Toward A New Model for Union Organizing: The Home Visits Doctrine and Beyond

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

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I. INTRODUCTION

Section 7 of the National Labor Relations Act ("NLRA" or "Act") affords employees the right to self-organization, that is, to form, join, or assist labor organizations. 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. 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. Under this doctrine a sharp differentiation is made between employee organizers, who are generally free to organize at the workplace during nonworking hours, and nonemployee/outside organizers who are generally barred from organizing at the work site. 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." Unions bear a strong burden of proof in establishing that such "available channels of communication" are not available.

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." Under this doctrine unions are allowed to campaign and organize by visiting employees at their homes, while employers are not. The Board has justified this disparity of treatment on the grounds that unions have fewer opportunities to address employees in other contexts. The Board has justified this disparity of treatment on the grounds that unions have fewer opportunities to address employees in other contexts. Thus, in effect, unions are given the

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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. 230 (1965).
10 See infra notes 71-79 and accompanying text.
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)’s 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

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

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).
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 599, 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.\(^{38}\)


\(^{33}\) See, e.g., Clark Bros. Co., 70 N.L.R.B. 802, 804-05 (1946), enforced, 168 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, reversed Bonwit Teller in Livingston Shirt Corp. 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. 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.

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. Nevertheless, despite both legislative and litigative attempts to overturn it, the Board's decision in Livingston Shirt has remained good law.

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). 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. Citing Babcock, 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." 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..."
organizational communication" existed. 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., in an attempt
to get the Kennedy-Johnson "New Frontier" Labor Board 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. This, the unions asserted, interfered with the conduct of free
and fair labor representation elections.

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. In Excelsior, the Board held 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.

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. 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 out-
side of work was not exactly a simple task.

The Excelsior decision was clearly designed to ameliorate this situation and, in par-
ticular, 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,
and the difficulties unions face in sidewalk solicitation and distribution of literature.
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

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51 Id. at 362.
53 For a trenchant criticism of the "New Frontier" Board and its policies, see K. McGuiness,
54 156 N.L.R.B. at 1250.
55 Id.
57 There was considerable controversy over this holding with regard to the fact that the Board
especially 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
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. The NLRB rejected contentions that the turning over of such lists unduly infringed employer property rights. The Board also rejected the contention that turning over such lists would subject employees to undue harassment and coercion in their homes, and explicitly held that union home visits were permissible.

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, while now, under Excelsior, explicitly facilitating such home visits by unions. 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. 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." Yet, nearly two decades after Excelsior and General Electric were decided, the NLRB has never squarely reconsidered these issues. 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., the Board found employer home visits to be "per se" coercive and therefore sufficient to overturn an election. 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.

This proposition was elaborated on later that year in Plant City Welding & Tank Co. It was not until Plant City Welding that the Board sharply differentiated between home visits and the use of the Excelsior names and addresses be limited to mailings. Id. at 1246.

See supra notes 11-12 and accompanying text and infra notes 71-79 and accompanying text.
visits by employers and home visits by unions. 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. 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." It is this latter prong concerning the need for union home visits to offset employer organizational advantages which, as noted above, has been developed in later cases as the major underlying theme of the "home visits doctrine."

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. 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. 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. 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."
In this context, as Professor William Gould has cogently observed, the rights afforded unions under *Excelsior* may be too little, too late. 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, 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.

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." Today, the norm is for employees to drive, often lengthy distances, to work. In many respects, a commuter society has developed. 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, it is harder, given current employee residential patterns, for unions to reach employees at their homes today than it was three decades ago.

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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].


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.\(^9^1\) The leading case in this regard is perhaps the NLRB’s 1970 decision in *Central Hardware Co.*\(^9^2\) 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.\(^9^3\) 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.\(^9^4\) 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.\(^9^5\)

On appeal, however, the Eighth Circuit reversed the Board’s decision.\(^9^6\) 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.\(^9^7\) 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.\(^9^8\)

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.\(^9^9\) 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,\(^1^0^0\) be forced, as one commentator has put it, to “run the gauntlet?”\(^1^0^1\) What level of “transaction

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\(^9^1\) For an excellent review of cases along these lines, see Texas Note, *supra* note 21, at 131–36.
\(^9^3\) Id. at 496.
\(^9^4\) Id.
\(^9^5\) 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).
\(^9^6\) *Central Hardware Co.* v. NLRB, 468 F.2d 252 (8th Cir. 1972).
\(^9^7\) Id. at 255–56.
\(^9^8\) Id.
\(^9^9\) K. GACALA, *supra* note 83, at 166.
\(^1^0^0\) See Weiler, *supra* note 82, at 1771–74 (outlining the decline in union density, and thus in union dues resources).
\(^1^0^1\) See Gould, *Recent Developments*, *supra* note 84, at 507. See generally J. KILGOUR, *supra* note 84, at 199.
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. As a general rule, unions seek the smallest employee election unit possible, and employers the largest unit possible. The reason for this, as Judge Richard Posner has recently observed, 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. 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.

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. 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. The percentage of representation elections involving units with this number of employees or more, however, has consistently remained at only about twenty percent. Consequently, Professor Bok does not envision any major prob-

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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).


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.

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

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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 Nutort,e 129 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. This is particularly so since, as Professor Paul Weiler has forcefully pointed out, the remedies such employees are afforded should their employer unlawfully discipline or discharge them for “talking union” are not especially effective ones. 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.

In contrast, employers, frequently advised by highly paid and highly knowledgeable attorneys and consultants, face no such difficulties in getting their story across. Under Nutone, employers are basically free to use the workplace for organizational purposes. The most potent force in the employer’s arsenal in this regard is, as noted above, 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. This fact appears to have been at least implicitly recognized by the NLRB in its holding in Peerless Plywood Co. that employer “captive audience” speeches during the twenty-four hours prior to a representation election are violative of election “laboratory conditions.” 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.

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.

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).
130 See supra notes 47–51 and accompanying text.
131 See supra notes 31–46 and accompanying text.
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. While the major finding of their study was that workers are not meaningfully affected by labor election campaign propaganda, (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. 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.

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), 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. 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.

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, 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. 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. 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. 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

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 95-96.
140 Id. at 103-107.
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 95-95.
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.\textsuperscript{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,\textsuperscript{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 \textit{NLRB v. Daniel Construction Co.},\textsuperscript{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 \textit{Daniel}, the construction company refused to turn over to the union the required \textit{Excelsior} list of employee names and addresses, and the NLRB sought enforcement of a subpoena requiring the company to turn over the list.\textsuperscript{150} The company based its refusal on the grounds that the list would give the union an undue organizational advantage.\textsuperscript{151} The company, citing the \textit{Excelsior} case itself,\textsuperscript{152} asserted that the basic purpose of the \textit{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.\textsuperscript{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.\textsuperscript{154} Consequently, the company argued that giving the union the \textit{Excelsior} list would give it an undue advantage in terms of personally contacting the workers.\textsuperscript{155}

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

\textsuperscript{147} Id. at 158.
\textsuperscript{148} See generally Gould, \textit{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.
\textsuperscript{150} Id. at 424.
\textsuperscript{151} Id. at 425.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id. at 425-26.
\textsuperscript{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).
\(^{159}\) See *supra* note 64 and accompanying text.
\(^{160}\) See Bok, *supra* note 107, at 105–06.
\(^{161}\) See *supra* note 76 and accompanying text.
employees "at will" who can be fired at any time and for any reason.\footnote{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.\footnote{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 \textit{Vaca v. Sipes},\footnote{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.\footnote{167} Why then would an employee want to risk being on the "outs" with the union because he turned them away from his home?\footnote{168} Even if the union loses the election, it, or another union, may come back in a following year\footnote{169} 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.\footnote{169} But, unfair labor practices charges brought in such instances may take years to resolve.\footnote{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?\footnote{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.\footnote{173} But, these precedents are not, as Professor Bok has pointed out,\footnote{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

\footnote{166} 386 U.S. 171 (1967).
\footnote{167} Id. at 192.
\footnote{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).
\footnote{170} See generally Penn Comment, supra note 13, at 786-87.
\footnote{171} See generally Weiler, supra note 82, at 1796-98.
\footnote{172} See infra notes 199-212 and accompanying text, discussing the difficulties members of Congress had in wrestling with this issue.
encyclopedia or life insurance. Moreover, in Stanley v. Georgia 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. Thus, the home in many respects should be seen as a "safe haven," a place where, particularly given the advent of two worker families, employees can get away from it all. 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, 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 controversial 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. 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, 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.

As originally introduced, the Democratic majority bill in the House of Representatives contained the following language dealing with this subject:
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 unions\(^{186}\) 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

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\(^{186}\) See generally Penn Comment, supra note 13, at 783 & D. 163-67.

\(^{187}\) See 123 Cong. Rec. 92,483-84 (1977) (statement of Congressman Thompson); id. at 92,486 (colloquy between Congressmen Glickman and Thompson).

\(^{188}\) See id. at 92,495-98.

\(^{189}\) See id. at 92,489-98.


\(^{191}\) See LAW AND REALITY, supra note 87, at 158.


\(^{193}\) 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 \textit{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. \textit{See} id. at 796–97.

\(^{198}\) For a good discussion of the political dynamics of the proposed legislation, see generally Rosen, \textit{Labor Law Reform: Dead or Alive?}, 57 U. Denv. L. Rev. 1 (1979).

\(^{199}\) \textit{See} H.R. REP. NO. 637, \textit{supra} note 181, at 71.

\(^{200}\) \textit{See} 123 CONG. REC. 32,489 (1977).

\(^{201}\) \textit{Id}.

\(^{202}\) \textit{Id.} at 32,490.

\(^{203}\) \textit{Id.} at 32,490–91.

\(^{204}\) \textit{See} supra notes 63–67 and accompanying text.

\(^{205}\) 123 CONG. REC. at 32,492–93.

\(^{206}\) \textit{Id.} at 32,493.

\(^{207}\) \textit{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." 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.

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. Instead, Congressman Ashbrook's proposed amendment to afford employers the right to visit employees at their homes was simply tabled.

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 model 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. 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-
ing the "home visits doctrine," where the doctrine's key historical role as a purported "balancer" of union/management organizational rights received no evaluation or meaningful attention. 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 1977-1978 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, 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. 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.

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 law...
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 6\(^{221}\) 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.\(^{225}\) 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.


\(^{224}\) 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).


\(^{227}\) 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. 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, and there are considerable arguments in favor of affording the NLRB broad discretion to proceed on a case-by-case basis. 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 obsfuscated and unclear. 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, a less clear-cut approach might, as Professor Bok has put it, ultimately “result in much greater arbitrariness.”

This is particularly true because, as various members of Congress noted during the 1977-1978 labor reform debate, 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. 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.

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).


Bok, supra note 107, at 102-03.

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

See Bok, supra note 107, at 102.

See, e.g., 123 Cong. Rec. at 32,484 (statement of Mr. Erlenborn); id. at 32,486 (statement of Mr. Ford). See generally Bok, supra note 107, at 58-59, 66.

See Bok, supra note 107, at 59.

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 debates 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." 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, 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. 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, 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, the price of such possible increased effectiveness may be rather high in terms of heightened regulatory complexity and potential political controversy. In addition,
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. 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 rights 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 election and trigger *Excelsior* rights, but likely high enough to discourage frivolous use of the process. Further, the ten percent authorization card standard has been used by the NLRB as a benchmark in other contexts.

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. Similar requirements currently exist pursuant to the Landrum Griffin Act 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. 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

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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.
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 "intervenors," 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.
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 consid-
erable 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 uncontroversial 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 work-
place do have considerable rights in terms of engaging in union organizational solicita-
during nonworking time and in nonworking areas. Indeed, these rights of employee
solicitation have received strong, recent reaffirmation by the Supreme Court in NLRB
v. Magnavox Co. and Eastex, Inc. v. NLRB. 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.

In-plant employee organizers, however, as Professor Daniel Pollitt has recently
pointed out, do frequently face one tremendous obstacle — “fear of employer retal-
iation.” Despite the fact that section 8(a)(3) clearly makes it an unfair labor practice
violation of the Act for employers to discharge or otherwise discriminate against em-
ployees 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. 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. GAGAIA, 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).


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 controversy 278 and have considerable potential drawbacks. 279 Nevertheless, they and other possible solutions 280 to this difficult problem seem worthy of careful, closer examination.

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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.
274 See Weiler, supra note 82, at 1780.
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.
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." To the extent this situation can be reversed, and employees can become freely able to exercise their section 7 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.* 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.

Three years later, however, the Board shifted its position on this issue in the case of *Tri-County Medical Center.* 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." 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. Nevertheless, since its *Tri-County* decision, the Board has at times cited *GTE Lenkhurt* as the primary precedent governing this area and there appears to be some ongoing confusion regarding the applicable standards pertaining to this subject. 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.

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 premises — then off-duty employees should simply be treated like nonemployees and barred from the

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281 Weiler, supra note 82, at 1805 n.130.
284 Id. at 921.
286 Id. at 1089.
288 See Texas Note, supra note 21, at 142.
289 See Yale Note, supra note 22, at 380 n.40.
290 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.

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.
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. While, of course, the general notion of promoting "free debate on issues dividing labor and management" 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 time 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. 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.

On the other hand, Board debates could potentially be structured as simply an additional campaign option open to the parties at their discretion. 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, 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. Special rules might also be instituted outlawing "captive audience" speeches and/or debates during the final three to seven days of the election campaign, again along the lines of recommendations made by Professor Bok.

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 arguably orga-
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.
# 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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