

BOSTON COLLEGE LAW REVIEW

VOLUME XXVII

DECEMBER 1985

NUMBER 1

TOWARD A NEW MODEL FOR UNION ORGANIZING: THE HOME VISITS DOCTRINE AND BEYOND†

LEONARD BIERMAN*

I. Introduction	2
II. Employer/Union Access to Employees at the Workplace	3
A. The <i>Republic Aviation</i> and <i>Babcock</i> Rules	3
B. "Captive Audiences" and <i>Nutone</i>	5
C. <i>General Electric</i> and <i>Excelsior</i>	7
III. Union Home Visits as an "Alternative Channel" of Union Organizational Communication	8
A. The Basic Doctrine	8
B. The General Ineffectiveness of Union Home Visits as an Organiza- tional "Balancer"	9
1. Timing of the <i>Excelsior</i> "Trigger"	9
2. The Suburban Shift	10
3. Big Units/Small Units	12
4. Competing Attentions	13
5. The Overwhelming Nature of Employer Access	13
a. The Basic Construct	13
b. Empirical Evidence	16
c. Exceptions to the Rule	17
C. Union Home Visits and Employee Rights of Privacy	18
IV. Formulating A New Model for Union Organizing	20
A. The Labor Reform Act of 1977-1978	20
1. The General Approach	20
2. The Home Visits Issue	22
3. Problems Raised and Lessons Learned	23
B. Some Possible Elements, Guidelines, and Recommendations for Reform	24
1. Forums for Action	24

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*Assistant Professor of Management, Public Policy/Law and Economics Group, Texas A & M Business School. B.S., Cornell University; J.D., University of Pennsylvania; M.A. (in economics), University of California, Los Angeles.

2. The Need for "Bright Lines"	26
3. The Home Visits Doctrine	27
4. Extending <i>Excelsior</i>	28
5. Strengthening Unfair Practice Remedies	30
6. Off-Duty Employees	32
7. "Captive Audiences" and Election Debates	33
V. Conclusion	34

I. INTRODUCTION

Section 7¹ of the National Labor Relations Act² ("NLRA" or "Act") affords employees the right to self-organization, that is, to form, join, or assist labor organizations.³ The National Labor Relations Board ("NLRB" or "Board") and the courts in interpreting this section have developed a somewhat Byzantine set of rules regulating the parameters of union organizing efforts.⁴ At the heart of these rules is the doctrine set forth by the Supreme Court in the 1956 case of *NLRB v. Babcock & Wilcox Co.*⁵ Under this doctrine a sharp differentiation is made between employee organizers, who are generally free to organize at the workplace during nonworking hours,⁶ and nonemployee/outside organizers who are generally barred from organizing at the work site.⁷ Outside/nonemployee organizers are prohibited under the *Babcock* doctrine from organizing at the workplace so long as "reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message."⁸ Unions bear a strong burden of proof in establishing that such "available channels of communication" are not available.⁹

To help achieve a better "balance" of organizing rights between unions and employers, however, the NLRB has devised the critically important, yet frequently overlooked, "home visits doctrine."¹⁰ Under this doctrine unions are allowed to campaign and organize by visiting employees at their homes, while employers are not.¹¹ The Board has justified this disparity of treatment on the grounds that unions have fewer opportunities to address employees in other contexts.¹² Thus, in effect, unions are given the

¹ 29 U.S.C. § 157 (1982).

² 29 U.S.C. §§ 151-169 (1982).

³ Employer actions unreasonably interfering with such protected activities violate NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1).

⁴ See generally 1 C. MORRIS, *THE DEVELOPING LABOR LAW* 71-266, 309-40 (2d ed. 1983).

⁵ 351 U.S. 105 (1956).

⁶ See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 805 (1945).

⁷ *Babcock*, 351 U.S. at 112-14.

⁸ *Id.* at 112.

⁹ See Note, *NLRB Orders Granting Union Access to Company Property*, 68 CORNELL L. REV. 895, 902 (1983); see also *Sears Roebuck & Co. v. San Diego County Dist. Coun. of Carpenters*, 436 U.S. 180, 205 (1978). The classic cases permitting worksite access to nonemployee organizers involve situations where employees are both living and working at the job site, such as in the case of a mining community or resort town. See, e.g., *Alaska Barite Co.*, 197 N.L.R.B. 1023 (1972) (unpublished *per curiam* decision), enforced, 83 L.R.R.M. 2992 (9th Cir. 1973); *S & H Grossinger's, Inc.*, 156 N.L.R.B. 233 (1965).

¹⁰ See *infra* notes 71-79 and accompanying text.

¹¹ See *Plant City Welding & Tank Co.*, 119 N.L.R.B. 131 (1957); *Peoria Plastic Co.*, 117 N.L.R.B. 545 (1957).

¹² See *Plant City Welding*, 119 N.L.R.B. at 133.

right to visit employees at their homes as something of a tradeoff for not being able to reach them easily at the workplace.

This article examines the prevailing organizational rights of unions and employers and argues that the tradeoff envisioned by the Board in establishing the "home visits doctrine" is not a fair one. More specifically, in today's social and economic environment, the advantages employers gain by reaching employees at the workplace far outweigh any concurrent union advantages in reaching employees at their homes. Moreover, even if the "home visits doctrine" does meaningfully help "balance" union/management organizational rights, such balancing might come at too high a cost through concomitant invasion of employee privacy which such visits entail. Consequently, this article will recommend, in the context of a general reformulation of union organizational rights, that the "home visits doctrine" be abolished and that neither employers *nor* unions be permitted to campaign by visiting employees at their homes.

In this regard, Part II will sketch the contours of the current state of the law with respect to employer/union access to employees at the workplace. This will be followed in Part III by a discussion of the "home visits doctrine," and the key interrelationship between this doctrine and the need for a more coherent model of union/management organizational rights. Finally, Part IV will set forth specific guidelines regarding the abolition of the "home visits doctrine" and the development of a new model for union organizing. These guidelines will draw in part on various proposals in this regard raised in Congress as part of the proposed Labor Reform Act of 1977, which was passed by the House of Representatives, but successfully filibustered in the United States Senate.¹³

II. EMPLOYER/UNION ACCESS TO EMPLOYEES AT THE WORKPLACE

A. *The Republic Aviation and Babcock Rules*

The rules governing labor organizing at the workplace are fraught with an inherent underlying conflict between the self-organizational rights of employees under section 7 of the NLRA and the right of employers as property owners and managers. Despite section 8(a)(1)'s¹⁴ prohibition against any "interference" with employee section 7 organizational rights, the NLRB and the courts have attempted to construct a careful balance between these rights and the property rights of employers impaired by permitting union organizing on their premises.

One of the key early cases in this regard is the United States Supreme Court's 1945 decision in *Republic Aviation Corp. v. NLRB*.¹⁵ In this case the Court made a sharp distinction between workplace organizing conducted during working time and that conducted during nonworking time.¹⁶ The Court held that employer rules prohibiting union solicitation or distribution of literature during working time are presumptively valid, while such rules when applied to nonworking time are presumptively invalid.¹⁷ While over the years some twists and turns have been incorporated into the *Republic Aviation*

¹³ See Comment, *Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Elections*, 127 U. PA. L. REV. 755, 755 & n.1 (1979) (listing the relevant pieces of legislation) [hereinafter cited as Penn Comment].

¹⁴ 29 U.S.C. § 158(a)(1) (1982).

¹⁵ 324 U.S. 793 (1945).

¹⁶ *Id.* at 801-05 & nn.8 & 10.

¹⁷ *Id.*

doctrine, such as rules prohibiting the distribution of union literature in working areas even during nonworking time¹⁸ and those giving retail establishments special flexibility in restricting all solicitation on the selling floor,¹⁹ the basic working time/nonworking time distinction developed in that case has remained good law.²⁰

The Supreme Court in *Republic Aviation* did not, however, make any distinction between employee organizers and nonemployee organizers,²¹ and the NLRB subsequently afforded both groups freedom to organize at the workplace during nonworking hours.²² The Court, though, in its seminal decision eleven years later in *NLRB v. Babcock & Wilcox Co.*,²³ sharply reversed the Board on this issue.²⁴

In *Babcock*, the Supreme Court strongly differentiated between workplace organizing by employees themselves, and workplace organizing by outside union organizers.²⁵ The Court held that employers were free to deny workplace access to outside union organizers as long as "reasonable efforts through other available channels of communication" would enable the union to reach employees with its message.²⁶ The Court emphasized that in *Babcock* forty percent of the company's 500 employees lived in a nearby town of 21,000, and that employees were thus reasonably accessible to the union at their homes and through other means aside from workplace organizing.²⁷

The basic core distinction between employee and nonemployee organizing set forth in *Babcock* in 1956 still prevails. Absent unusual situations, such as mining communities or resort hotels, where employees both live and work at the workplace and union access to employees outside the workplace is virtually impossible,²⁸ employers have generally been free to exclude outside union organizers from the workplace. Indeed, the courts and the Board have tended to extend the basic principles of *Babcock* to off-duty employees, severely limiting the rights of these employees to organize on employer premises.²⁹ In any event, *Babcock's* holding that alternative methods for reaching employees

¹⁸ See *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615 (1962).

¹⁹ See, e.g., *McDonald's Corp.*, 205 N.L.R.B. 404, 407-08 (1973); *Goldblatt Bros.*, 77 N.L.R.B. 1262, 1271 (1948); *May Dep't Stores*, 59 N.L.R.B. 976, 981 (1944) (dictum), *enforced as modified*, 154 F.2d 533 (8th Cir.), *cert. denied*, 329 U.S. 725 (1946).

²⁰ See generally 1 C. MORRIS, *supra* note 4, at 88-89. See also G. BERENDT, *COLLECTIVE BARGAINING* 176-77 (1984).

²¹ See Note, *Still as Strangers: Non-employee Union Organizers on Private Commercial Property*, 62 TEX. L. REV. 111, 117 (1983) [hereinafter cited as Texas Note].

²² *Id.* at 117-18. See also Hanley, *Union Organization on Company Property — A Discussion of Property Rights*, 47 GEO. L.J. 266, 295 (1958); Note, *Property Rights and Job Security: Workplace Solicitation by Non-employee Organizers*, 94 YALE L.J. 374, 378 n.24 (1984) [hereinafter cited as Yale Note].

²³ 351 U.S. 105 (1956).

²⁴ *Id.* at 112-13.

²⁵ *Id.* at 112-14.

²⁶ *Id.* at 112.

²⁷ *Id.* at 106-07.

²⁸ See *supra* note 9 and accompanying text.

²⁹ See *infra* notes 285-94 and accompanying text. The basic thrust of *Babcock* is one of distinction between invitees and trespassers with outside organizers falling into the latter category. Since off-duty employees are no longer invitees, various courts have held them to be similarly situated. See *McDonnell Douglas Corp. v. NLRB*, 472 F.2d 539, 547 (8th Cir. 1973); *Diamond Shamrock Co. v. NLRB*, 443 F.2d 52, 58 (3d Cir. 1971). The NLRB has more or less supported this view, although the Board's position has contained some ambiguities, and tended to require more of an employer accommodation in terms of property rights with respect to off-duty employees. Compare *Tri-County Medical Center, Inc.*, 222 N.L.R.B. 1089 (1976), with *GTE Lenkhurt, Inc.*, 204 N.L.R.B. 921 (1973), and *Pioneer Fishing Corp.*, 247 N.L.R.B. 1299, 1303 (1980) (post-*Tri-County* case citing *GTE*).

available to unions, such as home visits, obviating the need for union access to the workplace, remains one of the most significant tenets of American labor law.

B. "Captive Audiences" and Nutone

The *Republic Aviation* and *Babcock* cases set forth the proposition that employers can develop general rules prohibiting on-site solicitation by outside union organizers, and any union solicitation during working time. These cases did not, however, address the question of how these rights might be affected by an employer's decision to wage a vigorous campaign against a union at the work-site during working time. This precise question, though, has been the subject of considerable litigation before the Board and the courts both prior to, and following, the *Republic Aviation* and *Babcock* decisions.³⁰

The issue which has captured the most attention in this regard has been the ability of employers to give "captive audience" speeches, that is anti-union speeches delivered at the workplace to massed groups of employees during working time. Various observers have characterized such speeches as perhaps the most potent weapon in an employer's anti-union arsenal.³¹ As Professor Howard Lesnick has noted, when an employer gathers his employees together for a paid group meeting to deliver an anti-union speech, he is implicitly telling them that he cares more about their position on unionization than about their work.³²

For this and related reasons, the NLRB, during the early days of the Act, found "captive audience" speeches to be inherently coercive and unfair labor practices.³³ Congress's incorporation of a "free speech" provision, section 8(c),³⁴ as part of its 1947 Taft-Hartley amendments to the Act, however, forced a reevaluation of the issue.³⁵ As a result, in the 1951 case of *Bonwit Teller, Inc.*,³⁶ the NLRB held that employer "captive audience" speeches were no longer per se unlawful.³⁷ The Board in *Bonwit Teller*, however, put a condition on an employer's decision to make such a speech, holding that an employer who chooses to use his premises for such purposes must give the union the same opportunity to present its case.³⁸

³⁰ For an excellent historical review of the subject, see Bredhoff, *Labor Law Reform: A Labor Perspective*, 20 B.C.L. REV. 27, 27-37 (1978). See also Kramer, *Labor Law Reform: A Management Perspective*, 20 B.C.L. REV. 4, 4-13 (1978).

³¹ See, e.g., L. JACKSON & R. LEWIS, WINNING NLRB ELECTIONS: MANAGEMENT STRATEGY AND PREVENTIVE PROGRAMS 119-20 (1972); Lewis, *The Law and Strategy of Dealing with Union Organizing Campaigns*, 25 LAB. L.J. 42, 46 (1974). The special potency of speeches of this kind has been confirmed in recent empirical studies. See, e.g., Dickens, *The Effect of Company Campaigns on Certification Elections: Law and Reality Once Again*, 36 INDUS. & LAB. REL. REV. 560, 570-71 (1983).

³² See *The Advocates: Should Congress Provide More Protection for Union Organizing?* 17 (April 27, 1978) (transcript of television program), cited in Penn Comment, *supra* note 13, at 780 n.148.

³³ See, e.g., *Clark Bros. Co.*, 70 N.L.R.B. 802, 804-05 (1946), *enforced*, 163 F.2d 373 (2d Cir. 1947).

³⁴ 29 U.S.C. § 158(c) (1982).

³⁵ For a comprehensive historical analysis of this provision and what led to its enactment see Penn Comment, *supra* note 13, at 758-62.

³⁶ 96 N.L.R.B. 608 (1951).

³⁷ *Id.* at 614-15.

³⁸ *Id.* at 612.

Two years later, however, the Board, in a not atypical abrupt shift in policy occasioned by the appointment of new members,³⁹ reversed *Bonwit Teller* in *Livingston Shirt Corp.*⁴⁰ In *Livingston Shirt*, the NLRB held that employers are free to give "captive audience" speeches without affording unions an "equal opportunity" to do the same.⁴¹ More specifically, the Board stated:

We do not believe that unions will be unduly hindered in their right to carry on organizational activities by our refusal to open up to them the employer's premises for group meetings, particularly since this is an area from which they have traditionally been excluded, and there remains open to them all the customary means for communicating with employees. These include individual contact with employees on the employer's premises outside working hours . . . at their homes, and at union meetings. These are time-honored and traditional means by which unions have conducted their organizational campaigns, and experience shows that they are fully adequate to accomplish unionization and accord employees their rights under the Act to freely choose a bargaining agent.⁴²

It should be noted, however, that in its *Livingston Shirt* decision the NLRB provided no specific details, documentation, or empirical evidence to support its claim that "experience" has shown that other avenues of communicating with employees are "fully adequate" for unions to achieve their organizational goals.⁴³ Nevertheless, despite both legislative⁴⁴ and litigative⁴⁵ attempts to overturn it, the Board's decision in *Livingston Shirt* has remained good law.⁴⁶

Moreover, the general principle enunciated by the NLRB in *Livingston Shirt* was upheld by the Supreme Court in the 1958, post-*Babcock* case of *NLRB v. United Steelworkers (Nutone)*.⁴⁷ In *Nutone*, the Court held that an employer can lawfully enforce a workplace no-solicitation rule against unions while at the same time "violating" this policy by engaging in anti-union solicitation at times and places prohibited by the rule.⁴⁸ Citing *Babcock*,⁴⁹ the Supreme Court noted that under the NLRA unions have other available avenues of communication, and that they are not "entitled to use a medium of communication simply because the employer is using it."⁵⁰ Nevertheless, Justice Frankfurter, writing for the *Nutone* Court, did state that employers were not free to implement no-solicitation rules in this manner where a substantial "imbalance in the opportunities for

³⁹ For an interesting treatment of more recent NLRB reversals of policy, see Bierman, *Reflections on the Problem of Labor Board Instability*, 62 DEN. U.L. REV. 551 (1985) (Labor Law Symposium).

⁴⁰ 107 N.L.R.B. 400 (1953).

⁴¹ *Id.* at 409.

⁴² *Id.* at 406.

⁴³ See generally Bredhoff, *supra* note 30, at 30.

⁴⁴ See *infra* notes 181-200 and accompanying text.

⁴⁵ See *infra* notes 52-70 and accompanying text.

⁴⁶ One significant caveat to the *Livingston Shirt* rule is the NLRB's ruling in *Peerless Plywood Co.*, 107 N.L.R.B. 427, 429 (1953), which holds that an election can be set aside under the Board's "laboratory conditions" test if an employer makes a "captive audience" speech within twenty-four hours prior to a representation election.

⁴⁷ 357 U.S. 357 (1958).

⁴⁸ *Id.* at 358, 364.

⁴⁹ *Id.* at 363.

⁵⁰ *Id.* at 364.

organizational communication" existed.⁵¹ Thus, as in *Babcock and Livingston Shirt*, the Court's decision in *Nutone* turned on the perceived ability of unions to communicate effectively with employees in other manners, particularly those outside the workplace.

C. General Electric and Excelsior

The labor movement in 1966 brought a test case, *General Electric Co.*,⁵² in an attempt to get the Kennedy-Johnson "New Frontier" Labor Board⁵³ to reverse the Eisenhower Board's decision in *Livingston Shirt* holding that employers are free to give "captive audience" speeches without affording unions any right of reply. The unions argued that the Board, by allowing employers the right to campaign at the worksite while affording unions no right of worksite reply, gave employers an unfair advantage in communicating their side of the story.⁵⁴ This, the unions asserted, interfered with the conduct of free and fair labor representation elections.⁵⁵

The Board, however, deflected resolution of the issues raised in *General Electric* by pointing to its decision on the same day in the companion case of *Excelsior Underwear, Inc.*⁵⁶ In *Excelsior*, the Board held⁵⁷ that within seven days of the scheduling of a Board representation election, employers must file with the Board a list containing the names and addresses of all eligible voters, which will then be turned over to the unions involved. Failure by employers to comply with this requirement will result in the Board setting the given election aside pursuant to its "laboratory conditions" doctrine.⁵⁸

The Board based its decision in *Excelsior* on findings that, without access to complete and accurate lists of employee names and addresses, unions were at a severe organizing disadvantage.⁵⁹ Indeed, unions had been placed in something of a "Catch-22" situation. The Court and the Board told the unions in *Babcock*, *Nutone*, and *Livingston Shirt* not to worry about access to employees at the workplace because they could reach employees outside of work. But, without employee names and addresses, reaching employees outside of work was not exactly a simple task.

The *Excelsior* decision was clearly designed to ameliorate this situation and, in particular, to afford unions the opportunity to reach employees at their homes. The Board specifically cited the advantages employers have in reaching employees at the jobsite,⁶⁰ and the difficulties unions face in sidewalk solicitation and distribution of literature.⁶¹ The Board also noted the difficulties unions face in having employee supporters engage in personal solicitation at the workplace where such solicitation is limited to nonworking

⁵¹ *Id.* at 362.

⁵² 156 N.L.R.B. 1247 (1966).

⁵³ For a trenchant criticism of the "New Frontier" Board and its policies, see K. MCGUINNESS, *THE NEW FRONTIER NLRB* (1963).

⁵⁴ 156 N.L.R.B. at 1250.

⁵⁵ *Id.*

⁵⁶ 156 N.L.R.B. 1236 (1966).

⁵⁷ There was considerable controversy over this holding with regard to the fact that the Board essentially promulgated a "rule" without engaging in formal "rulemaking" proceedings pursuant to section 6 of the Act. See 29 U.S.C. § 156 (1982). This action prompted sharp criticism from the Supreme Court. See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764-65 (1969).

⁵⁸ 156 N.L.R.B. at 1239-40.

⁵⁹ *Id.* at 1240-41.

⁶⁰ *Id.* at 1240.

⁶¹ *Id.* at 1241 n.10.

time, and where there are often large numbers of employees to reach.⁶² The NLRB rejected contentions that the turning over of such lists unduly infringed employer property rights.⁶³ The Board also rejected the contention that turning over such lists would subject employees to undue harassment and coercion in their homes,⁶⁴ and explicitly held that union home visits were permissible.⁶⁵

Finally, the NLRB rejected the contention that it would be "inequitable" for it to continue its policy of prohibiting employers from visiting employees at their homes,⁶⁶ while now, under *Excelsior*, explicitly facilitating such home visits by unions.⁶⁷ The Board in justifying the continuing home visits distinction pointed to the ability of employers to communicate with employees at the access jobsite, and the corresponding severe limitations on unions.⁶⁸ Thus, the ability of unions, now equipped with complete and accurate name and address lists, to visit employees at their homes was viewed by the NLRB as a major counterpoint to employer in-plant access advantages.

But buried beneath *Excelsior* is the underlying question of whether the advantage unions gain by engaging in home visits is one which really offsets employer communicational advantages at the worksite. In *General Electric*, the NLRB ruled that broader union organizational access issues such as the right of "captive audience" reply should be deferred "until after the effects of *Excelsior* become known."⁶⁹ Yet, nearly two decades after *Excelsior* and *General Electric* were decided, the NLRB has never squarely reconsidered these issues.⁷⁰ What follows is an attempt to fill this gaping void which the Board has left.

III. UNION HOME VISITS AS AN "ALTERNATIVE CHANNEL" OF UNION ORGANIZATIONAL COMMUNICATION

A. The Basic Doctrine

The NLRB's "home visits doctrine" really evolved out of two cases decided by the Board in 1957. In the first case, *Peoria Plastic Co.*,⁷¹ the Board found employer home visits to be "per se" coercive and therefore sufficient to overturn an election.⁷² According to the Board, the content of employers' statements during such visits was immaterial — the mere conduct of an employer visiting an employee at his home to discuss unionization was sufficient to set an election aside.⁷³

This proposition was elaborated on later that year in *Plant City Welding & Tank Co.*⁷⁴ It was not until *Plant City Welding* that the Board sharply differentiated between home

⁶² *Id.*

⁶³ *Id.* at 1243.

⁶⁴ *Id.* at 1243-44.

⁶⁵ The Board rejected contentions that the use of the *Excelsior* names and addresses be limited to mailings. *Id.* at 1246.

⁶⁶ See *supra* notes 11-12 and accompanying text and *infra* notes 71-79 and accompanying text.

⁶⁷ 156 N.L.R.B. at 1246 n.27.

⁶⁸ *Id.*

⁶⁹ *General Electric*, 156 N.L.R.B. at 1251.

⁷⁰ See generally Getman, Goldberg & Herman, *NLRB Regulation of Campaign Tactics: The Behavioral Assumptions on Which the Board Regulates*, 27 STAN. L. REV. 1465, 1481 n.98 (1975).

⁷¹ 117 N.L.R.B. 545 (1957).

⁷² *Id.* at 548.

⁷³ *Id.* at 547-48.

⁷⁴ 119 N.L.R.B. 131 (1957).

visits by employers and home visits by unions.⁷⁵ The Board rested this differentiation on two prongs. First, the Board stated that unions are never in the position of "control over tenure of employment and working conditions" of the kind which imparts the coercive effect to employer home visits.⁷⁶ Second, and far more significant, the Board stated that unions should be allowed to visit employee homes, while employers are not so permitted, because "unions often do not have the opportunity to address employees in assembled or informal groups."⁷⁷ It is this latter prong concerning the need for union home visits to offset employer organizational advantages which, as noted above,⁷⁸ has been developed in later cases as the major underlying theme of the "home visits doctrine."⁷⁹

B. *The General Ineffectiveness of Union Home Visits as an Organizational "Balancer"*

1. Timing of the *Excelsior* "Trigger"

One major factor which helps contribute to the general ineffectiveness of union home visits as an organizational "balancer" is the timing of the triggering of the Board's *Excelsior* mandates. Under *Excelsior*, employers are not required to furnish the regional office of the NLRB a list of employee names and addresses for transmittal to the relevant unions, until seven days *after* a labor representation election has been scheduled.⁸⁰ Such elections are not scheduled, however, until the union has already provided the NLRB with evidence that at least thirty percent of the employees in the given bargaining unit are interested in being represented by the union.⁸¹ Moreover, most unions, for strategic purposes, do not seek to schedule such elections until at least fifty percent of the given employees sign authorization cards or otherwise express their interest in union representation.⁸² Thus, in many respects, it is the very early stages of union organizational efforts, before representation elections have even been scheduled, that are among the most critical. Successful employer anti-union efforts during this period of time may be extremely effective in "nipping" union activity "in the bud."⁸³

⁷⁵ *Id.* at 133-34.

⁷⁶ *Id.*

⁷⁷ *Id.* at 133.

⁷⁸ See *supra* notes 60-70 and accompanying text.

⁷⁹ It is somewhat unclear, however, whether an election will be set aside where an employer visits only a handful of homes. Compare *The Hurley Co.*, 130 N.L.R.B. 282, 283 (1961) and *F.N. Calderwood, Inc.*, 124 N.L.R.B. 1211, 1214-15 (1959) (setting aside elections based on employer visits to only a handful of homes), with *Excelsior*, 156 N.L.R.B. at 1246 n.27 (noting in dictum that the Board sets aside elections "because an employer or his agents calls on all or a majority of employees in their homes in the period preceeding the election").

⁸⁰ See *Excelsior*, 156 N.L.R.B. at 1239-40.

⁸¹ 29 C.F.R. § 101.18 (1981). Unions generally are able to establish this "showing of interest" by way of authorization cards signed by the employees. See generally S. SCHLOSSBERG & F. SHERMAN, *ORGANIZING AND THE LAW* 50-56 (1971).

⁸² See A. DEMARIA, *HOW MANAGEMENT WINS UNION ORGANIZING CAMPAIGNS* 37 (1980); Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1776 n.22 (1983).

⁸³ See A. DEMARIA, *supra* note 82, at 55-65; K. GAGALA, *UNION ORGANIZING AND STAYING ORGANIZED* 57-94 (1983). See generally *United Dairy Farmers Coop. Ass'n v. NLRB*, 633 F.2d 1054 (3d Cir. 1980) (upholding issuance of nonmajority NLRB bargaining order).

In this context, as Professor William Gould has cogently observed, the rights afforded unions under *Excelsior* may be too little, too late.⁸⁴ For without considerable access to employees at the workplace, and facing the somewhat insurmountable job of reaching employees at their homes without a comprehensive list of names and addresses,⁸⁵ unions may never even get to the point of petitioning for an election and consequently triggering their *Excelsior* rights. Given this type of scenario, the organizational "advantage" unions gain over employers through their ability to call on employees in their homes seems a relatively shallow one.

2. The Suburban Shift

Even if unions had early access to the names and addresses of all employees, their ability to call on employees in their homes has become increasingly difficult in recent years with the growing tendency of employees to live, and many companies to locate, in the sprawling suburbs. In this regard, it must be remembered that the Supreme Court's decision in *Babcock* turned in significant degree on the fact that forty percent of the company's employees lived in a small town only *one* mile from the jobsite, and were thus arguably easily accessible to the union off working premises.⁸⁶

Professors Getman, Goldberg and Herman in their recent empirical study of union representation elections found limited desire on the part of *today's* union organizers to call on employees in their homes given "employees' tendency, increased by the interstate highway system, to live scattered over a wide area."⁸⁷ Today, the norm is for employees to drive, often lengthy distances, to work.⁸⁸ In many respects, a commuter society has developed.⁸⁹ Today's employees, unlike many of those discussed in the *Babcock* case, do not generally walk a mile or so to work.

The impact of this societal shift on union organizing and the problems it has engendered call into stark question the underlying premise of the NLRB's 1957 holding in *Plant City Welding* that union opportunities to visit employees at their homes offset any employer workplace access advantages. As various observers have recognized,⁹⁰ it is harder, given current employee residential patterns, for unions to reach employees at their homes today than it was three decades ago.

⁸⁴ See Gould, *Recent Developments Under the National Labor Relations Act: The Board and the Circuit Courts*, 14 U.C.D. L. REV. 497, 507 n.35 (1981) [hereinafter cited as Gould, *Recent Developments*]. See also J. KILGOUR, *PREVENTIVE LABOR RELATIONS* 200 (1981).

⁸⁵ Suggestions that unions can easily obtain employee names and addresses by having supporters record employee automobile license plate numbers and then compare them with public state listings of vehicle owners' addresses seem rather specious given the degree of effort that such endeavors require. See *Falk Corp.*, 192 N.L.R.B. 716, 722 (1971) (Brown, member, dissenting).

⁸⁶ *Babcock*, 351 U.S. at 106.

⁸⁷ See J. GETMAN, S. GOLDBERG & J. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* 94-95 (1976) [hereinafter cited as *LAW AND REALITY*].

⁸⁸ See generally J. MEYER, J. KAIN & M. WOHL, *THE URBAN TRANSPORTATION PROBLEM* 60-82 (1966). Cf. Broomfield, *Preemptive Federal Jurisdiction Over Concerted Trespassory Union Activity*, 83 HARV. L. REV. 552, 553 (1970) (citing the difficulties unions face in communicating with workers whenever employees drive to work).

⁸⁹ See generally J. MEYER, J. KAIN & M. WOHL, *supra* note 88.

⁹⁰ See, e.g., *LAW AND REALITY*, *supra* note 87, at 94-95; Broomfield, *supra* note 88, at 553. See generally Gould, *The Question of Union Activity on Company Property*, 18 VAND. L. REV. 73, 102-03 (1964) [hereinafter cited as Gould, *Company Property*].

Indeed, the impact of the "suburban shift" on the ability of unions to make home visits has, to some extent, been recognized by the Board and the courts.⁹¹ The leading case in this regard is perhaps the NLRB's 1970 decision in *Central Hardware Co.*⁹² In *Central Hardware*, the Board for the first time suggested that the dispersion of employee residences throughout an urban area, in this case metropolitan Indianapolis, made union home visits an ineffective means of communication.⁹³ The Board also pointed to the testimony of a union organizer that he had to go back to employee residences an average of five or six times in order to find someone at home.⁹⁴ Resting its decision on these bases, the Board, applying *Babcock*, found no adequate "alternative channels of communication" open to the union, and ordered that *nonemployee* union organizers be granted access to the company's parking lot.⁹⁵

On appeal, however, the Eighth Circuit reversed the Board's decision.⁹⁶ The court rejected the notion that residential dispersion of employees made union home visits ineffective, and stated that it was not surprising for employees not to be at home when unexpected visits are made without prior notice or appointment.⁹⁷ Moreover, the appeals court emphasized that the burden is strongly on the union to demonstrate that channels of communication other than access to the workplace are not available, and that the union had not met this heavy burden in the instant case.⁹⁸

The Eighth Circuit's opinion in *Central Hardware*, however, missed the point in many respects. First, the reason why many union organizers do not call employees in advance to make appointments before calling on them at their homes is that there tends to be a greater likelihood for employees to say "no" to such a possible visit when contacted over the phone, than when confronted by a union organizer at their doorstep.⁹⁹ Moreover, while there is little doubt, as the appeals court pointed out, that unions are still technically able to reach employees despite "suburban sprawl," the critical issue is at what cost?

To what extent should unions, faced with increasingly limited resources,¹⁰⁰ be forced, as one commentator has put it, to "run the gauntlet?"¹⁰¹ What level of "transaction

⁹¹ For an excellent review of cases along these lines, see Texas Note, *supra* note 21, at 131-36.

⁹² 181 N.L.R.B. 491 (1970), *rev'd*, 468 F.2d 252 (8th Cir. 1972).

⁹³ *Id.* at 496.

⁹⁴ *Id.*

⁹⁵ *Id.* at 491-92 & n.2. The Board also rested its decision on the independent ground that the employer's parking lot was "quasi-public" property under the Supreme Court's decision in *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968). *Central Hardware*, 181 N.L.R.B. at 491-92 & 492 n.2. This part of the decision was reversed by the Supreme Court in *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972), where the Court held that the parking lot at issue did not fall into the *Logan Valley* definition of "quasi-public" property. *Id.* at 547-48. The Supreme Court then remanded the case to the Eighth Circuit for a decision purely pursuant to *Babcock* with regard to whether the union had shown that "alternative channels of communication" were ineffective. *Id.* at 548. The Supreme Court expressly overruled *Logan Valley* four years later in the case of *Hudgens v. NLRB*, 424 U.S. 507, 518 (1976).

⁹⁶ *Central Hardware Co. v. NLRB*, 468 F.2d 252 (8th Cir. 1972).

⁹⁷ *Id.* at 255-56.

⁹⁸ *Id.*

⁹⁹ K. GAGALA, *supra* note 83, at 166.

¹⁰⁰ See Weiler, *supra* note 82, at 1771-74 (outlining the decline in union density, and thus in union dues resources).

¹⁰¹ See Gould, *Recent Developments*, *supra* note 84, at 507. See generally J. KILGOUR, *supra* note 84, at 199.

costs"¹⁰² can reasonably be imposed on unions in their organizational quests? In sum, it appears that due to greater dispersion in employee residential patterns, visits to employees at their homes have become an increasingly costly, and decreasingly effective, union organizing method.

3. Big Units/Small Units

A related issue to that of "suburban sprawl" in the context of the viability of employee home visits as an effective union organizational tool is the question of representation election unit size. In determining the size of a given employee election unit, the NLRB relies heavily on the "community of interest" of the employees, as well as on any past bargaining history.¹⁰³

As a general rule, unions seek the smallest employee election unit possible, and employers the largest unit possible.¹⁰⁴ The reason for this, as Judge Richard Posner has recently observed,¹⁰⁵ is at least in part because it takes more resources for a union to campaign and win votes in a larger unit than in a smaller one.¹⁰⁶ In the context of home visits, it is much easier for union representatives to visit the homes of twenty employees than it is for them to visit the homes of one hundred employees, assuming that the homes are all geographically dispersed along roughly the same lines.¹⁰⁷

The importance of the size of the election unit to the ability of unions to campaign effectively in labor representation elections has been forcefully articulated by Professor Derek Bok.¹⁰⁸ According to Professor Bok, unions run into "substantial" problems in communicating with employees once the number of employees in the given election unit reaches about seventy-five.¹⁰⁹ The percentage of representation elections involving units with this number of employees or more, however, has consistently remained at only about twenty percent.¹¹⁰ Consequently, Professor Bok does not envision any major prob-

¹⁰² The pathbreaking article in this area was published in 1960 by Professor Ronald Coase. See Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960). For an excellent article outlining the general costs and benefits of union organizing, see Voos, *Union Organizing: Costs and Benefits*, 36 INDUS. & LAB. REL. REV. 576 (1983).

¹⁰³ See generally R. GORMAN, *LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* 68-72 (1976); Leslie, *Labor Bargaining Units*, 70 VA. L. REV. 353, 380-83 (1984).

¹⁰⁴ See R. GORMAN, *supra* note 103, at 67-68; Heneman & Sandver, *Predicting the Outcome of Union Certification Elections: A Review of the Literature*, 36 INDUS. & LAB. REL. REV. 537, 555-56 (1983). But see generally Leslie, *supra* note 103, at 389-418 (suggesting that unions might be better off with larger units, as such units would facilitate mediation of conflicts among subgroups of employees). Professor Leslie's contention in this regard, however, has been strongly disputed by Judge/Professor Richard Posner. See Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 1009 (1984).

¹⁰⁵ See Posner, *supra* note 104, at 1008.

¹⁰⁶ Judge Posner also emphasized that workers in a smaller unit are more likely to have convergent interests, thus making it easier for the union to directly appeal to their needs and to later meet those needs in the bargaining process. *Id.*

¹⁰⁷ See generally Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 94-95, 97 (1964) (pointing out the relative ease of contacting small numbers of employees at their homes versus contacting thousands of employees via this method, and questioning how many house calls a union can reasonably be expected to make given a set number of employees living within a certain radius).

¹⁰⁸ *Id.* at 101-02.

¹⁰⁹ *Id.* at 101.

¹¹⁰ Compare FORTY-SIXTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 220, table 17 (1981), with TWENTY-EIGHTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 183, table 17 (1963).

lems in giving unions special access to employees in the twenty percent of elections involving units of seventy-five or more workers.¹¹¹

While there is obviously a degree of arbitrariness in setting the cutoff for special union access at seventy-five or any other number,¹¹² the basic premise underlying Professor Bok's thesis appears to be a sound one. It does seem plausible that, as a general rule, the more employees there are in a given election unit the more difficult it is for the union to communicate with them. In this context, providing unions with special rights of access in the twenty percent of elections involving the largest units of employees, may well be a reasonable approach worthy of more in-depth consideration.

4. Competing Attentions

One final factor hampering the effectiveness of union home visits as a "balancer" of labor-management organizational rights is that in conducting such visits union organizers are competing against a wide range of after-work activities in an effort to gain the worker's attention.¹¹³ Unlike at the workplace, no person can be a "captive audience" in his or her own home.¹¹⁴

This factor has perhaps become more pronounced in recent decades, as at least some sociologists and other observers have noted an increasing trend for workers to separate or bifurcate their working lives from their personal lives.¹¹⁵ As one commentator has put it:

[T]he value of home visits as a tool for communicating information on self-organization and collective bargaining is diminished to the extent organizers find the employees distracted from the relationships and dissatisfactions of their working lives. At home, employees must attend to their responsibilities as parents, spouses, and consumers and are far removed from the work-related concerns that properly should guide them in matters affecting their organizational life. The "compartmentalization" of modern life may leave workers unresponsive to the organizer's appeal to their productive economic existence — to their existence as employees.¹¹⁶

Thus, once at home a worker may prefer to completely forget about what goes on at work, a fact which makes the life of a union organizer trying to appeal to the worker by way of home visit all the more difficult.

5. The Overwhelming Nature of Employer Access

a. *The Basic Construct*

Even assuming that union visits to employee homes are a more effective organizational method than they appear to be, their effectiveness as a "balancer" of employer organizational rights is likely to be called into question given the overwhelming strength

¹¹¹ Bok, *supra* note 107, at 102.

¹¹² This is a fact readily admitted by Professor Bok. *See id.*

¹¹³ *See generally* LAW AND REALITY, *supra* note 87, at 94-95.

¹¹⁴ *See* Texas Note, *supra* note 21, at 159 n.276.

¹¹⁵ *See, e.g.,* Cumbler, *The City and Community*, 3 J. URB. HIST. 427, 440 (1977). This issue is one which could hypothetically be subject to empirical testing.

¹¹⁶ Texas Note, *supra* note 21, at 159.

of employer opportunities to effectively communicate with employees regarding unionization. These employer communicational advantages have been recognized with stunning candor by some leading management representatives. Alfred T. DeMaria, one of the nation's better known management employee relations attorneys, has written:

[M]any of those in management believe that unions have the advantages in communicating messages to the employees. Yet the reverse is true. The employer has the decided advantage in this context The employer's greater opportunity to communicate with employees, the virtually complete access to the minds of the voters during working hours, and the control management can exert over employees give the employer a considerable advantage over his union counterparts. This advantage can legally be utilized to produce a winning vote on election day.¹¹⁷

In this context,¹¹⁸ the ability of unions to visit employees at their homes, while employers can not, seems of relatively minor consequence.

Employer communicational advantages often start well before a union is even on the scene. Employers have the opportunity to express to workers from the onset of their employment the disadvantages of unionization.¹¹⁹ But once a union does appear on the scene, employers can be expected to act with greater fervor.

First, employers generally have complete and accurate lists of employee names and addresses from the very beginning of any union organizational efforts. While employers can not make use of these records to call on employees at their homes,¹²⁰ they can make very effective use of such records by sending mail to the employees' homes. Indeed, some management observers believe that personalized letters sent home to the spouses of employees, addressing such issues as the possibility of strikes and union violence, are among the most effective methods employers can use in thwarting union efforts.¹²¹ This is particularly true since unions, during the early stages of organization, rarely possess complete name and address lists of the kind which would enable them to attempt to rebut employer correspondence of this kind.¹²²

Second, under *Nutone*,¹²³ and as Mr. DeMaria has noted, employers do have "virtually complete access to the minds of the voters during working hours."¹²⁴ Of course, employees who support the union are free to talk to other employees regarding unionization during coffee breaks, rest periods, and so forth. But many such employees are afraid to

¹¹⁷ A. DEMARIA, *supra* note 82, at xvii.

¹¹⁸ Other leading management representatives, particularly in terms of addressing possible reforms of the system by Congress, have been considerably more demure arguing that an "equal" balance in rights in this regard between management and labor exists. *See, e.g.,* Nash, *The Labor Reform Act of 1977: A Detailed Analysis*, 4 EMPLOYEE REL. L.J. 59, 59-74 (1978).

¹¹⁹ *See* Weiler, *supra* note 82, at 1815 ("the employer has had ample opportunity and incentive to demonstrate the advantages of an individual bargaining regime before the union comes on the scene"). Management consultants and representatives frequently emphasize the need for "preventive" labor relations. *See, e.g.,* R. LEWIS & W. KRUPMAN, *WINNING NLRB ELECTIONS: MANAGEMENT'S STRATEGY AND PREVENTIVE PROGRAMS* 1-3 (1979).

¹²⁰ *See supra* notes 71-79 and accompanying text.

¹²¹ Telephone interview with Peter J. Carre, Management Attorney (May 12, 1985); A. DEMARIA, *supra* note 82, at 117.

¹²² It must be remembered that union rights to such lists under *Excelsior* are only triggered seven days after an election has been scheduled. *See supra* notes 56-58 and accompanying text.

¹²³ *See supra* notes 47-49 and accompanying text.

¹²⁴ A. DEMARIA, *supra* note 82, at xvii.

take action of this kind because it may put them in disfavor with their employer.¹²⁵ This is particularly so since, as Professor Paul Weiler has forcefully pointed out,¹²⁶ the remedies such employees are afforded should their employer unlawfully discipline or discharge them for "talking union" are not especially effective ones.¹²⁷ Moreover, employee union supporters frequently do not have the training or experience to convey the union's appeal with the effectiveness of professional union organizers, and such professional organizers are generally excluded from the workplace under *Babcock*.¹²⁸

In contrast, employers, frequently advised by highly paid and highly knowledgeable attorneys and consultants,¹²⁹ face no such difficulties in getting their story across. Under *Nutone*, employers are basically free to use the workplace for organizational purposes.¹³⁰ The most potent force in the employer's arsenal in this regard is, as noted above,¹³¹ probably the "captive audience" speech. The employer's ability to call all his or her employees together, "en masse," during paid working time for the purpose of listening to an anti-union address seems to give the employer a considerable practical and psychological edge.¹³² This fact appears to have been at least implicitly recognized by the NLRB in its holding in *Peerless Plywood Co.*¹³³ that employer "captive audience" speeches during the twenty-four hours prior to a representation election are violative of election "laboratory conditions."¹³⁴ But employers, of course, work around *Peerless Plywood* to the greatest extent possible, scheduling "captive audience" speeches which begin twenty-four and one-half hours before the election and end just as the twenty-four hour clock begins to run.¹³⁵

In any event, there appears to be rather powerful subjective evidence to the effect that employers generally have a considerable communicational advantage over unions. This advantage significantly outweighs any opportunity unions may gain through their ability to visit employees at their homes while employers can not. In recent years, however, this subjective evidence has been buttressed by a major empirical study examining this issue.

¹²⁵ See Note, *Not as a Stranger: Non-Employee Union Organizers Soliciting on Company Property*, 65 YALE L.J. 423, 427 n.33 (1956).

¹²⁶ See Weiler, *supra* note 82, at 1787-1803.

¹²⁷ *Id.* at 1777-78. See also Smisek, *New Remedies for Discriminatory Discharges of Union Adherents During Organizing Campaigns*, 5 INDUS. REL. L.J. 564, 572-76 (1983).

¹²⁸ See *NLRB v. S & H Grossinger's, Inc.*, 372 F.2d 26, 29 (2d Cir. 1967). See generally C. DAUGHERTY, *LABOR PROBLEMS IN AMERICAN INDUSTRY* 421-22 (5th ed. 1941).

¹²⁹ See generally Bernstein, *Union-Busting: From Benign Neglect to Malignant Growth*, 14 U.C.D. L. REV. 1 (1980); Bethel, *Profiting From Unfair Labor Practices: A Proposal to Regulate Management Representatives*, 79 NW. U. L. REV. 506 (1984).

¹³⁰ See *supra* notes 47-51 and accompanying text.

¹³¹ See *supra* notes 31-46 and accompanying text.

¹³² See *id.* See also Penn Comment, *supra* note 13, at 779-80; Goldberg, Getman & Brett, *Union Representation Elections: Law and Reality: The Authors Respond to the Critics*, 79 MICH. L. REV. 564, 591-93 (1981). See generally Dickens, *supra* note 31, at 570-71; Gould, *Company Property*, *supra* note 90, at 100; Summers, *Past Premises, Present Failures, and Future Needs in Labor Legislation*, 31 BUFFALO L. REV. 9, 21 (1982). But see Smither, *Does the Goalpost Move When Employers Kick About Union Misconduct During Elections?*, 15 LAB. L.J. 578, 580-81 (1964) (arguing, it seems rather speciously, that employer rights to address employees "en masse" are not equivalent to union "buttonhole" organizing techniques).

¹³³ 107 N.L.R.B. 427 (1953).

¹³⁴ *Id.* at 429.

¹³⁵ See A. DEMARIA, *supra* note 82, at 279. But see generally Dickens, *supra* note 31, at 570-71 (employer campaign meetings later in campaign have relatively less impact).

b. *Empirical Evidence*

Professors Getman, Goldberg and Herman in their major 1976 empirical study of labor representation elections reached far different conclusions regarding the existing "balance" of labor/management communicational abilities than those reached, on more subjective bases, by the Supreme Court in *Babcock and Nutone*.¹³⁶ While the major finding of their study was that workers are not meaningfully affected by labor election campaign propaganda,¹³⁷ (a conclusion which has drawn considerable criticism), the researchers did find a powerful correlation between attendance at union and company meetings and employee familiarity with the content of the campaigns.¹³⁸ Moreover, there was evidence that attending union meetings and familiarity with the union campaign were, in particular, associated with employees switching their election vote to the union.¹³⁹

The researchers also found, though, that a far higher proportion of employees (eighty-three percent) attended company meetings than attended union meetings (thirty-six percent),¹⁴⁰ a situation strongly influenced by the fact that company meetings are held at the workplace during paid working time, while union meetings are held outside of the workplace during employee leisure hours.¹⁴¹ In addition, most of the employees attending union meetings were found to have *already* supported the union, while company meetings were attended by a broad cross-section of union supporters, company supporters, and undecided voters.¹⁴²

Based on this data, and given their finding that relatively few employees were contacted by unions at their homes or by fellow employee union supporters at the workplace,¹⁴³ Professors Getman, Goldberg, and Herman concluded, the Supreme Court's holding in *Nutone* aside, that a substantial *imbalance* in organizational abilities between management and labor exists.¹⁴⁴ In their view unions, because of their basic inability to gain access to the workplace, are at a "substantial disadvantage" in terms of effectively communicating with employees.¹⁴⁵ To ameliorate this inequity, the professors suggested that companies campaigning or holding campaign meetings at the workplace during working time should be required to afford unions "equal access" opportunities to also campaign or hold meetings at the workplace during working time.¹⁴⁶ While noting that there may be some "practical problems" with enforcing these requirements, the professors pointed out that these problems are not "insuperable," and that such equal

¹³⁶ See generally Goldberg, *Empirical Research in Labor Law: Problems, Prospects and Pleasures*, 1981 U. ILL. L. REV. 15, 29.

¹³⁷ The researchers found that the vast majority of employees voted in accord with their *pre-campaign* intent. LAW AND REALITY, *supra* note 87, at 64. This conclusion has drawn considerable criticism. See Dickens, *supra* note 31; Eames, *An Analysis of the Union Voting Study from a Trade Unionist's Point of View*, 28 STAN. L. REV. 1181, 1182 (1976); King, *Pre-Election Conduct — Expanding Employer Rights and Some New and Renewed Perspectives*, 2 INDUS. REL. L.J. 185, 210-13 (1977); Weiler, *supra* note 82, at 1782-86.

¹³⁸ LAW AND REALITY, *supra* note 87, at 95-96.

¹³⁹ *Id.* at 103-107.

¹⁴⁰ *Id.* at 95-96.

¹⁴¹ *Id.* at 94-96. Thus, the "opportunity cost" for workers to attend workplace meetings is considerably less. See generally D. LEE & R. MCNOWN, *ECONOMICS IN OUR TIME* 4-6 (1983).

¹⁴² LAW AND REALITY, *supra* note 87, at 96.

¹⁴³ *Id.* at 93-95.

¹⁴⁴ *Id.* at 96, 156.

¹⁴⁵ *Id.* at 96.

¹⁴⁶ *Id.* at 157-58.

opportunities for union/management communication are particularly important in light of their call for labor election speech deregulation.¹⁴⁷

In sum, the empirical work of Professors Getman, Goldberg, and Herman adds weight to the evidence that unions are generally at a considerable disadvantage in communicating their side of the story to employees, a disadvantage which is not overcome by the advantage they gain over employers by being able to visit employees at their homes. The employer's ability, and the union's general inability, to reach employees at the workplace seems to be the overriding factor determining labor/management organizational effectiveness,¹⁴⁸ a fact which must be kept clearly in mind in formulating any new model for union organizing.

c. *Exceptions to the Rule*

For every general rule there are, of course, exceptions, and these exceptions must be taken into account in formulating any reform proposal. The notion that the special right of unions to conduct home visits is not an effective "balancer" of employer/union organizational rights, is predicated on the strength of the employer's ability to make effective use of the workplace in communicating his or her ideas to the employees. But what happens when the employer's advantage in this regard is not present? This was the interesting issue involved in *NLRB v. Daniel Construction Co.*,¹⁴⁹ perhaps the leading federal court case directly interpreting the "home visits doctrine," and one worthy of closer examination if only for its excellent illustration of the complexity of this area and the difficulties inherent in attempting "broad-brush" reforms.

In *Daniel*, the construction company refused to turn over to the union the required *Excelsior* list of employee names and addresses, and the NLRB sought enforcement of a subpoena requiring the company to turn over the list.¹⁵⁰ The company based its refusal on the grounds that the list would give the union an undue organizational advantage.¹⁵¹ The company, citing the *Excelsior* case itself,¹⁵² asserted that the basic purpose of the *Excelsior* rule was to enable unions to visit employees at their homes (a privilege not afforded employers) thus offsetting employer advantages in terms of being able to personally contact employees at the jobsite.¹⁵³

The company asserted that in the case at bar, however, due to the vagaries of the construction business, two-thirds of the employees eligible to vote in the given representation election were no longer employed by the company or present at its jobsites.¹⁵⁴ Consequently, the company argued that giving the union the *Excelsior* list would give it an undue advantage in terms of personally contacting the workers.¹⁵⁵

The federal district judge found this argument persuasive, at least in part, stating:

¹⁴⁷ *Id.* at 158.

¹⁴⁸ See generally Gould, *Union Organizational Rights and the Concept of "Quasi-Public" Property*, 49 MINN. L. REV. 505, 513 (1965) (outlining how the workplace is the "focal point" for organizational effort). Of course, this area is open to further empirical testing.

¹⁴⁹ 299 F. Supp. 423 (D.S.C. 1968), *vacated*, 418 F.2d 790 (4th Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).

¹⁵⁰ *Id.* at 424.

¹⁵¹ *Id.* at 425.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 425-26.

¹⁵⁵ *Id.* at 426.

To enforce the subpoena as applied for by the Board under the particular and special circumstances of this case would arbitrarily create an inequality as to the rights of the two parties to the election. On the other hand, to refuse enforcement entirely would be to give the employer the unfair advantage that the *Excelsior* rule sought to overcome. In this situation and because of the unique and unusual facts of this case, I feel that the subpoena should be enforced on this specific condition, i.e., the respondent shall only supply such names and addresses to the petitioning union with the express restriction that the union shall communicate solely by mail with those employees who have not been on the payroll of the respondent within thirty days of this Order. As to all other employees, the right of the access by the union to the employees will not be restricted or limited by this Order.¹⁵⁶

The district court made no analysis of whether the visitation of employee homes was *really* as effective a union organizing technique as it presumed it to be. On appeal, the Fourth Circuit held that the question was not ripe for judicial review until after the NLRB took final action on the case's certification proceedings, thus effectively avoiding a firm resolution of the unique problem presented.¹⁵⁷ The Supreme Court denied certiorari in the case.¹⁵⁸

The chief lesson of *Daniel* is that things are seldom quite as simple as they seem. While as a general rule it appears that employers enjoy clear organizational advantages vis-a-vis unions, this is not always the case. Formulations for reform in this area must be designed to take exceptions to the rule clearly into account.

C. Union Home Visits and Employee Rights of Privacy

Even if union home visits did, contrary to prevailing evidence, serve an important role in balancing union versus management organizational rights, the question must be asked at what cost in terms of individual employee privacy rights such "balancing" comes. Of course, there is no clear evidence, regardless of the assertions made by those who opposed the NLRB's adoption of the *Excelsior* rule,¹⁵⁹ that unions which engage in such home visits unduly harass and coerce employees. On the other hand, though, as Professor Bok has forcefully pointed out,¹⁶⁰ there is also, contrary to the Board's holding in *Plant City Welding*,¹⁶¹ no clear evidence that employees would be unduly intimidated if employers were permitted to visit them at their homes. Moreover, the Act does indeed protect employees against coercive employer or union campaign behavior.¹⁶²

Nevertheless, analysis along these lines seems somewhat disingenuous. As Professor Charles Alan Reich has pointed out, in today's society the job has become perhaps the most important "property" an individual possesses.¹⁶³ Most employees, however, are

¹⁵⁶ *Id.* at 427 (emphasis added).

¹⁵⁷ 418 F.2d 790, 792 (4th Cir. 1969).

¹⁵⁸ 397 U.S. 1039 (1970).

¹⁵⁹ See *supra* note 64 and accompanying text.

¹⁶⁰ See Bok, *supra* note 107, at 105-06.

¹⁶¹ See *supra* note 76 and accompanying text.

¹⁶² Such behavior, if properly documented, would constitute an unfair labor practice under the Act. See 29 U.S.C. §§ 158(a)(1), 158(b)(1) (1982).

¹⁶³ See Reich, *The New Property*, 73 YALE L.J. 733, 739 (1964).

employees "at will" who can be fired at any time and for any reason.¹⁶⁴ Given such a construct, it is hard to imagine an employee telling his boss to "go away" when the boss comes knocking on his door. Whether the union wins or loses the election, the employee will have to live with the employer, and it would be ridiculous for the employee to risk antagonizing him or her.

On the other hand, though, it may not be particularly advisable for employees to follow the advice some employers have given them, to "slam the door in the union's faces" when the union comes calling.¹⁶⁵ If the union wins, the employee will have to live with it on an ongoing basis, and under the Supreme Court's decision in *Vaca v. Sipes*¹⁶⁶ unions are afforded a fairly wide range of discretion in terms of choosing which employee grievances to pursue to arbitration and otherwise administering labor agreements.¹⁶⁷ Why then would an employee want to risk being on the "outs" with the union because he turned them away from his home?¹⁶⁸ Even if the union loses the election, it, or another union, may come back in a following year¹⁶⁹ and be successful. From the employee's perspective, taking an antagonistic approach seems to make little sense.

Of course, employees are, under the Act, protected from union or management reprisals taken because the employee turned them away, as well as from "coercive" union or management behavior during such home visits.¹⁷⁰ But, unfair labor practices charges brought in such instances may take years to resolve.¹⁷¹ Moreover, there would seem to be considerable problems of proof when bringing a charge based on coercive employer/union conduct during a home visit. Absent, perhaps, a video-cassette recording of the entire visit, how can one easily prove that something "coercive" was indeed said or done? In addition, what types of speech or action are going to be deemed illegally "coercive" in this context?¹⁷²

Beyond all this, however, there seem to be strong general arguments in favor of the fact that employees, regardless of the labor policy implications, should enjoy the basic right to be left alone in their homes. It is true that the Supreme Court has, in other contexts, emphasized the value of door-to-door solicitation as a method of promoting free speech.¹⁷³ But, these precedents are not, as Professor Bok has pointed out,¹⁷⁴ binding in any legal sense, and there are considerable differences between labor election home visits and other types of door-to-door solicitations such as those involving the sale of

¹⁶⁴ See Bierman & Youngblood, *Employment At Will and the South Carolina Experiment*, 7 INDUS. REL. L.J. 28, 28-29 (1985).

¹⁶⁵ See, e.g., Ripley Mfg. Co., 144 N.L.R.B. 1132, 1140-41 (1963).

¹⁶⁶ 386 U.S. 171 (1967).

¹⁶⁷ *Id.* at 192.

¹⁶⁸ Being on the "outs" with the union may not be a particularly pleasant thing. See generally Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. PA. L. REV. 251, 270-72, 274-75 (1977).

¹⁶⁹ There is, of course, a statutory election bar rule which prohibits another representation election in a given bargaining unit for one year after such an election has been held. See 29 U.S.C. § 159(c)(3) (1982).

¹⁷⁰ See generally Penn Comment, *supra* note 13, at 786-87.

¹⁷¹ See generally Weiler, *supra* note 82, at 1796-98.

¹⁷² See *infra* notes 199-212 and accompanying text, discussing the difficulties members of Congress had in wrestling with this issue.

¹⁷³ See, e.g., *Martin v. City of Struthers*, 319 U.S. 141, 141-42 (1943).

¹⁷⁴ Bok, *supra* note 107, at 100.

encyclopedias or life insurance.¹⁷⁵ Moreover, in *Stanley v. Georgia*¹⁷⁶ and other recent cases, the Supreme Court has placed particular emphasis on the importance of the home as a place where individuals should enjoy special privacy rights.¹⁷⁷ Thus, the home in many respects should be seen as a "safe haven," a place where, particularly given the advent of two worker families,¹⁷⁸ employees can get away from it all.¹⁷⁹ Under such circumstances, the prohibition of labor election home visits by *either* labor or management would seem appropriate.

In sum, the efficacy of union labor election home visits as a "balancer" of labor/management organizational rights must be weighed against the intrusion on individual employee rights of privacy such visits pose. Given this intrusion, and the fact that unions have generally not found them to be a particularly effective tool in offsetting employer workplace communicational advantages,¹⁸⁰ the continued viability of home visits in the labor representation election context seems open to considerable question.

IV. FORMULATING A NEW MODEL FOR UNION ORGANIZING

A. *The Labor Reform Act of 1977-1978*

1. The General Approach

Provisions regarding the proper parameters for union organizing were perhaps the most controversial¹⁸¹ of all those contained in the proposed Labor Law Reform Act of 1977-1978, which was passed by the United States House of Representatives but successfully filibustered in the United States Senate.¹⁸² The basic approach of the proposed legislation was to broaden opportunities for union organizational access to employees. This approach was premised on the notion that unions were at a competitive disadvantage vis-a-vis employers in organizational access,¹⁸³ a notion the sponsors of the proposed amendments attempted to substantiate by citing the work of Professors Getman, Goldberg, and Herman as well as other data.¹⁸⁴

As originally introduced, the Democratic majority bill in the House of Representatives contained the following language dealing with this subject:

¹⁷⁵ See Texas Note, *supra* note 21, at 160. See generally *Developments in the Law — Elections*, 88 HARV. L. REV. 1111, 1234-35 (1975) (differentiating the regulation of labor elections from that of political elections).

¹⁷⁶ 394 U.S. 557 (1969).

¹⁷⁷ See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 984-85 (1978).

¹⁷⁸ In recent years the number of females in the workforce has jumped dramatically. See generally Northrup, *Labor Market Trends and Policies in the 1980's*, in R. SCHULER & S. YOUNGBLOOD, *READINGS IN PERSONNEL AND HUMAN RESOURCE MANAGEMENT* 25-26 (1984).

¹⁷⁹ See Texas Note, *supra* note 21, at 170-71. See generally Lewis, *NLRB Intrudes on the Right of Privacy*, 17 LAB. L.J. 280, 283-84 (1966).

¹⁸⁰ See *supra* notes 80-111 and accompanying text.

¹⁸¹ See H.R. REP. NO. 637, 95th Cong., 1st Sess. 69 (1977); see generally Bredhoff, *supra* note 30, at 27-37; Kramar, *supra* note 30, at 4-13.

¹⁸² For an excellent and comprehensive overview of this subject and how it fared in the 95th Congress, see Penn Comment, *supra* note 13 at 755-97.

¹⁸³ See generally *supra* notes 117-48 and accompanying text.

¹⁸⁴ See H.R. REP. NO. 637, *supra* note 181, at 27-39; S. REP. NO. 628, 95th Cong., 2d Sess. 23-26 (1978).

The Board shall within twelve months after the date of enactment of the Labor Reform Act of 1977 issue regulations to implement the provisions of [the relevant sections] including rules . . . which shall, subject to reasonable conditions including due regard for the needs of the employer to maintain continuity of production, assure that if an employer or employer representative addresses the employees on its premises or during working time on issues relating to representation by a labor organization during a period of time that employees are seeking representation by a labor organization the employees shall be assured of an equal opportunity to obtain in an equivalent manner information concerning such issues from such labor organization.¹⁸⁵

While this language in and of itself is somewhat unclear, it was clarified during debate on the House floor to mean only that an employer delivering a "captive audience" speech during a labor representation election campaign would be under an obligation to give the relevant union or unions¹⁸⁶ an "equal opportunity" right to reply.¹⁸⁷ Amendments on the House floor further clarified the fact that employers would be required to pay employees during such working-time union "captive audience" replies.¹⁸⁸ House floor action also afforded employers the right to reply to union speeches at union halls.¹⁸⁹

Action in the United States Senate on this subject took a broader tack. The original Carter Administration/Senate Democratic Majority bill, S. 2467,¹⁹⁰ essentially incorporated the union access/free speech recommendations made by Professors Getman, Goldberg and Herman on this subject,¹⁹¹ with respect to affording outside organizers opportunities to respond at the workplace to all employer campaigning, albeit during nonworking time and in nonworking areas.¹⁹² S. 2467 also called for greater deregulation of labor election speech,¹⁹³ thus incorporating the major thrust of the Getman, Goldberg, and Herman study,¹⁹⁴ as well as a provision in this regard sought by various Republican opponents to the original House Administration/Democratic bill.¹⁹⁵

When S. 2467 began to run into major trouble on the Senate floor, Senate Majority Leader Robert Byrd offered a substitute bill for it. The "Byrd substitute," offered on June 8, 1978, retained provisions calling for the deregulation of labor election speech, but significantly watered down the "equal access" provisions of the original Senate bill by eliminating the right of unions to reply to employer "captive audience" speeches during working time.¹⁹⁶ Instead, the bill proposed that both "captive audience" speeches

¹⁸⁵ H.R. 8410, 95th Cong., 1st Sess. § 6(b)(1) (1977), reprinted in *Labor Reform Act of 1977: Hearings on H.R. 8410 Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 95th Cong., 1st Sess., pt. 1, 5-6 (1977).

¹⁸⁶ The problem of possible multiple unions and how to divide reply time under such circumstances was not meaningfully considered. See generally Penn Comment, *supra* note 13, at 783 & nn.163-67.

¹⁸⁷ See 123 CONG. REC. 32,483-84 (1977) (statement of Congressman Thompson); *id.* at 32,486 (colloquy between Congressmen Glickman and Thompson).

¹⁸⁸ See *id.* at 32,495-98.

¹⁸⁹ See *id.* at 32,489-98.

¹⁹⁰ S. 2467, 95th Cong., 2d Sess. (1978), reprinted in S. REP. NO. 628, *supra* note 184, at 45-60.

¹⁹¹ See LAW AND REALITY, *supra* note 87, at 158.

¹⁹² See S. REP. NO. 628, *supra* note 184, at 23-26.

¹⁹³ See S. 2467, *supra* note 190, § 6.

¹⁹⁴ See LAW AND REALITY, *supra* note 87, at 159.

¹⁹⁵ See S. REP. NO. 628, *supra* note 184, at 26-27.

¹⁹⁶ See Penn Comment, *supra* note 13, at 795-97.

and other employer campaigning within the plant were to be offset by permitting a limited number of nonemployee union organizers to campaign in designated nonworking areas during nonworking time.¹⁹⁷ Even the watering down of this provision, however, did not help carry the day, and on June 22, 1978 a successful filibuster forced the "Byrd substitute" off the Senate floor and back to the Senate Labor Committee where it died a slow death.¹⁹⁸

2. The Home Visits Issue

Congress did address the home visits issue as part of its consideration of the Labor Reform Act. During the House Labor Committee's mark-up of the legislation, minority Republican members of the committee informally offered an amendment to the bill's "equal access" provision which would have permitted employers to make home visits while insuring the "sanctity of employees' homes."¹⁹⁹ After the committee rejected this amendment, the late Congressman John Ashbrook then formally offered it on the floor of the House.²⁰⁰ Under Congressman Ashbrook's proposal, employers would have an "equal opportunity" to visit employees at their homes, although the Board would at the same time be instructed to adopt rules to insure "due regard for the needs . . . of the employees to enjoy the privacy of their homes."²⁰¹ The basic thrust of the proposal was, according to Congressman Ashbrook, to apply a more even-handed approach, that is, if unions were to be allowed to respond to employer "captive audience" speeches, employers should be allowed to campaign by visiting employees at their homes.²⁰²

The proposal, however, came under immediate attack from House Democratic members. Then House Labor Committee Chairman Frank Thompson quickly labeled the proposal the "trick or treat" or "door-bell" amendment, and chastised it as representing an invasion on employee rights of privacy.²⁰³ Congressman George Miller argued, along the lines of the NLRB's holding in the *Plant City Welding* case,²⁰⁴ that there is a distinction between the "pressure" being brought to bear by a union organizer who has "no control" over a worker approaching the worker at home, and the pressure brought by the person who "signs the paychecks" paying a visit.²⁰⁵

Congressman Ashbrook, however, rebutted such assertions stating that the record on the issue of labor intimidation is not "one-sided."²⁰⁶ This theme was further developed on the House floor by Congressman Edwards of Oklahoma who stated that "the union organizer can be at least as intimidating as the employer."²⁰⁷ Moreover, in terms of

¹⁹⁷ In this regard, it could be argued that the "Byrd substitute" adopted among the worst of all possible reforms in this area since it sanctioned a significant incursion on employer property rights, even though this incursion arguably did little to ameliorate the union/management organizational imbalance. See *id.* at 796-97.

¹⁹⁸ For a good discussion of the political dynamics of the proposed legislation, see generally Rosen, *Labor Law Reform: Dead or Alive?*, 57 U. DET. J. URB. L. 1 (1979).

¹⁹⁹ See H.R. REP. NO. 637, *supra* note 181, at 71.

²⁰⁰ See 123 CONG. REC. 32,489 (1977).

²⁰¹ *Id.*

²⁰² *Id.* at 32,490.

²⁰³ *Id.* at 32,490-91.

²⁰⁴ See *supra* notes 63-67 and accompanying text.

²⁰⁵ 123 CONG. REC. at 32,492-93.

²⁰⁶ *Id.* at 32,493.

²⁰⁷ *Id.*

employee privacy, Congressman Ashbrook pointed out that the proposed amendment created no "right" to enter anyone's home, but merely the "opportunity" for the employer to knock on the voter's door, the "same opportunity afforded unions."²⁰⁸ In addition, the NLRB would be instructed to develop rules so that such employer visits would not improperly intrude on employee rights of privacy.

The majority of members of the House, however, did not find such counterarguments persuasive. Indeed, some members even questioned whether *either* unions or employers should be permitted to campaign by visiting employees at their homes. Thus, Congressman O'Brien of Illinois stated:

I just do not think we improve this situation by compounding the felony. I do not agree that either side should be granted the privilege of accosting an employee at his home.

I think that [such activity] puts undue pressure on the employee, his wife and the entire family. Such activity does not belong at the home. I think this is bad law on both counts.²⁰⁹

No formal amendments were offered, however, to eliminate the opportunity for unions to campaign by conducting home visits, and indeed, there was not even any further exploration of this issue by the legislative body. Moreover, no consideration was given by House members to the issue of whether union home visits were really serving a positive role as a "balancer" of union versus management organizational rights.²¹⁰ Instead, Congressman Ashbrook's proposed amendment to afford employers the right to visit employees at their homes was simply tabled.²¹¹

3. Problems Raised and Lessons Learned

The issues raised regarding union organizational access during the 95th Congress's consideration of labor reform legislation are illustrative of the complexity of the problems involved in this area of the law. While there seemed to be *some* consensus that the existing *Babcock/Nutone* model²¹² needed to be reformed to give unions greater organizational access opportunities, there was no agreement regarding how precisely to construct such change. Is giving unions the right to reply to employer "captive audience" speeches sufficient to counterbalance employer organizational advantages, or is greater union access necessary? What about employer rights of free speech? Should greater freedoms be afforded in this area in return for greater union avenues of organizational access? To what extent would provisions such as those calling for employer access to the union hall be substantively meaningful, or merely "symbolic" in nature?

In many respects the area of union/management organizational rights is a tightly woven tapestry, with the various elements of NLRB regulation being very closely interrelated to each other.²¹³ One major problem with Congress's considerations in this area during the labor reform debate was the fact that at times salient interrelationships were essentially overlooked. This seemed particularly true with regard to the debate concern-

²⁰⁸ *Id.* at 32,492.

²⁰⁹ *Id.*

²¹⁰ See generally *supra* notes 80-111 and accompanying text.

²¹¹ 123 CONG. REC. at 32,493.

²¹² See *supra* notes 23-51 and accompanying text.

²¹³ See generally Bok, *supra* note 107; Penn Comment, *supra* note 13.

ing the "home visits doctrine," where the doctrine's key historical role as a purported "balancer" of union/management organizational rights²¹⁴ received no evaluation or meaningful attention.²¹⁵ Thus, one important lesson that clearly seems to have emanated from the 1977-1978 congressional debate in this area is that reform must not be approached in a piecemeal manner. Instead, attempts must be made to carefully evaluate all the different interrelated pieces of the puzzle, and construct an integrated model for reform. Moreover, efforts should be made in constructing such a model to give ample consideration to possible *new* approaches and ideas, as opposed to merely relying on approaches of the past.

What follows is an attempt to sketch some possible elements, guidelines, and recommendations for reform in this highly difficult and complex area of the law. In particular, an effort will be made to set forth some possible new approaches for tackling these problems. It is hoped that such ideas and guidelines will serve as a blueprint and impetus for prompt congressional and executive action.

B. *Some Possible Elements, Guidelines, and Recommendations for Reform*

1. Forums for Action

There seem to be strong arguments for the proposition that Congress is *not* the appropriate forum for the initial development of an integrated model for reform in the area of union organizational rights. The highly contentious nature of the debate concerning this and other issues during the consideration of the Labor Law Reform Act of 1977-1978²¹⁶ leads one to at least question whether the House and the Senate are indeed the best forums for the *reasoned preliminary* formulation and development of models for labor reform, particularly in an area as sensitive as that involving union organizational rights. This concern is compounded by the fact, at times well illustrated during the relevant 1977-1978 congressional labor reform floor debates,²¹⁷ that individual members of Congress are generally not particularly well versed in the intricacies of labor law, especially when it comes to an area as befuddling as that of union organizational rights.²¹⁸ Members are thus forced to rely on their staff members who also may not possess any great range of expertise or experience in the field.²¹⁹

Indeed, Congress did, at least in part, recognize its own possible shortcomings in this regard when it attempted to mandate as part of the proposed 1977-1978 labor

²¹⁴ See *supra* notes 66-79 and accompanying text.

²¹⁵ See generally *supra* notes 199-211 and accompanying text.

²¹⁶ See generally R. FREEMAN & J. MEDOFF, *WHAT DO UNIONS DO?* 202-04 (1984); F. TURNER, *THE LABOR LAW REFORM BILL, 1977-78: AN ANALYSIS OF ITS DEFEAT* (1982); Mills, *Flawed Victory in Labor Law Reform*, HARV. BUS. REV., May-June, 1979, at 92.

²¹⁷ See, e.g., 123 CONG. REC. at 32,496 (misstatement, shortly later corrected, by then House Labor Committee Chairman Frank Thompson regarding the applicability of the "24 hour" *Peerless Plywood* rule).

²¹⁸ Of course, on a rare occasion a member of Congress may formerly have worked for the NLRB or otherwise practiced labor law. See, e.g., 123 CONG. REC. at 32,487-88 (statements of Congresswoman Patricia Schroeder regarding insights gained while working as an NLRB staff member). Such instances, though, are quite expectedly relatively few and far between.

²¹⁹ Congressional staff members are frequently young professionals ranging in age from about twenty-five to forty. While such individuals may possess unusually strong innate abilities, their range of practical experience is necessarily limited due to their age. See generally M. MALBIN, *UNELECTED REPRESENTATIVES* (1980).

reform legislation that the NLRB develop "rules" regarding the specific details to be encompassed in the proposed right of unions to "equal opportunity" organizational access.²²⁰ If enacted, this mandate would have been something of a milestone in the analogs of the NLRB given the agency's oft-criticized general refusal to use its section 6²²¹ rulemaking power in establishing new policy.²²²

While it seems that Congress was on the right track in attempting to mandate the use of a procedure which would afford broad open debate and input on this subject, it appears somewhat less clear whether NLRB rulemaking of this kind would necessarily be the best approach to the problem. First, it must be remembered that the NLRB has always been and in the opinion of some has increasingly become, a "political" institution.²²³ Even though the Administrative Procedure Act would require that no rules be promulgated by the Board without the requisite opportunity for "notice and comment" by all interested parties,²²⁴ the Board, a political entity, could still ultimately issue politically-oriented rules. Indeed, the fear of possible NLRB "politicization" of the rulemaking process was expressed by some members of Congress during the 1977-1978 labor law reform debate on this subject.²²⁵

Beyond the issue of possible politicization of the process, however, there also seem to be strong arguments for the development of general "rules" in this area in *anticipation*, rather than as a result of, congressional action. More specifically, why not have a blue-ribbon study commission, established along the lines of the Social Security Reform Commission recently chaired by Dr. Alan Greenspan,²²⁶ which would develop guidelines for reform in this area for consideration by Congress? In the given context, the advantages of such an approach seem considerable. In particular, the issues involved are so controversial that it is perhaps only through a blue-ribbon study commission made up of representatives from labor, business, Congress, and the executive branch, that any sort of consensus can successfully be reached.²²⁷ Furthermore, a study commission of this kind would afford opportunities for the voicing and consideration of a wide range of views, with such views being evaluated by individual commission members with the technical expertise and ability to recognize the necessary and subtle interrelationships which exist in this area of the law.²²⁸ Most significantly, though, should a blue-ribbon commission of this kind be able to achieve, through reasoned objective analysis, a con-

²²⁰ See *supra* note 185 and accompanying text.

²²¹ 29 U.S.C. § 156 (1982).

²²² See, e.g., Bernstein, *The NLRB's Adjudication-Rulemaking Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 581-93 (1970); Summers, *Politics, Policy Making, and the NLRB*, 6 SYRACUSE L. REV. 93, 105-06 (1955).

²²³ See generally Cook & Gautschi, *Political Bias in NLRB Unfair Labor Practice Decisions*, 35 INDUS. & LAB. REL. REV. 539 (1982); Dunau, *The Role of Criticism in the Work of the National Labor Relations Board*, 16 N.Y.U. CONF. LAB. 205 (1963); 119 LAB. REL. REP. (BNA) 47 (May 20, 1985) (statement of former NLRB Chairwoman Betty Southard Murphy); Meltzer, *Is the NLRB a Closed Shop to Labor?*, Wall St. J., Oct. 18, 1984, at 32, col. 3.

²²⁴ See 5 U.S.C. § 553(b)(2), (b)(3), (c) (1982).

²²⁵ See 123 CONG. REC. at 32,491 (statement of Congressman Ashbrook discussing political impact of "liberal" NLRB on rulemaking).

²²⁶ See generally N.Y. Times, Dec. 17, 1981, at 16, col. 3.

²²⁷ Cf. Mills, *supra* note 216, at 101 (advocating a cooperative approach to problems in this area).

²²⁸ See generally *supra* notes 217-18 and accompanying text.

sensus model for reform, there would likely be considerable political impetus for both Congress and the Executive Branch to take positive action with respect to it.

In sum, there seem to be strong arguments in favor of the establishment of some sort of blue-ribbon panel to develop proposals for labor law reform, particularly with respect to the area of rights of union organizational access.²²⁹ Given the highly controversial nature of the issues involved, such an approach seems far better than one which relegates solely to Congress the initial development of an acceptable model for reform, or one whereby Congress sets forth broad general guidelines and delegates formal rulemaking to the NLRB. In this particular context, a nonpartisan blue-ribbon study commission is probably the best potential forum for successful action.

2. The Need For "Bright Lines"

In developing guidelines for change in the area of union organizational rights, any blue-ribbon panel considering possibilities for labor law reform should make a special effort to set forth, to the extent possible, "bright line" recommendations, that is, clear and precise doctrinal guidelines. Of course, the Supreme Court has stated that there are no "mechanical answers" in this complex area of labor relations,²³⁰ and there are considerable arguments in favor of affording the NLRB broad discretion to proceed on a case-by-case basis.²³¹ But, as Professor Bok has forcefully pointed out, there are perhaps even stronger arguments in favor of the proposition that the legal rules in this area of labor law have become far too obfuscated and unclear.²³² Thus, while there would obviously be a degree of "arbitrariness" involved were a study commission to recommend, for example, that all campaigning cease during the twenty-four hours before a labor election,²³³ a less clear-cut approach might, as Professor Bok has put it, ultimately "result in much greater arbitrariness."²³⁴

This is particularly true because, as various members of Congress noted during the 1977-1978 labor reform debate,²³⁵ unclear rules and regulations tend to work their greatest hardship on small employers and unions who simply can not afford "hot-shot" labor lawyers. Indeed, such unions and employers may actually be forced to yield on a given issue rather than face the prospect of absorbing the high costs of litigating it before the Board and the federal courts.²³⁶ Such an outcome does not seem to be a particularly desirable or equitable one, and argues strongly for any study commission examining this area to make recommendations that are, to the extent reasonably possible, straightforward and easily understandable to all interested parties.²³⁷

²²⁹ Incidentally, the general concept of a nonpartisan study commission is not a completely foreign one to the labor relations area. See, e.g., Interim Report and Recommendations of the Chairman's Task Force on the NLRB for 1976 (Betty Southard Murphy, Chairwoman).

²³⁰ NLRB v. United Steelworkers (*Nulone*), 357 U.S. 357, 364 (1958).

²³¹ See generally NLRB v. A.J. Tower Co., 329 U.S. 324 (1946).

²³² Bok, *supra* note 107, at 102-03.

²³³ See generally Penn Comment, *supra* note 13, at 778-79 (making a suggestion along these lines).

²³⁴ See Bok, *supra* note 107, at 102.

²³⁵ See, e.g., 123 CONG. REC. at 32,485 (statement of Mr. Erlenborn); *id.* at 32,486 (statement of Mr. Ford). See generally Bok, *supra* note 107, at 58-59, 66.

²³⁶ See Bok, *supra* note 107, at 59.

²³⁷ Certainly it seems that any such study commission, despite the intervening self-interests of the inevitable cadre of lawyers serving on it, should do its part to help put a lid on the "litigation

3. The Home Visits Doctrine

In the context of the discussion above regarding the need for "bright line" standards, the amendment to the "home visits doctrine" offered by the late Congressman John Ashbrook during the 1977-1978 congressional labor law reform debates²³⁸ was arguably an absolute abomination. The proposed amendment permitted employers to campaign by visiting employees at their homes, but added the almost classically oxymoronic caveat that the NLRB should, in this context, develop rules which protect the rights "of the employees to enjoy the privacy of their home."²³⁹ It is, of course, almost impossible to conjecture what this caveat was meant to mean. Were unions and employers to have been required to make appointments prior to calling on employees at their homes,²⁴⁰ to visit employees only on weekdays before eight p.m., to knock only on the back door? As Congressman George Miller of California insightfully pointed out during the House debate on this issue, the proposed amendment offered almost limitless potential for regulatory paperwork and confusion.²⁴¹

A far better approach for a blue-ribbon commission studying this issue to take would be the recommendation that the "home visits doctrine" be abolished, and that neither employers nor unions be allowed to campaign by visiting employees at their homes. For one, an approach of this kind would have the obvious advantage of setting forth a "bright line" regarding what interested parties can and can not do. Of course, essentially equally "bright lines" could be established were a study commission merely to recommend that the "home visits doctrine" be retained in its current form, that is, unions are permitted to campaign by visiting employee homes while employers are not, or to propose that employers be afforded the same rights in this regard as unions. Either of these latter approaches, however, would have serious shortcomings.

First, as developed above,²⁴² the "home visits doctrine" as presently constructed has not been particularly effective in fulfilling its role as a means of providing unions with organizational opportunities of the kind which successfully offset apparent employer advantages. While it may be possible to make the doctrine in its present form more effective,²⁴³ the price of such possible increased effectiveness may be rather high in terms of heightened regulatory complexity²⁴⁴ and potential political controversy.²⁴⁵ In addition,

explosion" which has considerably overburdened both administrative agencies and the federal courts. See generally Bok, *The Ballooning Waste of Legal Hot Air: Are We Drowning In a Sea of Laws and Legal Procedure?*, BUS. & SOC. REV. Fall 1983, at 17-22. See also Epstein, *Simple Rules for a Complex World*, WALL ST. J., June 27, 1985, at 28, col. 3.

²³⁸ See *supra* notes 201-02 and accompanying text.

²³⁹ See 123 CONG. REC. at 32,489.

²⁴⁰ Such a requirement could significantly undercut the effectiveness of the technique. See *supra* note 99 and accompanying text.

²⁴¹ 123 CONG. REC. at 32,492 (statement of Congressman George Miller).

²⁴² See *supra* notes 71-111 and accompanying text.

²⁴³ For example, unit size could be limited in certain demographic situations or in certain industries, to facilitate the ability of unions to visit all employees at their homes. See generally *supra* notes 103-12 and accompanying text.

²⁴⁴ Developing a myriad of different unit size limitations depending on demographic distributions, for example, would represent a considerable move away from "bright lines" standards. See generally *supra* notes 230-37 and accompanying text.

²⁴⁵ Any change of rules in this area, particularly if one industry or another is going to be singled out for better or worse treatment, is likely to engender considerable political controversy.

retention of the status quo ante would still leave irksome "imbalance" problems, such as those presented in special situations like *Daniel Construction*,²⁴⁶ to be reckoned with.

On the other hand, adoption of legislation permitting employers to make home visits would appear to be even more foolhardy. There are strong arguments in favor of the proposition that employers already enjoy a marked organizational access advantage over unions.²⁴⁷ Indeed, the "home visits doctrine" as currently formulated represents an administrative attempt to offset alleged employer advantages in this regard.²⁴⁸ Thus, it would seem rather nonsensical to further increase employer advantages in this area.²⁴⁹ This is particularly true given the fact that such an approach would entail an even greater incursion on employee rights of privacy than currently exists.

In sum, very strong arguments exist that support a study commission's recommendations in favor of abolishing the "home visits doctrine" and prohibiting *both* unions and employers from visiting employees at their homes during labor election campaigns. Such an approach would have the advantage of setting forth a clear standard, but more significantly would represent a significant step forward toward better protection of individual employee privacy rights.²⁵⁰ The one obvious and key drawback of such an approach, though, is that it would put unions at an *even greater organizational access disadvantage* than they currently are. The general benefits to be derived from taking such a tack, however, would in all probability outweigh the harm in this regard. This is particularly true since the incorporation of various of the suggestions set forth below into an overall model for reform, would more than offset any diminution in organizational abilities unions suffer as a result of the lost ability to campaign by visiting employees at their homes.

4. Extending *Excelsior*

In the context of the potential abolition of the "home visits doctrine," the arguments in favor of extending the Board's *Excelsior* doctrine appear to be considerable. Without the ability to campaign by visiting employees at their homes, unions will need to make greater use of alternative organizational techniques. A number of such techniques, including mailing letters to employee homes, placing targeted advertising in local media,²⁵¹ and perhaps even making telephone calls to employee homes,²⁵² would all be

²⁴⁶ See *supra* notes 149-58 and accompanying text.

²⁴⁷ See *supra* notes 117-48 and accompanying text.

²⁴⁸ See *supra* notes 66-79 and accompanying text.

²⁴⁹ This would seem to be true even if, as in the case of the 1977-1978 labor reform proposals, such a provision was part of a package giving unions increased organizational opportunities. A formula could be worked out increasing union opportunities to the point where they roughly equal those of employers, without "upping the ante" and still further increasing employer opportunities -- particularly where such "upped ante" would significantly invade employee privacy rights.

²⁵⁰ See *supra* notes 159-80 and accompanying text.

²⁵¹ Advertising on local radio stations and in local newspapers (particularly those of the "shopper" variety) can often be rather inexpensive. With improvements in technology being achieved on an ongoing basis, new forms of communication will be constantly evolving. See generally *The Changing Situation of Workers and Their Unions, A Report by the AFL-CIO Committee on the Evolution of Work*, at 20, 27 (1985).

²⁵² It seems unlikely that telephone calls to the home would be banned under a ban on "home visits" since such telephone calls do not represent the same level of intrusion on employee privacy rights as do home visits. Nevertheless, this is an issue worthy of further consideration.

meaningfully facilitated were the scope of the *Excelsior* doctrine extended and unions able to obtain employee name and address lists at an earlier stage in the organizational process.²⁵³ Given such a construct, it seems that providing unions with earlier access to such lists would make considerable sense. This is particularly true since concerns of the kind raised by employers during the *Excelsior* litigation regarding the fact that union use of such lists might lead to undue invasions of employee privacy rights²⁵⁴ would now in large part be obviated given the home visits doctrine's abolition.

The primary problems in extending the scope of the *Excelsior* doctrine and releasing employee names and addresses to unions at an earlier stage in the organizational process, however, are likely to be logistical ones. There are, however, various viable options for a study commission to consider in examining this issue.

One possibility, for example, might be to adopt a ten percent authorization card benchmark, whereby unions possessing "authorization cards" signed by ten percent of the employees in the given unit and stating that said employees wished to be represented by that union, could be entitled to a comprehensive list of all unit employee names and addresses. Such a standard would be considerably lower than the thirty percent card showing presently required to schedule a representation election²⁵⁵ and trigger *Excelsior* rights, but likely high enough to discourage frivolous use of the process.²⁵⁶ Further, the ten percent authorization card standard has been used by the NLRB as a benchmark in other contexts.²⁵⁷

Another possibility, at least as far as union home mailings are concerned, might be to mandate that employers address and mail to employees' homes any letters or literature that given unions wish to send, as long as the unions are willing to *pay* for the mailings.²⁵⁸ Similar requirements currently exist pursuant to the Landrum Griffin Act²⁵⁹ in internal union elections. This right might be one unions would be able to assert at *anytime* during their organizational efforts, that is, no ten percent or other showing of interest would have to be established for such mailings to be sent as long as the unions were willing to bear the mailing costs.²⁶⁰ Or, perhaps, a rule might be developed whereby unions would be able to assert this right before they obtained a ten percent showing of interest, but if

²⁵³ See generally K. GAGALA, *supra* note 83, at 167-76 (discussing these organizational techniques); Gould, *Recent Developments*, *supra* note 84, at 507 n.35.

²⁵⁴ See *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1243-44 (1966).

²⁵⁵ Of course, since the Supreme Court's holding in *Linden Lumber*, an employer can insist on the holding of a secret ballot election regardless of the percentage of signed authorization cards a union possesses.

²⁵⁶ For example, once a petitioning union has made a thirty percent showing of interest and an election is scheduled, other unions, known as "intervenor," can frequently win a place on the ballot with a showing of only *one* authorization card. See, e.g., *Manhattan College*, 195 N.L.R.B. 65 (1975). Where such a standard applied for the triggering of name and address rights, it might possibly encourage frivolous use of the system, for example, a union obtaining one signed card in order to obtain a list of employee names and addresses to be used or sold for other purposes.

²⁵⁷ The Board, for example, permits intervening unions who have demonstrated a ten percent showing of interest to block election-scheduling "consent agreements" between employers and petitioning unions. Unions with lesser showings cannot block such election scheduling. See NLRB, *AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES* § 11022.3(c)-(d) (1974).

²⁵⁸ See generally Bok, *supra* note 107, at 100.

²⁵⁹ 29 U.S.C. § 418(c) (1982).

²⁶⁰ Such "mailing costs" would probably have to include the cost of postage plus some charge for overhead expenses.

such an assertion were made the threshold for later obtaining a comprehensive listing of employee names and addresses might rise to perhaps a fifteen percent authorization card level.

In any event, the above suggestions are by all means meant to be of a very tentative and preliminary nature. A study commission examining this issue would have considerable leeway in formulating the most auspicious approach. Nevertheless, it seems clear that providing unions with earlier access to employee name and address lists would be one relatively painless and uncontroversial²⁶¹ way to offset lost union organizational opportunities engendered by the proposed abolition of the "home visits doctrine," and to better balance union/management rights in this regard.

5. Strengthening Unfair Practice Remedies

Another way for unions to have stronger organizational abilities even absent the right to make home visits, would be for action to be taken significantly bolstering the NLRA's unfair practice remedy provisions. It must, in this regard, be remembered that under the Supreme Court's decision in the *Republic Aviation* case, employees at a workplace *do* have considerable rights in terms of engaging in union organizational solicitation during nonworking time and in nonworking areas.²⁶² Indeed, these rights of employee solicitation have received strong, recent reaffirmation by the Supreme Court in *NLRB v. Magnavox Co.*²⁶³ and *Eastex, Inc. v. NLRB*.²⁶⁴ While outside professional organizers may generally be somewhat more capable of conveying to workers the union's appeal, the organizational abilities of in-plant employees should not be underestimated, particularly since it is not completely unknown for unions anticipating a major organization to have experienced organizers attempt to "hire into" the targeted workplace.²⁶⁵

In-plant employee organizers, however, as Professor Daniel Pollitt has recently pointed out,²⁶⁶ do frequently face one tremendous obstacle — "fear of employer retaliation." Despite the fact that section 8(a)(3)²⁶⁷ clearly makes it an unfair labor practice violation of the Act for employers to discharge or otherwise discriminate against employees for union organizational activity, the number of employees being discharged in flagrant disregard of this provision has skyrocketed in recent years. Indeed, while the overall number of labor representation elections being held has remained relatively stable over the years, the number of workers being reinstated to their jobs by the NLRB because they were "discriminatorily discharged" has soared from a low of 922 employees in 1957 to over 10,000 employees in 1980.²⁶⁸ In addition, thousands of other meritorious charges are being brought each year by employees who are able to prove that employers

²⁶¹ Employers have no highly significant "property" interest in such lists, and if a proposal of this kind were part of a broader consensus study commission package of reform, little objection would probably be engendered.

²⁶² See *supra* notes 15–19 and accompanying text.

²⁶³ 415 U.S. 322, 325–26 (1974) (holding that employee solicitation rights cannot be waived in a collective bargaining agreement).

²⁶⁴ 437 U.S. 556, 574–75 (1978) (broadly construing what type of literature is protected by the "mutual aid or protection clause" of NLRA).

²⁶⁵ See K. GAGALA, *supra* note 83, at 149–53.

²⁶⁶ See Statement of Professor Daniel H. Pollitt, before House Labor Subcommittee on Labor-Management Relations, 118 LAB. REL. REP. (BNA), at F-6 (June 22, 1984).

²⁶⁷ 29 U.S.C. § 158(a)(3) (1982).

²⁶⁸ See Weiler, *supra* note 82, at 1780.

have discriminated against them because of union activity in ways falling short of discharge.²⁶⁹

Employer incentives in this regard are obvious. Union supporters who are dismissed become immediately ineligible to vote, a fact which in and of itself might tip a close election.²⁷⁰ Moreover, the discharge of union adherents will in all probability give, as Professor Paul Weiler has put it, "a chilling edge to the warning that union representation is likely to be more trouble for the employees than it is worth."²⁷¹ This is particularly true given the fact that it may take years for a discriminatorily discharged employee to get his job back,²⁷² and that what the employer then pays is the employee's back pay (plus interest) *minus* what he or she has earned, or in the judgment of the NLRB *should have earned* in the interim period.²⁷³ The average unfair practice backpay award under the Act is currently about two thousand dollars.²⁷⁴

A study commission concerned enough with the importance of protecting individual employee rights to consider the abolition of the "home visits doctrine" should also be concerned enough about such rights to closely consider strengthened remedies for illegal employee discharges and other discrimination at the workplace. The Labor Reform Act of 1977-1978 offered two specific possibilities in this regard, namely, the greater use of preliminary injunctions under section 10(1)²⁷⁵ in discriminatory discharge cases,²⁷⁶ and the awarding of something *more* than simple mitigated back pay plus interest to employees found to have been illegally fired for union activity.²⁷⁷ Both of these proposals stirred considerable controversy²⁷⁸ and have considerable potential drawbacks.²⁷⁹ Nevertheless, they and other possible solutions²⁸⁰ to this difficult problem seem worthy of careful, closer examination.

²⁶⁹ *Id.* at 1780-81.

²⁷⁰ *Id.* at 1778.

²⁷¹ *Id.*

²⁷² It may take up to as many as three years or so for an employee to ultimately be reinstated to his job by the Board and the courts. *Id.* at 1796-97.

²⁷³ See H.R. REP. NO. 637, *supra* note 181, at 7; S. REP. NO. 628, *supra* note 184, at 13.

²⁷⁴ See Weiler, *supra* note 82, at 1780.

²⁷⁵ 29 U.S.C. § 160(1) (1982).

²⁷⁶ See H.R. REP. NO. 637, *supra* note 181, at 7, 30; S. REP. NO. 628, *supra* note 184, at 11-13.

²⁷⁷ The House version of the reform bill would have awarded double back pay plus interest while the Senate bill would have granted only one and one-half times back pay plus interest. In addition, the House bill would have permitted no mitigation of damages, while the Senate bill would have permitted mitigation but only for wages actually earned.

²⁷⁸ See, e.g., Nash, *supra* note 118, at 66-72; *Labor Reform Act of 1977: Hearings on S. 1883 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 650-51 (1977) (statement of Charles G. Bakaly) [hereinafter cited as Bakaly Statement].

²⁷⁹ Both provisions, for example, might create strong pressures on employers to litigate rather than settle given charges. See Bakaly Statement, *supra* note 278, at 651; Nash, *supra* note 118, at 67, 71. See generally Nolan & Lehr, *Improving NLRB Unfair Labor Practice Procedures*, 57 TEX. L. REV. 47, 58-60 (1978); Weiler, *supra* note 82, at 1803. Moreover, the increased back-pay proposal, in particular, might cast the Act in an improperly punitive, as opposed to remedial, mode. See generally Nash, *supra* note 118, at 67 (discussing the possible punitive aspects of this provision especially on small business persons). Cf. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11-12 (1940) (expressing the view that the relief provisions of the NLRA are designed to be "remedial" and not "punitive").

²⁸⁰ One possibility, for example, might be the incorporation into the NLRA of the Japanese doctrine of "kinkyu meirei," under which employees can be afforded back pay and other relief pending judicial review of their charges. See Gould, *Labor Law in Japan and the United States: A*

One leading observer of the American labor scene recently stated that "defiance of section 8(a)(3) has become almost a way of life for nonunion American employers."²⁸¹ To the extent this situation can be reversed, and employees can become freely able to exercise their section 7²⁸² rights and talk to other employees at the workplace about unionization, union organizational abilities will receive a "shot in the arm" of far greater consequence than the loss of the ability to visit employees at their homes. The issue is one of highest priority.

6. Off-Duty Employees

It may further be possible to extend union organizational abilities by means of clarifying and expanding the scope of organizational access afforded to off-duty employees. In the 1973 case of *GTE Lenkhurt, Inc.*²⁸³ the NLRB likened the status of off-duty employees to that of "trespassing" nonemployees, and held that off-duty employees would thus be subject to the same restrictions on workplace organizing as are nonemployees.²⁸⁴

Three years later, however, the Board shifted its position on this issue in the case of *Tri-County Medical Center*.²⁸⁵ In *Tri-County*, the NLRB held that off-duty employees were to be given significantly greater rights of organizational access than nonemployees, specifically stating that off-duty employees can engage in union organizational activity so long as such activity is conducted outside "the interior of the plant and other working areas."²⁸⁶ Thus, under *Tri-County*, employer rules prohibiting off-duty employee access to outside areas such as plant parking lots and gates are presumptively invalid absent strong business justifications.²⁸⁷ Nevertheless, since its *Tri-County* decision, the Board has at times cited *GTE Lenkhurt* as the primary precedent governing this area,²⁸⁸ and there appears to be some ongoing confusion regarding the applicable standards pertaining to this subject.²⁸⁹ Moreover, while the Board's decision in *Tri-County* seems to rest on far better legal and practical grounds than its one in *GTE Lenkhurt*, the distinctions the *Tri-County* holding makes between interior versus exterior off-duty employee workplace access seem to be rather artificial ones, as one commentator has insightfully noted.²⁹⁰

More specifically, if the concern regarding off-duty employee organizational access is one based on protection of employer property rights — the theory set forth in *Babcock* as the justification for keeping nonemployee organizers off employer premises²⁹¹ — then off-duty employees should simply be treated like nonemployees and barred from the

Comparative Perspective, 6 INDUS. REL. L.J. 1, 57-59 (1984). See also W. GOULD, JAPAN'S RESHAPING OF AMERICAN LABOR LAW 84-89 (1984).

²⁸¹ Weiler, *supra* note 82, at 1803 n.130.

²⁸² 29 U.S.C. § 157 (1982).

²⁸³ 204 N.L.R.B. 921 (1973).

²⁸⁴ *Id.* at 921.

²⁸⁵ 222 N.L.R.B. 1089 (1976).

²⁸⁶ *Id.* at 1089.

²⁸⁷ *Id.*

²⁸⁸ See, e.g., *Pioneer Fishing Corp.*, 247 N.L.R.B. 1299, 1303 (1980).

²⁸⁹ See Texas Note, *supra* note 21, at 142.

²⁹⁰ See Yale Note, *supra* note 22, at 380 n.40.

²⁹¹ See generally *supra* notes 23-29 and accompanying text.

work premises. To this extent, the Board's decision in *GTE Lenkhurt*, while perhaps "legally and practically unsound,"²⁹² at least rests on a solid theoretical foundation.

On the other hand, if it is essentially managerial interests which are being protected, then it makes little sense to differentiate the situation of the off-duty employee from that of the on-duty employee who is permitted to engage in union organizing activity but *only* in nonworking areas during nonworking time. Under *Tri-County*, however, specious managerial-type interests are advanced to prohibit individuals who have already been admitted onto the property from talking to workers in contexts which would seem to represent little real threat to managerial integrity.²⁹³

A study commission examining this issue would thus likely be taking a positive step forward in recommending that off-duty employees be afforded the same organizational rights as on-duty employees, particularly if overall union organizational abilities are going to be cut back via the abolition of the "home visits doctrine." Such an approach would entail relatively minimal encroachment on employer property or managerial interest, while providing off-duty employees the chance to meet with fellow workers in cafeterias, rest areas, and other workplace locations which are amenable to free discussion regarding the opportunities posed by self-organization.²⁹⁴ In sum, expansion of the organizational rights of off-duty employees appears to be a reform highly worthy of careful further examination.

7. "Captive Audiences" and Election Debates

Over the years the NLRB has recognized the special potency of employer anti-union "captive audience" speeches delivered to employees during paid working time by regulating said speeches in a variety of manners.²⁹⁵ At the present time, however, employers generally have broad license to deliver such speeches without restriction,²⁹⁶ a fact which arguably gives them a significant organizational access advantage over unions.²⁹⁷ The Labor Reform Act of 1977-1978 would have legislatively implemented an approach, formerly administratively tested by the NLRB for a short while in the 1950s,²⁹⁸ of giving unions an in-plant "right of reply" to these speeches.²⁹⁹ The logistical problems involved in establishing such a union "right of reply" are considerable, however,³⁰⁰ and there seems to be some merit to exploring other possible ways of dealing with this somewhat intractable problem.

²⁹² See Comment, *Right of Off-Duty Employees to Enter and Remain on Employer Premises for Organizational Purposes*, 54 B.U.L. REV. 199, 201 (1974).

²⁹³ See Yale Note, *supra* note 22, at 380 n.40.

²⁹⁴ Plant gates, in contrast, while amenable to literature distribution, are not exactly the best places for relaxed discussions regarding the advantages of unionization. See *id.* See also Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1370 (1982) (workplace as a natural forum for communication of this kind).

²⁹⁵ See Penn Comment, *supra* note 13, at 779-80.

²⁹⁶ The only major restriction on such speeches at the present time is that they cannot be given during the 24 hours prior to the election. See *Peerless Plywood Co.*, 107 N.L.R.B. 427, 429-30 (1953).

²⁹⁷ See generally *supra* notes 131-35 and accompanying text. This advantage, as Professor Bok has pointed out, can be as much psychological as practical. See Bok, *supra* note 107, at 101 n.174.

²⁹⁸ See *Bonwit Teller, Inc.*, 96 N.L.R.B. 608 (1951).

²⁹⁹ See 123 CONG. REC. at 32,483-86 (statements of Congressmen Thompson, Ford and Glickman).

³⁰⁰ See Penn Comment, *supra* note 13, at 782-84.

In this regard, one idea at least worthy of further consideration is the possible institution of NLRB sponsored union/management *election debates*.³⁰¹ While, of course, the general notion of promoting "free debate on issues dividing labor and management"³⁰² has long been a central one under the NLRA, this concept has never been operationalized by the actual scheduling of NLRB sponsored give-and-take election debates.

The debates approach could be integrated into the current regulatory framework in a variety of fashions. One possibility, for example, might be for Congress to mandate that a set number of such debates be held on working premises during working time³⁰³ as part of any given representation election campaign. Such debates would *replace* the right of employers to deliver "captive audience" speeches, as well as the argued-for right of unions to reply to such deliverances.³⁰⁴ Hopefully, the give and take of debates of this kind would better serve to inform and educate the electorate than the combination of an employer "captive audience" speech and a possible union reply.³⁰⁵

On the other hand, Board debates could potentially be structured as simply an additional campaign option open to the parties at their discretion.³⁰⁶ Alternatively, a far broader "remedial" type structure could be used, with any employer deliverance of even one "captive audience" speech triggering a minimum of three Board sponsored work-time election debates. In any event, consistent with Professor Bok's suggestion,³⁰⁷ this may be a particularly appropriate area in which to experiment with special rules for larger election units, given the particular difficulties unions face in getting their story across in such situations.³⁰⁸ Special rules might also be instituted outlawing "captive audience" speeches and/or debates during the final three to seven days of the election campaign,³⁰⁹ again along the lines of recommendations made by Professor Bok.³¹⁰

In any event, the ideas sketched above are, once again, only meant to be preliminary in nature. Nevertheless, the general concept of having NLRB sponsored representation election debates appears to be a very appealing one. Even a study commission comprised of leading experts, though, will have its hands full in fleshing out the precise contours of such an approach.

V. CONCLUSION

Since the 1950s Supreme Court decisions in *Babcock* and *Nutone* holding that employers have broad rights to campaign at the workplace while simultaneously excluding nonemployee union organizers from doing so, unions have been at an arguable orga-

³⁰¹ The author is initially indebted to Professor Howard Lesnick for this idea.

³⁰² See *Linn v. Plant Guard Workers*, 383 U.S. 53, 62 (1966).

³⁰³ The precise logistics of compensating workers during this time would, of course, have to be worked out.

³⁰⁴ See generally Penn Comment, *supra* note 13, at 785.

³⁰⁵ See *id.*

³⁰⁶ See *id.*

³⁰⁷ See Bok, *supra* note 107, at 101-02. See generally *supra* notes 103-11 and accompanying text.

³⁰⁸ See Bok, *supra* note 107, at 101-02. Congress or the Board, for example, might mandate the holding of more debates in units larger than 75 or 100 workers.

³⁰⁹ Of course, "captive audience" speeches, are currently prohibited during the final 24 hours before an election. Nevertheless, there may be strong arguments for a broader ban on "last minute" campaigning, which is extremely difficult to rebut or counter.

³¹⁰ See *id.* at 100-03.

nizational access disadvantage. In 1966, this fact was explicitly recognized by the NLRB in its companion holdings in the *Excelsior* and *General Electric* cases, where the Board decided to afford unions petitioning for an election the right to a list of employee names and addresses. A primary rationale for providing unions with such lists was the hope that they would be able to successfully use them in making campaign visits to employee homes. In addition, since the right to campaign by means of employee home visitations was not one lawfully afforded employers, it was further hoped that unions' advantage in this regard would work to offset employer organizational advantages of other kinds, and create a balanced union/management organizational climate.

The "home visits doctrine," however, has not fulfilled its promise. Due to a variety of demographic and other factors, it has not been an effective counterbalance to the organizational advantages employers enjoy by way of their almost overwhelming ability to reach employees at the workplace. Moreover, even if the "home visits doctrine" was effective as a balancer of organizational rights, it is highly questionable whether the benefits derived in this regard outweigh the costs imposed on individual employees in terms of diminished rights of privacy.

Consequently, this article has recommended that the "home visits doctrine" be abolished, and that neither employers *nor* unions be permitted to make campaign visits of this kind. To compensate unions for the loss of this access to employees, however, and to help better meaningfully structure and balance union versus management organizational rights and privileges, this article has set forth a number of proposals for study commission examination. These proposals, drawn in part from Congress' 1977-1978 labor law reform debates, include: (1) the extension of the *Excelsior* doctrine, (2) the strengthening of unfair labor practice remedies, (3) the broadening of the organizational rights of off-duty employees, and (4) the establishment of NLRB sponsored labor election debates. It is hoped that these proposals will help serve as catalysts for change in an area deserving of priority attention.

BOSTON COLLEGE LAW REVIEW

VOLUME XXVII

DECEMBER 1985

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1984-1985 ANNUAL SURVEY OF LABOR RELATIONS AND EMPLOYMENT DISCRIMINATION LAW

INTRODUCTION

THE NATIONAL LABOR RELATIONS BOARD AND THE POLITICS OF LABOR LAW.....	David L. Gregory	39
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LABOR RELATIONS LAW

I. REPRESENTATIONAL AND ORGANIZATIONAL ACTIVITY.....		53
A. <i>A Second Decade of Health Care Bargaining Unit Litigation: St. Francis II</i>		53
B. <i>Exclusion of Family Members of Management from Bargaining Units: NLRB v. Action Automotive, Inc.</i>		61
C. <i>The Difficulty of Applying the Yeshiva Standard: Lorretta Heights College v. NLRB</i>		69
D. <i>Union Access to Employer's Plant for Safety Inspection: Holyoke Water Power Co.</i>		78
II. UNFAIR LABOR PRACTICES		84
A. <i>Employer Unfair Labor Practices</i>		84
1. <i>The Cyclical Nature of an Industry Justifies an Employer's Failure to Reinstate Former Strikers with Full Seniority: NLRB v. Harrison Ready Mix Concrete</i>		84
2. <i>Appropriate Remedies of Weingarten Violations Where Employees Have Engaged in Misconduct: Taracorp Industries</i>		95
B. <i>Union Unfair Labor Practices</i>		106
1. <i>Union Restrictions on Members' Rights to Resign: International As- sociation for Machinists and Aerospace Workers and Neufield Porsche-Audi, Inc.</i>		106
III. CONCERTED ACTIVITY		115
A. <i>Maintaining the Jurisdictional Restrictions of the Norris-LaGuardia Act: Briggs Transportation Co. v. International Brotherhood of Teamsters</i>		115
IV. FIRST AMENDMENT DECISIONS		120
A. <i>Constructive Persuader Agreements Require Disclosure Under the LMRDA: Master Printers of America v. Donovan</i>		120
V. PREEMPTION		129
A. <i>States' Ability to Limit Employees' Section 7 Right to Select the Officers of Their Labor Union: Brown v. Hotel and Restaurant Employees and Bartenders International Union, Local 54</i>		129
VI. FAIR LABOR STANDARDS ACT		138
A. <i>The Supreme Court Overrules National League of Cities, Thereby Extend- ing the Fair Labor Standards Act to Virtually All State and Local Government Employees: Garcia v. San Antonio Metropolitan Transit Authority</i> ...		138

EMPLOYMENT DISCRIMINATION LAW

I. PROCEDURAL DEVELOPMENTS	149
A. <i>Allocation of Procedural Burdens in Title VII Reverse Discrimination Cases: Johnson v. Transportation Agency</i>	149
B. <i>Burdens of Proof in Title VII Class Discrimination Actions: Segar v. Smith</i>	157
C. <i>Limiting the Role of Statistical Evidence in Affirmative Action Cases: Janowiak v. City of Southbend</i>	168
D. <i>Res Judicata in Title VII Actions: Cooper v. Federal Reserve Bank of Richmond</i>	173
E. <i>Court Appointment of Counsel in Title VII Cases: Bradshaw v. United States District Court for the Southern District of California</i>	184
F. <i>The Rejection of Comparable Worth Claims: Spaulding v. University of Washington</i>	193
II. REMEDIES	201
A. <i>Right to Contribution Not Available to Parties in Violation of Section 1981: Anderson v. Local Union No. 3</i>	201
III. EMPLOYMENT BENEFITS	206
A. <i>Retroactive Relief for Discriminatory Use of Gender-Based Mortality Tables in Calculating Pension Benefits: Spirt v. Teachers Insurance and Annuity Association</i>	206
IV. SENIORITY SYSTEMS	214
A. <i>Voluntary Race-Conscious Affirmative Action Versus Seniority Rights: Wygant v. Jackson Board of Education</i>	214
V. AGE DISCRIMINATION IN EMPLOYMENT ACT	228
A. <i>Defining Willfulness Under the Age Discrimination in Employment Act: Trans World Airlines v. Thurston</i>	228
B. <i>Burdens of Proof Under the Age Discrimination in Employment Act: Sharry v. Hanover Insurance Co.</i>	234