

# NONEMPLOYEE ACCESS TO EMPLOYER PROPERTY: A STATE OR FEDERAL SOLUTION?

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It has been five years since I wrote *Taking State Property Rights Out of Federal Labor Law*, in which I addressed some of the problems arising from the current limits on unions' and other nonemployees' ability to access employer property.<sup>1</sup> Although my appreciation for the issues at stake in these cases has developed during that time, the law has largely remained static. This has put me in somewhat of an odd position, as I find myself lamenting that my article still has relevance; I would much rather be looking back at a piece that reforms had made obsolete. On the other hand, the lack of reform has provided me the opportunity to engage in this discussion with Jesse Dill.

In his article, *Restoring Unions in America by Reforming Nonemployee Union Representative Access Rights to Employer Property*, Dill also confronts the nonemployee access issue, but he takes a far different path.<sup>2</sup> We do not differ in our view that the current *Lechmere/Babcock* framework inadequately protects nonemployees' ability to communicate with employees on employer property.<sup>3</sup> Yet, our approaches to reform are diametrically opposed: I criticize the influence of state property law in federal labor cases, while Dill seeks to increase the influence of state law.<sup>4</sup>

In distinguishing our approaches to right-to-access disputes, one must consider two separate realities. The first, which was the focus of my article, is the status quo. It is a world in which *Lechmere* remains the law, with no serious prospect

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<sup>1</sup> Jeffrey M. Hirsch, *Taking State Property Rights Out of Federal Labor Law*, 47 B.C. L. REV. 891 (2006) [hereinafter *Property*].

<sup>2</sup> Jesse Dill, *Restoring Unions in America by Reforming Nonemployee Union Representative Access Rights to Employer Property*, 12 TRANSACTIONS: TENN. J. OF BUS. L. 127 (2010).

<sup>3</sup> See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

<sup>4</sup> See Dill, *supra* note 2, at 131.

of congressional or judicial reversal.<sup>5</sup> It was this reality with which my article was concerned—a reality where, in my mind, the National Labor Relations Board (the “NLRB”) still has options for improving nonemployees’ ability to communicate with employees at a worksite despite the limits of *Lechmere*.<sup>6</sup> Dill raises objections to this argument, but his ultimate focus is on an entirely different reality. This reality is one in which the Supreme Court or Congress takes up reform.<sup>7</sup> This kind of reform is not likely in the near future, but it is certainly worth considering. Indeed, I share Dill’s desire for a more substantive solution to *Lechmere* by the Supreme Court or Congress. My belief that reform would not happen anytime soon led me to my original argument, but I am more than happy to engage in a more optimistic exercise and consider how such reform should occur.

Beyond this discussion on reforming nonemployee access rights is a far broader debate. A central feature of Dill’s and my differing approaches to nonemployee access disputes are disparate views of a much larger issue: workplace federalism. The extent to which labor and employment law should be the province of state or federal regulation is a topic about which I have written much recently.<sup>8</sup> Although I do myself a disservice by summarizing my own arguments on this complex issue in a single sentence, a major theme in my writings has been the assertion that exclusive federal regulation of the workplace would be superior to state jurisdiction or shared state and federal jurisdiction. Exclusive federal jurisdiction—like the other options—is not without costs, but in most cases it is superior to the alternatives. This idea represents a radical departure from our current system in the United States; thus, it is no surprise that my arguments have led to stiff opposition from those who would prefer to see more, rather than less, state governance of the workplace.<sup>9</sup> Dill’s article places him firmly in the camp of these opponents. Although he is in good company, I remain unmoved by these arguments, particularly with regard to attempts to expand nonemployees’ right to access employers’ property.

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<sup>5</sup> *Property*, *supra* note 1, at 948.

<sup>6</sup> *Id.*

<sup>7</sup> Dill, *supra* note 2, at 168-72.

<sup>8</sup> *See infra* note 16.

<sup>9</sup> *See id.*

## I. THE *LECHMERE* REALITY

A large portion of Dill's article addresses the same world that I did, one in which there is no legislative or judicial response to *Lechmere*. Under this regime, the Supreme Court has provided employers with near-total power to exclude nonemployees from its property, even if those nonemployees were merely trying to inform employees of their NLRA right to engage in collective action or seek collective representation.<sup>10</sup> Given the NLRA's stagnation over the last several decades, this reality is likely to exist for quite some time.<sup>11</sup> Indeed, even among the few NLRA bills that reached the realm of possibility—yet still failed—an attempt to overturn *Lechmere* has not been among them.<sup>12</sup> Similarly, there is no reason to believe that the Supreme Court will change its mind in favor of granting unions and other nonemployees more access to private property than it did in *Lechmere*.

Accordingly, although both Dill and I favor statutory reform, it is important to consider other means to address the problems of *Lechmere*. This inquiry prompts the most significant differences between Dill and myself. He favors an approach that increases the role of states, while my approach would do the opposite by seeking to eliminate state law as much as possible from nonemployee right-to-access cases. Both proposals have pros and cons, but the passage of time has not dissuaded me

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<sup>10</sup> See Jeffrey M. Hirsch, *Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action*, 44 U.C. DAVIS L. REV. (forthcoming 2011) (manuscript at 24-25), available at <http://ssrn.com/abstract=1553031> [hereinafter *Communication*].

<sup>11</sup> See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530-31, 1543 (2002); Jeffrey M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLR?*, 76 GEO. WASH. L. REV. 262, 265-68 (2008) [hereinafter *Silicon Bullet*].

<sup>12</sup> See H.R. 743, 104th Cong. (1995). For instance, the Teamwork for Employees and Managers Act of 1995 (TEAM Act), was passed by a Republican-led Congress and would have lowered restrictions on employer-sponsored workplace participation groups. *Id.* at § 3 (seeking to amend 29 U.S.C. § 158(a)(2)). Congress, however, did not override the veto of President Clinton, a Democrat. See 142 CONG. REC. H8816-01 (1996) (announcing veto of President Clinton). More recently, the Employee Free Choice Act of 2009 (EFCA), H.R. 1409, 111th Cong. (2009), would have altered several aspects of the certification of unions and the collective negotiations of initial collective-bargaining agreements. *Id.* Despite high hopes among organized labor groups following the 2008 election, in which Democrats gained the White House and both houses of Congress, the EFCA stalled in the Senate, and it has little chance of passage. See Michael O'Brien, *Obama: Chances of Passing 'Card Check' Now Are Not Real High*, THE HILL, Sept. 13, 2010, <http://thehill.com/blogs/blog-briefing-room/news/118421-obama-chances-of-passing-card-check-now-are-not-real-high>.

from the view that the enforcement of labor rights would benefit from less state involvement, not more.

A. *A Proposal to Eliminate State Property Law from NLRA Access Cases*

In my article, *Taking State Property Rights out of Federal Labor Law*, I addressed an issue that has troubled many commentators: the harmful effect of *Lechmere* on union organizing.<sup>13</sup> Unlike the previous criticisms, however, I began from the premise—albeit grudgingly—that *Lechmere* would not be overturned by either the Supreme Court or Congress.<sup>14</sup> Instead, I sought an alternative to the NLRB's current application of *Lechmere*, one that would remain valid under the Supreme Court's precedent, but would reduce its ill effects on union organizing.<sup>15</sup> The article can also be viewed, with the advantage of hindsight, as an opening salvo in a project with which I have been engaged for the last several years. The aim of this project has been to push for more exclusive federal control over labor and employment regulation, and it has thankfully grown into a wide-ranging discussion with others.<sup>16</sup> With his current piece, Dill has joined the discussion, and, like most of the participants, he is not in my corner.

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<sup>13</sup> See, e.g., Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305, 308 (1994); Alan L. Zmija, *Union Organizing After Lechmere, Inc. v. NLRB—A Time to Reexamine the Rule of Babcock v. Wilcox*, 12 HOFSTRA LAB. & EMP. L.J. 65, 99 (1994); *Property*, *supra* note 1.

<sup>14</sup> See *Property*, *supra* note 1, at 916-17.

<sup>15</sup> *Id.* at 917-18.

<sup>16</sup> See Jeffrey M. Hirsch, *Revolution in Pragmatist Clothing: Nationalizing Workplace Law*, 61 ALA. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1329522> [hereinafter *Revolution*]; Jeffrey M. Hirsch, *Paper Rights or Real Rights?*, 157 U. PA. L. REV. PENNUMBRA 39 (2008); Jeffrey M. Hirsch, *The True Irony of Workplace Law: Less Is More*, 157 U. PA. L. REV. PENNUMBRA 27 (2008); Jeffrey M. Hirsch, *The Law of Termination: Doing More With Less*, 68 MD. L. REV. 89 (2008); Jeffrey M. Hirsch, *Taking States Out of the Workplace*, 117 YALE L.J. POCKET PART 225 (2008). For opposing views, see, e.g., Henry H. Drummonds, *Beyond the Employee Free Choice Act: Unleashing the States in Labor-Management Relations Policy*, 19 CORNELL J.L. & PUB. POL'Y 83 (2009); Henry H. Drummonds, *Reforming Labor Law By Reforming Labor Law Preemption Doctrine To Allow the States to Make More Labor Relations Policy*, 70 LA. L. REV. 97 (2009); Paul M. Secunda, *Assessing Political Captive Audience Meetings in the Post-Citizens United Environment*, 120 YALE L.J. POCKET PART 17 (2010); Paul M. Secunda, *More of Less: The Limits of Minimalism and Self-Regulation*, 157 U. PA. L. REV. PENNUMBRA 33 (2008); Paul M. Secunda, *The Ironic Necessity for State Protection of Workers*, 157 U. PA. L. REV. PENNUMBRA 21 (2008); 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 (2008).

My proposal, at its essence, was to incorporate a typical Section 8(a)(1) analysis into nonemployee access cases.<sup>17</sup> That is, I argued that the NLRB should focus on the question of whether an employer's attempt to remove nonemployees would tend to interfere with reasonable employees' willingness to exercise their labor rights.<sup>18</sup> In particular, I would treat peaceful attempts to remove nonemployees from property that employees believe is the employer's—no matter the actual property rights—as presumptively lawful.<sup>19</sup> This presumption could be rebutted by showing special circumstances that would make reasonable employees view the removal as coercive, such as a pattern of unlawful anti-union activity or harassment.<sup>20</sup> In contrast, non-peaceful attempts to remove nonemployees from what employees believe to be employer property,<sup>21</sup> or peaceful attempts to exclude nonemployees from property that employees view as not being the employer's, would be presumptively unlawful.<sup>22</sup>

The two major purposes for my proposal were to eliminate the need for the NLRB to rule on state property law issues, which are well beyond the agency's expertise, and to focus instead on the effect of exclusions on employees' labor rights. As I argued in my article, the current reliance on state property law has ill-served both employees' labor rights and the NLRB's ability to adjudicate these disputes.<sup>23</sup> Focusing instead on the manner in which an employer attempts to remove nonemployee organizers eliminates the need for the NLRB to analyze state property law. Moreover, where employers remove nonemployee organizers from most worksites in a way that tends to chill employees' willingness to exercise their labor

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<sup>17</sup> 29 U.S.C. § 157 (2010). Section 7 of the NLRA protects employees' right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Id.* Those rights are enforced through Section 8(a)(1), which states that "[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. *Id.* at § 158(a)(1).

<sup>18</sup> *Property*, *supra* note 1, at 917-19.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 918-19.

<sup>21</sup> *Id.* at 919, 925-34. For example, removal accompanied by threats or violence would be presumptively unlawful. *Id.*

<sup>22</sup> *Id.* at 919-20.

<sup>23</sup> See *infra* pp. 23-25 and notes 51-64 and accompanying text; see also *Property*, *supra* note 1, at 909-15.

rights, my proposal offers relief that is lacking under current law, as well as under Dill's nonlegislative proposal. That said, there are still gaps in both of our nonlegislative proposals; for that reason, we agree that statutory reform provides the best approach for protecting employees' right to communicate about collective action and representation.<sup>24</sup>

Dill levels several criticisms at my proposal. For instance, he argues that the Section 8(a)(1) right-to-access analysis would make the NLRB's job difficult because it is subjective.<sup>25</sup> That is simply not true. Like Section 8(a)(1) generally, my proposal would center on the objective inquiry of whether the employer's conduct in excluding nonemployees *would tend* to interfere with a *reasonable* employee's labor rights.<sup>26</sup> Employees' subjective perceptions could serve as evidence in this objective inquiry, but they would not be necessary.<sup>27</sup>

Similarly, Dill is concerned that my proposal would require the NLRB to make factual and credibility determinations.<sup>28</sup> But this is a criticism that could be made of the entire legal system, in which virtually all cases require extensive factual determinations. The NLRB, in particular, is well-versed in fact-finding, as the vast majority of its cases turn on disputes over facts and various individuals' interpretations of what happened. Indeed, if the NLRB is unable to adequately make factual findings and credibility determinations, then its entire adjudicatory function is in doubt. But that capability has never been seriously questioned; despite many shortcomings with the NLRB, its ability to make factual and credibility determinations is not among them.<sup>29</sup> Moreover, my proposal would create relatively

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<sup>24</sup> See *infra* note 73 and accompanying text; Dill, *supra* note 2, at 170-71.

<sup>25</sup> Dill, *supra* note 2, at 131, 158. My test would look to employees' subjective views of the employer's property right interests. See *Property*, *supra* note 1, at 918. Dill's concern is not this element of the test, but rather the existence of disputes about each party's version of the events at the heart of the dispute. Dill, *supra* note 2, at 158-59.

<sup>26</sup> See *Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1006 (9th Cir. 1995). An employer violates Section 8(a)(1) when its conduct tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights; evidence of intent is unnecessary. See *id.*

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

<sup>28</sup> Dill, *supra* note 2, at 158.

<sup>29</sup> See *Fluor Daniel, Inc. v. NLRB*, 332 F.3d 961, 967 (6th Cir. 2003) (“[W]e severely limit our review of credibility determinations and accept those made by the Board unless they have ‘no rational basis.’”); Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP.

clear guidelines—in the form of rules of presumption—with the intent of aiding the NLRB’s analysis of these cases.<sup>30</sup>

The irony in this criticism is that Dill’s proposals would do little to lessen the NLRB’s fact-finding workload. In determining whether a state property right to exclude exists, as would be required regularly under Dill’s proposals, the NLRB would have to address factual questions about where nonemployees were standing, what a lease stated, whether the organizers had been given permission to be in an area, the extent to which the employer kept out other nonemployee groups, and a host of other issues.<sup>31</sup>

Dill also expresses concern that my proposal would require separate litigation if there were both NLRA and state trespass claims.<sup>32</sup> The prospect of parallel state and federal litigation is a valid concern, and one that I have addressed before.<sup>33</sup> Unfortunately, this problem cannot be alleviated without a major change in property law jurisdiction, as the NLRB is and has always been without power to adjudge state trespass claims.<sup>34</sup> Thus, Dill’s concern about parallel litigation applies equally to

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L. 707, 754 (2006) (“The Board is thus distinguished from a court not only in its superior ability to learn relevant facts.”) (quoting Ralph K. Winter, Jr., *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 63 (1968)).

<sup>30</sup> See *Property*, *supra* note 1, at 918-19.

<sup>31</sup> Dill, *supra* note 2, at 158-59. Moreover, Dill argues that his model is superior because it provides an objective focus for a fact-finder. *Id.* This argument seems to suggest that property rights questions are less susceptible to different factual stories, but reality does not bear that out. Although there is an additional legal component to his analysis—state property law issues that, unlike factual findings, are outside of the NLRB’s normal practice—there can be numerous factual questions that the NLRB must resolve. See, e.g., *Property*, *supra* note 1, at 893 n.12 (citing cases involving questions about the existence of an employer’s right to exclude).

<sup>32</sup> Dill, *supra* note 2, at 159.

<sup>33</sup> See *supra* note 16.

<sup>34</sup> One complicated question that may arise in these cases is whether the state trespass claim is preempted by the NLRA. The answer to that question depends on the circumstances, but generally Dill’s nonlegislative proposal would result in *less* preemption—and therefore more two-forum cases—than my nonlegislative proposal. See *Property*, *supra* note 1, at 936-40. Any federal legislation increasing nonemployees’ right to access would increase the number of preempted state trespass claims. See *id.* at 938. Moreover, even under current law, some states specifically exempt from their trespass laws any circumstances in which a refusal to leave private property is done in the exercise of a federal labor right to be on that property. See CAL. PENAL CODE § 602(o); see also W.VA. CODE § 61-3B-3 (2005) (exempting labor disputes from criminal trespass liability); *Rum Creek Coal Sales, Inc. v.*

current law, as well as the law as it would exist under his proposals. Simply put, if an employer wants to pursue a trespass claim, it will have to instigate separate state litigation because the NLRB is wholly without authority to rule on such claims.<sup>35</sup> This is sensible, as state property law should be decided by state courts, while federal labor issues should be adjudicated by the NLRB.<sup>36</sup> Given the NLRB's lack of jurisdiction over state property claims, not to mention its lack of expertise in the area, it makes little sense to force the NLRB to engage in substantive rulings on state property law.<sup>37</sup>

One weakness with my original proposal that Dill does not raise, but that has become more apparent to me over the years, is that it did not do enough to directly recognize the importance of communications to collective activity. The proposal would provide such protection indirectly, but a better solution would provide more protection for substantive nonemployee-employee communications. Such interaction is often necessary for employees to have the freedom to exercise their right to collective action.<sup>38</sup> The problem, ultimately, is that my proposal was only intended as a second-best or stopgap measure that reflected the current law. That law, primarily under the Court's decision in *Lechmere*, is the real reason that there is insufficient protection for workplace communications, because it views virtually any type of communication between nonemployees and employees—no matter how fleeting—as satisfying employees' right to learn about collective action.<sup>39</sup> That view

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Caperton, 926 F.2d 353, 355-56 n.2, 363-64 (4th Cir. 1991) (discussing West Virginia, California, Hawaii, Louisiana, and New Mexico).

<sup>35</sup> See NLRA §§ 9, 10 (setting forth NLRB's jurisdiction).

<sup>36</sup> *Property*, *supra* note 1, at 942.

<sup>37</sup> *Cf.* NLRB v. Calkins, 187 F.3d 1080, 1087-88 (9th Cir. 1999) (stating that the Supreme Court has explained “that employers may exclude union organizers in deference to state common law, but not because the NLRA itself restricts access. “The right of employers to exclude union organizers from their private property emanates from state common law, and while this right is not superseded by the NLRA, nothing in the NLRA expressly protects it.”) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 n.21 (1994)).

<sup>38</sup> See *Communication*, *supra* note 10, at 24-25.

<sup>39</sup> *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537-38 (1992).

is demonstrably false,<sup>40</sup> and as Dill and I agree, the best solution is to legislatively reverse it.<sup>41</sup>

### B. *Back to the Future*

Although the NLRB has the authority to modify its nonemployee access analysis under *Lechmere*,<sup>42</sup> my proposal would admittedly be an abrupt departure from a relatively established practice. It is no surprise, therefore, that others may seek less radical departures from the status quo. Dill's nonlegislative proposal, however, suffers from the opposite problem, as its main requirement would do no more than require the NLRB to follow its current practice.<sup>43</sup>

The central argument in Dill's proposal is that the NLRB's *Lechmere* analysis should begin with a determination whether an employer has a state property right to exclude.<sup>44</sup> This reform is anything but, as it merely describes the current state of NLRB law.

Dill acknowledges that in many cases the NLRB already examines employer's state property interests as an initial matter.<sup>45</sup> Yet, he decries what he characterizes as an alternative *Lechmere* analysis, one in which the threshold question is solely whether the two *Babcock* exceptions—no other means of access, and discrimination—apply.<sup>46</sup> This alternative analysis is an illusion, however; in truth the NLRB and courts have never abandoned the rule that *Lechmere* only applies where the employer has a state property right to exclude.<sup>47</sup> For instance, the D.C. Circuit has explicitly stated that

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<sup>40</sup> See *Communication*, *supra* note 10, at 25.

<sup>41</sup> See *infra* pp. 29-33 and notes 73-79 and accompanying text.

<sup>42</sup> As I argued in my article, the reliance on state property law seems to ignore the Supreme Court's holding in *Lechmere* that nonemployees' derivative right to communicate with employees is satisfied as long as the nonemployees have a means to access employees. *Property*, *supra* note 1, at 907. In other words, as long as the easy-to-satisfy alternative access concern is met, nonemployees' derivative rights are no longer in play.

<sup>43</sup> See Dill, *supra* note 2, at 131.

<sup>44</sup> *Id.* at 168.

<sup>45</sup> *Id.* at 150-51 (citing *NLRB v. Calkins*, 187 F.3d 1080 (9th Cir. 1999)).

<sup>46</sup> *Id.* at 150.

<sup>47</sup> See, e.g., *United Bhd. of Carpenters v. NLRB*, 540 F.3d 957, 962 (9th Cir. 2008); *NLRB v. Calkins*, 187 F.3d 1080, 1088 (9th Cir. 1999) ("Where state law does not create [an interest allowing the employer to exclude organizers], access may not be restricted consistent with Section 8(a)(1).");

under the NLRB's reading of *Lechmere*, an "employer may, without violating § 8(a)(1), exclude a nonemployee union representative from its property *if and only if it has that right under state law.*"<sup>48</sup>

As the sole example of the alternative analysis, Dill cites a Second Circuit decision issued subsequent to my article, *Salmon Run Shopping Center LLC v. NLRB*.<sup>49</sup> It is true that the court in *Salmon Run* focused solely on whether one of the *Babcock* exceptions applied.<sup>50</sup> But it goes too far to suggest that the court was holding that state property law is never an issue in nonemployee access cases. Instead, *Salmon Run* is merely one of many cases—like, as Dill notes, *Lechmere* itself—in which the employer's state property right to exclude is uncontested.<sup>51</sup> Indeed, the court in *Salmon Run* noted that the only contested issue was whether the union's invocation of the discrimination exception was appropriate.<sup>52</sup> Given that no party questioned the employer's right to exclude, it is little wonder that the court and the NLRB did not waste time in addressing that issue.<sup>53</sup>

More generally, Dill cites no cases—and I am aware of none—in which the NLRB has applied *Lechmere* in a situation in which it found that the employer lacked a right to exclude.<sup>54</sup> To the contrary, the NLRB, with court approval, has repeatedly

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O'Neil's Mkts. v. NLRB, 95 F.3d 733, 738–39 (8th Cir. 1996) (citing Johnson & Hardin Co., 305 N.L.R.B. 690 (1991), *enforced in relevant part*, 49 F.3d 237 (6th Cir. 1995) (stating that "*Lechmere* leaves undisturbed previous Board holdings that an employer lacking the right to exclude others from certain property violates section 8(a)(1) when it removes section 7 actors from those areas"); Corp. Interiors, Inc., 340 N.L.R.B. 732, 745–49 (2003); Snyder's of Hanover, Inc., 334 N.L.R.B. 183, 185 (2001), *enforcement denied on other grounds*, 39 F. App'x 730, 734 (3d Cir. 2002); Bristol Farms, Inc., 311 N.L.R.B. 437, 438 (1993).

<sup>48</sup> Fashion Valley Mall, LLC v. NLRB, 451 F.3d 241, 244 (D.C. Cir. 2006) (emphasis added).

<sup>49</sup> Salmon Run Shopping Ctr., LLC v. NLRB, 534 F.3d 108 (2d Cir. 2008).

<sup>50</sup> *Id.* at 114.

<sup>51</sup> Dill, *supra* note 2, at 150. Dill also appropriately acknowledges the Court's reliance on state property rights when determining unions' access rights, as stated in Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 217 (1994). *Id.* at 152.

<sup>52</sup> *Salmon Run*, 534 F. 3d at 114 (noting that it was reviewing a NLRB order that "rested exclusively upon a claim of discrimination").

<sup>53</sup> *See id.* at 108.

<sup>54</sup> *See, e.g.*, CSX Hotels, Inc. v. NLRB, 377 F.3d 394, 400–01 (4th Cir. 2004); Victory Mkts., Inc., 322 N.L.R.B. 17, 20–21 (1996). Among the few times an employer will be justified in removing nonemployees from property over which it has no right to exclude are instances where the

reasserted its long-held view that under *Lechmere*, it is “beyond question” that an employer violates Section 8(a)(1) when it attempts to bar nonemployee collective activity from property over which it lacks a state right to exclude.<sup>55</sup>

Dills’ state property law proposal, therefore, is a solution looking for a problem. More accurately, it is a proposal that would reestablish the current problems with the NLRB’s *Lechmere* analysis—a status quo that both Dill and I agree fails to adequately protect communications between nonemployees and employees.<sup>56</sup> Thus, the question is what to do about this failure. Although largely a restatement of current NLRB law, Dill’s proposal and its defense of the incorporation of state property law into the *Lechmere* analysis raises a more general policy debate regarding the value of shared state and federal governance over labor law.

### C. Labor Federalism

Dill’s argument in favor of increased state labor regulation joins a larger debate about workplace federalism. I have written much on this topic and will not rehash here the arguments for and against state regulation of the workplace.<sup>57</sup> However, it is worth emphasizing that there are costs and benefits to each argument. For example, as Dill implicitly recognizes, it would be desirable to have a uniform standard for the NLRB’s analysis of nonemployee access disputes—a standard that becomes more difficult with increased state law influence. On the other hand, if one is concerned about increasing protection for nonemployee access, state regulation provides an additional option, albeit one that would likely be as difficult to achieve as more direct reform of federal labor law.

Of more importance is the central point that I have tried to make throughout this debate, which is that we need to move away from judging workplace federalism based on its ability to provide a specific outcome at a given point in time.<sup>58</sup> This is the approach that Dill and other critics have adopted. In contrast, I have argued that we should instead focus on placing jurisdiction with the entity or entities in the best

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nonemployees, for example, are blocking access to the employer’s business or causing traffic problems. *Id.* However, these cases were not decided under the *Lechmere* analysis. *Id.*

<sup>55</sup> *Bristol Farms*, 311 N.L.R.B. at 437–38; *see also supra* note 47.

<sup>56</sup> Dill, *supra* note 2, at 130–31.

<sup>57</sup> *See Revolution*, *supra* note 16.

<sup>58</sup> *See id.*

position to exercise it. Such a policy is most likely to provide superior regulation over the long term.<sup>59</sup>

The danger of an outcome determinative approach is two-fold. First, it is futile to attempt to develop a federalism approach that will consistently produce a desired outcome. Political winds change rapidly, and there is no better example of this phenomenon than labor law. The policy oscillations of the NLRB are well known and make any attempt to predict what the NLRB will do in the future impossible.<sup>60</sup> Similar changes often occur in states as well. Therefore, expanding state labor jurisdiction may provide employees more protection in the near term—at least employees in a select few states<sup>61</sup>—but such an expansion may end up undermining stronger federal enforcement in the future.<sup>62</sup>

Second, an outcome determinative approach is unprincipled and ignores important questions of governing competence. It seems far better in the long run to place jurisdiction with the entity that is best able to achieve labor law's goals. The national and international nature of the global labor market suggests that consistent national regulation will generally be the most efficient form of labor governance.<sup>63</sup> This is particularly true when considering the NLRB's use of specific topics like property law, where there are significant disparities among the states.<sup>64</sup> To be sure, federal enforcement is far from perfect, but we are likely to see better regulation over

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<sup>59</sup> *See id.*

<sup>60</sup> *See* Anne Marie Lofaso, *The Persistence of Union Repression in an Era of Recognition*, 62 ME. L. REV. 199, 231 (2010). *See generally* Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985).

<sup>61</sup> Cutting out state law admittedly has its costs, especially in the few states with more union-friendly property law—although employees in states with less friendly laws would do worse under Dill's proposal. Moreover, it is possible that a “ratchet” approach, in which the federal government sets a minimum level of regulation which states can add to, will result in an optimal mix of rights. *See* John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 520 (2002). However, the ratchet approach would also result in additional costs from increased complexity. *See Revolution, supra* note 16, at 62.

<sup>62</sup> *See Revolution, supra* note 16, at 61, 63.

<sup>63</sup> *See id.* at 3, 4, 40-43 (describing the costs of state workplace regulation in a national and international labor market).

<sup>64</sup> *See* *Walmart Foods v. NLRB*, 354 F.3d 870, 874 (D.C. Cir. 2004); *Snyder's of Hanover, Inc. v. NLRB*, 39 F. App'x 730, 734 (3d Cir. 2002); *State v. Shack*, 277 A.2d 369, 374-75 (N.J. 1971).

the long term from centralized federal labor governance than decentralized state governance—especially given states' relative inexperience with labor law.<sup>65</sup>

The other side of this coin is that there are risks in giving the NLRB more jurisdiction than is warranted. The NLRB's expertise is federal labor law; forcing it to delve deeply into other complicated areas of law, like state property law, is demanding too much of a specialized administrative agency. As I noted in my article, the NLRB has struggled to make sense of complex property law issues, which is not a surprise given its expertise in federal labor law.<sup>66</sup> Indeed, the risks associated with expanding the NLRB's reliance on state property law was recently underscored in its *Register-Guard* decision, which addressed employer limits on electronic communications.<sup>67</sup>

Dill appropriately criticizes *Register-Guard's* substantial narrowing of the *Babcock* discrimination exception.<sup>68</sup> However, another aspect of the decision is worth noting. In *Register-Guard*, the NLRB created a new rule for employer attempts to bar use of its electronic systems and other personal property. In so doing, the NLRB ran afoul of a basic rule of property law that should be obvious to most first-year law students. The problem comes from the fact that, in contrast to nonemployee access cases, the NLRB has long given employees a presumptive right to solicit for

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<sup>65</sup> Although there are exceptions, such as New York's Public Employment Relations Board, most states' labor law regulation is far more limited than the NLRB's, and some states lack any traditional labor laws.

<sup>66</sup> *Property*, *supra* note 1, at 909-15.

<sup>67</sup> *Guard Publ'g Co. (Register-Guard)*, 351 N.L.R.B. 1110 (2007), *enforced in part, enforcement denied in part*; *Register-Guard v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009) (refusing enforcement in part but not addressing the substance of the NLRB's new rules on electronic communications or discriminatory applications of non-solicitation policies).

<sup>68</sup> Dill, *supra* note 2, at 153-55. I share Dill's concern about the expansion of *Register-Guard's* definition of discrimination to real property cases. *Id.* at 153 (citing *Fremont-Rideout Health Group*, 20-CA-33521, 2009 N.L.R.B. LEXIS 20, at \*32-34 (Jan. 29, 2009)). That said, there was no reason to think that the NLRB would do otherwise, as *Register-Guard* relied explicitly on the Seventh Circuit's definition of discrimination in real property access cases. *Register-Guard*, 351 N.L.R.B. at 1117-18 (citing *Fleming Cos. v. NLRB*, 349 F.3d 968, 975 (7th Cir. 2003); *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 320 (7th Cir. 1995)). However, the Obama NLRB has just announced that it is reconsidering *Register-Guard's* narrow interpretation of discrimination. See National Labor Relations Board, *Notice and Invitation to File Briefs* (Nov. 17, 2010) (seeking briefs in *Roundy's Inc.*, 356 N.L.R.B. No. 27 (2010), available at [http://www.nlr.gov/about\\_us/news\\_room/Invitations/Documents/Roundy's%20Notice%20and%20Invitation.pdf](http://www.nlr.gov/about_us/news_room/Invitations/Documents/Roundy's%20Notice%20and%20Invitation.pdf)).

collective action on employers' property during nonwork time and in nonwork areas.<sup>69</sup> Yet the NLRB refused to extend that presumption to employee emails in *Register-Guard*, concluding that employers have a greater interest over their personal property.<sup>70</sup> This directly conflicts with a basic property law rule: real property is entitled to *more* protection, not less, than personal property.<sup>71</sup> If the NLRB cannot grasp such a basic rule of property law, why would we want to expand its reach into often far more complex state property issues implicated by nonemployee access cases?

## II. WISFUL THINKING: THE LABOR RIGHTS ACT

One significant point upon which Dill and I agree is the need for legislation to better protect the ability of nonemployees and employees to communicate at the worksite. My earlier proposal was limited to a world in which *Lechmere* remained valid and, as such, was admittedly an attempt at a second-best solution.<sup>72</sup> Ideally, legislative reform would make my proposal unnecessary.

Dill's proposed legislative response is his "Labor Rights Act" (LRA), which would guarantee that all individuals, including nonemployees, have a right to use an employer's public accommodations free from discrimination based on labor viewpoints.<sup>73</sup> Although possibly an improvement on the status quo, the proposal does not go far enough. Indeed, a fair reading of the LRA's terms would actually provide less protection for certain nonemployee communications than exists under current law.

First, the proposed LRA seems to narrow protection for nonemployees in

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<sup>69</sup> See *LeTourneau Co.*, 54 N.L.R.B. 1253, 1260 (1944), *rev'd sub nom.* *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); see also *TeleTech Holdings, Inc.*, 333 N.L.R.B. 402, 403 (2001) ("A no-distribution rule which is not restricted to working time and to work areas is overly broad and presumptively unlawful."). Exceptions to this presumption exist for production or disciplinary reasons, or where written distributions are involved. See, e.g., *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 110 (1956) (citing *LeTourneau*, 54 N.L.R.B. at 1262); *Peyton Packing Co.*, 49 N.L.R.B. 828, 843-44 (1943).

<sup>70</sup> *Register-Guard*, 351 N.L.R.B. at 1117.

<sup>71</sup> See *Intel Corp. v. Hamidi*, 71 P.3d 296, 302-03 (Cal. 2003). Personal property is a form of chattel, and a trespass of chattel claim, unlike real property trespass, requires proof of harm. See *id.*

<sup>72</sup> *Property*, *supra* note 1, at 908 n.105.

<sup>73</sup> Dill, *supra* note 2, at 170.

many situations. By limiting its application to areas of public accommodation, there is an implication that attempts to access non-public employer property are wholly without protection—a significant problem given that many employers provide no public access to their worksites.

Second, even if the LRA is intended as an additional protection for public workplaces that would exist along with the *Lechmere* framework, it is still questionable whether it would do much to advance nonemployees' ability to communicate on employer property. This is because the LRA, on its face, does not provide any more protection than current law. Even under *Lechmere*, employers cannot bar nonemployee solicitations in a discriminatory fashion. The question, of course, is how to define "discrimination." Dill's proposal does not clarify the term, thereby leaving it in the first instance to the NLRB. There is generally nothing wrong with leaving such interpretations to the NLRB; however, this failure to provide a more specific definition would do nothing to address the problems with the NLRB's interpretation of discrimination under *Register-Guard*.<sup>74</sup> Both Dill and I agree that this definition is unjustifiably narrow, thus the LRA proposal would benefit from a clearer and broader interpretation of discrimination.

More important, legislative reform of nonemployee access should not be restricted to situations that involve discriminatory bars to access. The importance of communications between nonemployees and employees exists no matter the employer's motivation in trying to stop such communications.<sup>75</sup> Accordingly, true reform would seek to ensure some level of nonemployee access in most instances, balanced against employers' property and business interests.

One need not look far for this reform, as an appropriate standard has existed for 75 years: the *Republic Aviation* rule.<sup>76</sup> Although the rule has been limited to

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<sup>74</sup> See *supra* note 69 and accompanying text.

<sup>75</sup> See *supra* note 61; *Communication*, *supra* note 10.

<sup>76</sup> See *supra* note 70. Professor Cynthia Estlund has proposed a similar test, which would replace *Lechmere* with a rule that would require that an employer provide a "good reason" before excluding nonemployees who are trying to communicate peacefully with individuals who are typically allowed in a given area. Estlund, *supra* note 11, at 344. One difference between our approaches is that Estlund's test would apply only where employers had a state law right to exclude, while my proposal could apply even if the employer lacked that right. See *Property*, *supra* note 1, at 942-43 (contrasting my *Lechmere* proposal with Estlund's proposal). That said, in practice both approaches would be similar—in most cases employers would have to provide some reasonable level of access to nonemployees.

employee communications, there is no reason why a modified version cannot apply to nonemployees as well. For instance, the new rule could create a presumption that employers must allow nonemployees some access to a worksite for the purposes of communicating with employees. Employers would have the opportunity to rebut that presumption, such as by showing that the requested access would be unduly disruptive or that special business concerns necessitated unusual limits on access. The result would likely be a NLRB-developed norm that would generally permit unions and other nonemployees some degree of access to employer property in areas and during times in which employees arrive and leave.<sup>77</sup> Consequently, the rule would substantially expand nonemployees' ability to communicate with employees, including at worksites that do not generally allow public access.<sup>78</sup>

### III. CONCLUSION

Nonemployees' ability to access a worksite to communicate with employees is a significant issue in labor law.<sup>79</sup> Such communications are often a prerequisite to the core right of the NLRA: the ability of employees to choose whether to engage in collective action.<sup>80</sup> As Dill and I agree, the status quo following *Lechmere* falls woefully short of providing the access needed for employees to truly enjoy this right. How to address that shortcoming is where we differ.

Despite opposition from Dill and others, I remain convinced that expanding states' role in enforcing labor law is the wrong approach. Although certain states would expand access, many others would not, and the overall effect would be to further complicate an already complex analysis. A better solution would be to reduce

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<sup>77</sup> In establishing these norms, the NLRB would consider many factors, including the degree of public access to the area in question, the effect on the employer's business, and the effectiveness of the access in fostering nonemployee/employee communications. Cf. *Silicon Bullet*, *supra* note 11, at 287-88, 294 (discussing similar proposal for electronic communications).

<sup>78</sup> See *supra* note 77. However, the lack of public access could be a factor in the degree of require access. *Id.*

<sup>79</sup> Dill notes that in one of the fiscal years that I surveyed, there was only one *Lechmere* NLRB decision. Dill, *supra* note 2, at 169. While it is true that the NLRB does not issue numerous *Lechmere* decisions—although only a single case in a given year is an outlier—that does not minimize the negative effect of *Lechmere*. Because of the substantial limitations that *Lechmere* places on nonemployee communications, its biggest effect perhaps is chilling nonemployees' attempts to access employer property.

<sup>80</sup> *Communication*, *supra* note 10.

the reliance on state law, whether through my proposed rule or—even better—federal legislation that overturned *Lechmere*. This legislation, however, must provide broad access, including access to property that is not typically accessible to the public. It is only by giving employees at virtually all worksites the opportunity to communicate with nonemployees that the right to collective action will have any relevance for most employees.

