion is closely examined. First, *Lechmere* expressly overruled the NLRB's *Jean Country* opinion.¹⁵⁸ In *Jean Country*, the NLRB implemented a three-part balancing test that included private property rights and § 7 rights to determine nonemployees' right to access employer property.¹⁵⁹ In light of the rejection of a balancing test that initially considers state property law, one could infer that the NLRB should not begin to consider whether the employer has a state-law right to exclude so soon in its analysis. Second, nowhere in the *Lechmere* opinion did the court actually embark on a state-law analysis of the private property rights at

¹⁵³ *Id.* at 1083-84.

¹⁵⁴ *Id.* at 1087-88.

¹⁵⁵ *Id.* at 1089.

¹⁵⁶ *Id.* at 1089-93.

¹⁵⁷ *Id.* at 1095-96.

¹⁵⁸ *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538 (1992).

¹⁵⁹ *Jean Country & Brook Shopping Centers Inc.*, 291 N.L.R.B. 11, 14 (1988) (“[I]n all access cases our essential concern will be the degree of impairment of the § 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted. We view the consideration of the availability of reasonably effective alternative means as especially significant in this balancing process.”).

issue.¹⁶⁰ Rather, the Court presumed that nonemployees had no right to access the employer's property under state law.¹⁶¹ The importance of state property rights was undermined when the court assumed, without stating or supporting with authority, that the employer maintained an absolute right to exclude nonemployees.

Despite these suggestions, convincing arguments exist that state property rights are important and should be a controlling consideration to determine a nonemployee's access rights. First, an individual should not lose a right to access property that he or she might otherwise enjoy simply because the purpose behind their access is motivated by § 7 of the Act. As *Calkins* demonstrates, California maintains broad access rights because that state, through its constitution, highly regards freedom of speech.¹⁶² Restricting consideration of the nonemployee's ability to access employer property to a *Babcock* exception severely limits a nonemployee's right to access that he or she should otherwise enjoy.

Second, the Supreme Court's emphasis on state property law in *Thunder Basin Coal Co. v. Reich*, handed down shortly after *Lechmere*, also suggests that access rights under state property law are a primary concern.¹⁶³ In *Thunder Basin*, a mine owner challenged the granting of miner representatives the right to accompany government officials on safety and health inspections of mines pursuant to the Federal Mine Safety and Health Amendments Act of 1977.¹⁶⁴ The Court denied the mine owner's claim that a miner representative could potentially abuse its access privileges and subject the mine owner to serious harm.¹⁶⁵ In its reasoning, the Court noted, "The right of employers to exclude union organizers from their private property emanates from state common law, and while this right is not superseded by the Act, nothing in the Act expressly protects it."¹⁶⁶ Thus, a nonemployee's right to access under state law cannot be preempted by the Act and the application of the *Babcock* exceptions

¹⁶⁰ In *Lechmere* the appropriate state property law to consider would have come from Connecticut. The Ninth Circuit in *Calkins* analyzed Connecticut law when it distinguished the facts in *Lechmere*. *Calkins*, 187 F.3d at 1088.

¹⁶¹ See *Lechmere*, 502 U.S. at 537-39.

¹⁶² *Calkins*, 187 F.3d at 1089-93.

¹⁶³ *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994).

¹⁶⁴ *Id.* at 202-04, 216-18.

¹⁶⁵ *Id.* at 216-17.

¹⁶⁶ *Id.* at 217 n.21.

should not restrict those rights.

The difference between each approach taken by courts and described above is significant. The Second Circuit interpretation in *Salmon Run* (following the *Babcock/Lechmere* framework) presents a narrow interpretation that makes it difficult for nonemployees to ever hold access rights to employer property. A nonemployee seeking to conduct § 7-related activity does not have the same right to access property that is held open to the general public under the *Salmon Run* approach. The nonemployee speaker must first classify their inability to access employer property within a *Babcock* exception.¹⁶⁷ Additionally, access is further narrowed for the § 7 speaker, because courts define discrimination narrowly to allow the employer to exclude only those nonemployees addressing § 7 matters but not other nonemployee speakers.¹⁶⁸ However, under the second approach, which considers state property rights first, like that in *Calkins*, the nonemployee has a greater chance of having a lawful access interest in the property.¹⁶⁹ The limited circumstances presented by the *Babcock* exceptions no longer act as a filter before addressing state property law.

E. Fremont-Rideout Threatens to Require the NLRB to Apply a Narrow Definition of Discrimination

Nonemployee union representatives' access to employees on employer property threatens to become even more limited due to recent NLRB decisions. In *Fremont-Rideout*, an Administrative Law Judge (the "ALJ") applied the NLRB's *Register-Guard* discrimination analysis¹⁷⁰ to nonemployee union representative access to employer property.¹⁷¹ If the NLRB accepts this analysis, it would significantly curtail the remaining access to property rights for union representatives.

1. *Register-Guard*

The NLRB created a new definition of discrimination in the context of company property in *Register-Guard* when it considered an employee's right to use its

¹⁶⁷ *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537-40 (1992).

¹⁶⁸ *Salmon Run Shopping Ctr., LLC v. NLRB*, 534 F.3d 108, 115-16 (2d Cir. 2008).

¹⁶⁹ See *NLRB v. Calkins*, 187 F.3d 1080, 1087-88 (9th Cir. 1999).

¹⁷⁰ *The Guard Publ'g Co. (Register-Guard)*, 351 N.L.R.B. 1110, 1117-18 (2007).

¹⁷¹ *The Fremont-Rideout Health Group (Fremont-Rideout)*, 2009 N.L.R.B. LEXIS 20, at *32 (N.L.R.B. Jan. 29, 2009).

employer's e-mail system for § 7 purposes.¹⁷² The NLRB relied on its precedent concerning employer equipment to determine that an employee did not have a § 7 right to use Register-Guard's e-mail system for union purposes.¹⁷³ Register-Guard's restrictions on company e-mail were analogous to lawful employer restrictions on bulletin boards, telephones, and televisions.¹⁷⁴ Register-Guard's property interest in the e-mail system controlled, preventing employees from engaging in any § 7 activity, regardless of the employees' authorized presence at the workplace.¹⁷⁵ Further, the NLRB was not convinced that e-mails presented such a unique form of communication that it had to modify its rules to deal with them.¹⁷⁶

The truly remarkable part of the *Register-Guard* opinion came when the NLRB addressed the definition of discrimination.¹⁷⁷ Prior to *Register-Guard*, an employer could exclude all non-work related material from a communication system but could not discriminate between non-work related subjects, including union-related

¹⁷² *Register-Guard*, 351 N.L.R.B. at 1118. The Register-Guard and Eugene Newspaper Guild published a newspaper with the union representing its employees. In October 1996, Register-Guard implemented a Communications Systems Policy ("CSP") that prevented employees from using Register-Guard's communications systems and equipment to solicit for "outside organizations." In May and August 2000, management formally warned employee Suzi Prozanski for violating the CSP by using the company's e-mail system for union purposes. Register-Guard first warned Prozanski following a May 4, 2000 e-mail, in which Prozanski informed employees that management created rumors that anarchists would be attending a union rally. Register-Guard then later warned Prozanski for violating the CSP following two August 2000 e-mails urging employees to wear green in support of the union during negotiations and asking employees to participate in the union's entry in a town parade. Unlike Prozanski's first e-mail, she did not use any physical company property or work time to communicate with Register-Guard employees through these August e-mails. Prozanski sent these e-mails from a union computer, but she sent the e-mails to the employees' Register-Guard e-mail addresses. *Id.* at 1111-12.

¹⁷³ *Id.* at 1116.

¹⁷⁴ *Id.* at 1114 (citing *Mid-Mountain Foods, Inc.*, 332 N.L.R.B. 229, 230 (2000) (television for campaign video), *enforced*, 348 U.S. App. D.C. 75, 269 F.3d 1075 (D.C. Cir. 2001); *Eaton Techs., Inc.*, 322 N.L.R.B. 848, 853 (1997) (bulletin board); *Champion Int'l Corp.*, 303 N.L.R.B. 102, 109 (1991) (copy machine); *Churchill's Supermarkets, Inc.*, 285 N.L.R.B. 138, 155 (1987) (telephone), *enforced* 857 F.2d 1474 (6th Cir. 1988), *cert. denied* 490 U.S. 1046 (1989)).

¹⁷⁵ *Register-Guard*, 351 N.L.R.B. at 1115-16.

¹⁷⁶ *Id.*

¹⁷⁷ *See id.* 1116-19.

matters.¹⁷⁸ In *Register-Guard*, the NLRB followed the Seventh Circuit's approach and applied an entirely new definition of discrimination: "[D]iscrimination means the unequal treatment of equals. Thus, in order to be unlawful, discrimination must be along § 7 lines. In other words, unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other § 7-protected status."¹⁷⁹ This narrow construction of "discrimination" significantly narrowed when an employer might be found to unlawfully distinguish between access rights.

2. *Fremont-Rideout*

In *Fremont-Rideout*, an ALJ applied the *Register-Guard* discrimination analysis to nonemployee access to property.¹⁸⁰ The California Nurses Association ("CNA") became the collective bargaining representative of the nurses at the Fremont-Rideout Health Group's hospital facilities in California in September 2006, and subsequently began collective bargaining for a contract in December 2006.¹⁸¹ Prior to the nurses electing CNA as their representative, a Fremont-Rideout policy prohibited employees from soliciting or distributing literature during work hours, or soliciting or distributing at any time in working or patient care areas.¹⁸² Despite this policy, Fremont-Rideout allowed nurses to regularly visit with family and friends in the break room, to solicit other nurses to purchase goods, and to bring in information

¹⁷⁸ *Benteler Indus., Inc.*, 323 N.L.R.B. 712, 714 (1997).

¹⁷⁹ *Register-Guard*, 351 N.L.R.B. at 1117-18. The NLRB found that *Register-Guard* did not violate § 8(a)(1) of the NLRA by warning Prozanski after her August 14 and 18 e-mails. Although employees were allowed to exchange personal e-mails on the *Register-Guard* system, this distinction was not important under the NLRB's new definition. *Register-Guard* did not discriminate on § 7 grounds because there was no evidence that the company permitted employees to solicit for other groups or organizations. Ironically, the NLRB found that *Register-Guard* violated § 8(a)(1) when it warned Prozanski following her May 4 e-mail because that e-mail was not soliciting employees. The NLRB noted that *Register-Guard*'s CSP prohibited only "non-job-related solicitations." However, the NLRB was unable to distinguish Prozanski's non-solicitous, union-related e-mail from other permitted nonwork related e-mails. Therefore, *Register-Guard* unlawfully discriminated along § 7 lines and violated §8(a)(1) when it warned Prozanski after her May 4 e-mail. *Id.* at 1119.

¹⁸⁰ *The Fremont-Rideout Health Group (Fremont-Rideout)*, 2009 N.L.R.B. LEXIS 20, at *31-34 (N.L.R.B. Jan. 29, 2009).

¹⁸¹ *Id.* at *4.

¹⁸² *Id.* at *5-6.

concerning school fundraisers.¹⁸³ Thus, while Fremont-Rideout had a policy against solicitation and distribution, that policy was not consistently enforced.¹⁸⁴

Fremont-Rideout even allowed nonemployee labor representatives to flout these policies.¹⁸⁵ CNA labor organizers and representatives routinely met with nurses in break rooms and other areas of the hospitals.¹⁸⁶ Not only did these CNA representatives pass by nursing supervisors during their visits without problems, but in certain areas CNA employees even “buzzed in” these individuals to the intensive care unit.¹⁸⁷ After CNA was elected to represent Fremont-Rideout’s nurses, however, the hospital began to strictly enforce its no solicitation or distribution policy against union representatives.¹⁸⁸

In *Fremont-Rideout*, the ALJ applied the new *Register-Guard* definition of discrimination to nonemployee access.¹⁸⁹ Carrying this precedent over to the real property access context, the ALJ held this same standard applied to nonemployees’ attempts to enter employer property.¹⁹⁰ Although the employer allowed access to hospital areas to family and friends of nurses, it did not have to allow access to union representatives under the new definition of discrimination.¹⁹¹ The family and friends Fremont-Rideout allowed to access the hospital were not similar to the CNA

¹⁸³ *Id.* at *7.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at *26-31.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at *25-26.

¹⁸⁸ *Id.* at *26-31.

¹⁸⁹ *Id.* at *31-34. The *Register-Guard* court specifically noted that whether *Lechmere* could apply to Prozanski was not an issue considered by the NLRB. *Id.* at 1119, n.25.

¹⁹⁰ *Id.* at *32. The judge in *Fremont-Rideout* did not address several important distinctions with *Register-Guard*. For example, the NLRB in *Register-Guard* applied its employer equipment analysis rather than its employer real property analysis. *Register-Guard*, 351 N.L.R.B. at 1114. Additionally, the NLRB noted that the situation in *Register-Guard* still afforded employees the ability to communicate face-to-face regarding § 7 protected topics. *Id.* at 1115. In contrast, *Fremont-Rideout* involved real property and there was no alternative face-to-face communication possible on the employer’s property.

¹⁹¹ *Id.* at *33-34.

representatives, so Fremont-Rideout did not deny the nurses their § 7 rights.¹⁹² The nurses and CNA representatives were, therefore, left without recourse as the Act did not protect their access.

If accepted by the NLRB, this discrimination standard threatens to substantially narrow the opportunities nonemployee union representatives have to access employees on employer property. *Lechmere* may be limited to the issue it stated it was addressing: “*Babcock’s* inaccessibility exception.”¹⁹³ By narrowly framing its review to that sole issue, *Lechmere* suggests it was not considering *Babcock’s* discrimination exception, where the employer discriminates specifically against union distribution or solicitation.¹⁹⁴ *Fremont-Rideout* narrows this exception by defining discrimination so that an employer can allow solicitation and distribution by outside groups on non-union matters, but not those groups concerned with § 7 rights.¹⁹⁵ Furthermore, the employer maintains the right to hold captive audience meetings, which are typically held on the employer’s property in the absence of non employees.¹⁹⁶ The employer, thus, can both exclude all outside pro-union viewpoints and promote a vigorous anti-union campaign without violating *Lechmere*.

IV. HIRSCH’S PROPOSAL TO ELIMINATE STATE PROPERTY LAW FROM THE ANALYSIS

America has a longstanding policy seeking to grant equality to unions at the bargaining table, but it is no longer effective. As demonstrated above, the ability for nonemployee union representatives to access employer property is lessening. If Labor advocates want to return unions membership to a significant population of the workforce, they must advocate for change. Professor Hirsch proposed one reform: eliminating state property law from the NLRB’s analysis of nonemployee

¹⁹² *Id.*

¹⁹³ *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539 (1992).

¹⁹⁴ *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). *See also* *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 205 (1978) (“To gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer’s access rules discriminate against union solicitation.”).

¹⁹⁵ *See* *The Fremont-Rideout Health Group (Fremont-Rideout)*, 2009 N.L.R.B. LEXIS 20, at *33-34 (N.L.R.B. Jan. 29, 2009).

¹⁹⁶ *See id.*

access to employer property.¹⁹⁷ Rather than seeking to eliminate state property rights from the NLRB's consideration, pro-union advocates should embrace state property law as a means of expanding nonemployee access to employer property.

A. Hirsch's Proposed Analysis for Nonemployee Access to Employer Property

Hirsch contends that the NLRB lacks the expertise to properly scrutinize property rights in all fifty states and provides convincing examples of where this problem has been evident in past opinions.¹⁹⁸ Requiring the NLRB to engage in this sort of analysis has left employers and employees alike uncertain over how the NLRB's precedent might apply.¹⁹⁹

Hirsch's approach would relieve the NLRB of this burden and instead consider the manner in which an employer excludes § 7 activity.²⁰⁰ Hirsch argues that a peaceful request by an employer to nonemployee organizers to leave its property should establish a rebuttable presumption of lawful behavior.²⁰¹ Furthermore, any employer actions beyond a peaceful request are presumed to be coercive, unlawful activity under the Act.²⁰² Under this model, any common law claims, such as trespass, would be left for state courts to decide under a separate action.²⁰³

While Hirsch presents a creative alternative to current NLRB policy, his proposal has two significant flaws. First, deciding whether an employer violates § 8(a)(1) based on the manner in which the employer requests union organizers to leave its property is susceptible to routinely becoming a battle of "he said, she said." Presumably, disputes will often center on the union's version of the employer's actions versus the employer's version. Hirsch's model lacks an objective basis that a fact-finder can refer to in making its decision. By focusing on property rights, the NLRB can examine objective evidence to determine what rights the parties enjoyed,

¹⁹⁷ Hirsch, *supra* note 2.

¹⁹⁸ *Id.* at 909-15.

¹⁹⁹ *Id.* at 893-94.

²⁰⁰ *Id.* at 892.

²⁰¹ *Id.* at 918-19.

²⁰² *Id.*

²⁰³ *Id.* at 919.

regardless of what was said.

Second, while Hirsch's proposal may make dispute resolution easier from the NLRB's perspective, it fails to make the process any smoother for the parties who raise a dispute. Although Hirsch addresses potential NLRA preemption concerns,²⁰⁴ the NLRB should take a greater interest in the parties it serves. By requiring an employer's trespass claims to be resolved in state courts, Hirsch's plan inevitably leaves the employer and union to handle two cases at once. Requiring the parties to litigate twice only complicates and increases the costs of proceedings. In other areas of employment law, however, Hirsch noted the disadvantages of any approach that opens the possibility of parties adjudicating their claims in two different forums.²⁰⁵ Further, this process unnecessarily creates twice the amount of work for courts, already strained institutions. Although Hirsch seeks to simplify the *Lechmere* analysis by subtracting property rights that vary across jurisdictions, the better approach is to set a uniform standard for those property rights when they are analyzed by the NLRB.

B. Avenues of Access: State Sources that Impact Private Property Rights

Rather than supporting the removal of state property law from nonemployee access analysis, Labor advocates who want to see an increase in union membership should endorse the use of state property law to determine nonemployee access rights to employer property. State laws currently control the access and exclusion rights associated with property in three forms: (1) constitutions, (2) statutes, and (3) common law. Currently, few states recognize nonemployee access rights through these forms of law. However, closer examination of each of these bases of law reveals opportunities for Labor to utilize and expand upon nonemployee union representative access rights to employer property. Successful union efforts to influence state law on other related matters provide a strong basis of support for seeking change for nonemployee access to employer property at this legislative level.

1. State Constitutions

Some states interpret their constitutions to allow for more expansive rights

²⁰⁴ *Id.* at 935-40.

²⁰⁵ Paul M. Secunda & Jeffrey M. Hirsch, *Debate: Workplace Federalism*, 157 U. PA. L. REV. PENNUMBRA 28, 38-39 (2008) (Hirsch argues against states limiting captive audience speeches by statute because it further complicates the adjudicatory process that is best left in the NLRB alone).

of access to private property.²⁰⁶ While the Supreme Court eliminated the possibility of a First Amendment basis in the federal constitution for accessing private property,²⁰⁷ the Court acknowledged elsewhere that state constitutions can be interpreted to provide more expansive access rights.²⁰⁸ States finding a right to access private property through their respective state constitutions generally look to free speech rights as the basis for analysis.²⁰⁹ The states acknowledging a state constitutional right to access private property can be divided based on whether they require state action.

Colorado found its state constitution grants individuals a right to access private property, but requires some form of state action for an individual to claim free speech protection. In *Bock v. Westminster Mall Co.*, the Colorado Supreme Court held that the free speech article of the Colorado Constitution granted individual members of a political association the right to distribute pamphlets and solicit signatures in common areas of a local mall.²¹⁰ Article II, Section 10 of the Colorado

²⁰⁶ While this section discusses those states that have allowed individuals to access private property through their state constitutions, a number of state courts have outright denied such rights in their respective state constitutions. These decisions include *Fiesta Mall Venture v. Mecham Recall Comm.*, 767 P.2d 719 (Ariz. Ct. App. 1988); *Cologne v. Westfarms Assocs.*, 469 A.2d 1201 (Conn. 1984); *Citizens for Ethical Gov't, Inc. v. Gwinett Place Assoc., L.P.*, 392 S.E.2d 8 (Ga. 1990); *State v. Viglielmo*, 95 P.3d 952 (Haw. 2004); *City of West Des Moines v. Engler*, 641 N.W.2d 803 (Iowa 2002); *Woodland v. Mich. Citizens Lobby*, 341 N.W.2d 174 (Mich. Ct. App. 1983), *aff'd en banc*, 378 N.W.2d 337 (Mich. 1985); *SHAD Alliance v. Smith Haven Mall*, 488 N.E.2d 1211 (N.Y. 1985); *State v. Felmet*, 273 S.E.2d 708 (N.C. 1981); *Eastwood Mall v. Slanco*, 626 N.E.2d 59 (Ohio 1994); *W. Penn. Socialist Workers 1982 Campaign v. Conn. Gen. Life Ins. Co.*, 485 A.2d 1 (Pa. Super. Ct. 1984), *aff'd*, 515 A.2d 1331 (Pa. 1986); *Charleston Joint Venture v. McPherson*, 417 S.E.2d 544 (S.C. 1992); *Jacobs v. Major*, 407 N.W.2d 832 (Wis. 1987).

²⁰⁷ *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976).

²⁰⁸ *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (“Our reasoning . . . does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.”).

²⁰⁹ See, e.g., *Alderwood Assocs. v. Wash. Env'tl. Council*, 635 P.2d 108 (Wash. 1981) (finding that Washington's constitutional free speech protections prevented mall owners from stopping a political group from soliciting signatures or demonstrating in support of “Initiative 383”). But see *Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 780 P.2d 1282, 1289 (Wash. 1989) (limiting *Alderwood* to soliciting signatures under the initiative provision of the Washington constitution).

²¹⁰ *Bock v. Westminster Mall Co.*, 819 P.2d 55, 63 (Colo. 1991).

Constitution provides that “every person shall be free to speak, write or publish whatever he will on any subject.”²¹¹ Colorado’s free speech rights protected the individuals distributing and soliciting in the mall because of “an affirmative acknowledgement of the liberty of speech” and a long tradition in broad speech protection.²¹² To reach this conclusion, the court found sufficient government involvement through the City’s financing of street and drainage systems adjacent to the mall; a police substation in the mall; and Army, Navy, and Marine Corps recruiting offices maintained in the mall.²¹³

Other state supreme courts hold their state constitutions grant individuals the right to access private property without a state action requirement. The California Supreme Court famously found a right to access private property that was later affirmed by the United States Supreme Court in *PruneYard Shopping Center v. Robins*.²¹⁴ In *PruneYard*, security guards at the PruneYard Shopping Center stopped a group of high school students from soliciting support to oppose a United Nations resolution.²¹⁵ Relying on the free speech provisions of Article I, Section 2 of the California Constitution, the *PruneYard* court determined the students had a right to access the privately owned shopping mall to convey their message.²¹⁶ The *PruneYard* court analogized the students’ rights to encroachments on private property interests that result from public interests in zoning laws, environmental needs and other concerns.²¹⁷ The court summarized, “As the interest of society justifies restraints upon individual conduct, so also does it justify restraints upon the use to which property may be devoted.”²¹⁸ The strong interest in free speech rights led the court to justify the students’ right of access to the private property.²¹⁹

²¹¹ Colo. Const. Art. II, § 10.

²¹² *Bock*, 819 P.2d at 59-60.

²¹³ *Id.* at 61.

²¹⁴ *PruneYard Shopping Center v. Robins*, 592 P.2d 341 (1979), *aff’d*, 447 U.S. 74 (1980).

²¹⁵ *Id.* at 902.

²¹⁶ *Id.* at 910-11. The California Supreme Court also concluded that Article I, Section 3 of the state constitution provided a right to access the property to petition.

²¹⁷ *Id.* at 906.

²¹⁸ *Id.*

²¹⁹ *See id.*

Similarly, the New Jersey Supreme Court found a right for individuals to distribute leaflets at a shopping center through the expansive free speech guarantees of its state constitution.²²⁰ The Massachusetts Supreme Court also found an individual had the right to solicit signatures at a shopping mall pursuant to Article IX of the Massachusetts Constitution, which concerned equality to elect and be elected²²¹ because no state action was required under that provision.²²²

While these state constitution cases deal with shopping malls as the setting of private property,²²³ the fundamental aspects of this type of property parallel other forms of private property that may be the target of union efforts to organize. The property in the shopping mall cases is owned by a private individual or entity. Additionally, both shopping malls and the properties discussed in the aforementioned union access cases restrict access to certain individuals, like solicitors and union representatives, but allow others. Like a mall that places few restrictions on who may enter, the hospital in *Fremont-Rideout* allowed friends and family

²²⁰ N.J. Coalition Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 770-79 (N.J. 1994). The court strongly emphasized that this ruling was “limited to leafleting at such centers, and it applies nowhere else.” *Id.* at 760. The New Jersey Constitution states, “Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.” N.J. Const., Art. I, Para. 6.

²²¹ At one time, Oregon similarly reasoned that an individual could access private property through the initiative and referendum clauses of the Oregon Constitution. *Lloyd Corp. v. Whiffen*, 849 P.2d 446 (Or. 1992). However, this decision was later reversed and such rights were denied under the state constitution. *Stranahan v. Fred Meyer, Inc.*, 11 P.3d 228 (Or. 2000). Similarly, Washington granted a right to access private property but then later reversed its decision. *See Alderwood Assocs., v. Wash. Env'tl. Council*, 635 P.2d 108 (Wash. 1981); *Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 780 P.2d 1282, 1289 (Wash. 1989).

²²² *Batchelder v. Allied Stores Int'l, Inc.*, 445 N.E.2d 590, 592-96 (Mass. 1983). The Massachusetts Court noted that it was not addressing the individual's right to access private property under the state constitution's freedom of speech provision. However, as the *Batchelder* court noted with the freedom and equality of elections provision, the Massachusetts free speech clause does not refer to the state in granting its protections. Rather, it states, “The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth. The right of free speech shall not be abridged.” Mass. Const. Pt. 1, Art. XVI. Therefore, it seems there is a strong argument that a similar analysis would apply if the right to access private property rested on the free speech clause of the Massachusetts constitution.

²²³ Although local governments may play a role in building shopping centers, these properties are largely considered to be private.

members to visit as they pleased.²²⁴ Further, the ability to communicate the message with the targeted audience is significantly stronger when access to the private property is granted. In the case of shopping malls, the intended audience is the general public that collectively gathers to engage in commercial activity.

2. State Statutes and Regulations

State statutes and regulations represent another form of state law that can allow individuals access to private property. Exceptions provided by state law to common law trespass claims provide a good example. In some contexts, state laws grant an individual on another person's property a privilege from any common law trespass claims.²²⁵ At common law, trespass was "an invasion (a) which interfered with the right of exclusive possession of the land, and (b) which was a direct result of some act committed by the defendant."²²⁶ Today, common law trespass includes a defendant's "misfeasance, transgression, or offense that damages another's person, health reputation or property."²²⁷ However, a legislative duty or authority can be placed on an individual to grant that person a privilege to access private property.²²⁸ Therefore, a common law trespass action itself may be defeated by state legislation or regulation.

For instance, in *Consolidated Cigar Corp. v. Dept. of Public Health*, the Massachusetts Supreme Court analyzed whether an employer's claims of a right to exclude others could be defeated by individuals seeking to access the property to

²²⁴ See *The Fremont-Rideout Health Group (Fremont-Rideout)*, 2009 N.L.R.B. LEXIS 20, at *6, *31 (N.L.R.B. Jan. 29, 2009).

²²⁵ RESTATEMENT (SECOND) OF TORTS § 211.

²²⁶ Powell on Real Property, § 64A.01[2] (citing W. Prosser and W. Keeton on Torts, § 13 at 67 (5th ed. 1984)).

²²⁷ *Id.* at § 64A.01[3].

²²⁸ Section 211 of the Restatement (Second) of Torts states that:

A duty or authority imposed or created by legislative enactment carries with it the privilege to enter land in the possession of another for the purpose of performing or exercising such duty or authority in so far as the entry is reasonably necessary to such performance or exercise, if, but only if, all the requirements of the enactment are fulfilled.

Section 329 defines a trespasser as "a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise."

speak with employees pursuant to the state's department of public health's regulations.²²⁹ Massachusetts law granted the department the ability to enact regulations addressing educational and recreational opportunities available to migrant workers.²³⁰ Pursuant to this law, the department's regulations granted migrant workers at farm labor camps "reasonable rights of visitation."²³¹ These rights included receiving visitors during non-working hours.²³² However, the employer denied entry to a non-profit organization employee and a church chaplain seeking to speak with migrant worker under these regulations.²³³

The Massachusetts Supreme Court ruled that these regulations did not unconstitutionally infringe on the employer's right to exclude others from its private property.²³⁴ In rejecting the employer's claims, the court noted that "the enjoyment of private property may be subordinated to reasonable regulations that are essential to the peace, safety, and welfare of the community."²³⁵ The court found the regulations were reasonable because they were (1) rationally related to promoting the public health and welfare and (2) reasonably necessary to accomplish that purpose.²³⁶ Therefore, the department of health's regulations successfully overcame the employer's private property right to exclude others.²³⁷

3. State Common Law

Finally, courts also overcome the right to exclude from private property by creating common law exceptions. The New Jersey Supreme Court utilized this approach in *New Jersey v. Shack*.²³⁸ In this case, employees from nonprofit organizations providing legal and health services for migrant farm workers attempted

²²⁹ Consolidated Cigar Corp. v. Dept. of Public Health, 364 N.E.2d 1202 (Mass. 1977)

²³⁰ *Id.* at 1204 (citing Mass. Gen. Laws ch. 111, § 128H (1971)).

²³¹ *Id.* at 1205, n.4.

²³² *Id.*

²³³ *Id.* at 1205.

²³⁴ *Id.* at 1207.

²³⁵ *Id.* (citing *Durgin v. Minot*, 89 N.E. 144, 146 (Mass. 1909)).

²³⁶ *Id.* at 1208.

²³⁷ *Id.*

²³⁸ *New Jersey v. Shack*, 277 A.2d 369 (N.J. 1971).

to visit a farm employee living on the employer's property to administer medical aid.²³⁹ The employer, however, would only allow these individuals to see the employee in the employer's office with the employer present.²⁴⁰ After the social services workers rejected the employer's visitation terms and refused to leave the premises until they could see the employee in private, the employer executed a formal complaint for violation of the state's trespass statute, and the individuals were convicted of trespassing.²⁴¹

The New Jersey Supreme Court reversed the defendants' conviction for trespassing after balancing the policies behind private property rights and the state's interest in promoting the welfare of migrant farm workers.²⁴² The court found a strong state interest in assisting migrant farm workers, evidenced by the Economic Opportunity Act of 1964.²⁴³ The court recognized the "unorganized" status of migrant farm workers, which contributed to their economic and political powerlessness.²⁴⁴ The right to access the migrant farm worker was further supported by the importance of communication in rendering the appropriate aid.²⁴⁵ Notably, the court cited a government report that identified "the lack of adequate direct information" regarding the availability of public services as a significant problem facing migrant farm workers.²⁴⁶ On the other hand, the court found a weak interest in maintaining the employer's absolute right to exclude from its property those individuals seeking to aid the migrant farm worker.²⁴⁷ Further, the court found property rights are weakened where there is a strong societal interest at stake.²⁴⁸ Thus, the court relied on a common law exception, preventing an individual from

²³⁹ *Id.* at 370.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 370-71.

²⁴² *Id.* at 372-75.

²⁴³ *Id.* at 372.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 372-73.

²⁴⁶ *Id.* at 373.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

using his property “to injure the rights of others,”²⁴⁹ to provide the public service third parties access rights to the employer’s property.²⁵⁰

Balancing these factors, the court concluded that the employer’s private property right had to accommodate the state’s interest in providing for the welfare of the migrant farm worker by allowing the social services employees to access the employer’s property and privately visit the farm worker.²⁵¹ Therefore, the employer suffered no illegal invasion of his private property interest.²⁵² The court, however, went to great lengths to explain that the employer retained its right to provide reasonable limitations to that access.²⁵³ The employer could continue to deny access to outside individuals if the employer was not depriving the migrant worker of “practical access to things he needs” or place restrictions on visitors such as requiring an individual seeking access to identify him or herself.²⁵⁴

Similarities exist between the nonemployee union representative’s attempts to access unorganized employees on employer property and the nonemployee’s efforts to access the migrant farm worker in *Shack*. First, the court noted that the unorganized status of migrant farm workers contributed to their economically and politically disadvantageous position.²⁵⁵ Similarly, unorganized employees may be in an economically disadvantageous position compared to those employees who belong to a union. Second, the court noted that communication was the key to the farm workers realizing their opportunities under the law.²⁵⁶ Without allowing access to the migrant farm workers in *Shack*, that message was crippled. Although the migrant farm worker in *Shack* lived on the employer’s property, the argument continues to apply in the case of employees who do not live on employer property. The workplace provides a collective meeting point and a forum, which otherwise does not exist, to communicate with a targeted audience. Nonemployee union

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 374-75.

²⁵¹ *Id.*

²⁵² *Id.* at 375.

²⁵³ *Id.* at 374.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 372.

²⁵⁶ *Id.*

representatives faced with the inability to address employees on employer property are forced to dilute their message because they are not able to effectively communicate with those employees.

4. A Window of Opportunity for Expanded Access Rights

These three sources of state law authority (state constitutions, state statutes and regulations, and state common law) demonstrate that pro-Labor groups seeking to expand union membership should not shy away from relying on state property law to grant access for nonemployee union representatives. In each instance, there are opportunities where greater access rights can be realized than those available under federal law. These opportunities demonstrate that Labor should not seek to eliminate state property law from consideration of nonemployee access rights to employer property as Hirsch advocates.

Returning the focus to state property rights also makes this issue one controlled by local government and allows labor advocates greater opportunities for persuading local lawmakers to expand access rights than they might experience in dealing with federal legislators. For example, the labor movement has witnessed a growing movement in certain parts of the country to end captive audience meetings held by employers on employer property.²⁵⁷ In recent years, Connecticut and Oregon considered legislation to ensure employers cannot take adverse employment actions against employees who choose to walk away from these meetings.²⁵⁸ The success of passing this legislation in Oregon²⁵⁹ demonstrates that labor advocates can have greater success influencing access rights on quasi-public property in a state-by-state effort than in attempting to influence national legislation.

²⁵⁷ Paul M. Secunda, *Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. & POL'Y J. 209, 211 (2008).

²⁵⁸ *Id.* at 226-27.

²⁵⁹ Kris Maher, *Unions Push Issues in State Capitals*, WALL ST. J., Nov. 11, 2009 at A4. The Oregon law, entitled the Worker Freedom Act, was passed in June 2009 and took effect in January 2010. The legislation was immediately challenged by the Oregon Chamber of Commerce. Posting of Paul Secunda to Workplace Prof Blog, Chamber of Commerce Challenges Oregon Workplace Captive Audience Legislation, Jan. 5, 2010, http://lawprofessors.typepad.com/laborprof_blog/2010/01/chamber-of-commerce-challenges-oregon-workplace-captive-audience-legislation.html.

V. RESTORING BALANCE TO THE SUPREME COURT'S BALANCING TEST AND ENACTING THE LABOR RIGHTS ACT OF 2010

If Labor advocates want to succeed in restoring union membership ranks to previous levels, they should turn their attention to emphasizing state property law's influence on the Act. This article suggests a two-pronged approach. First, contrary to Hirsch's proposal, the Supreme Court should bring state property rights to the forefront of the *Lechmere* analysis and not treat the *Babcock* exceptions as exhaustive. Second, Congress should prohibit private property owners that hold their property open to the public from discriminating on the basis of labor viewpoints. Each of these proposals addresses the mistakes of the current *Lechmere* analysis. Additionally, each proposal supports the other in its attempt to reform the Act.

A. *Returning Balance to Lechmere*

The Supreme Court must address the shortcomings of *Lechmere* by determining that nonemployee access analysis begins with analyzing one's property right to exclude that exists under relevant state law. In numerous jurisdictions, state courts have found public access rights to private property under state law.²⁶⁰ By requiring the NLRB to analyze state property rights first, individuals addressing labor matters will no longer be treated as second-class citizens because of the content of their speech. Further, the Court should relegate the *Babcock* exception to the situation where it was originally intended to apply: where access to private property is prohibited to all nonemployees. By approaching the analysis in this manner, the nonemployee access precedent will remain intact.

Any rights granted to access private property must be grounded in state law because the First Amendment does not grant a federal right to exercise an individual's freedom of speech on private property.²⁶¹ Although Hirsch suggests it is too difficult to ask the Board to analyze state property law, he overstates the challenges the Board will face. Many jurisdictions have a long line of precedent addressing whether their state's constitutions, statutes, regulations, and common laws afford access rights to private property.²⁶² As demonstrated above, some jurisdictions grant access rights through state constitutional provisions, while others

²⁶⁰ See Part IV.B.

²⁶¹ *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 567 (1972). See also *Hudgens v. NLRB*, 424 U.S. 507, 518-19 (1976).

²⁶² See *Middle E. v. J.M.B. Realty Corp.*, 650 A.2d 757, 769-70 (N.J. 1994).

allow the general public no such right. Even though Hirsch cites several striking examples demonstrating the possible complexities of state property law,²⁶³ the low frequency of these cases does not justify a conclusion that the NLRB is unable to analyze state property law. Hirsch attempts to demonstrate the NLRB's problems in analyzing these cases by noting that it takes "substantially longer" to decide *Lechmere* cases compared to all other NLRB cases.²⁶⁴ But the NLRB infrequently hears *Lechmere* cases – exceedingly complex state property law claims – as evidenced in the data Hirsch cites to support his proposal. For example, in 2002 the NLRB heard only one *Lechmere* case.²⁶⁵ Thus, while the NLRB may occasionally be forced to work with state law that does not always provide absolute clarity, these types of cases are rare.

The Second Circuit interpreted *Lechmere* to require that the accommodation analysis between state property law and § 7 rights take place only if the *Babcock* exception applies.²⁶⁶ But this approach does not afford a citizen speaking on labor issues equal protection of the law. Outside of the union context, nonemployee individuals are given solicitation access without having to overcome the obstacles in the *Lechmere/Babcock* framework. For example, in California an individual who seeks to engage others on international politics in a public shopping mall is likely to be afforded the right to do so, because California's state constitution provides broad freedom of speech rights on private property.²⁶⁷ But that same individual, speaking on labor matters affecting one of the store's employees, is unlikely to receive similar protections under the *Lechmere* analysis.²⁶⁸ Assuming the mall enacts some sort of no-solicitation policy, the NLRB would likely deny mall access to these speakers and relegate their access to alternatives like public spaces adjacent to the mall parking lot.²⁶⁹

²⁶³ Hirsch, *supra* note 2, at 909-15.

²⁶⁴ *Id.* at 909, n.109.

²⁶⁵ *Id.*

²⁶⁶ *Salmon Run Shopping Ctr., LLC v. NLRB*, 534 F.3d 108, 114 (2d Cir. 2008).

²⁶⁷ *See Robins v. PruneYard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980).

²⁶⁸ *See Salmon Run*, 534 F.3d at 108.

²⁶⁹ *See id.*

B. The Labor Rights Act of 2010

While the Supreme Court awaits the opportunity to clarify the *Lechmere* analysis, Labor advocates who want to see union membership grow should push Congress to enact what I would call the Labor Rights Act of 2010 (LRA). The LRA would address the problem courts and the NLRB confront in the absence of a uniform definition of “discriminate” as it applies to labor viewpoint access to property. The text of the LRA would read:

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined by 42 U.S.C. § 2000a(b),²⁷⁰ without discrimination or segregation on the ground of expressing labor, employee organization, or collective bargaining viewpoints.

Like the Civil Rights Act of 1964, the LRA would grant individuals seeking to solicit information or distribute materials regarding labor issues equal access to forums that are otherwise afforded to non-labor speakers. Title II of the Civil Rights Act states “All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race

²⁷⁰ 42 U.S.C. § 2000a(b) (2006) defining public accommodation as:

- (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
- (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
- (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
- (4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

color, religion, or national origin.”²⁷¹ The LRA will simply substitute the language addressing “race, color, religion, or national origin” with “labor, employee organization, or collective bargaining viewpoints.” By enacting this legislation, Congress will level the playing field so that if an individual opens his or her property to nonemployees to conduct non-labor activity, such as soliciting charitable donations, then nonemployees conducting similar labor activity will be afforded comparable rights.

The LRA is likely to withstand any constitutional challenges because of the Court’s precedent in *Heart of Atlanta Motel v. United States*.²⁷² In *Heart of Atlanta*, an Atlanta, Georgia hotel operator challenged the constitutionality of the Civil Rights Act of 1964.²⁷³ The Court upheld the law as a legitimate use of Congress’ Commerce Clause power.²⁷⁴ Similarly, the LRA will be supported by Congress’ lawful exercise of the Commerce Clause power. The consistency of the language incorporated in the law will be undeniable. The words of the LRA are almost identical to the approved language in the Civil Rights Act of 1964. Further, any employer’s labor force has an even greater direct tie to interstate commerce than the hotel room transactions at issue in *Heart of Atlanta*. The justifications for Congress’ use of its Commerce Clause power in passing the NLRA²⁷⁵ would likewise apply to support passage of the LRA.

Not only would the LRA help bring balance to the union debate, but it supports America’s labor policy enacted long ago in the NLRA. The LRA would support Labor advocates’ goal of a strong middle class. Labor advocates can stand behind the LRA to convince Americans of the position that a strong labor movement is important to our country’s economy. By enacting the LRA, Congress will send a clear message that labor viewpoints share the same protection as any other speech.

VI. CONCLUSION

Congress has identified a problem with the current state of unionization in

²⁷¹ 42 U.S.C. § 2000a (2006).

²⁷² *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

²⁷³ *Id.* at 242-44.

²⁷⁴ *Id.* at 257-59.

²⁷⁵ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

the United States and has proposed reform efforts designed to increase union participation through the EFCA. However, this is an inadequate solution for Labor advocates because it does not address nonemployee access to employer property. The focus of this analysis should be state property rights. As a short-term answer to the property access debate for Labor advocates, courts should approach the *Lechmere* analysis by looking at state property rights as a threshold inquiry. As a long-term solution to this debate, Labor advocates should ask Congress to enact the LRA. Through both of these measures, Labor advocates and union members can return to a position of significance in America.