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Union Representation Election Reform: Equal Access and the *Excelsior* Rule†

RANDALL J. WHITE*

> [A]ny . . . communication from an employer made directly to his employees may have, and ordinarily will have, a double aspect: on the one hand, it is an expression of his own beliefs and an attempt to persuade his employees to accept them; on the other, it is an indication of his feelings which his hearers may believe will take a form inimical to those of them whom he does not succeed in convincing.[1]

INTRODUCTION: LABOR CAMPAIGNS AND ELECTIONS

The relationship of employers and employees is defined by the National Labor Relations Act.[2] To eliminate and remedy the effects of the unrest and strife that had characterized labor-management relations,[3] Congress declared the fundamental policy of American labor law to be "encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[4]

In adopting the NLRA, Congress gave employees the rights to choose to organize, to select a representative, to empower that representative to bargain on their behalf, and to refuse to engage in these activities.[5] Employees exercise these rights through secret ballot elections[6] sanctioned and conducted

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1. NLRB v. American Tube Bending Co., 134 F.2d 993, 994 (2d Cir.), *cert. denied,* 320 U.S. 768 (1943).

2. 29 U.S.C. §§ 151-69 (1988) [hereinafter referred to as the Act or the NLRA]. Originally enacted as the Wagner Act, 49 Stat. 449 (1935), it is now comprised of two additional acts: the Labor Management Relations Act (the Taft-Hartley Act), 61 Stat. 136 (1947), and the Labor-Management Reporting and Disclosure Act of 1959 (the Landrum-Griffith Act), 73 Stat. 519 (1959).

3. *E.g.,* 29 U.S.C. § 151.

4. *Id.*

5. 29 U.S.C. § 157. This section details the basic rights of employees, known colloquially as "section 7 rights." *See* NLRB v. U.S. Sonics Corp., 312 F.2d 610, 615 (1st Cir. 1963) ("[U]nilateral [bargaining] activities are antithetical to the basic philosophy of the Act which is the encouragement of collective—as opposed to individual—bargaining.").

6. 29 U.S.C. § 159(e). A union must show that at least 30% of the employees in the bargaining unit support that union to secure a Board election order. *Id.*

by the National Labor Relations Board.[7] Implicit in the prescription of an employee election is the principle that employees should be free to choose or reject a bargaining representative as they please. The Board has declared that "[a]n election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative."[8]

The Board attempts to guarantee freedom of choice by regulating the election process and the conduct of the parties to an election[9] on both objective and subjective levels. Objectively, the Act protects employees from unfair labor practices by both employers and unions. Unfair labor practices are generally defined as acts that tend to inhibit employees' free choice.[10] On the subjective level, the Board requires that elections be carried out under "laboratory conditions"[11] and that they be "fair."[12]

This Note is concerned with a particular facet of this general "fairness" requirement: Board regulation of employer and union access to employees for the purposes of election campaigning.[13] Although this Note will refer to access by employees and access to employees interchangeably, it is, stated accurately, the access *to* campaign information *by employees* that the Board

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7. 29 U.S.C. §§ 153-68 [hereinafter referred to as the Board or the NLRB].

8. General Shoe Corp., 77 N.L.R.B. 124, 126 (1948).

9. *See* NLRB v. Waterman S.S. Corp., 309 U.S. 206, 226 (1946) (holding that "[t]he control of the election proceeding, and the determination of the steps necessary to conduct that election fairly [are] matters which Congress entrusted to the Board alone." (footnote omitted)).

10. 29 U.S.C. § 158. Among other proscriptions, employers may not "interfere with, restrain, or coerce employees in the exercise of [their] rights," 29 U.S.C. § 158(a)(1), "dominate or interfere with the formation . . . of any labor organization," 29 U.S.C. § 158(a)(2), or "discriminat[e] in regard to hire or tenure of employment," 29 U.S.C. § 158(a)(3). Labor unions may not "restrain or coerce" employees. 29 U.S.C. § 158(b)(1). (Interestingly, labor unions presumably may "interfere with" employees' rights or "cause or attempt to cause an employer to discriminate against an employee." 29 U.S.C. § 158(b)(2).) Neither employers nor unions may make "threat[s] of reprisal or force or promise of benefit" in an attempt to influence an employee's vote. 29 U.S.C. § 158(c).

11. The Board has stated:

> [I]t is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly as ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault, or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.

General Shoe, 77 N.L.R.B. at 127 (footnote omitted).

12. *See supra* note 9. "Fairness" is not specifically mandated by the Act, yet few would dispute the contention that "the concept seems much too obvious, too central to the very idea of an election, not to be taken into account." Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act,* 78 HARV. L. REV. 38, 53 (1964).

13. The Board also regulates fairness with respect to the *content* of organization campaigns. *See e.g.,* 29 U.S.C. § 158(c). This level of analysis, though, is beyond the scope of this Note.

seeks to regulate.[14] In this context, the Board and the courts have concluded that an election is "fair" if employees have access to all information relevant to the decision they make when they cast their votes.[15]

The pursuit of fairness is problematic in that the Board relies on the two adversary parties to the election—the union and the employer—to communicate to employees the benefits and detriments of collective bargaining.[16] As adversaries, unions and employers are interested not in fairness, but in winning the election. The employer, though, enjoys "built-in" access to employees because they work on his property. Moreover, employers can assert their rights as property owners to exclude union campaigners from the workplace. This "clash between the statutory rights of employees to effectively receive essential information on self-organization, and the right

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14. Neither employers nor labor unions are given rights under the NLRA. Korn, Note, *Property Rights and Job Security: Workplace Solicitation by Nonemployee Union Organizers,* 94 YALE L.J. 374, 378-79 (1984). However, as employees have been held to have a section 7 right "'to receive aid, advice, and information from others concerning self-organization,'" *id.* at 379 (quoting Harlan Fuel Co., 8 N.L.R.B. 25, 32 (1938)), labor unions may be thought of as asserting employees' rights vicariously, as "they are employees' principal source of pro-union information during a representation campaign." *Id.* at 378-79.

It has been suggested that there is support for the idea that unions have rights under the Act. "At least one scholar . . . cites evidence that 'strongly supports the argument that 'nonemployee' organizers are protected under the statute, not solely because 'employees' of a particular employer may need their assistance, but because nonemployee organizers, as statutory 'employees,' have rights of their own to 'form . . . or assist labor organizations.'" Gresham, Note, *Still as Strangers: Nonemployee Union Organizers on Private Commercial Property,* 62 TEX. L. REV. 111, 122 n.61 (1983) (quoting J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 62 (1983)).

15. The Board has found that free choice is compromised when employees lack information about one side and that they should have "an effective opportunity to hear [all] the arguments." Excelsior Underwear Inc., 156 N.L.R.B. 1236, 1240 (1966). The Fourth Circuit concluded that fairness "includes such completeness of information, and timeliness of its dissemination, as will allow the voters to make a reasoned choice." NLRB v. Hanes Hosiery Div., 384 F.2d 188, 191 (4th Cir. 1967).

16. Professor Paul Weiler has pointed out the irony of this arrangement:

> [T]he purpose of the representation process is to permit employees to decide whether collective bargaining or individual bargaining will better advance their own interests. . . .
>
> [I]t is hard to see why the employer should be given a role to play in the process by which employees decide in the first place whether they will deal collectively with the employer.

Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA,* 96 HARV. L. REV. 1769, 1813-14 (1983).

Theoretically, since the Board protects the "rights" of employees to choose a bargaining representative but not the wisdom of that choice, the Act's mandate could be fulfilled by a staff of Board-appointed "NLRA Rights Representatives" who visit workplaces to explain to employees their rights. In practice though, employees vote for or against a union based upon their perception of what that union can achieve for them at the bargaining table. *See infra* note 89. Their vote, then, represents not so much a choice between collective and individual bargaining as a choice between representation by a particular union and individual bargaining.

of the employer to unfettered control of its property"[17] is the source of the need for Board regulation.

This Note addresses the issues of equal access and the accommodation of conflicting rights by discussing the Board's attempts to define and guarantee equal access in the face of claims by both employers and labor organizations that "the other side" has greater access to employees. Part I discusses the body of law that currently regulates access to employees. Part II suggests that the law as it now exists fails to achieve an acceptable measure of equality. Part III critically assesses reforms that have been proposed to better assure fair elections and suggests that they, as well, cannot be expected to do so. Part IV proposes a reform that has not been widely considered: the extension of the *Excelsior* rule[18] to require that employers regularly submit to the Board a list of the names and addresses of its employees, so that a union seeking to organize those employees may have free access to the list. This Note concludes that this may well be the only reform acceptable to all parties, while also being effective in assuring employees fair and equal access to the organizational debate.

I. EQUAL ACCESS LAW

In a simplistic conception of labor election campaigns, employees can be contacted with campaign information at two locations: "at work" and "not at work." On its face, this dichotomy does not suggest the need for regulation by the Board. The need arises when employers actively campaign in the workplace—their own property—and prevent unions from having similar access to employees. Unions claim that such restrictions preclude them from being able to communicate with the employees, as they perceive communication with the employee who is "not at work" to be ineffective.[19]

The Board regulates this "inherent underlying conflict"[20] by attempting to strike a balance between the property rights of employers and the section

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17. Zimny, *Access of Union Organizers to "Private" Property,* 25 LAB. L.J. 618, 618 (1974).

18. The rule states:

> [W]ithin 7 days after the Regional Director has approved a consent-election agreement . . . or after the Regional Director or the Board has directed an election . . . the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case. Failure to comply with this requirement shall be grounds for setting aside the election . . . .

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

19. For a detailed discussion of how conflicts over campaign access arise, see Korn, *supra* note 14. *See also* Comment, *Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Elections,* 127 U. PA. L. REV. 755 (1979) [hereinafter Penn. Comment].

20. Bierman, *Toward a New Model for Union Organizing: The Home Visits Doctrine and Beyond,* 27 B.C.L. REV. 1, 3 (1985).

7 organizational rights of employees.[21] The balance "may fall at differing points along the spectrum depending on the nature and strength of the respective . . . rights asserted in any given context,"[22] but the Board and court decisions that strike this balance all seek to resolve one issue: "whether the union's opportunity to communicate with employees is approximately the same as that possessed by the employer."[23]

A. Campaigning "At Work": On Employer Property[24]

1. Employer Campaigning

The employer generally perceives the prospect of a unionized shop as a threat to be countered at almost all costs.[25] Professor Weiler's assertion that employers should perhaps play no role in the campaign process aside,[26] first amendment considerations prevent the Board and courts from prohibiting all employer attempts to influence election outcomes.[27] Congress codified this protection in the Taft-Hartley Act,[28] leaving employers free to campaign in any manner, short of resorting to threats or promises. The most significant form of employer campaigning is the captive audience speech.[29] Prior to 1952, employers were prohibited from using this tactic unless "*a similar opportunity to address [employees] were accorded*

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21. *See supra* note 5 and accompanying text.

22. Hudgens v. NLRB, 424 U.S. 507, 522 (1976).

23. J. GETMAN, S. GOLDBERG & J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY 19 (1976) (footnote omitted) [hereinafter J. GETMAN].

24. "Employer property" includes, for the purposes of this Note, the area inside the actual workplace, both work and nonwork areas, and areas outside the workplace, including parking lots, employer-owned access roads, etc.

25. *See generally* A. DEMARIA, HOW MANAGEMENT WINS UNION ORGANIZING CAMPAIGNS (1980); J. KILGOUR, PREVENTIVE LABOR RELATIONS (1981); R. LEWIS & W. KRUPMAN, WINNING NLRB ELECTIONS: MANAGEMENT STRATEGY AND PREVENTIVE PROGRAMS (1979) (all presenting specific instruction in "the tactics and strategy necessary to avoid a successful union campaign attempt." A. DEMARIA, *supra*, at xv.).

26. *See supra* note 16.

27. *See* NLRB v. Virginia Elec. & Power Co., 314 U.S. 469 (1941). From 1935-1941, the Board had prohibited all employer campaigning. *See* Shams, Note, *Employer Free Speech in Union Organizing Campaigns,* 15 U. FLA. L. REV. 231, 231 (1962). The Board found *any* employer speech to be per se coercive and an unfair labor practice. *Id.* at 232.

28. "The expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

29. The captive audience speech, so named because its occurrence on company premises during working hours allows employers to compel employee attendance, is the most widely used and effective employer campaign tactic. *See* J. KILGOUR, *supra* note 25, at 273-75; R. LEWIS & W. KRUPMAN, *supra* note 25, at 22-23. *See also* J. GETMAN, *supra* note 23, at 90-92 (employer meetings found to be more than "significantly associated" with employee familiarity with campaign issues).

representatives of the union."[30] The Board emphasized the importance of the employees' right to hear all issues[31] but relied on the rationale that an employer who prohibited solicitation in the workplace did so discriminatorily when he himself solicited employee support against a union.[32]

In 1952, the Board expanded the right of employers to exclude union organizers from the workplace in *Livingston Shirt Corp.*[33] Employers have since been free to require employee attendance at campaign speeches without granting unions a right to reply.[34] The Board stated:

> We believe that the equality of opportunity which the parties have a right to enjoy is that which comes from the lawful use of both the union and the employer of the customary fora and media available to each of them. It is not to be realistically achieved by attempting . . . to make the facilities of the one available to the other.[35]

In effect, the Board concluded that opportunities for access *are equal* as long as one party does not interfere with the other's "natural" ability to campaign.[36]

The employer's right to campaign on his own premises was given substantially greater protection in *NLRB v. United Steelworkers (NuTone).*[37] In *NuTone,* the Board, and subsequently the Supreme Court, held that an employer did not commit an unfair labor practice by violating his own no-solicitation rule. "[T]he Taft-Hartley Act does not command that labor organizations . . . under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it."[38]

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30. Bonwit Teller, Inc., 96 N.L.R.B. 608, 613 (1951) (emphasis in original) (quoting NLRB v. Clark Bros. Co., 163 F.2d 373, 376 (1947), *enforcing* 70 N.L.R.B. 802 (1946)).

The Board had vacillated considerably on this issue. In Babcock & Wilcox Co., 77 N.L.R.B. 577 (1948), the Board held that captive audience speeches were not unfair labor practices. The *Bonwit Teller* decision reinstated *Clark Bros. Co.,* requiring a right of reply to any captive audience speech. *See* Penn. Comment, *supra* note 19, at 767-68 nn.75-79.

31. *Bonwit Teller,* 96 N.L.R.B. at 612.

32. *Id.* at 611.

33. 107 N.L.R.B. 400 (1953).

34. *Id.* at 409.

35. *Id.* at 407.

36. There are two limitations to the *Livingston Shirt* rule, both of which rest on the conclusion that captive audience speeches in particular situations upset the "natural" balance of access, giving employers an opportunity to which unions cannot effectively respond. "[A] retail establishment or other employer entitled to implement more restrictive access rules . . . or an employer with an illegally broad rule, cannot give a captive audience speech without affording the union a right of reply." Penn. Comment, *supra* note 19, at 768. The second forbids speeches to employees on company time in the twenty-four hours prior to an election. Peerless Plywood Co., 107 N.L.R.B. 427 (1953).

37. 357 U.S. 357 (1958).

38. *Id.* at 364.

NuTone contained an important exception, albeit one that is broad and ill-defined. If a no-solicitation rule diminished a union's access to employees to the extent that its ability to reach workers is not "at least as great as the employer's ability,"[39] then the employers may be required to permit union solicitation. In making this determination the Court allowed that the Board "may find relevant alternative channels . . . for communication[] . . . ."[40] that may be available to the union.

2. Employee Campaigning

An employee's right to solicit union support among her fellow employees remains problematic, as "[t]he Act does not . . . say that employees are privileged to exercise their statutory rights while in the workplace. . . . That a particular form of concerted employee activity is protected against employer interference does not itself mean that an employer can be made to suffer its presence on his property."[41] Since the workplace is viewed as "a uniquely appropriate site to discuss unionization[,]"[42] employers generally forbid such solicitation.[43]

The Supreme Court established the balance between these competing property and section 7 interests in *Republic Aviation Corp. v. NLRB*.[44] An employer had asserted his rights as property owner by discharging an employee for repeatedly violating a nondiscriminatory no-solicitation rule. The Court held that an employer is free to enforce such a rule in his workplace if "the [proscribed] activity tends to interfere with production, discipline, or safety."[45] A rule banning *only* this type of activity is presumed valid.[46]

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39. *Id.*

40. *Id.* The "alternative channels" analysis is derived from NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). *See infra* notes 54-60 and accompanying text for the discussion of this analysis.

41. Gresham, *supra* note 14, at 112-13. "As the Board recently observed of one form of union activity, 'the mere protected nature of . . . picketing does not necessarily clothe the pickets with a right to infringe upon the private property rights of others.'" *Id.* at 113 (quoting Giant Food Mkts., Inc., 241 N.L.R.B. 727, 728 (1979)).

42. Korn, *supra* note 14, at 375 (footnote omitted). The value of the workplace as a campaign forum is certainly not lost on employers, who view their daily access to employees as their most effective campaign tool. *See* A. DEMARIA, *supra* note 25, at xvii.

43. The no-solicitation/no-distribution rule is a campaign tactic of which employers are exceptionally fond. *See* A. DEMARIA, *supra* note 25, at 70; R. LEWIS & W. KRUPMAN, *supra* note 25, at 31-36.

44. 324 U.S. 793 (1945).

45. Gresham, *supra* note 14, at 113 (footnote omitted).

46. The Court adopted a system of presumptions, originally promulgated in Peyton Packing Co., 49 N.L.R.B. 828 (1943).

> Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working

Republic Aviation and its progeny turn on a balancing of employees' organizational rights and employers' property and managerial rights.[47] The analysis does not evaluate the union's access to employees, that is, the alternative channels of communication analysis. It rests on the simple conclusion that the employer's workplace in nonwork time is one of the "natural fora" in which employees are entitled to exercise their organizational rights.

3. Nonemployee Campaigning

Employees must *do* something in order to secure union representation,[48] but organization of a particular workplace will rarely result from endogenous activity alone. Invariably, employees must be contacted by nonemployee union organizers. But as unwilling as employers are to allow solicitation by their own employees, it is hardly surprising that they are even more adamant in their exclusion of nonemployees. Prior to 1956, the Board had applied *Republic Aviation* equally to employee and nonemployee solicitors,[49] but that case did not answer one crucial question: "Was the employer's property right to deny workplace solicitation *entirely* displaced by employees' § 7 right . . . or only displaced in the context of workplace solicitation *by employees?*"[50]

The Supreme Court answered this question in *NLRB v. Babcock & Wilcox Co.*,[51] finding a "distinction . . . of substance"[52] between employee and

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> hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours . . . is an employee's time to use as he wishes . . . although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.

Id. at 843-44.

The Board has since extended the *Republic Aviation* rationale to cover distribution of union literature. In Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615 (1962), the Board ruled that the presumption of validity extends to rules prohibiting distribution in work areas at all times and to nonwork areas during working time. A rule prohibiting distribution in nonwork areas during nonworking time is presumptively invalid. Korn, *supra* note 14, at 377 n.18.

47. One commentator notes that "courts frequently distinguish an employer's role as the 'owner' of private property . . . from his role as the 'manager' of an economic concern." Property rights include "the right to exclude unwanted persons and activities from the land." Managerial rights are narrower in scope; "[t]hey embrace the employer's interest in maintaining the efficiency and safety of his business . . . ." Gresham, *supra* note 14, at 116 n.24.

48. Eames, *An Analysis of the Union Voting Study from a Trade-Unionist's Point of View*, 28 STAN. L. REV. 1181, 1181 (1976).

49. *See* Babcock & Wilcox Co., 351 U.S. at 106-11 (1956). See also Korn, *supra* note 14, at 378 for a discussion of the development of nonemployee solicitation law.

50. Korn, *supra* note 14, at 376 n.17 (emphasis added).

51. 351 U.S. 105 (1956).

52. *Id.* at 113.

nonemployee organizers. The Court held that an employer's right to exclude nonemployees was broader than his right to exclude his own employees.[53] Under *Babcock & Wilcox,* employee organizers may only be excluded on a showing that they somehow disrupt production or safety in the workplace, but employers are free to exclude nonemployees from their premises "if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message."[54]

Applying the *Babcock & Wilcox* rule is a much less straightforward matter than applying *Republic Aviation,* for there is no agreement as to the standard to be used to assess the availability of alternative channels. Justice Reed's opinion for the Court seemed to leave open several options. First, the Board could follow the "other available channels of communication"[55] language and inquire whether employees were actually contacted. Alternatively, the Board could apply the "makes ineffective the reasonable attempts"[56] language and measure the relative effectiveness of particular communications with employees. Finally, at its most restrictive, the opinion could be read to require employers to permit access only if "the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts."[57]

Discerning a definitive test for alternative channels remains difficult, resulting in significant disagreement between the Board and the courts. The Board has shown a dogged determination to find that the alternative channels available to a union in a particular campaign are not effective, requiring the employer to permit nonemployee organizers access to the workplace.[58] The courts, however, seem equally determined to impose upon a union the heavy burden of proving that it has tried all alternatives and has still failed to reach the employees.[59] Certainly, it may be said that the

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53. *See id.* at 112-13.

54. *Id.* at 112. As under *Republic Aviation,* employers may not exclude nonemployee organizers with a discriminatory regulation, that is, one which permits some nonemployees on the premises, but not others. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 113.

58. *See* Gresham, *supra* note 14, at 125-36. The Board is quick to find alternative channels ineffective when employees live and work on their employer's property. It has adopted what amounts to a presumption that, in this situation, all means of communication save for workplace access are ineffective. *See* New Pines, Inc., 191 N.L.R.B. 944 (1971); Tamiment, Inc., 180 N.L.R.B. 1074 (1970); Kutsher's Hotel & Country Club, Inc., 175 N.L.R.B. 1114 (1969). Yet, in workplaces where employees do not live on the premises, the Board is not significantly less willing to require employers to open their gates to nonemployee organizers. Hutzler Bros., 241 N.L.R.B. 914 (1979) (alternatives found ineffective despite union's weak efforts to try to reach workers); Central Hardware Co., 181 N.L.R.B. 491 (1970) (alternatives found inadequate even where union already possessed a list of 80% of employees' names).

59. *See* Gresham, *supra* note 14, at 125-36. In each of the above cited cases the courts refused to enforce the Board's access order. NLRB v. New Pines, 468 F.2d 427 (2d Cir. 1972)

union bears the burden of proving that no reasonable alternatives exist.[60] Beyond this it may only be possible to say that the Board is likely to conclude that, in a particular case, no reasonable alternatives exist and that the courts are unlikely to concur in that determination.[61]

B. Campaigning Off of Employer Property

The workplace, although ideally suited for organizational campaigning in many respects, is not the only forum used by unions and employers to communicate with employees. Both are free to use such "traditional" media as the mail, television and radio advertisements, billboards, and so on, limited only by their own resources.[62] While the Board regulates access to employees outside the workplace as well as within it, it is not concerned with ensuring that all parties have access to all campaign fora. Rather, Board processes are concerned with balance of opportunity and equality of access.[63]

1. The Home Visits Doctrine

The Board evidently perceives that its workplace access rules, particularly those enunciated in *Babcock & Wilcox,* do not effectively balance opportunities for access.[64] It has noted that "[u]nlike employers, unions often do

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(union must make reasonable attempts); NLRB v. Tamiment, 451 F.2d 794 (3d Cir. 1971) (union must demonstrate that it first tried all alternative channels), *cert. denied,* 409 U.S. 1012 (1972); NLRB v. Kutsher's Hotel & Country Club, Inc., 427 F.2d 200 (2d Cir. 1970). The "ordinary workplace" cases were no different. Hutzler Bros. v. NLRB, 630 F.2d 1012, 1017 (4th Cir. 1980) (Board may not "infer inadequacy from physical structure and location of the plant"); Central Hardware Co. v. NLRB, 468 F.2d 252 (8th Cir. 1972) (union should try to assure employees will be home by making an appointment for a home visit). It may thus fairly be said that "the *Babcock* rule reflects a judicial confidence that other channels of communication are ordinarily sufficiently effective to enable union organizers to reach employees with their message." Gresham, *supra* note 14, at 152.

60. Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 205 (1978).

61. The analysis for determining whether employers may exclude off-duty employees from the workplace is similar. *See* Gresham, *supra* note 14, at 138-42. The Board has held that "the 'status [of an off-duty employee] is more nearly analogous to that of a nonemployee, and he is subject to the principles applicable to nonemployees.'" *Id.* at 141 (quoting GTE Lenkurt, Inc., 204 N.L.R.B. 921, 921 (1973)). However, that position has since been limited to nondiscriminatory rules, "clearly disseminated to all employees," that exclude off-duty employees only from work areas and areas inside the plant. *Id.* at 142 (quoting Tri-County Medical Center, Inc., 222 N.L.R.B. 1089, 1089 (1976)).

62. *See Babcock & Wilcox,* 351 U.S. at 107, 113.

63. *See supra* notes 22-23 and accompanying text.

64. One might infer this simply from noting the Board's many efforts to enforce nonemployee access in the face of the courts' restrictive application of *Babcock & Wilcox. See supra* notes 58-59 and accompanying text.

not have the opportunity to address employees in assembled or informal groups, and never have the position of control over tenure of employment and working conditions."[65] The Board addresses this imbalance with its rules concerning campaigning in the employee's home, the "home visits doctrine,"[66] which permits unions to campaign in the homes of employees but prohibits employers from engaging in such conduct.[67]

Under the home visits doctrine, any attempt by an employer to personally campaign in an employee's home is per se coercive and an unfair labor practice.[68] A statement by the employer in an employee's home, regardless of content or that it would be privileged if made in the workplace, is "conduct calculated to interfere with the free choice of a bargaining representative."[69] Freedom of choice implies that the employee should be able to listen to or ignore campaign information as he chooses, but, in fact, "the employee risks reprisal if he actually turns his employer's representatives away from his residence."[70] The Board finds no coercion inherent in a home visit by a union since the employee has no reason to fear reprisal by a union.[71]

More importantly, the Board views the home visits doctrine as a counterweight to the employer's opportunities to campaign in the workplace. Given the *Babcock & Wilcox* rule and the fact that employers may freely conduct captive audience speeches, the Board concludes that "unions have more need to seek out individual employees to present their views"[72] and allows them exclusive access to the employee in his home.

2. The *Excelsior* Rule

If union solicitation in the home is to effectively equalize access to employees, a union must be able to identify who the targeted employees

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65. Plant City Welding and Tank Co., 119 N.L.R.B. 131, 133 (1957).
66. *See* Bierman, *supra* note 20, at 2-3.
67. *Plant City Welding,* 119 N.L.R.B. at 134.
68. *See* Peoria Plastic Co., 117 N.L.R.B. 545, 547-48 (1957).
69. *Id.* at 547.
70. Penn. Comment, *supra* note 19, at 786. In *Peoria Plastic* the Board drew an apt analogy between campaigning in the home and calling employees into a manager's office to listen to campaign statements, 117 N.L.R.B. at 547, a tactic that the Board has "consistently condemned." *Id.* The Board perceives that this "coercion" would be exacerbated if the employer were permitted to carry his influence into the home, the realm where the individual is thought to be sovereign.

Professor Bok has questioned this conclusion. He refers to conversations with union organizers, "many [of whom] believe that it is *what* is said and by *whom* that really count and that the location of the conversation is largely immaterial." Bok, *supra* note 12, at 105 (emphasis in original) (footnote omitted). Still, while he does not view campaigning in the home as more coercive than in the workplace, it is unlikely that he would view it as *less* coercive.
71. *Plant City Welding,* 119 N.L.R.B. at 133-34.
72. *Id.* at 134.

are and where they live.[73] Employers have ready access to this information, but a union does not. Acquiring such a list independently imposes a serious, often crippling burden on a union, one that often prevents use of the home visit.[74]

The Board attempted to remedy this dilemma in *Excelsior Underwear, Inc.*[75] The *Excelsior* Rule provides unions with a list of names and addresses of all voters in the particular bargaining unit within seven days after the Board has ordered a representation election.[76] The Board found that "access of *all* employees to [organizational] communications can be insured only if all parties have the names and addresses of all the voters."[77] Failure to comply with the rule upsets the desired balance and results in the Board's setting aside the election.[78]

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73. Without a list of names and addresses, "the union is often, as a practical matter, denied effective contact with the employees." Pass, Comment, *Dilemma in Labor Law: The Right to Own Versus the Right to Know,* 5 DUQ. L. REV. 77, 79 (1966-67). The need for such a list is all the more compelling given the "Catch-22" imposed by *Babcock & Wilcox*: The nonemployee access rule forced unions to rely on contact outside the workplace "[b]ut, without employee names and addresses, reaching employees outside of work [is] not exactly a simple task." Bierman, *supra* note 20, at 7. *See also* NLRB v. Rohlen, 385 F.2d 52, 55 (7th Cir. 1967), *aff'g* 64 L.R.R.M. (BNA) 2168 (N.D. Ill.), which notes that a list "has become all the more important because of court decisions which have limited . . . a union's access to employees during organizational campaigns[,]" namely, the decisions applying the "alternative channels" analysis. *See supra* notes 54-60 and accompanying text.

74. *See Excelsior,* 156 N.L.R.B. at 1241 n.11 (discussing difficulty encountered by union in May Dep't Stores Co., 136 N.L.R.B. 797 (1962), *enforcement denied,* 316 F.2d 797 (6th Cir. 1963) where, after 20 months of organizing, the union had only 1250 names of a total of 3000 voters). *See also* Bok, *supra* note 12, at 99 *and* Pass, *supra* note 73, at 79 (each discussing the difficulty unions encounter in acquiring names and addresses). *But see* Lewis, *NLRB Intrudes on the Right of Privacy,* 17 LAB. L.J. 280, 281 n.4 (1966) (calling *May Dep't Stores* an "extreme case [as m]ost unions are able to obtain the names of 99 to 100 percent of the eligible voters within a relatively short period of time" and noting that addresses can be easily obtained from telephone directories or other employees).

75. 156 N.L.R.B. 1236 (1966).

76. *See supra* note 18. The employer must submit the list even if he has consented to the election. *Rohlen,* 385 F.2d at 56-57. He may not stipulate that it is for use by the Board only, NLRB v. Hanes Hosiery Div.—Hanes Corp., 384 F.2d 188, 191 (4th Cir. 1967), *cert. denied,* 390 U.S. 950 (1968), and must comply even if the union already compiled a complete list on its own, NLRB v. Beech-Nut Life Savers, Inc., 274 F. Supp. 432, 436-37 (S.D.N.Y. 1967), *aff'd,* 406 F.2d 253 (2d Cir. 1968), *cert. denied,* 394 U.S. 1012 (1969). The employer must also submit the list in good faith. Centre Eng'g, Inc., 253 N.L.R.B. 419, 424 (1980) (Where employer is able to arrange a list alphabetically and include all addresses and zip codes, he must do so.).

77. *Excelsior,* 156 N.L.R.B. at 1241 (emphasis in original).

78. If the employer fails to comply after the first election has been set aside, the Board will postpone a second election and seek enforcement of its order in federal court. The order may be enforced via the Board's power to subpoena evidence, NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969), *rev'g* 397 F.2d 394 (1st Cir. 1968), *rev'g* 270 F. Supp. 280 (D. Mass. 1967), or through the court's use of its injunctive power to enforce Board orders, NLRB v. British Auto Parts, Inc., 266 F. Supp. 368, 374 (C.D. Cal. 1967), *aff'd,* 405 F.2d 1182 (9th Cir. 1968), *cert. denied,* 394 U.S. 1012 (1969).

The Board has rejected several challenges to the *Excelsior* rule that are relevant to the equal access issue. In *Excelsior* itself, the Board dismissed the objection that compelled disclosure of the employee list violated the employer property interest in the list, finding that no such right existed.[79] Nor can employers argue that the *Excelsior* rule infringes the employees' section 7 right to refrain from concerted activity.[80] Finally, the Board discounted the possibility that the privacy rights of employees would be infringed by disclosure of their names and addresses or that unions might engage in harassing campaign tactics, stating that it possessed the power under the Act to remedy any incidents of abuse.[81]

The Board, then, strikes a precarious balance between employee organizational rights and employer property rights. The employer is essentially free to campaign on his own property. He may ban union solicitation by employees if it infringes on certain managerial interests and by nonemployees unless to do so would leave employees with no access to union information. The union is free to contact employees in their homes, an opportunity from which the employer is excluded, and may obtain from the employer a list of employee names and addresses to facilitate those efforts. Theoretically, this doctrine assures that employees will have equal access to information for and against union organization.

II. Equal Access Law Evaluated: Some More Equal Than Others

The Board's goal in regulating NLRA election conduct is to guarantee employees a free and fair choice concerning organization. The Board defines such a choice as one in which employees have had equal access to all sides of the campaign. The effectiveness of the Board's attempts to balance employer property rights with employee organizational rights depends, then, upon the answer to one question: Does either the union or the employer "have disproportionate power to exert pressures that will sway the outcome of the election on grounds unrelated to the merits of its position"?[82]

There is some commentary, albeit limited, suggesting that equal access law in its current formulation gives unions an advantage over employers in conducting campaigns. As might be expected, much of this criticism comes

79. The Board found that even if such a right did exist it was "plainly outweighed by the substantial public interest in favor of disclosure where . . . disclosure is a key factor in insuring a fair and free election." *Excelsior,* 156 N.L.R.B. at 1243. The Supreme Court deferred to the Board's determination in *Wyman-Gorden Co.*, 394 U.S. at 767.

80. The Board has held that "[i]n truth, [*Excelsior*] is an assist to this end." *Hanes Hosiery,* 384 F.2d at 191.

81. *Excelsior,* 156 N.L.R.B. at 1244.

82. Bok, *supra* note 12, at 54.

from management.[83] Rather than address the overall balance between employer and union access to employees, these commentaries focus on individual facets of the doctrine. They charge, for example, that permitting unions to campaign in the employee's home while barring the employer from the same conduct is unfair.[84]

Such a narrow critique fails to recognize that equal access doctrine is a "system" that balances access rights with property rights across a broad spectrum. To focus on one facet is to mischaracterize the law as rules that exist in isolation from each other. To assess its effectiveness in providing equal access, the doctrine must be viewed in the aggregate. Under this analysis, unions do not have "disproportionate" advantage over employers in conducting organizing campaigns.

This leaves the contrary question for consideration: Do employers have a "disproportionate" advantage over unions? If not, then all is well with the world of organizing campaigns, and employees are free to make a reasoned choice between collective and individual bargaining, as is guaranteed by the NLRA. However, as this Part will suggest, this is not the case. Employers have a considerable advantage over labor unions because they enjoy far greater access to employees. Thus, employees are not being sufficiently protected in the exercise of their section 7 rights.

The disproportionate power that an employer possesses derives from the economic control that he can exert over the lives of his employees. Control of the workplace allows the employer to effectively monopolize the most important campaign tactics—personal contact and the campaign meeting—to undermine employee confidence in a union and to begin to influence employees far in advance of any union solicitation.[85] In order to be effective,

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83. *See* J. SWANN, NLRB ELECTIONS: A GUIDEBOOK FOR EMPLOYERS vii (1980) ("[U]nions have a distinct 'rules-of-the-game' advantage over employers, which means that management needs all the help it can get . . . .").

84. *See* A. DEMARIA, *supra* note 25, at 8. *See also* Lewis, *supra* note 74, at 280 (making observations concerning the "big assist" that the *Excelsior* rule gave to unions).

85. One well-known labor attorney has succinctly summarized the source of the employer's disproportionate power:

> The employer's greater opportunity to communicate with its 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.

A. DEMARIA, *supra* note 25, at xvii. The author does not specifically acknowledge the advantage gained by the employer through the economic control that he exercises over employees, but this factor may be implicit in the "control management can exert" language. Few would dispute that a threat of being fired would have some impact on an employee's actions.

The author does point out that the employer may exercise his advantage within the bounds of the law. He need not commit an unfair labor practice to be effective. Indeed, the Getman study, a seminal empirical study of factors determining the outcomes of representation elections through interviews with well over 1,000 workers, *see generally* J. GETMAN, *supra* note 23,

any campaign statements made by a union, no matter what the forum, must overcome this disadvantage. The current structure of labor election law fails to recognize and account for this fundamental distinction.

A. The Employer's Economic Power

Control over the employee's economic well-being is probably the employer's most significant source of campaign power: The employer hires the employee; controls her salary, benefits, and promotion or demotion; and may fire her. An employer's anti-union position is often known to his employees,[86] and an employee may fear that supporting a union could cost him his job. This is a legitimate fear, particularly as most are "employees 'at will' who can be fired at any time and for any reason."[87]

In one sense, the employer's economic power over the employee can be his most effective "legitimate" campaign tool. As Professor Weiler pointed out, "the employer has . . . ample opportunity and incentive to demonstrate the advantages of an individual bargaining regime before the union comes on the scene."[88] He need not accede to every employee demand but can make working conditions acceptable enough to avoid an organizing campaign.[89]

Most employers, however, are more likely to exploit their economic power over their employees, using it as a stick with which to threaten or punish

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suggests that employer unfair labor practices have no more impact on election outcomes than legal campaign methods. *Id.* at 115-20 ("There was no group of potential union voters in which a significantly greater proportion voted against union representation in bargaining order elections than in clean elections or in elections characterized by lesser unlawful campaigning."). *But see id.* at 116 (Card-signers voted against union representation significantly more often in unlawful elections than in clean elections.).

86. Employers' counsel recommend informing employees early on, as early as their first day on the job, of the company's anti-union stance. *See* R. LEWIS & W. KRUPMAN, *supra* note 25, at 19-23; J. KILGOUR, *supra* note 25, at 114-15 (recommending that managers make clear that "*we* are a nonunion company and intend to stay that way") (emphasis in original).

87. Bierman, *supra* note 20, at 18-19 (citing Bierman & Youngblood, *Employment At Will and the South Carolina Experiment,* 7 INDUS. REL. L.J. 28, 28-29 (1985)).

88. Weiler, *supra* note 16, at 1815. Professor Weiler suggests that this opportunity to "preempt" organization should be an employer's *only* input into the employee's decision and that perhaps the employer should not be given the chance to participate in the campaign at all. *Id.*

89. *See* J. GETMAN, *supra* note 23, at 54-55. The Getman study found that employees who were satisfied with working conditions were more likely to vote against unionization than those who were dissatisfied. *Id. See also* Heneman & Sandver, *Predicting the Outcome of Union Certification Elections: A Review of the Literature,* 36 INDUS. & LAB. L. REV. 537, 556 (1983) ("[T]he more satisfied employees are, the less likely they are to vote for the union. Programs to assess and improve employee satisfaction thus could have long-term payoffs in defeating the union . . . . [S]uch activities might also lessen the probability of an election ever occurring.").

union sympathizers rather than as a carrot to keep employees satisfied.[90] Because employees will always be wary of this "stick," an employer's "legitimate" campaign statements become all the more influential.

A labor union, even one that is a certified bargaining agent, has no such control over the employee. A certified union's influence may arguably be as coercive as an employer's, for an employee looks to his union for economic benefits and must "live with [the union] on an ongoing basis."[91] However, to an employee deciding for whom to vote, any such risk is far more remote than the immediate risk of being fired for supporting a union.[92]

B. The Employer's Power Through Control of the Workplace

The second source of the power inherent in employer campaign efforts may fairly be said to fit under the rubric of "virtually complete access to the minds of the voters during working hours."[93] The employer retains what amounts to an exclusive opportunity to campaign in the workplace. The significance of this fact lies in the prominence of the workplace as a campaign forum. The Board recognizes the workplace as "the one place where all employees involved are sure to be together[,] . . . the one place where they can all discuss with each other the advantages and disadvantages of organization, and lend each other support and encouragement."[94] To control the workplace, then, is to control the campaign.

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90. "Most unlawful campaigning consists of efforts by an employer to capitalize on its economic control over employees through threats and acts of reprisal, and promises and grants of benefit." Goldberg, Getman & Brett, Union Representation Elections: Law and Reality: *The Authors Respond to the Critics,* 79 MICH. L. REV. 564, 568 (1981) [hereinafter Goldberg]. *See also* Weiler, *supra* note 16, at 1803 n.130 ("[D]efiance of section 8(a)(3) [discriminatory discharges as unfair labor practices] has become almost a way of life for nonunion American employers.").

91. Bierman, *supra* note 20, at 19.

92. The employee is at even greater risk in the early stages of the campaign, before the union files an election petition. The Act protects against discriminatory treatment by a certified bargaining agent, but the employee is not protected prior to that time. *See* A. DEMARIA, *supra* note 25, at 77-78. While the Act recognizes the section 7 rights of unorganized employees, the Board will not consider employer actions prior to the filing of the election petition in deciding whether setting aside an election is warranted. *Id.* at 77. Moreover, the employer can implicitly threaten employees in a way that does not risk unfair labor practice charges, no matter when he does so. Since supervisors are specifically excluded from NLRA protection, 29 U.S.C. § 152(3) (1988), they may be fired for refusing to campaign against organization. A. DEMARIA, *supra* note 25, at 98. An employee could not help but draw the inference that he may be risking his own job by supporting the union.

93. *See supra* note 85.

94. May Dep't Stores Co., 136 N.L.R.B. 797, 802 (1962), *enforcement denied,* 316 F.2d 797 (6th Cir. 1963). The Supreme Court has called the workplace "the one place where [the workers] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees." NLRB v. Magnavox, 415 U.S. 322, 323-24 (1974) (quoting Gale Products, 142 N.L.R.B. 1246 (1963)).

The scope of this advantage is considerable. The employer may significantly limit, even wholly exclude, union solicitation on his premises, while facing no such restrictions himself. He may effectively monopolize personal contact with employees and coerce attendance at campaign meetings, undermining the union's ability to campaign as well as the credibility of any campaigning in which it does engage.

1. Control Over Campaign Methods

Republic Aviation Corp. v. NLRB[95] and *Stoddard-Quirk Mfg. Co.*[96] permit employees to organize among themselves on employer property. However, the employer may easily undermine the significance of these rules by limiting employees' access to one another. He may "transfer the personnel involved to other duties and locations[,]" "rearrange . . . the usual work flow or communication process," or break up an existing bargaining unit itself.[97] He may achieve this same effect simply by rearranging workers and their shifts. In short, the employer can almost completely dilute Board protection of employee solicitation.

In addition to his control over solicitation among the employees themselves, the employer may almost completely exclude nonemployee union organizers from the workplace. No-solicitation and no-distribution rules are a common union deterrence tactic, one which employers are advised to implement long before a union begins an organizing campaign.[98] *NLRB v. Babcock & Wilcox Co.*[99] allows the employer to ban nonemployee solicitors only if reasonable alternative channels of communication exist to reach employees. However, it has proven virtually impossible for unions to prove a lack of alternative channels. It may be, as Dean Bok has noted, that "any attempt to weigh dissimilar methods of communication is bound to produce inconclusive and subjective decisions,"[100] or perhaps a substantial overvaluation of employer property rights,[101] but the courts have been unwilling to enforce Board orders granting union access to employer property.[102] "Generally speaking, an employer . . . can prohibit union solicitation

95. 324 U.S. 793 (1945).
96. 138 N.L.R.B. 615 (1962).
97. J. KILGOUR, *supra* note 25, at 235-36.
98. *See supra* note 43.
99. 351 U.S. 105 (1955).
100. Bok, *supra* note 12, at 95.
101. *See* Gresham, *supra* note 14, at 167-72. "[T]he mere invocation of the shibboleth 'private property' has . . . summarily excluded nonemployee organizers from the workplace and has precluded any serious discussion of the proper role of property rights in a modern economy." *Id.* at 171-72. *Cf.* Zimny, *supra* note 17, at 624 ("[T]o elevate property rights over the personal rights guaranteed by the Act, as the Board and the Courts have largely done in their repeated denial of the right of nonemployee organizers to effectively communicate with workers, frustrates fulfillment of federal law in the most basic way.").
102. *See supra* note 59 and accompanying text.

or distribution by non-employees at any time and anywhere on his property,"[103] and unions will be left without a remedy.

While the employer is effectively free to bar union campaigners from the workplace, he faces no such restrictions on his own campaign efforts.[104] The employer is free to use any workplace campaign method that is not coercive or threatening.[105] Meetings at which employee attendance is required are common, whether they be with the entire workforce, small groups,[106] or between individual employees and their supervisors.[107] The employer may conduct surveys of employee attitudes toward unionization[108] and may interview individual workers on a regular basis regarding their attitudes.[109] His access to employee records allows him to write and telephone employees at their homes. The employer is limited only by the broad proscriptions of the Act and the scope of his imagination.[110]

Due to the employer's pervasive control of the workplace, a union seeking to organize a particular group of workers is relegated to attempting to contact them outside the workplace. The employer suffers no such infirmity; he is free to campaign on his own property. Given the "unique" value of the workplace as a campaign forum,[111] this dichotomy creates a significant imbalance of access.

2. Monopoly of Personal Contact

The campaign tactics that a union must employ when faced with no-solicitation/no-distribution rules are, by their nature, inferior to employer

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103. Fanning, *Union Solicitation and Distribution of Literature on the Job—Balancing the Rights of Employers and Employees,* 9 GA. L. REV. 367, 371 (1975).

104. *See* NLRB v. United Steelworkers (NuTone and Avondale), 357 U.S. 357 (1958) [hereinafter NuTone] (an employer may violate his own nondiscriminatory, no-solicitation rule if reasonable alternative channels remain open to the union); Livingston Shirt Corp., 107 N.L.R.B. 400 (1953) (an employer need not permit unions to reply to a captive audience speech).

105. *See* 29 U.S.C. § 158(a)(1).

106. *See* R. LEWIS & W. KRUPMAN, *supra* note 25, at 22.

107. A supervisor faces the peculiar dilemma of being unprotected by the Act, 29 U.S.C. § 152(3), suggesting that her loyalties should lie with the employer. Yet, because she is able to become a member of a union, this suggests that she shares the concerns of the other employees. 28 U.S.C. § 164(a).

108. *See* A. DEMARIA, *supra* note 25, at 110. Such surveys are particularly useful for detecting union interest before a formal organizing campaign begins and for targeting for specific attention employees who are "on-the-fence." If these surveys are conducted prior to the filing of an election petition, they are subject only to a cease and desist order from the Board and will not be considered grounds to set aside an election. An employer will no doubt conclude that the light that reveals union activity, however briefly, is well worth the risk of having the candle snuffed out by the Board.

109. R. LEWIS & W. KRUPMAN, *supra* note 25, at 18-19. Employers are advised to interview personnel regularly and on certain "important" dates—anniversary of employment, promotions, raises—to "remind the employees of those benefits and conditions that he too often takes for granted." *Id.* at 19.

110. One management labor consultant even suggests distributing fortune cookies with anti-union campaign slogans inside! A. DEMARIA, *supra* note 25, at 126.

111. *See supra* note 94 and accompanying text.

tactics because they afford limited opportunities for personal contact with the voters. While the employer is assured of personal contact with each employee each working day, the union must rely on means far less certain. Given the importance of personal contact,[112] this puts the union at a distinct disadvantage.

At the risk of stating the obvious, each employee goes to her particular place of work each work day, where she comes into personal contact, of some sort, with her employer. In a small shop she may speak with the owner every day, while in a larger workplace the contact may be much less direct. Nevertheless, her contact with the employer—and thus with his anti-union position—is guaranteed.

The employer has at his disposal one campaign "tool" particularly well suited to initiating and maintaining personal contact: the supervisor. The supervisor is in regular contact with the employees, serving as a constant reminder of the employer's attitude toward organization and as a conduit through which the employer may learn the identity of those employees soliciting support for organization. However, "[t]he real value of a supervisor during a campaign is utilizing his knowledge of each of the employees who works under him"[113] to target employer campaign efforts at those employees not yet committed to union support or those otherwise susceptible to electioneering.[114] This type of daily contact is a luxury not enjoyed by union organizers.

The union is left with several less appealing options for establishing personal contact with the employees, one of which is solicitation by fellow employees. *Republic Aviation* forces employers to allow some solicitation by employees, particularly oral solicitation, but it is not clear that this occurs to any significant extent.[115] Moreover, the effectiveness of solicitation by untrained employees who may themselves fear employer retaliation is questionable.[116] Thus a union cannot rely solely on employee solicitors to

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112. *See generally* C. QUINN, T. HILL & J. NICHOLS, MAINTAINING NONUNION STATUS 205 (1982) [hereinafter C. QUINN] ("The importance of personal contact cannot be overemphasized."); J. GETMAN, *supra* note 23, at 157 ("Campaign familiarity [a significant factor in the voting decision] is . . . significantly related to personal contacts.").

113. A. DEMARIA, *supra* note 25, at 201.

114. "It is the middle group of uncommitted employees, especially those who would be flattered by the personal attention or receptive to the organizer's rational arguments for whom this device is most suited." J. KILGOUR, *supra* note 25, at 200.

115. *See infra* notes 122-23 and accompanying text.

116. *See* Gresham, *supra* note 14, at 153-54. "While some organizational work can be done by employees who are willing to solicit fellow employees, it is obvious that, lacking as they do the requisite special training and experience, they cannot convey the [u]nion's appeal with anything like the effectiveness of professional union organizers." NLRB v. S & H Grossinger's, Inc., 372 F.2d 26, 29 (2d Cir. 1967). *But see* Bierman, *supra* note 20, at 30 ("While outside professional organizers may generally be somewhat more capable . . . the organizational abilities of in-plant organizers should not be underestimated, particularly since it is not completely unknown for unions . . . to have experienced organizers attempt to 'hire into' the targeted workplace.").

establish the personal contact with voters that is required to successfully communicate a campaign message.

The union may also attempt to "catch" employees on their way to and from work, stopping them to "talk union." But even the most diligent efforts to speak with employees on sidewalks or street corners are unlikely to be completely successful.[117] And if the workplace is one to which a majority of employees drive, the union may find trying to talk with, or distribute literature to, an employee as he drives into or out of a parking lot next to impossible, if not life-threatening.[118]

The union may be left to rely on visits to the employees' homes to establish personal contact. Certainly, the home visit represents an opportunity for the organizer to discuss issues personally with the voter, but there is considerable debate over the efficacy of the home visit.[119] Those who see it as an ineffective campaign tool cite the logistical difficulties presented by a "suburbanized" workforce, limited union resources juxtaposed with a large bargaining unit, and the belief that "once at home a worker may prefer to completely forget about what goes on at work."[120] Most significant, though, is the assertion that unions do not have access to employees' names and addresses early enough in the campaign to use the home visit effectively.[121]

That reliance on these methods has been an ineffective guarantee of personal contact between union and employee seems incontrovertible. The Getman study found that, during the three weeks between certification of a petition and the election itself, union representatives contacted only twenty-four percent of the voters in the thirty-one elections studied.[122] Such a low rate of contact does not match the employer's ability to contact employees personally.[123]

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117. "The likelihood that all employees will be reached by such methods is . . . problematic at best." Excelsior Underwear Inc., 156 N.L.R.B. 1236, 1241 n.10 (1966).

118. *See Babcock & Wilcox,* 351 U.S. at 106-07 (The Court cited the facts that 90% of the employees in question drove to work and the parking lot could be reached only by a company-owned access road, leaving the union to try to contact employees as they turned off of the highway onto the access road. It noted that "[b]ecause of the traffic conditions . . . it [is] practically impossible for union organizers to distribute leaflets safely to employees in motors [sic] as they enter or leave the lot.").

119. *Compare* Bierman, *supra* note 20 (criticizing the "home visits doctrine" as ineffective to balance employer/employee rights and suggesting that it be abolished) *with* A. DEMARIA, *supra* note 25, at 8 (characterizing the home visit as "one of the most strategic and effective weapons" in the organizer's arsenal, particularly if the union is able to target the undecided voters).

120. *See* Bierman, *supra* note 20, at 10-13.

121. *See id.* at 9-10.

122. J. GETMAN, *supra* note 23, at 93-94. Union organizers attributed this largely to employer access rules and the difficulty encountered in trying to contact employees scattered over a large area. *Id.* at 94.

123. The Getman study points out that employers personally contacted only 14% of the

3. Power to Coerce Meeting Attendance

The employee campaign meeting is one of the most effective campaign tactics.[124] The employer is entirely free to hold campaign meetings in his workplace. He may do so during working hours and can require the attendance of all employees. He need not permit a union reply.[125] The Getman study found that when employers held such meetings 83% of eligible voters attended.[126] That attendance record and the significant correlation between campaign meetings and familiarity with the campaign issues[127] easily explains the fact that 76% of voters in the study who changed their position on unionization during the campaign and 68% of the previously undecided voters voted against the union.[128]

A union is free to try to persuade employees to attend union meetings, and it may even have a union hall at which to hold a meeting, but it has no power comparable to that of an employer to compel attendance. As a result, the campaign meeting has proven an ineffective tool for unions. The Getman study found that only 36% of the voters surveyed attended union meetings. The primary reasons for not attending were inconvenience, lack of interest in the union, and not knowing about the meeting.[129]

The inability of a union to achieve a higher rate of meeting attendance is doubtless a significant determinant of election outcomes. The Getman study showed that those "switches" and undecided voters who voted pro-union did so based on information about the union and what it promised

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voters. But while unions contacted a higher percentage of workers, there is good reason to conclude that the employer contacts were more effective. Of those whom the employers contacted personally, 68% voted against organization. Union personal contacts garnered only a 48% success rate. *Id.* at 93. This suggests that employers may have targeted those employees with whom they felt personal campaigning would be most effective, particularly undecided voters. This is a function to which supervisors are uniquely suited and one to which they are often put. *See supra* note 113 and accompanying text. Moreover, the survey studied only the period after an election had been scheduled, failing to account for any employer personal contacts that may have taken place previously. *See* J. GETMAN, *supra* note 23, at 33.

124. *See* Lewis, *The Law and Strategy of Dealing with Union Organizing Campaigns,* 25 LAB. L.J. 42, 46 (1974). The Getman study provides substantial support for this position, finding attendance at campaign meetings more than significantly associated with familiarity with campaign issues. J. GETMAN, *supra* note 23, at 91. A re-analysis of the Getman data, conducted in a study simulating 31,000 elections with a subsample of the workers interviewed in the Getman study, strongly supports this conclusion. Dickens, *The Effect of Company Campaigns on Certification Elections: Law and Reality Once Again,* 36 INDUS. & LAB. REL. REV. 560 (1983). Dickens concluded that an employer who holds a campaign meeting early in the campaign "decrease[s] the probability of an average worker voting union by about 5 to 7 percent." *Id.* at 570.

125. Livingston Shirt Corp., 107 N.L.R.B. 400 (1953).

126. J. GETMAN, *supra* note 23, at 92.

127. *Id.* at 90-92.

128. *Id.* at 91, 107.

129. *Id.* at 92.

to do.[130] Since the campaign meeting is a singularly effective forum for communicating information concerning organization, one conclusion is inevitable: "[W]hen the employer can hold campaign meetings on working time and premises and the union cannot, the union is at a substantial disadvantage in achieving meaningful communication with employees . . . ."[131]

4. Employee Perceptions

On a subjective level, the fact that a union is forced to campaign outside company property may have an important effect on election outcomes, because it influences how the union is perceived by the targeted employees. In its campaign, a union attempts to convince employees that, as their collective bargaining representative, it will be able to negotiate aggressively with the employer and obtain an agreement that improves wages, benefits, and working conditions.[132] If the employees are to believe that this is possible, the union must instill in them a sense of confidence. Is it to be expected that a union can have this impact when the employees see that it cannot even get inside the workplace to campaign?

> [W]hatever the employer has to say about unionization is communicated in an orderly fashion in the very place where it is relevant—the workplace. . . . The contrast between the image of the employer—in control in the workplace, stating its position in an orderly fashion—and the union organizer—scurrying about on the outside, attempting to say a few hurried words—is striking.[133]

The difference is perhaps too striking to allow one to rationally conclude that a union can communicate its message effectively, instill confidence in the employees, and demonstrate that it can bargain at arm's length with the employer.

C. The Employer's Head Start

If it were possible, for the purposes of an empirical study, to control each of the employer advantages discussed in the foregoing Parts, the findings would probably differ only slightly from those reached above: current equal access law gives employers a significant advantage in communicating with employees. That advantage lies simply in timing. If all else were equal, employers would still have the opportunity to begin campaigning far earlier than unions—from the employee's first day on the job.

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130. *Id.* at 145.
131. *Id.* at 96.
132. *See supra* note 89.
133. Goldberg, *supra* note 90, at 592-93.

The conclusion that early campaigning gives employers an advantage rests on several presumptions: first, employers can in fact communicate with employees much earlier than union organizers; second, employers do campaign earlier than unions; finally, early campaigning is so effective that subsequent union campaigning is hard-pressed to overcome its lasting effects.

That employers are able to begin to campaign earlier than unions is beyond doubt. If the employer chooses, he may make his position on organization known on the employee's first day of work and even publish his position in the company handbook.[134] He may make captive audience speeches or initiate regular individual communication through supervisors. He also has ready access to employee names and addresses to facilitate a letter or telephone campaign. A union, however, is afforded none of these opportunities.

That employers in fact do make systematic use of their earlier access is only slightly less certain. It is instructive, though, to consider what employers perceive as the primary goal of their anti-union policies: preventing a union from achieving the thirty percent signed authorization cards required to file a petition for election, winning the early "battles" to avoid an escalation of the "war."[135] Achieving this goal not only preempts the risks posed by an election, it also enables the employer to assert his "official" ignorance of union activity as a defense if called upon to justify his acts in an unfair labor practice proceeding.[136] If the employer's maxim is "[w]inning an NLRB election may be an achievement; but a greater achievement is

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134. *See* C. QUINN, *supra* note 112, at 86. *See also* J. KILGOUR, *supra* note 25, at 114 ("There is probably no time when the employee is as receptive to communication from management as during the initial day . . . on the job.").

135. "The organizer's success in obtaining authorization cards is the measure of the employer's failure. If the organizer succeeds . . . there is fertile ground for unionization." R. LEWIS & W. KRUPMAN, *supra* note 25, at 37-38. Thus, "the important work of preventive labor relations takes place before the active campaign begins." J. KILGOUR, *supra* note 25, at 210.

136. Actual knowledge of union-organizing activity may constitute a union's prima facie case that an employer had the requisite intent to commit an unfair labor practice. *Cf.* J. KILGOUR, *supra* note 25, at 211. The filing of an election petition triggers actual knowledge. Prior to that time, the employer can claim that he was conducting business as usual in acting in a way that would constitute an unfair labor practice if done after the union filed. *See* R. LEWIS & W. KRUPMAN, *supra* note 25, at 20.

The employer's "fall-back" position is to prevent the union from reaching 50% signed cards. Few unions will file a petition without first having at least 50% of the employees' cards, *see* A. DEMARIA, *supra* note 25, at 37, and many will wait for more than a simple majority, *see, e.g.*, S. SCHLOSSBERG & G. SHERMAN, ORGANIZING AND THE LAW 55-56 (1971) (discussing United Auto Workers' policy of not filing without majority support). Moreover, a union that has shown majority support at one time may petition the Board to order the employer to bargain without an election as a remedy for egregious unfair labor practices. *See generally* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) (*Gissel* bargaining order as a remedy when employer practices have made holding a fair election nearly impossible).

preventing one,"[137] then early campaigning by the employer must be an essential tactic for defeating an attempted organization.

This proposition has received criticism from prominent sources. The Getman study suggested, and Professor Weiler agreed, that since most union elections take place in small bargaining units,[138] employers usually do not learn of pre-certification organizing activity in time to campaign against it.[139] If this is so, employers have no real advantage in their early access to employees. This criticism, however, strikes wide of the mark. This Note suggests that it is the opportunity to communicate anti-union views *before* any union organizing takes place that gives the employer a decisive advantage.

The Getman study concluded that this assertion cannot be empirically supported. Most significantly, the authors concluded that campaigning does not significantly affect an employee's ultimate vote. They found that vote to be determined by "strong predispositions for or against union representation that are based on . . . attitudes towards working conditions and unions."[140] They found that they could correctly predict eighty-one percent of the employees' votes based upon factors extraneous to the election.[141]

The Getman study most likely began too late in the election process to account for employees who had been influenced by campaigning prior to election certification.[142]

> [T]he authors have demonstrated that the contents of the last 3 weeks of the campaign . . . do not affect the votes of a large majority of the

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137. R. LEWIS & W. KRUPMAN, *supra* note 25, at 69.

138. "Fifty percent of all representation elections are held in units of 20 or fewer, 75% in units of 50 or fewer, 85% in units of 100 or fewer, and 95% in units of 250 or fewer." Weiler, *supra* note 16, at 1774 n.10 (citing Roomkin & Block, *Case Processing Time and the Outcome of Representation Elections: Some Empirical Evidence,* 1981 U. ILL. L. REV. 75, 85-86).

139. J. GETMAN, *supra* note 23, at 135 (Of 18 elections studied, all cards were signed before the employer learned of the campaign in 10 and, in 4, 50-75% were signed. In the remaining 4, the employer knew of the campaign before many cards were signed.); Weiler, *supra* note 16, at 1807 (In smaller units, "unions' efforts generally take place quickly and invisibly and produce a majority in just a few days or not at all.").

140. J. GETMAN, *supra* note 23, at 146. The authors allowed that pre-filing campaigning may have helped set employee attitudes, but felt that little actually took place. But a comparison of elections where the parties had campaigned early with those in which they had not showed that "[v]oting was *as predictable* when there had been no [early] campaigning . . . as when there had been." *Id.* at 69 (emphasis added). From this they concluded that early campaigning did not affect attitudes, ignoring the possibility that campaigning may affect voter attitudes regardless of when it takes place. *Id.*

141. *Id.* at 66-70. "Favorable attitudes toward unions in general [as measured prior to the campaign] create a strong predisposition to vote for union representation." *Id.* at 58. *See also* Dickens, *supra* note 124, at 568-69 (Worker disposition toward a union is the most important influence on the vote.).

142. Eames, *supra* note 48, at 1185 ("Opening the study so late in the campaign meant that many employees had already moved to the poles of their polarization before the study began . . . .").

> voters, namely those who are polarized and immovable. *But one of the ways in which these people became polarized and immovable was as a result of earlier campaigning.*[143]

The authors themselves acknowledged this possibility but dismissed its likelihood because it would require the assumption that "the limited [pre-petition] campaigning which took place . . . had a greater effect than the more substantial [later] campaigning."[144]

Such an assumption is not at all implausible. Given the importance of an employee's early attitudes toward unionization, the employer need not make specific substantive statements to be effective. It is enough that he rely on nuances that "stimulate favorable attitudes toward working conditions and unfavorable attitudes toward unions."[145] To any employee who has preliminary dispositions against a union, including such sentiments as "the union can't help me" or "I could lose my job if I support the union," *any* anti-union statements made by the employer would solidify his attitudes.[146]

The Getman study's conclusion that employer campaigning has little effect on voting is further undermined by the fact that nineteen percent of the voters surveyed voted contrary to their anticipated vote, indicating that they *did* switch. The survey found a "significantly greater attitude change"[147] among this group than among those who voted in accordance with the study's prediction and found that this change correlated with increased campaign information.[148] The campaign, then, must have had an effect, at least on this group of voters.[149] Moreover, seventy-six percent of those who switched and sixty-eight percent of those who had been undecided voted for the company.[150] Clearly, the employer's campaign had an impact. If early attitudes—even those that are not firm—are as predictive of voter behavior as the authors assert, then employers must have been able to provide a foundation for, or at least to solidify, those attitudes.

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143. *Id.* at 1191 (emphasis added).

144. J. GETMAN, *supra* note 23, at 70.

145. *Id.* at 145-46. *See also* Goldberg, *supra* note 90, at 575 (Employers need only express opposition to unionization, not make specific "factual assertions," to be effective.).

146. *See* Goldberg, *supra* note 90, at 588 ("[The] data points strongly to the conclusion that those employees who are contemplating a union vote are sensitive to intimations by the employer that it will use economic power to punish union supporters and reward union opponents."). Such "reinforcement" must have a substantial impact on the formation of early voting intentions. "The firmness with which initial voting intentions are held may well be crucial, and for those voters whose initial intent is not firm, the subtle influence exerted by a respected supervisor . . . may be decisive." *Id.* at 586.

147. J. GETMAN, *supra* note 23, at 71.

148. *Id.* at 103.

149. The study was only able to conclude that "neither the fact of [the] change in the direction of the company, nor the rate of that change, was related to the use of *unlawful* campaign tactics." Goldberg, *supra* note 90, at 585 (emphasis added).

150. J. GETMAN, *supra* note 23, at 107.

It would be rash to conclude that because only nineteen percent of voters switched during the campaign the impact that early campaigning may have on the outcome of an election is not significant. According to the Getman study, the votes of those who switched decided the outcomes of nine of thirty-one elections.[151] Any factor that can alter the results of twenty-nine percent of labor elections cannot be deemed insignificant.[152]

The employer clearly possesses the ability to reach employees with a campaign message earlier than unions. This represents a distinct advantage for the employer, given the demonstrated importance of early attitudes toward unions and the fact that when those attitudes change they change more often in favor of the employer. The advantage may well be decisive, for "[t]he importance of the campaign lies in its effect on the ultimate election verdict, and a small shift in the number of workers voting for union representation may have a substantial effect on the number of union victories."[153]

III. Reform Proposals: Too Little or Too Much

The Board's attempts to define and regulate a policy concerning the access of employees to campaign information have attracted a considerable amount of critical commentary.[154] There is a virtual consensus of thought among the commentators that current policy is inadequate and ineffective to enforce the Board's mandate under the Act; employees do not have equal access to all information relevant to the campaign. There has been a myriad of proposed reforms but little agreement as to where the true problems lie and which reforms ought to be implemented. This Part will discuss the most significant of these proposals and suggest that none is likely to have its intended effect *and* be acceptable to the Board and the courts.

A. Renunciation of the Babcock & Wilcox *Rule*

Perhaps the most far-reaching and controversial proposal, in terms of upsetting current thinking about equal access law, is that the *Babcock & Wilcox*[155] rule be abandoned, leaving all equal access questions to be resolved

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151. *Id.* at 103.

152. *Cf.* Dickens, *supra* note 124, at 572 (Dickens' re-evaluation of the Getman data in election simulation models showed that "a one percent change in the probability of [the average worker] voting union translates . . . into roughly a 2 percent change in the number of elections won by the union."). *But cf.* J. Getman, *supra* note 23, at 107 ("The union campaign may be influencing some employees, but not enough to make a difference in many elections.").

153. Weiler, *supra* note 16, at 1784.

154. *See* Bierman, *supra* note 20; Gresham, *supra* note 14; Penn. Comment, *supra* note 19; J. Getman, *supra* note 23; Bok, *supra* note 12.

155. 351 U.S. 105 (1956).

under *Republic Aviation Corp.*[156] If this proposal were adopted, the Board would no longer consider whether a particular employer's no-solicitation rule left employees and unions without reasonable alternative channels by which to communicate with each other.[157] The analysis would instead focus only on whether the access requested by a particular union would interfere with production or safety in the workplace, a much lower level of scrutiny.[158] Employers would be permitted to assert only managerial rights to exclude solicitors from the workplace, not their rights as property owners, significantly expanding the opportunities for union campaigning in the workplace.

The presumption underlying this proposal is compelling: *Babcock & Wilcox*'s alternative channels of communication test has allowed the courts to gut the employee's right to equal access to union information.[159] Unable to campaign in the workplace, unions are effectively denied the opportunity to contact employees personally,[160] to hold successful campaign meetings,[161] and to establish any measure of credibility as an effective bargaining representative.[162] The alternative channels test, per se, has not caused this. Rather, the Supreme Court's "failure to state clearly the substantive standard . . . that the Board and courts should apply"[163] to claims that alternative channels are unavailable has created "a nearly irrebuttable presumption against non-employee access to company property"[164] and thus against equal access to all information. Abandoning *Babcock & Wilcox* in favor of *Republic Aviation* would allow significantly greater union access to employees in the workplace, as employers could exclude organizers only by asserting a managerial interest.

While it would no doubt be effective, it is highly unlikely that *Babcock & Wilcox* will be repudiated. Such a change would require revising much of the thinking concerning property rights that characterizes our society, the likelihood of which is remote in the extreme. While the Board is willing to find that property rights should yield in the face of organizational rights,[165] the courts have been almost unyielding in their refusal to enforce

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156. 324 U.S. 793 (1945).

157. See *supra* notes 53-60 and accompanying text for discussion of the alternative channels analysis.

158. *See supra* notes 44-47 and accompanying text.

159. *See* Korn, *supra* note 14, at 381-83; Gresham, *supra* note 14, at 123-36; *Cf.* Pass, *supra* note 73, at 87-88 (The point is stated succinctly here: "Our law and society . . . enforce property concepts where they give an employer the right to keep off his property non-employee union organizers who contribute to a democratic choice by showing the employee another view or idea.") *Id.* at 88.

160. *See supra* notes 112-23 and accompanying text.

161. *See supra* text accompanying notes 129-31.

162. *See supra* notes 132-33 and accompanying text.

163. Gresham, *supra* note 14, at 120.

164. Korn, *supra* note 14, at 381.

165. *See supra* notes 58 & 60 and accompanying text.

Board access orders.[166] Lest it be thought that Congress may be—and ought to be—relied upon to resolve this conflict, it should be noted that Congress has been as unwilling as the courts to adopt such a fundamental change.[167]

Babcock & Wilcox relies upon a logical inconsistency, and its mourners should be few if its shaky foundation were to give way to a revision of the property rights/organizational rights balance.[168] The flaw lies in the rule's failure to recognize the proper scope of the property rights it seeks to balance. The reasoning

> equat[es] property interests exclusively with the right to exclude outsiders or strangers (*e.g.*, nonemployee union organizers) and defining trespassers solely as outsiders or strangers who enter the property without the owner's consent . . . . [It does not acknowledge that a]n employer's property rights include not only the right to exclude outsiders but also the right to regulate the activity of those already legally on his land.[169]

Applying two different standards to determine whether the employer may prevent an intrusion on his property logically follows from the creation of two different definitions for property intrusions. However, if it is presumed that "[b]oth intrusions offend the employer's property interest in the same manner[,]"[170] then it follows that the same analytical standard should apply to each, whatever that standard may be.

The Supreme Court has declined to adopt the latter position. A seven-member majority explicitly affirmed the employee/nonemployee distinction in *Eastex, Inc. v. NLRB.*[171] Predicting with absolute certainty how the

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166. *See supra* notes 58-60 and accompanying text.

167. The 1978 Labor Reform Act, the last significant legislative attempt at equal access reform, included a provision that would have required the Board to adopt rules

> which shall . . . provide that if an employer . . . addresses the employees on its premises or during work 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 an equal opportunity to obtain in an equivalent manner information concerning such issues from such labor organization.

Gresham, *supra* note 14, at 172 n.325 (emphasis added) (quoting S.2467, 95th Cong., 1st Sess. § 4, 124 CONG. REC. 57,526 (1978)). Although the House passed this provision, it died a slow death by a filibuster which withstood six cloture motions. Penn. Comment, *supra* note 19, at 795.

The actual impact of this Bill, had it passed, is questionable. It would have required access to company property only *after* an organization attempt was underway. It would have done nothing to address exclusivity of employer access prior to that time, when employers can make their positions on unionization quite clear to their employees, to lasting effect. *See supra* notes 134-53 and accompanying text.

168. *See generally* Gresham, *supra* note 14, at 151-72 (discussion of the *Babcock & Wilcox* rule as "[w]orse than a rule without a reason, . . . a clearly irrational rule, an archaic, 'obsequious' mistake." *Id.* at 171.).

169. *Id.* at 163.

170. *Id.* at 165.

171. 437 U.S. 556, 571 (1978). Justice Rehnquist, joined by Chief Justice Burger, disagreed, stating that "both *Babcock* and *Republic Aviation* . . . involved a 'trespass on the employer's property,' in that union members sought to override the employer's right to prescribe the conditions of entry to its property." *Id.* at 581 n.1 (citation omitted) (Rehnquist, J., dissenting).

present Court would resolve this question may not be possible—although one can hazard a guess—but it is not clearly an "implausible assertion that control over access to company premises . . . is . . . a more important property right than control over the use of its premises."[172] True, both employee and nonemployee campaigning threaten the employer's right to control the use of his property. But, while the right to control the use of property alone may not be compelling in the face of section 7 rights, it may *become* compelling when coupled with the distinct right to bar access entirely. Thus, the employee/nonemployee distinction in *Republic Aviation* and *Babcock & Wilcox* is not without support. Given the obduracy of the courts in perpetuating this distinction, it is unlikely that *Babcock & Wilcox* will be abandoned in the foreseeable future.

B. Reinstatement of a Right to Reply

The now defunct *Bonwit Teller*[173] doctrine required an employer to permit unions to reply on company property to any captive audience speech.[174] The Board abandoned this position in *Livingston Shirt Corp.*[175] and allowed an employer to campaign while excluding a union entirely. Several authors have suggested that a reversion to *Bonwit Teller,* with an accompanying reversal of *NuTone,* would re-establish the balance of organizational rights and property rights, guaranteeing employees equal access.[176]

The recommendation that a right to reply to captive audience speeches be granted derives support in large part from the Getman study, which found a strong correlation between attendance at campaign meetings and the vote, but that unions were effectively unable to hold such meetings.[177] Requiring a right to reply would give unions increased opportunity to use an important campaign tool, but at the expense of a "direct incursion"[178] on employers' property rights. As noted previously, courts and Congress are quite unwilling to brook any change that is more invasive of employers' property rights.[179]

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172. Korn, *supra* note 14, at 380.

173. Bonwit Teller, Inc., 96 N.L.R.B. 608 (1951).

174. *See supra* notes 30-32 and accompanying text. The doctrine did not apply to individual contacts an employer had with his employees. Such contacts were covered by NLRB v. United Steelworkers (NuTone & Avondale), 357 U.S. 357 (1958), which permitted the employer to violate his own no-solicitation rules. *See supra* text accompanying notes 37-38.

175. 107 N.L.R.B. 400 (1953).

176. *See* J. GETMAN, *supra* note 23; King, *Pre-Election Conduct—Expanding Employer Rights and Some New and Renewed Perspectives,* 2 INDUS. REL. L. J. 185 (1977); Korn, *supra* note 14; Penn. Comment, *supra* note 19.

177. *See supra* notes 124-31 and accompanying text.

178. Penn. Comment, *supra* note 19, at 781.

179. *See supra* notes 166-67 and accompanying text.

Arguably, the incursion caused by the creation of a broad right to reply would be less extensive, and thus potentially more acceptable, than that caused by abandoning *Babcock & Wilcox.* The *Bonwit Teller* rule would grant unions access only after the employer holds a captive audience speech. Abandoning *Babcock & Wilcox,* on the other hand, could require union access to company property on demand.

Despite the appeal of reinstating *Bonwit Teller,* conditioning the union's opportunity to hold a successful campaign meeting on the employer's first making a captive audience speech would make the repeal of *Livingston Shirt Corp.* a union victory that rings hollow. To continue to bar the union's access, the employer need only refrain from conducting such speeches. Rather than equalize the opportunities for access, this would leave the employer in much the same position of strength and control that he currently enjoys. As the Getman study surmised, the employer would refocus his campaign strategy to rely on appealing to workers on an individual basis.[180] Thus, without a concomitant abandonment of *NuTone,* the right to reply to a captive audience speech is little more than a toothless tiger.

What would seem to "enable" a return to *Bonwit Teller,* abandoning *NuTone,* would actually be its undoing. Granting unions a right to reply to any employer campaigning in the workplace is far more problematic than the mere right to reply to a captive audience speech. Most significant is the problem of when to trigger the right. Must the employer who states his anti-union position in a company handbook so inform the regional director so that a union may be located and urged to distribute its literature to the employees? Although perhaps something of an *in terrorem* argument, the question suggests a legitimate issue: Surely only a union already interested in organizing a particular group of employees would want to respond to an employer speech, but if the right to reply is to be triggered only after an actual organizing campaign is underway, the employer retains his ability to campaign *prior* to the union campaign. Given the importance of attitudes formed before formal campaigning begins,[181] this leaves the unions with little more than they have under current law.

If the employer's "head start" is to be negated, a right to reply must be triggered by *any* employer anti-union statement made at any time. However, such a proposition causes the property right objection to rear its ugly head once again. The employer would be required to admit unions which have no prior support in the bargaining unit—nor any real hope of ever gaining any—simply because a supervisor made an innocuous pro-employer statement.[182]

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180. J. GETMAN, *supra* note 23, at 157.

181. *See supra* notes 139-46 and accompanying text.

182. One commentator has suggested limiting the reply right to access to parking lots and

The reinstatement of the right to reply to a captive audience speech appears, on its face, to be a promising proposal. Without the repudiation of *NuTone,* though, it would give a union little. However, tying to it the weight accompanying a reversal of *NuTone* would make it far too burdensome to be implemented.

C. *Abolition of the Home Visit*

The final reform proposal to be considered[183] is that all campaign visits to the employee's home, whether by the employer or the union, be prohibited. Under the current doctrine, a union is free to contact employees in their homes by whatever means it chooses. The employer may mail letters to the home but may not otherwise contact the employees there.[184] The home visits doctrine has been roundly criticized as being ineffective in balancing the employer advantage[185] and for allowing the union to violate the privacy rights of employees, providing employees only the modest concession that employers not be allowed to do so.[186] To withdraw the union's right to contact an employee in his home, it is suggested, would

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other "nonsensitive" areas of the workplace. Korn, *supra* note 14, at 393. This would limit the incursion on property rights but arguably not to an extent great enough to convince Congress or the courts to subjugate property interests to organizing rights.

An alternative proposal addresses the issue differently, providing that "unions with at least a ten percent showing of interest would receive equal opportunity rights before an election has been scheduled. After an election has been scheduled, however, all intervening unions would have . . . reply rights." Penn. Comment, *supra* note 19, at 784. This may put the union in a Catch-22, for without a right of reply to the employer's campaigning the union may never secure the required level of support in the first place, particularly in larger bargaining units.

183. The discussion in this Part does not pretend to offer a comprehensive catalogue of proposed reforms but has attempted to confront broad categories of the most prominent suggestions. Numerous other ideas have been proffered, both as individual suggestions and uniform proposals. Professor Weiler's suggestion that the employer's role in organizing campaigns be eliminated, by implementing a system of "instant elections," to take place within days of the petition for election, is one of the most intriguing. *See* Weiler, *supra* note 16. The Getman study, with strong support, *see* Penn. Comment, *supra* note 19, at 792-95 (discussing the House proposals in the Labor Reform Act of 1978), suggested a complete deregulation of campaign speech. J. GETMAN, *supra* note 23, at 147-50. The study suggests that, as "the employee voter . . . appear[s] less interested in the campaign than traditional theory would have it[,]" the employer and union should be permitted "to use whatever campaign appeals they wish, short of malicious defamation." *Id.* at 150.

Nearly all proponents of serious labor reform seem to agree that when the Board does regulate, it should do so with stiffer remedies, triggered automatically by the occurrence of the illegal act. *See* Bierman, *supra* note 20, at 3-32; King, *supra* note 176, at 216. For a definitive discussion of the weakness of current Board remedies as a contributor to unequal access, see generally Weiler, *supra* note 16.

184. Peoria Plastic Co., 117 N.L.R.B. 545 (1957).

185. *See supra* notes 119-21 and accompanying text.

186. *See infra* note 220 and accompanying text.

not be a severe retrenchment of equal access rights *if* accompanied by a corresponding expansion of rights in other areas.[187]

One proponent of abolishing the home visit suggests that employers be compelled to submit to unions a list of employees' names and addresses at an earlier date than is currently required by the *Excelsior* rule[188] as a means of balancing the loss of the home visit.[189] This requirement would be triggered by a showing of some minimal level of employee support for a union. Alternatively, the employer could be required to mail union literature to its employees, rather than giving an employee list to the union.[190]

It is difficult to see that these changes would offer the union the increased access needed to balance the employer's current advantage. The union would lose the home visit, its one sure tool for contacting employees personally. In exchange it would receive the opportunity to mail literature to the employees' homes[191] and to contact them by telephone. Under the alternative suggestion the union would not even receive this but would be asked to rely on the employer to mail its literature. The extension of the *Excelsior* rule is a worthy suggestion.[192] But, limited as set out above, it is merely the camel's nose in the tent flap. Tied to the abolition of the home visits doctrine, it does more harm than good.

IV. A Proposed Solution: *Excelsior* List on Demand

American labor law gives an employer the authority in all but a few narrow circumstances to prevent a union from effectively communicating its message to employees. If the employer seizes this opportunity, he can make himself the only party with real power to influence the outcome of the election. Therefore, if employees are to be guaranteed their right to choose their bargaining representative freely, the law must be changed to create a balance of power between the employer and the union.

Much of the employer's power is derived from his role as the fundamental economic force in his employees' lives.[193] He has the ability to hire and

187. Alone, the abolition of the home visit "would put unions at an *even greater organizational access disadvantage* than they currently are." Bierman, *supra* note 20, at 28 (emphasis in original).

188. Excelsior Underwear Inc., 156 N.L.R.B. 1236 (1966). For a detailed discussion of the rule, see *supra* notes 73-81 and accompanying text.

189. *See* Bierman, *supra* note 20, at 28-29. The author also suggests permitting off-duty employees to campaign in the workplace, subject to no more restraint than on-duty employees. *See generally supra* notes 44-46 and accompanying text.

190. Bierman, *supra* note 20, at 29.

191. The Getman study concluded that unions are already successful in distributing literature to 85% of employees. J. Getman, *supra* note 23, at 90.

192. Part IV will propose that *Excelsior* be extended with no accompanying limitations on existing law. *See infra* notes 201-31 and accompanying text.

193. *See supra* notes 85-89 and accompanying text.

fire, a fact of which employees are well aware and which must influence their vote.[194] The thesis of this Note is, however, that this arm of the employer's power can never be counterbalanced in any meaningful way by a reform of labor election regulation. Although the point is tautological, the owner of a business is, in fact, the owner. He decides when, where, and how to open a business, and our economic system protects and encourages him in these decisions. Unless reforms require employers to give employees some degree of ownership in the business, or at least some control over the management of the business,[195] the employer's economic power over the employees will remain integral to the system.[196]

This is not to say that every source of the employer's advantage over unions cannot be counterbalanced. The employer derives considerable advantage from his control of the workplace[197] and from his ability to begin campaigning much earlier than the union is capable of doing.[198] This advantage can be remedied by enhancing the effectiveness of campaign tools currently available to unions, but a reform that gives a union the opportunity to enter the employer's property to any extent greater than is currently allowed will not be acceptable to the courts or to Congress.

The Board currently requires, under the *Excelsior* rule,[199] that the employer submit to the Regional Director a list of the names and addresses of the employees in the bargaining unit within seven days after an election has been set. The Regional Director makes the list available to the union or unions involved in the election.[200] The union is then free to use that list in its campaign efforts. This Note proposes that a union's ability to campaign could be significantly enhanced by expanding the *Excelsior* rule to require employers to submit a list of names and addresses to the NLRB on a regular basis, perhaps annually or biannually, so that any union wishing to organize

194. At issue here is not a discriminatory exercise of economic power by the employer but the mere fact that it exists.

195. For a brief discussion of such "participation management" systems, see generally St. Antoine, *The Legal and Economic Implications of Union-Management Cooperation,* N.Y.U. ANN. NAT'L CONF. LAB. (1988), *reprinted in,* 33 THE LAW QUADRANGLE 46 (1989).

196. The point is well illustrated by the fact that the Board cannot sanction an employer who, in response to a union organization attempt, completely closes down his business. The Supreme Court, in Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965), held that "so far as the Labor Act is concerned, an employer has the absolute right to terminate his entire business *for any reason he pleases.*" *Id.* at 268 (emphasis added). "[E]ven if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice." *Id.* at 274. Closing a business is the most flagrant assertion of economic power imaginable, yet it is not one against which the Act can protect employees. The right to close a business is endemic to a capitalist system. Absent such a right, owners of capital will not risk investment.

197. *See supra* notes 93-133 and accompanying text.

198. *See supra* notes 134-53 and accompanying text.

199. Excelsior Underwear Inc., 156 N.L.R.B. 1236 (1966).

200. *See supra* note 18.

a particular workplace may have access to the list—on demand—for use in its campaign.

A. Extension of Excelsior *as an Effective Reform*

The 1966 Board adopted the *Excelsior* rule to "maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation."[201] As the Board iterated:

> As a practical matter, an employer, through his possession of employee names and home addresses as well as his ability to communicate with employees on plant premises, is assured of the continuing opportunity to inform the entire electorate of his views with respect to union representation. On the other hand, without a list of employee names and addresses, a labor organization, whose organizers normally have no right of access to plant premises, has no method by which it can be certain of reaching all the employees with its arguments in favor of representation, and, as a result, employees are often completely unaware of that point of view.[202]

The *Excelsior* Board might just as easily have been evaluating conditions today. The comparison is all the more poignant given the stubbornness with which the courts cling to the notion that unions can almost always find some way to communicate with employees even when faced with a no-solicitation rule.

Granting unions uninhibited access to employees' names and addresses would balance much of the advantage that the employer derives from his control of the workplace. Its primary impact would be to improve the effectiveness of the campaign tools that unions currently use. The union's ability to campaign via the telephone and the mails would be significantly enhanced:[203] It could use its resources to develop mailing and advertising campaigns or to pay telephone canvassers, rather than in attempts to compile a list of employees' names by talking to them on the street[204] or trying to record license plate numbers as they leave the workplace.

The ability to identify and contact employees would also significantly improve the union's ability to promote attendance at campaign meetings. The Getman study found a "powerful correlation"[205] between meeting

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201. *Excelsior,* 156 N.L.R.B. at 1241. The Supreme Court has affirmed this goal: "The disclosure requirement furthers this objective by encouraging an informed employee electorate . . . ." NLRB v. Wyman-Gordon Co., 394 U.S. 759, 767 (1969), *rev'g* 397 F.2d 394 (1st Cir. 1968), *rev'g* 270 F. Supp. 280 (D. Mass. 1967).

202. *Excelsior,* 156 N.L.R.B. at 1240-41 (footnote omitted).

203. Bierman, *supra* note 20, at 28-29.

204. *Excelsior,* 156 N.L.R.B. at 1241 n.10. The enhanced ability to identify the voters would thwart a favored employer tactic. *See* J. KILGOUR, *supra* note 25, at 53 ("One important reason for restricting the union's access to the workplace is to hinder it from identifying the appropriate bargaining unit.").

205. J. GETMAN, *supra* note 23, at 156.

attendance and knowledge of campaign issues, but only thirty-six percent of employees attended union meetings as opposed to an eighty-three percent attendance rate at company meetings.[206] Personal contact prior to a meeting may generate greater interest in attendance, thereby overcoming the union's "substantial disadvantage in achieving meaningful communication with employees."[207]

Early access to an employee roster would also allow unions to make much more effective use of the home visit. A union faced with a work force that is spread out over a large suburban area could use the list to target undecided voters, "qualify" their interest in organization,[208] and make appointments to see those with whom a home visit might be most effective.[209] In the process, the union would be making the personal contact with employees that is so relevant to the voting decision.[210]

Most significant, though, is that extending *Excelsior* would remove the legal impediments to a union's doing all of this *as early as the employer is able to campaign*.[211] Currently, the employer need not submit the *Excelsior* list until seven days after the election has been set. Because elections generally take place between fifteen and thirty days after the election has been ordered,[212] the union has at most three weeks, and in some cases only one week, in which to use the list to solicit support. Standing alone, the idea that a union may have only one week to use the type of access that an employer may have been exploiting for years seems laughable. Coupled with the finding by the Getman study that eighty-one percent of employees' votes could be predicted based on attitudes formed prior to the start of the formal campaign period,[213] the fact that unions are losing more than one-half of Board-conducted elections is not shocking.[214] Extending *Excelsior*

206. *Id.* at 92.

207. *Id.* at 96.

208. The employer's ability to "target" key voters for campaigning in the workplace is one of his particular advantages. *See supra* notes 113-14 and accompanying text and *supra* note 123.

209. The Eighth Circuit stated that a union that has not attempted to make such appointments before trying to visit employees at home will not be heard to argue that it has expended all available alternative channels of communication. Central Hardware Co. v. NLRB, 468 F.2d 252, 255-56 (8th Cir. 1972).

210. J. GETMAN, *supra* note 23, at 157.

211. The union may well choose not to do so, but the decision would be made internally, for strategic reasons, not imposed by the Board or the employer.

212. J. GETMAN, *supra* note 23, at 2.

213. *See supra* notes 140-41 and accompanying text.

214. A. DEMARIA, *supra* note 25, at xv. This is not to say that unequal access has directly caused unions to lose most elections, for certainly many other variables can be presumed to be important. Nor does the proposal that *Excelsior* be extended reflect a judgment that unions should be winning more elections. Rather, it reflects a judgment that employees do not have equal access to all campaign information. Its purpose, to borrow from Professor Weiler, "is neither to chalk up a high union victory rate . . . nor to channel as many employees as possible into unions. Rather, it is to nurture and protect employee freedom of choice with respect to collective bargaining." Weiler, *supra* note 16, at 1808.

would give unions the same ability that employers possess: the ability to contact employees as early as they choose and the opportunity to develop early pro-union attitudes that employees will retain throughout the campaign.[215]

B. *Extension of* Excelsior *as an Acceptable Reform*

As Part III discussed, particular proposals for reform could increase employee access to union information *if* they could be adopted, but each suffers from some fatal flaw ensuring that it will not be adopted. The proposed extension of the *Excelsior* rule, however, may be distinguished from these other suggestions because it would work to balance employer and union access and would probably be acceptable to the Board, the courts, and Congress.

The primary objection to—indeed the death knell for—most equal access reform proposals is that the change would require employers to allow greater union encroachment on their property rights.[216] An extension of the *Excelsior* rule allows for no such objection, as it would involve no physical access to the business property itself.

However, it is likely that employers, seeking to avoid any reform that would enhance the ability of unions to reach employees, would assert their own interest in the list of names and addresses, as they did in *Excelsior*.[217] Arguably, this objection is more compelling when the *Excelsior* rule is broadened to give unions an employee list on demand. But the *Excelsior* Board found that the employer has no such interest in a list of its employees,[218] and a simple expansion of the rule does not undermine the Board's logic: "Such legitimate interest . . . as an employer may have is

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215. An extension of *Excelsior* could also relieve much of the pressure for reform and the pressure put on the courts by litigants claiming to have no reasonable alternative channels through which to communicate with workers. One commentator has suggested that union possession of an *Excelsior* list could reasonably be considered "prima facie evidence of equal access to voters." Samoff, *NLRB Elections: Uncertainty and Certainty,* 117 U. PA. L. REV. 228, 248 (1968). Although this Note does not seek to defend this position, the idea does have the appeal of a bright-line test for applying the alternative channels analysis. *See supra* notes 54-60 and accompanying text. Arguably, the most efficient approach, perhaps even most effective, would be to presume access to be equal, subject to rebuttal, when the employer is free to campaign in the workplace, and the union, with an *Excelsior* list, is not prevented from contacting employees outside the workplace. Leaving each party to rely on its own "natural forum," free from interference by the other, would seem to be a neutral, "free-market" approach to equal access regulation. However, characterizing areas outside the workplace as the union's "natural fora" for campaigning bespeaks a value judgement that the union does not belong in the workplace, is a stranger to it, and, until "invited in" by the employees via an election, should be excludible by the employer.

216. *See supra* notes 166-68 and accompanying text.

217. *Excelsior,* 156 N.L.R.B. at 1243.

218. *Id.*

. . . plainly outweighed by the substantial public interest in favor of disclosure where . . . disclosure is a key factor in insuring a free and fair election."[219]

Extending *Excelsior* may also be opposed on the grounds that it may lead to exposing employees to harassment and invasions of privacy.[220] The *Excelsior* Board dismissed the argument, finding it unlikely that a union would undermine its own support in the bargaining unit by harassing the employees and the "mere possibility that a union will abuse the opportunity . . . [an in]sufficient basis for denying this opportunity altogether."[221] The Board suggested that any harassment that did occur could be dealt with remedially.[222]

This objection also becomes more compelling when made to a proposed extension of the *Excelsior* rule. Earlier access to an employee list necessarily increases the opportunities for unions to contact employees, making the possibility of harassment more substantial. Indeed, it is not impossible to envision employees receiving repeated and annoying telephone calls over a period of time far more extended than is currently possible.

Moreover, to receive an *Excelsior* list under current law, a union must first secure an election order, indicating at least a thirty percent rate of support in the bargaining unit.[223] The proposed extension of *Excelsior* would require no such showing. As a result, the possibility of a union's requesting the list in bad faith—for sale for its value as a mailing list, for example—is greater. Thus, the union's rationale for requesting the list is arguably less compelling.

However, the logic and rationale underlying the original *Excelsior* rule need not be contravened. The risk of abuse remains only a possibility and section 7 still entitles all employees to receive campaign information—not just those who can muster the support of thirty percent of their co-workers. The Board, through its expertise, can protect against abuse by adopting appropriate administrative guidelines and conditions for releasing the list to a union,[224] as well as meaningful sanctions for violations. Professor Bok, anticipating the original *Excelsior* rule and the harassment objection to it,

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219. *Id.*; *accord* NLRB v. Beech-Nut Life Savers, Inc., 274 F. Supp. 432 (S.D.N.Y. 1967); NLRB v. British Auto Parts, Inc., 266 F. Supp. 368 (C.D. Cal. 1967).

220. *See* Heinsma, *Names, Addresses and the NLRB: Some Implications of the* Excelsior *Case,* 1 GA. L. REV. 646, 646-49 (1967); Lewis, *supra* note 74.

221. *Excelsior,* 156 N.L.R.B. at 1244.

222. *Id.*

223. *Id.* at 1244 n.20.

224. The Board could, for example, require that the union's record be free from a certain number of complaints of abuse of a certain severity or perhaps require that the union make some showing of genuine interest in representing, and some ability to represent, the bargaining unit. However, to condition the issuance of the list on a showing of a certain percentage of support in the unit, *see* Bierman, *supra* note 20, at 29-30, would defeat the purpose of expanding the rule in the first place.

may have answered best: "If this danger were truly significant, unions should presumably be restrained from making any unsolicited house calls instead of being prevented from visiting merely those employees whose addresses cannot be obtained through the union's own resources."[225]

There is some force to the suggestion that protecting privacy rights should take a preventive, as opposed to remedial form,[226] particularly when the opportunities for encroaching upon those rights become greater. However, the *Excelsior* Board's reliance on *Martin v. City of Struthers,*[227] in which the Supreme Court found "the risk of harassment through unsolicited house visits to be less important than the opportunity for individuals to communicate ideas from door to door[,]"[228] seems a satisfactory response. True, the right in question here is a statutory right, not the first amendment right asserted in *City of Struthers.* But as it is the section 7 right of the employee that this proposal seeks to protect and not those of the union as speaker, relying on the ability of the employee to protect his own privacy[229] and a remedial approach for egregious abuses is not unreasonable.

"In justifying . . . labor law reform, one must do more than show that such reform would be effective in achieving its aim; one must also show that the aim itself is worth achieving."[230] The extension of the *Excelsior* rule poses no serious threat of incursion into employer property rights nor on any other right that outweighs the need for full employee access to campaign information. As such, it is likely to pass muster in Congress and the courts. It would also be effective in balancing, or at least beginning to balance, the advantages that employers currently enjoy in their access to employees. Given the Board's goal of ensuring a free and fair election, that is surely a goal worth achieving.

CONCLUSION

The principle goal of American labor election law is to guarantee that workers may exercise their right to choose between collective bargaining and individual bargaining fairly, freely, and without unreasonable interference. A fair election is one in which the voters have equal access to

225. Bok, *supra* note 12, at 100. This "alternative"—banning all unsolicited house calls—is, of course, the proposed abolition of the home visit, discussed in Part III as being overly restrictive of union access.

226. *See* Heinsma, *supra* note 220, at 648-49.

227. 319 U.S. 141 (1943).

228. Bok, *supra* note 12, at 100.

229. *See* NLRB v. Wolverine Indus., 64 L.R.R.M. (BNA) 2060 (E.D. Mich. 1966) (The "average American citizen is a . . . fairly intelligent, independent and courageous man, and if he doesn't want to hear what the UAW or UMW has to say he can very quickly turn his back." *Id.* at 2061.).

230. Weiler, *supra* note 16, at 1822.

information relevant to the decision they are making. While the employer is permitted to present the individual bargaining system to the voters, he is also capable of barring their access to the collective bargaining regime's representative, the union. Because it is at the mercy of courts who grant access only on the rare finding that a union has no other way to reach employees, a union is virtually unable to communicate its message. Employees are left to vote with a distorted, one-sided view of the benefits of collective bargaining.

By requiring, with no disabling prerequisites, that employers submit through the Board to a union, a list of employee names and addresses, the mandate of the Act can be more faithfully served. The Board cannot balance *knowledge* of the various bargaining alternatives, but it can balance *access* to information. Giving a union an *Excelsior* list at an earlier date can guarantee a union at least the opportunity to use all of its own resources—however extensive or limited they may be—to contact employees and to do so at the time during which such contact can make an impact. The Act requires no more, and employees deserve no less.