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Extending Excelsior

Leonard Bierman

Graduate School of Business, Texas A&M University.

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Extending *Excelsior*

LEONARD BIERMAN*

INTRODUCTION

In a recent Note in this Journal,¹ Randall J. White suggested the development of a new model for conducting labor union representation elections, and critiqued the model for reform of this area which I had developed in previous writings.² Mr. White argued that employers have “built-in” advantages in the conduct of labor representation elections of a kind which deprive unions (and ultimately employees) of “fair and equal access to the organizational debate.”³ To ameliorate this situation, he cited to and suggested a reform that I had already put forward, that of extending the scope of the National Labor Relations Board’s (“NLRB” or “Board”) *Excelsior Underwear, Inc.*⁴ doctrine.⁵ Pursuant to the *Excelsior* doctrine, unions are presently able to obtain the names and addresses of all voters in a particular labor bargaining unit within seven days after the NLRB orders a union representation election in that unit.⁶ The reform of *Excelsior* ultimately suggested by Mr. White, however, is considerably broader in scope than the one I had suggested, and is designed to encourage union campaign visits to employee homes—a campaign technique that I strongly opposed.⁷ Overall, Mr. White asserts that while the reforms I had proposed in my earlier pieces are well-intentioned, they do not in some respects go far enough, and that they merely represent “the camel’s nose in the tent flap.”⁸

The issues raised by Mr. White and my previous writings have recently taken on increased importance with the Supreme Court’s 1992 decision in the case of *Lechmere, Inc. v. NLRB*.⁹ In *Lechmere* the Court’s controversial new member, Justice Clarence Thomas, in his first majority opinion, held that employers can exclude nonemployee union organizers from employer property even where such property (in this case a shopping center parking lot) is open

* Associate Professor, Graduate School of Business, Texas A&M University. The author thanks Professors Reginald Alleyne, Rafael Gely, and Clyde W. Summers for their insights regarding the issues discussed in this piece.

1. Randall J. White, Note, *Union Representation Election Reform: Equal Access and the Excelsior Rule*, 67 IND. L.J. 129 (1991).

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

3. White, *supra* note 1, at 131-32.

4. *Excelsior*, 156 N.L.R.B. 1236 (1966).

5. Bierman, *supra* note 2, at 28-30.

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

7. See Bierman, *supra* note 2, at 27-28.

8. White, *supra* note 1, at 160.

9. *Lechmere*, 112 S. Ct. 841 (1992).

to the general public.¹⁰ The *Lechmere* decision has considerable implications for the continued viability of the *Excelsior* doctrine, and indeed has already prompted some scholarly commentary.¹¹

This Article is a response to Mr. White's critique of my proposed reforms in light of the Supreme Court's *Lechmere* decision. I will argue that the Court's decision in *Lechmere* heightens the need for congressional reform of the standards regulating labor representation elections and that this issue should be high on the agenda of the recently formed Commission on the Future of Worker-Management Relations.¹² I will further argue that the reforms advocated by Mr. White in some respects go slightly too far and in other respects not far enough, and that his proposals do not adequately protect employee privacy rights. Finally, I will argue that Mr. White has misconstrued the potential effectiveness of the comprehensive and realistic reforms I have already advocated.

I. THE *EXCELSIOR*/GENERAL ELECTRIC DOCTRINES AND HOME VISITS

As noted above, the NLRB in its seminal *Excelsior* decision held that unions may obtain a list of employee names and addresses seven days after a labor election has been scheduled.¹³ Motivating the decision in *Excelsior* was the idea that giving unions such lists will make them better able to reach employees outside the workplace, thus offsetting what the NLRB has recognized as employers' clear advantages in reaching employees on the job.¹⁴ Indeed, *Excelsior* was decided in tandem with the case of *General Electric Co.*,¹⁵ where the Board denied unions the right to a worksite reply to employer speeches given to employees at the job-site on paid company time—so-called "captive audience" speeches.¹⁶ In short, the NLRB in the *General Electric/Excelsior* companion cases developed something of a compromise. Employers would have wide ranging abilities to reach (without any meaningful union rights of access or reply) employees at the workplace, while unions would now have enhanced opportunities to reach employees outside the workplace.

10. *Id.* at 850. The majority opinion sparked a sharp dissent. *Id.* at 850-53 (White, J. dissenting) (rejecting Justice Thomas' majority opinion and asserting that the Court should defer to the NLRB's determination that *Lechmere* violated the National Labor Relations Act).

11. See Leonard Bierman, *Justice Thomas and Lechmere, Inc. v. NLRB: A Reply to Professor Robert A. Gorman*, 10 HOFSTRA LAB. L.J. 299 (1992); Robert A. Gorman, *Union Access to Private Property: A Critical Assessment of Lechmere, Inc. v. NLRB*, 9 HOFSTRA LAB. L.J. 1, 18 n.71 (1991).

12. The formation of the Commission on the Future of Worker-Management Relations was announced on March 24, 1993, in a Labor Department press release. *Daily Labor Report*, BNA, Mar. 26, 1993, available in LEXIS. That release stated that the purpose of the commission is to "investigate methods to improve the productivity and global competitiveness of the American workplace. . . . The Commission will investigate the current state of worker-management relations and labor law and make recommendations concerning changes that may be needed to improve productivity through increased worker-management cooperation and employee participation in the workplace." *Id.*

13. See *supra* notes 4-6 and accompanying text.

14. *Id.*

15. *General Electric*, 156 N.L.R.B. 1247 (1966).

16. *Id.* at 1251.

To further cement this "compromise," the Board in these companion cases explicitly upheld its so-called "home visits doctrine."¹⁷ Pursuant to this doctrine, developed in two 1957 cases,¹⁸ unions are free to campaign by visiting employees at their homes, while employers are prohibited from engaging in such activity, in part because such visits by employers are seen as having an unduly coercive effect given the power and control employers exercise over workers.¹⁹ Thus, after *General Electric/Excelsior* employers would still be unable to visit employees at their homes, while unions newly armed with complete and accurate lists of names and addresses (which had heretofore been very difficult for them to obtain) could take full advantage of this campaign technique. In short, the NLRB viewed this new ability of unions to meaningfully engage in home visits as a major counter-weight to the advantages employers enjoyed from work site access to employees, and indeed specifically deferred consideration of whether such an approach really provided balanced opportunities for each side "until after the effects of *Excelsior* become known."²⁰

It has been almost three decades since these cases were decided, and the NLRB has never squarely reconsidered these issues. Legislation dealing with these issues was passed by the U.S. House of Representatives in 1977, but was successfully filibustered in the U.S. Senate in 1978.²¹

II. *LECHMERE* AND *EXCELSIOR/GENERAL ELECTRIC*

In its 1992 decision in *Lechmere*, the Supreme Court firmly reinforced the general holding by the Board in *General Electric* and by the NLRB and courts in other prominent cases,²² that absent extraordinary circumstances union organizers cannot enter employer property to campaign.²³ *Lechmere* itself involved an attempt by union organizers to distribute handbills in a shopping center parking lot during the early stages of an organizing campaign (before a representation election had been scheduled). The union was trying to organize the workers of a Connecticut retail store located in the shopping center.²⁴ The NLRB, using a "balancing" approach which considered the "openness" and "closedness" of the property involved, permitted union access to the property at issue, weighing heavily the fact that the parking lot was freely accessible to the general public.²⁵ Justice Thomas' majority opinion

17. *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1246 n.27 (1966).

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

19. *Plant City Welding*, 119 N.L.R.B. at 133-34.

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

21. See 123 CONG. REC. 32,613 (1977) (recording the passage of H.R. 8410, the Labor Reform Act of 1977, by the House of Representatives), and 124 CONG. REC. 18,400 (1978) (recording the Senate's successful filibuster of H.R. 8410).

22. See, e.g., *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

23. *Lechmere*, 112 S. Ct. at 849-50.

24. *Id.* at 843-44.

25. *Lechmere, Inc.*, 295 N.L.R.B. 92 (1989), *rev'd*, 112 S. Ct. 841 (1992); see also Gorman, *supra* note 11, at 8-14.

overruled the Board's holding, and essentially held that private property remains private regardless of its specific nature and that union organizers are simply not permitted on private property.²⁶

Justice Thomas suggested that union organizers could reach employees outside the workplace through various methods including mailings and home visits.²⁷ Justice Thomas also suggested that the union could organize from a forty-six foot-wide publicly-owned strip which was located between the parking lot and the Connecticut Berlin Turnpike (a busy four-lane highway), to which the union organizers had been relegated after they were thrown out of the parking lot.²⁸ The Court's holding in this case starkly illustrates the practical problems in the operation of the *Excelsior/General Electric* doctrine and the tremendous imbalance in organizational opportunities which exists in the conduct of labor representation elections today.

First, one must remember that unions are, pursuant to *Excelsior*, given a list of employee names and addresses seven days after a labor representation election has been scheduled by the NLRB.²⁹ But such elections are not scheduled until the union has provided the NLRB with evidence that at least thirty percent of the employees in the bargaining unit are interested in being represented by the union.³⁰ Moreover, most unions for strategic purposes, do not seek to schedule such elections until at least fifty percent of the employees have expressed such interest.³¹ Thus, unions simply have no rights to employee lists under *Excelsior* during the critical early stage of an organizing campaign when they are trying to garner enough support to actually have an election scheduled. *Lechmere* dramatically illustrates this problem: union organizers were forced to stand on a narrow, publicly-owned, grassy strip and record license plate numbers from cars parked in the shopping mall parking lot in an attempt to obtain employee names and addresses.³² Justice Thomas in *Lechmere* noted the union's "success" in reaching employees via the names and addresses translated from the license plates.³³ Justice Thomas further noted that the union generally had "reasonable access" to employees of a kind which offset employer worksite access and obviated the union's need to reach employees by coming onto the employer's private property.³⁴

But Justice Thomas' conclusions as to union "success" and "access" are both open to dispute. First, even through its assiduous (some may say

26. *Lechmere*, 112 S. Ct. at 849-50.

27. *Id.* at 849.

28. *Id.* at 849-50.

29. See *supra* notes 4-6 and accompanying text.

30. 29 C.F.R. § 101.18 (1981).

31. Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1776-77 n.22 (1983).

32. The union was apparently aided by the Connecticut Department of Motor Vehicles which gave the union the names and addresses of the individuals whose cars carried the given license plates. *Lechmere*, 112 S. Ct. at 844.

33. *Id.* at 844.

34. *Id.* at 849-50.

“pathetic”) efforts to obtain employee names and addresses, the union was only able to obtain this information for about twenty percent of the workforce. Simply put, the rights afforded unions under *Excelsior* come too late. Indeed, in *Lechmere* the union never was able to marshal support to the point where a representation election was scheduled and *Excelsior* rights were triggered.

Moreover, it is a bit disingenuous to believe that the types of access rights afforded the union in *Lechmere*—handing out handbills from a grassy knoll next to a busy highway—in any way effectively counterbalanced the employer’s ability to reach employees at the workplace. Indeed, the union’s inability to attain the thirty percent “showing of interest” necessary to formally schedule an election,³⁵ is itself a testimonial to the organizational advantages of employers in the current construct. As Professor Howard Lesnick has insightfully noted, “[w]hen an employer gathers his employees for a group meeting on paid company time to deliver an antiunion speech, [the employer] is implicitly telling [the employees] that he cares more about their position on unionization than about their work.”³⁶ It is hard to think of a more potent weapon in the organizational arsenal. Even, for example, if a union is able to jump through all the requisite “hoops,” obtain an employee’s home address, and visit the employee at his home, no person can be a “captive audience” in his or her own home where he or she may be distracted by numerous other responsibilities and relationships.³⁷ Under the current construct, organizational advantages clearly lie with employers. Employers’ ability to reach employees at the workplace and the inability of unions (especially after *Lechmere*) to do so, outweigh any advantages unions have in reaching employees at their homes or in other ways outside work. This is particularly the case because under the present regulatory scheme unions are not given *Excelsior* lists of employee names and addresses until after they have already demonstrated a substantial “showing of interest” from employees.³⁸

The Supreme Court’s decision in *Lechmere* illustrates and supports the contentions made by both Mr. White and myself that the current standards governing labor representation elections are not effective and are unduly biased in favor of employers. Mr. White and I differ, though, in our approaches to reform.

35. 29 C.F.R. § 101.18.

36. *Penn Comment, supra* note 2, at 780 & n.148 (citing transcript of television program “The Advocates: Should Congress Provide More Protection for Union Organizing?” at 17 (Apr. 27, 1978) (statement by Professor Howard Lesnick)).

37. Jay Gresham, Note, *Still as Strangers: Non-Employee Union Organizers on Private Commercial Property*, 62 TEX. L. REV. 111, 159 & n.276 (1983).

38. *Lechmere*, 112 S. Ct. at 1239-40.

III. MR. WHITE'S "HOME VISIT" APPROACH TO REFORM VERSUS MY COMPREHENSIVE SET OF REFORMS

Mr. White advocates a broad extension of the *Excelsior* doctrine to ameliorate the perceived imbalance in organizational rights between unions and employers.³⁹ Indeed, he argues that unions should be furnished *Excelsior* lists of employee names and addresses "on demand" at any time during an organizing campaign.⁴⁰ To institute this reform, employers would be regularly required, "perhaps annually or biannually," to furnish the NLRB with employee name and address lists which the Board would then turn over on request to any union.⁴¹

Mr. White views this as a "politically acceptable" reform because it avoids greater union encroachment on employer property rights.⁴² He also views this as an "effective" reform, in that it will enable unions to offset employers' organizational advantages by permitting them to begin campaigning "as early as the employer is able to campaign."⁴³ Under Mr. White's proposed reforms, unions will no longer have to wait until seven days after a representation election has been scheduled (and the union has demonstrated a "showing of interest" from at least thirty percent of the relevant workforce) to obtain a comprehensive list of employee names and addresses.

One of the primary reasons why Mr. White views providing unions with "on demand" *Excelsior* lists as being a positive and meaningful reform is that it will "allow unions to make much more effective use of the home visit."⁴⁴ He views the home visit as a critically important organizing tool because it is one of the primary ways unions are able to make personal contact with employees.⁴⁵

While I agree with Mr. White's thesis that there is an imbalance in organizational rights between unions and employers which operates against unions and needs to be ameliorated, the approach I have advocated is considerably different from that advocated by Mr. White. At the heart of my approach is the abolition of the "home visits doctrine" and concomitant legislative prohibitions on home visits by either employees or unions. I have argued that union home visits are not an especially effective organizing technique, and that even if they are an effective organizing method the costs they impose on employee privacy rights outweigh any such benefits.⁴⁶ I recognized, though, that taking away the ability of unions to visit employees at their homes (and thus an advantage they have over employers, because employers are explicitly prohibited from making home visits) will leave

39. White, *supra* note 1, at 160-66.

40. *Id.* at 161-62.

41. *Id.*

42. *Id.* at 164.

43. *Id.* at 163.

44. *Id.*

45. *Id.*

46. Bierman, *supra* note 2, at 27-28.

unions in a worse organizing position vis-a-vis employers than currently exists.⁴⁷

To rectify this situation and the overall imbalance in union/management organizational rights, I have advocated a comprehensive set of reforms.⁴⁸ The principal components of this set of reforms are: (1) NLRB sponsorship of election debates; (2) greater organizational rights for off-duty employees, for example, allowing off-duty employees more rights to distribute union literature and related materials; (3) extending *Excelsior*—although not as far as Mr. White suggests; (4) strengthening unfair practice remedies against employers; (5) overturning the “home visits doctrine” and prohibiting unions from making home visits; and (6) giving non-employee organizers the right to enter employer premises to respond to employer “captive audience” speeches. Given the Supreme Court’s recent decision in *Lechmere*, reforms of this kind are even more essential than when I first suggested them.

IV. THE PROBLEMS WITH MR. WHITE’S APPROACH AND THE DEVELOPMENT OF A MORE EFFECTIVE SET OF REFORMS

A. *The Home Visits Doctrine*

At the heart of my disagreement with Mr. White’s approach to labor representation election reform is the tack he takes with respect to the “home visits doctrine.” As noted above, a critical byproduct of his proposed extension of the *Excelsior* doctrine would be the increased ability of unions to campaign by visiting employees at their homes. Because he argues against the viability of any basic reform of the Supreme Court’s holding in *Babcock & Wilcox* (which the Court upheld in the *Lechmere* decision), pursuant to which union organizers are broadly excluded from employer property,⁴⁹ home visits would become the primary way unions are able to obtain the personal contact with employees which he states “is so relevant to the voting decision.”⁵⁰ Indeed, he emphasizes specifically the fact that the home visit is the “one sure tool” unions have “for contacting employees personally.”⁵¹

Mr. White does acknowledge points I have raised in my earlier writing regarding the logistical difficulties unions face in conducting home visits.⁵² He also notes my previous arguments regarding how such visits represent a significant incursion on employee rights of privacy.⁵³ Nevertheless, Mr. White feels that the “most significant” problem with the current home visits doctrine is the lack of union access to employee “names and addresses early

47. *Id.* at 28.

48. *Id.* at 27-34.

49. NLRB v. Babcock & Wilcox, Co., 351 U.S. 105, 113-14 (1956).

50. White, *supra* note 1, at 163.

51. *Id.* at 160.

52. *Id.*; see Bierman, *supra* note 2, at 8-20.

53. White, *supra* note 1, at 148.

enough in the campaign to use the home visit effectively."⁵⁴ His central proposal of extending the *Excelsior* doctrine by giving unions "on demand" employee name and address lists at any time during the campaign, would thus ameliorate this situation and arguably make home visits an effective campaign technique.

While making *Excelsior* lists available earlier does indeed make the home visit a more useful union campaign technique, it does not really alter the basic flaws of the home visits doctrine. First, regardless of how effective a union organizing technique the home visit is, there are strong arguments that such visits unduly encroach upon employee privacy rights.⁵⁵ The Supreme Court has emphasized the importance of the home as a place where individuals should enjoy special privacy rights.⁵⁶ This seems particularly applicable to home visits given the advent of the two worker family and the need for employees to have some sort of safe haven where they escape from work.

Also, arguments differentiating union home visits from potential visits by employers, which are currently outlawed in part because they would be "coercive" and "harassing," are a bit specious. One need only read some of the recent writings by Professor Clyde W. Summers and others regarding the organized criminal infestation of some unions to conjecture that visits to one's home by certain union officials might well be quite "intimidating."⁵⁷ Certainly, it might not be particularly advisable for employees to follow the advice some employers have given them to "slam the door in the union's faces" when some unions come calling.⁵⁸

Mr. White acknowledges these possible problems of harassment and invasions of privacy, but points to the fact that these problems can be dealt with "remedially" and through appropriate NLRB "administrative guidelines."⁵⁹ He also points to the free speech rights involved in allowing unions to present their case to employees, and to giving employees the right to have such ideas communicated to them.⁶⁰ Finally, he quotes a case which states that 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."⁶¹

54. *Id.*

55. See Bierman, *supra* note 2, at 18-20. See generally Julius G. Getman, *Ruminations on Union Organizing in the Private Sector*, 53 U. CHI. L. REV. 45, 60 (1986) (advocating one-on-one meetings with employees, getting to know rank-and-file members, and conveying a personal interest in employees as effective union campaign strategies).

56. See, e.g., *Stanley v. Georgia*, 394 U.S. 557 (1969) (holding that the power to regulate obscenity does not extend to mere possession of obscene material by an individual in the privacy of his own home); see also Bierman, *supra* note 2, at 20.

57. Randy M. Mastro et al., *Private Plaintiff's Use of Equitable Remedies Under the RICO Statute: A Means to Reform Corrupted Labor Unions*, 24 U. MICH. J.L. REF. 571 (1991); Clyde W. Summers, *Union Trusteeships and Union Democracy*, 24 U. MICH. J.L. REF. 689 (1991).

58. See *Ripley Mfg. Co.*, 144 N.L.R.B. 1132, 1140-41 (1963).

59. White, *supra* note 1, at 165.

60. *Id.* at 166.

61. *Id.* at 166 n.229.

I question, though, as I have noted previously, the ability of the NLRB to realistically remedy or develop administrative guidelines in this area. How is an employee, absent perhaps a video cassette recording of the entire visit, actually going to prove that what union officials said to him was "coercive"? Moreover, what types of speech or action are, presuming an accurate recording of events, going to be deemed illegally "coercive" or "harassing" in this context? When possible reform of the home visits doctrine was before the U.S. House of Representatives in 1977-1978, as part of the proposed Labor Law Reform Act, this issue proved to be a major stumbling block.⁶²

In addition, while I concede that there are important free speech issues involved in home visits by unions, I do not think these considerations are controlling or that they outweigh the costs these visits impose. The Supreme Court has emphasized in other contexts the free speech value of door-to-door solicitation, but I agree with Professor Derek Bok that these decisions are not legally binding in this context, and that there are considerable differences between labor election home visits and door-to-door solicitations involving the sale of life insurance or encyclopedias.⁶³ Further, while some employees may indeed be courageous enough to turn their backs on the United Auto Workers or United Mine Workers, it seems unfair to place this burden on employees, and unrealistic to expect employees to be as courageous when the union involved is one with perhaps more of a rough-and-tumble reputation.

Finally, apart from the issues of employee privacy raised by the home visits doctrine, I question how effective a campaign method of union home visits would be even given the kind of extension of the *Excelsior* doctrine proposed by Mr. White. In his piece Mr. White notes, but gives rather short shrift to, the concerns I have expressed regarding the suburbanization of the American workforce and the impact of this development on the home visits doctrine.⁶⁴ In this regard, it must be remembered that the Supreme Court's decision in *Babcock* denying union access to employer property turned in significant degree on the fact that forty percent of the company's employees lived in a small town only one mile from the jobsite, and were thus arguably easily accessible to the union off working premises.⁶⁵ Today, however, employees tend to live scattered over wide areas, often driving long distances to work. The result is that unions, even armed early with complete lists of employee names and addresses, face a rather daunting task in reaching employees at their homes.

In short, unions today operate in a considerably different environment than they did in 1956, when the Court decided *Babcock*, and in 1957, when the home visits doctrine was developed. Employees generally do not live in company towns or otherwise live together in close proximity to their workplaces. This makes home visits difficult for unions under any

62. Bierman, *supra* note 2, at 22-23; see H.R. REP. NO. 637, 95th Cong., 1st Sess. 71 (1977).

63. See Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 100 (1964).

64. Bierman, *supra* note 2, at 10-12.

65. N.L.R.B. v. *Babcock & Wilcox, Co.*, 351 U.S. 105, 106, 111-14 (1956).

circumstances, and raises the question whether reform of the basic *Babcock/Lechmere* doctrine is really necessary. As one leading observer has put it, “[s]uburbanization has also meant that employee residences are scattered over wide areas. As it becomes increasingly difficult for union representatives to communicate with employees . . . the need for access to the employer’s property becomes more important.”⁶⁶

Central to Mr. White’s proposed reforms is the increased use of home visits by unions. Such visits unduly intrude on employee privacy rights, and have the potential for being unlawfully harassing and coercive. Because of recent demographic shifts, such visits are difficult for unions to conduct even if they do have “on demand” lists of employee names and addresses. All labor campaign home visits should be outlawed, and other reforms, including granting unions the right to participate in election debates, should be implemented.

B. Election Debates and Beyond

Mr. White and I also disagree significantly about potential union access to the workplace. My view that the right of unions to engage in home visits should be abolished, lead me to suggest a wide range of other reforms designed to offset this loss for unions and to create a better balance in union/management organizational access. Direct union access to employer workplaces, at least for the purpose of participating in election debates, will help achieve this balance.

While Mr. White does not address my election debate proposals in his Note, he does discuss at considerable length possible renunciation of the *Babcock & Wilcox* rule and potential reinstatement of a union right to reply to employer “captive audience speeches.”⁶⁷ With respect to possible reform of the *Babcock* rule, he discusses the unlikelihood of either Congress or the courts initiating change in this area.⁶⁸ Mr. White notes, however, that the creation of a union right of reply to employer “captive audience speeches” would be “potentially more acceptable” than broad-scale reform of the *Babcock* doctrine.⁶⁹ Mr. White points out one possible shortfall of this reform: employers would have an easy way around this reform in that they could simply not give speeches of this kind.⁷⁰ More specifically, he argues that giving unions the right to reply to employer “captive audience speeches” would be a “union victory that rings hollow” because employers would simply avoid such speeches and emphasize other sorts of campaign techniques.⁷¹ In the end, union/management organizational access rights would, according to

66. Michael A. Broomfield, *Preemptive Federal Jurisdiction over Concerted Trespassory Union Activity*, 83 HARV. L. REV. 552, 553 (1970).

67. White, *supra* note 1, at 154-59.

68. *Id.* at 154-57 & 156 n.167.

69. *Id.* at 158.

70. *Id.*

71. *Id.*

him, not be equalized and employers would be left "in much the same position of strength and control" that they currently enjoy.⁷²

On this point I differ with Mr. White. As I have noted above,⁷³ and as empirical studies of the subject have documented,⁷⁴ the captive audience speech is probably the most potent weapon in the employer's organizational arsenal. The potency of this employer weapon is clearly diminished to the extent unions are (assuming all the various possible logistical difficulties are worked out) given a right to reply to such speeches. If the end result, as Mr. White suggests it will be, is that employers will simply stop giving such speeches in order to avoid giving unions opportunities for replies, I do not view this as a negative thing or, as he would put it, a "hollow victory."⁷⁵ Certainly it is true, as Mr. White points out, that in the absence of giving captive audience speeches employers will "refocus" their campaign strategies and "rely on appealing to workers on an individual basis."⁷⁶ But because this method of employer campaigning is less effective than the captive audience speech situation where an employer is able to call all workers together and address them on paid company time, I would view the overall impact of such a change to be a net benefit for unions.⁷⁷

Some of the extraordinary attention paid over the years to the issue of employer captive audience speeches and possible union replies to such speeches⁷⁸ should instead be focused on the possibility of having labor representation election debates. I have suggested that Congress seriously consider authorizing the NLRB to sponsor a series of preelection debates. While working out the precise details and logistics of such debates may be difficult, they would go a long way toward fostering the central goal of the Labor Act—promoting "free debate on issues dividing labor and management."⁷⁹ Such debate would both help insure an informed and educated electorate, and enable unions to get their message across on an equal basis with employers despite the inability to engage in home visits. Although Mr. White does not discuss the possibility of a reform of this kind, I believe it is one worthy of careful attention.

72. *Id.*

73. See *supra* note 36 and accompanying text.

74. See Gresham, *supra* note 37, at 152-53, 153 n.244.

75. White, *supra* note 1, at 158.

76. *Id.*

77. I understand that this point is clearly debatable and turns in significant measure on the perceived potency of the employer's "captive audience speech."

78. See, e.g., *Livingston Shirt Corp.*, 107 N.L.R.B. 400 (1953); *Bonwit Teller, Inc.*, 96 N.L.R.B. 608 (1951); *Babcock & Wilcox Co.*, 77 N.L.R.B. 577 (1948); *Clark Bros. Co.*, 70 N.L.R.B. 802 (1946).

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

C. Possible Logistical Problems with "On Demand" Excelsior

Mr. White recognizes that there are possibilities of abuse in implementing his proposal of furnishing *Excelsior* lists to unions "on demand."⁸⁰ He notes, however, that the NLRB, "through its expertise, can protect against abuse by adopting appropriate administrative guidelines and conditions" regarding the release of such lists and develop "meaningful sanctions for violations."⁸¹ I am somewhat less sanguine than Mr. White about the Board's "expertise" in this regard,⁸² and, as I have pointed out, I am somewhat concerned about the possible role of so-called "intervenor unions" (other unions who win a place on the election ballot in addition to the primary "petitioning union") in a scheme of this kind. In addition, many unions try to keep the early stages of their organizing efforts secret in an attempt to gain tactical advantages over employers.⁸³ Thus, even if a reform of the kind Mr. White suggests were adopted, many unions might not take full advantage of it. Nevertheless, the general notion of extending the reach of the *Excelsior* doctrine is a positive one, and I commend Mr. White for his scholarly discourse on this subject.

CONCLUSION

Mr. White, in his recent Note in this Journal, has outlined the current imbalance in organizational rights in labor representation elections, and the need for reform in this area. The Supreme Court's recent decision in *Lechmere* further exacerbates this imbalance, and accentuates the existence of employer advantages over unions in the organizational context. While I disagree with some of Mr. White's specific proposals, and feel strongly that the insidious home visits doctrine should be abolished and that neither unions nor employers should be permitted to campaign in this manner, it is important not to lose the proverbial "forest for the trees." I agree strongly with Mr. White that general reform in this area is necessary, and urge the recently formed Commission on the Future of Worker-Management Relations to make meaningful recommendations to serve as a precursor to congressional action.

80. White, *supra* note 1, at 165.

81. *Id.* at 165 & n.224.

82. For an interesting general critique of NLRB "expertise" in the conduct of labor representation elections, see Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988 (1984).

83. KEN GAGALA, UNION ORGANIZING AND STAYING ORGANIZED 150 (1983).