

The Silicon Bullet: Will the Internet Kill the NLRA?

Jeffrey M. Hirsch*

Abstract

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

Introduction

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

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

* Associate Professor, University of Tennessee College of Law. B.A., 1988, University of Virginia; M.P.P., 1995, College of William & Mary; J.D., 1998, New York University. I would like to thank Benjamin Barton, Judy Cornett, Lynn Dancy Hirsch, Barry Hirsch, Anne Marie Lofaso, Martin Malin, and Gregory Stein for their helpful comments.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I. Public Choice Theory and an End to Stagnation?

A. The NLRA's Legislative and Administrative Stagnation

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

This preeminence, however, has not lasted. Not amended in any significant fashion since 1959,¹² the NLRA has languished. A major problem is that, despite dramatic shifts in the U.S. economy resulting from increased global competition and the growing need for knowledge-based skills, the NLRA's language and enforcement are still based on a view of the workplace as it existed in 1935.¹³

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

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

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

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

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

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

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

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

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

¹⁶ See OLSON, *supra* note 14, at 49–52.

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁴ See *infra* notes 31–32 and accompanying text.

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

²⁶ See *supra* notes 22–23 and accompanying text.

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

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

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

³⁰ See *infra* Part III.

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

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

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

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

³³ See *supra* note 21 and accompanying text.

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

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

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

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

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

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

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

³⁸ *See supra* note 11 and accompanying text.

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

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

⁴¹ *See infra* Part III.

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

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

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

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

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

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

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

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

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

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

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

B. *The Internet: Savior or Assassin?*

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

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

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

⁴⁹ *See id.* § 151 (describing NLRA policies).

⁵⁰ *See infra* Part II.

⁵¹ *See infra* Part III.

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

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

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

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

⁵² See *infra* Part III.

⁵³ See *infra* Part III.

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

⁵⁵ See *supra* note 40.

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

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

⁵⁸ See *infra* notes 75–79 and accompanying text.

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

II. *The Internet in the Workplace*

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

Internet usage statistics show the extent of this transformation. Over seventy percent of Americans used the Internet in 2007.⁵⁹ This overall usage level is mirrored by employees' use of the Internet in the workplace. A 2003 survey estimated that forty percent of all workers used the Internet or e-mail at work.⁶⁰ Employers are well aware of the importance of this development and the potential problems it may cause, as an estimated seventy-six percent currently have some type of policy governing employee e-mail use.⁶¹

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

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

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

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

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

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

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

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

⁶³ See *supra* note 31 and accompanying text.

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

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

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

⁶⁷ *Id.*

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

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

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

Because the Board is virtually the only entity authorized to protect private-sector organizing against employer interference,⁷² the agency occupies an especially important role in shaping unions' ability to use the Internet in representation campaigns. The Board's regulation of Internet use, however, has thus far been poorly developed.⁷³ Although troubling, this failure presents the Board with an opportunity—one that looked promising following its announcement in the *Register-Guard* case⁷⁴ that it intended to address several issues involving the NLRA's treatment of Internet communications.⁷⁵

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

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

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

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

⁷³ See *infra* Part III.

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

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

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

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

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

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

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

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

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

Id.

⁸⁰ *Register-Guard*, slip op. at 5–7.

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

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

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

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

⁸¹ *Id.* at 7.

⁸² *See infra* notes 117–20 and accompanying text.

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

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

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

⁸⁶ *See supra* notes 31–35 and accompanying text.

⁸⁷ *See supra* Part II.

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

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

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

⁸⁸ See *supra* notes 62–71 and accompanying text.

⁸⁹ See *infra* Parts III.A–B.

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

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

⁹² See *infra* notes 174–77 and accompanying text.

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

⁹⁴ See Broder, *supra* note 5, at 1657; *supra* note 60.

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

Concluding that the NLRA protects Internet communications is merely the starting point. Although the Internet affects many representation issues under the NLRA—including the classification of workers as employees or independent contractors⁹⁶ and the Board's bargaining unit determinations⁹⁷—the most serious problems are related to the conflict between employees' NLRA rights and employers' property interests. The Board has long struggled to reconcile this conflict,⁹⁸ and the growth in Internet use at work threatens to disrupt

⁹⁵ See, e.g., *Timekeeping Sys.*, 323 N.L.R.B. at 247–50 (applying pre-Internet precedent to Internet communications). Section 7 of the NLRA protects employees' right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (2000). Those rights are enforced through section 8(a)(1), which provides that "[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise" of their section 7 rights. *Id.* § 158(a)(1). Evidence of antiunion intent is unnecessary to show a violation. See *Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1006 (9th Cir. 1995).

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

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

⁹⁸ See *infra* notes 104–05 and accompanying text.

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

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

A. *Employee Internet Use at Work*

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

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

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

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

¹⁰² *See supra* notes 62–71 and accompanying text.

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

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

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

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

¹⁰³ See *supra* note 62 and accompanying text.

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

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

¹⁰⁶ See *supra* notes 75–79 and accompanying text.

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

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

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

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

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

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

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

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

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

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

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

¹¹³ See *infra* note 196 and accompanying text.

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

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

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

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

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

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

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

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

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

¹³⁹ *Id.* at 619.

¹⁴⁰ See *id.* at 620.

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

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

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

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

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

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

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

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

²¹² *Id.* at 1244 n.20.

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

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

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

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

Conclusion

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

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

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

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