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INFORMING WORKERS OF THE RIGHT TO WORKPLACE
REPRESENTATION: REASONABLY MOVING FROM THE
MIDDLE OF THE HIGHWAY TO THE INFORMATION
SUPERHIGHWAY

G. MICAH WISSINGER*

INTRODUCTION

An oft forgotten and disregarded fundamental promise to American workers is the right to self-representation in the workplace conferred by section 7 of the National Labor Relations Act (“NLRA” or “the Act”).¹ Section 7 gives employees “the right to self-organization, to form, join, or assist labor organizations. . . .”² This right has been forgotten in large part because, while belonging to the employee, it can only gain effect through the accommodation of an agent on employer property, the union organizer.³ Through various agency decisions and court holdings, the basic section 7 right of an employee to receive information about workplace representation has been narrowed⁴ to the point of relegating unions to unreasonable and ineffective methods of communication.

The requirements of the Act inject a measure of rivalry into the choice for workplace representation by requiring a secret ballot

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1. *Id.* §§ 151–169 (1998).

2. *See id.* § 157. The Act defines a “labor organization” to be “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” 29 U.S.C. § 152(5).

3. Cynthia Estlund, *Labor, Property, and Sovereignty after Lechmere*, 46 STAN. L. REV. 305, 325–27 (1994); Rafael Gely & Leonard Bierman, *Labor Law Access Rules and Stare Decisis: Developing A Planned Parenthood-Based Model of Reform*, 20 BERKLEY J. EMP. & LAB. L. 138, 143–44 (1999).

4. Estlund, *supra* note 3, at 311–21.

election when a question concerning representation cannot be resolved between the parties.⁵ However, the contentious nature of representation elections has become more pronounced in the dissemination of pre-election campaign information, resulting in a competition between employers and unions rather than an exercise in accommodation.⁶ One way that the National Labor Relations Board (“NLRB” or “the Board”) and reviewing courts have furthered the pre-election contest rivalry for information is by awarding remedies to unions as a way to “balance” the gross inadequacies of access to workers. The Board seems to forget, however, that section 7 gives rights to workers and not to unions or employers. A “remedy” to the imbalance of access was announced in *Excelsior Underwear Inc.*,⁷ which requires that the names and addresses of workers be given to unions so that they can visit workers at their homes instead of on employer property.⁸

Arguments for reforming the rules of access, specifically the doctrine laid out in *Excelsior*, are far from novel.⁹ One way to achieve

5. 29 U.S.C. § 159(c)(1). A question concerning representation exists when a labor organization or individual seeks recognition as a bargaining agent and the employer refuses to grant recognition; the statute does not require the parties to use the formal processes of the NLRB. However, section 9 provides a framework for formal election procedure. 1 THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 376 (Patrick Harding et al. eds., 3d ed. 1992) [hereinafter THE DEVELOPING LABOR LAW].

6. Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 497 (1993). Becker outlines the origins of the contest theory of the representation election in the context of free speech rights. *Id.* at 547–61. He concludes, “the right to [workplace] representation has been subverted by lawmakers’ interpretation of industrial democracy in terms of an analogy between political and union elections—an analogy that suggests a theory of the union election as a contest between union and employer.” *Id.* at 602.

7. 156 N.L.R.B. 1236, 1245 (1966) (citing prior Board decisions regarding access as determinative). *Excelsior* also cites the “employer’s interest in controlling property” as significant. *Id.* at 1245.

8. *Id.* at 1241 (stating that “access of all employees . . . can be insured only if all parties have the names and addresses of all the voters.”).

9. See, e.g., Leonard Bierman, *Extending Excelsior*, 69 IND. L.J. 521, 524–25 (1994) [hereinafter Bierman, *Reply*] (replying to White’s article); Leonard Bierman, *Toward a New Model For Union Organizing: The Home Visits Doctrine and Beyond*, 27 B.C. L. REV. 1, 28–30 (1985) [hereinafter Bierman, *Home Visits*] (setting forth the home visits doctrine and arguing it is an ineffectual trade-off in access to workers); Gely & Bierman, *supra* note 3, at 180–81 (proposing reform in labor law access rules); David Greenhaus, *Should the NLRB Revisit Excelsior?*, 16 HOFSTRA LAB. & EMP. L.J. 259, 273–77 (1998) (arguing for reform of private sector *Excelsior* doctrine in light of the contrary rule applied to public sector employees through the Privacy Act); Martin H. Malin, *Labor Law Reform: Waiting for Congress*, 69 CHI.-KENT L. REV. 277, 281 (1994) (suggesting that adjudicatory rulemaking should reshape *Excelsior*); Randall J. White, *Union Representation Election Reform: Equal Access and the Excelsior Rule*, 67 IND. L. J. 129, 160–66 (1991) (proposing an extensive overhaul of the *Excelsior* doctrine).

meaningful communication with employees is to insert a neutral party into the competition for representation election access. That neutral party would be technology.

There has been a substantial amount of recent scholarship suggesting methods for the incorporation of technology into representation elections.¹⁰ Most articles regarding the incorporation of e-mail and the Internet have revolved around employer rights in their corporate e-mail systems vis á vis the doctrines of workplace and work time solicitation and distribution.¹¹ Scarce, if any, comment has been made about incorporating technology into the reform of non-work time organizing options and the *Excelsior* doctrine itself, this Note sets forth such a proposal.

This Note primarily focuses on a reform of *Excelsior* using private e-mail accounts and Internet web sites. It is premised on the previously articulated presumption that the *Excelsior* doctrine serves as an incomplete remedy to the rules for union access to workers, and also on the idea that an extensive overhaul of the doctrine of representation elections is preferable to any partial reform.¹²

Section I of this Note provides background on the rules of access, specifically *Excelsior*, its informational aim, and the “home visits doctrine.” Section II sets forth the argument for reform and provides a proposal for using private e-mail and Internet web sites as modes of communication in the representation election. Section III provides a case example that highlights the need for reform and shows the utility of technology as the communication means in representation elections.

10. See Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. KAN. L. REV. 1 (2000); Susan S. Robfogel, *Electronic Communication and the NLRA: Union Access and Employer Rights*, 16 LAB. L.J. 231 (2000); Gwynne A. Wilcox, *Section 7 Rights of Employees and Union Access to Employees: Cyber Organizing*, 16 LAB. L.J. 253 (2000); Elena N. Broder, Note, *(Net)Workers' Rights: the NLRA and Employee Electronic Communications*, 105 YALE L.J. 1639 (1996).

11. See Fredrick D. Rapone, Jr., Comment, *This Is Not Your Grandfather's Labor Union—Or is it? Exercising Section 7 Rights in the Cyberspace Age*, 39 DUQ. L. REV. 657 (2001); Cheryl M. Stanton, Comment, *Organizing Online: Union Solicitation on Employers' E-Mail Systems*, 1996 U. CHI. LEGAL F. 653 (1996).

12. See Gely & Bierman, *supra* note 3 (arguing for an extensive overhaul of the representation election and rejecting the “piecemeal” approach resulting from stare decisis).

I. BACKGROUND

The NLRA charges the NLRB with administering and enforcing most private-sector American labor policy,¹³ which theoretically fosters industrial peace and workplace harmony through collective bargaining.¹⁴ To this end, a process must first play out in the representation election—a process not normally characterized as peaceful.¹⁵ It is often the work of the NLRB to lend dignity to representation elections through the enactment and enforcement of procedures designed to balance the interests of employees and employers while, at the same time, accommodating unions in their attempt to supply employees with the information necessary to make an informed decision for workplace representation.¹⁶

A. Access Generally

It is outside the scope of this Note to give extensive treatment to each of the limitations placed on workplace and work time organizing, but for ease of discussion, the rules can be broken into four factors.¹⁷ First, the status of the organizer as an employee or nonemployee is often crucial to determining the treatment and protection ultimately provided by a reviewing court.¹⁸ Timing is also an important factor because there is a general presumption to protect non-work-time organizing.¹⁹ The third factor in determining access rights

13. 29 U.S.C. § 153 (1998).

14. 29 U.S.C. § 151; *see also* Peter Levine, *The Legitimacy of Labor Unions*, 18 HOFSTRA LAB. L.J. 529, 531 (2001) (citing NLRA text and undertaking a comprehensive moral critique of modern labor relations).

15. *E.g.*, J. GETMAN ET AL., *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* (1976) (examining the effects of fiercely contested representation elections). *But see* Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1782 (1983) (disagreeing with Getman et al. in their methodology and their conclusion that the effects of illegal employer tactics do not affect the outcome of representation elections).

16. Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 53–54 (1964) (arguing for imposing legal constraints in elections to preserve the implicit goal of fairness).

17. *E.g.*, THE DEVELOPING LABOR LAW, *supra* note 5, at 87–104.

18. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533 (1992) (banning nonemployee union organizers from employer owned property is permissible); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956) (permitting ban on nonemployee union organizers where other methods of communication are available).

19. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) (holding that employers may exert control over property to limit organizing from interfering with safety or production); *see also id.* at 803 n.10 (citing the *Peyton Packing* presumption that “work time is for work”).

centers on the location of the organizing activity.²⁰ The final factor, which often warrants different treatment depending on the context established by the other three factors, is whether to characterize the organization actions as solicitation or distribution.²¹

Section 7 says nothing of the rights of unions or employers. However, their respective interests in the representation election became a permanent part of the section 7 discourse in *NLRB v. Babcock & Wilcox Co.*²² The *Babcock* Court resolved a split in the circuits over the treatment of nonemployee union organizers distributing union literature in employer owned parking lots.²³ The resulting decision provided for an accommodation of interests rather than an absolute upholding of employee section 7 rights.²⁴ The Court stated that “[o]rganization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.”²⁵

The Court acknowledged that the right to self-organization under the Act depended, to some degree, on the “ability of employees

20. *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615, 621 (1962) (banning solicitation and distribution in work areas held permissible because of litter and threats to production). Additional restraints are often imposed on hospital and retail workers. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978) (needing to provide “tranquil atmosphere” as reason to prohibit organizing); *May Dep’t Stores Co.*, 136 N.L.R.B. 797, 803 (1962), *enforcement denied*, 316 F.2d 797 (6th Cir. 1963) (prohibiting discussion of union matters on the retail floor).

21. *Republic Aviation*, 324 U.S. at 797–98 (dealing with solicitation); *Stoddard-Quirk*, 138 N.L.R.B. at 619–20 (recognizing solicitation and distribution of literature are different “techniques” and holding that work areas should be free from distribution). For a review of the distinctions to be drawn between solicitation and distribution see Bok, *supra* note 16, at 92–96.

22. 351 U.S. 105. In *Babcock*, the Court held that employers could prevent nonemployee union organizers from entering their parking lots. *Id.* at 113–14. The employer’s plants were located near small towns and a large percentage of employees lived in these nearby towns, thus the Court reasoned that there were other methods of distributing information to these employees, and the plant owners could not be required to allow nonemployee union organizers to distribute literature in the parking lots. *Id.* at 107–08, 113. Employer property rights had already been recognized in *Republic Aviation*, yet not in the context of preventing nonemployee access. 324 N.L.R.B. 793.

23. 351 U.S. 105. In three cases the Board found that employers had committed unfair labor practices by refusing to allow union organizers access to company parking lots. The Fifth and Tenth Circuits denied enforcement of the Board’s orders and the Sixth Circuit granted enforcement. *Babcock & Wilcox Co.*, 109 N.L.R.B. 485 (1954), *enforcement denied*, 222 F.2d 316 (5th Cir. 1955); *Seamprufe, Inc.*, 109 N.L.R.B. 24 (1954), *enforcement denied*, 222 F.2d 858 (10th Cir. 1955); *Ranco, Inc.*, 109 N.L.R.B. 998 (1954), *enforced*, 222 F.2d 543 (6th Cir. 1955).

24. *Babcock*, 351 U.S. at 112.

25. *Id.*

to learn the advantages of self-organization from others.”²⁶ Thus, the Court created an exception stating:

[t]he employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization. But, when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize. The determination of the proper adjustments rests with the Board.²⁷

Babcock created this “reasonable means to communication” exception, but the Court held that it did not apply to the situation facing the *Babcock* union organizers.²⁸ The Court stated that the union could adequately inform workers of their right to self-organization without entering the employers’ parking lots.²⁹ The Court based much of its reasoning on the fact that most of the employees lived in small towns close to the plants, drove to work, and parked in company-owned lots.³⁰ These lots were accessible only by driving down a company-owned driveway. The Court said the organizers could communicate with employees at the driveway gates.³¹ However, the Board previously concluded that the traffic conditions at the driveway entrance made it “practically impossible for union organizers to distribute leaflets safely to employees in motors as they enter or leave the lot.”³² Despite the practical difficulties in communication, the Court held that there were still readily available methods of communication for the union to utilize, without expanding on what those methods were.³³

B. Excelsior

Most of the modern rules of representation campaign access were in place when Professor Derek Bok offered suggestions for a more stable approach to this area of the law in 1964.³⁴ A case that

26. *Id.* at 113.

27. *Id.* at 112.

28. *Id.* at 113.

29. *Id.* at 113.

30. *Id.* at 106–08, 113.

31. *Id.*

32. *Id.* at 107.

33. *Id.* at 113.

34. See Bok, *supra* note 16. According to the Westlaw database, Bok’s article has been cited by the Supreme Court six times, by lower courts in seventy-two decisions, and quoted by the Board in thirty-seven decisions (as of Jan. 7, 2002).

grew out of the times was *Excelsior Underwear Inc.*,³⁵ which marked an end to at least one facet of the problems cited by Bok as undermining the election process:³⁶ the inability of unions to reach workers with section 7 information during nonwork time.³⁷

Excelsior required “higher standards of disclosure” by mandating that seven days after a representation election is set, employers must provide the Board with an “*Excelsior* list” that includes the names and addresses of all members of the proposed bargaining unit.³⁸ The union may then request the list and the failure or refusal of an employer to supply the list is grounds for setting aside the election.³⁹ The right of a union to receive an *Excelsior* list was upheld by the Supreme Court in *NLRB v. Wyman-Gordon Co.*⁴⁰ This edict has remained virtually unchanged since 1969. Although not often distinguishable, two of *Excelsior’s* goals were to provide section 7 information to employees and to provide balance in the contest for access to employees. The informational goal can be found in the *Excelsior* decision itself.⁴¹ The balance of access theory is a result of a group of decisions collectively referred to as the home visits doctrine.⁴²

1. Informational Aim

Central to the reasoning in *Excelsior* was the much-extolled belief that an informed electorate, possessing all the relevant information, will make the superior choice when confronted with a decision for workplace representation.⁴³ The Board asserted that, among other factors, a lack of information impedes free choice in an election.⁴⁴ Through the new rule announced in *Excelsior*, the Board sought to “remove the impediment to communication” by helping

35. 156 N.L.R.B. 1236 (1966). In this case, the Board refers to Bok as a “thoughtful commentator” and cites him for the idea of giving contact information to unions. *Id.* at 1242 n.18.

36. Bok suggests that the Board adopt policies that would withstand “the vicissitudes of changing attitudes and administrations.” Bok, *supra* note 16, at 39.

37. *Id.* at 99–100.

38. 156 N.L.R.B. at 1239–40.

39. *Id.* at 1240.

40. 394 U.S. 759 (1969).

41. 156 N.L.R.B. at 1240–41.

42. *See infra* notes 51–56 and accompanying text.

43. 156 N.L.R.B. at 1242.

44. *Id.* at 1240.

unions disseminate information during nonwork time.⁴⁵ It explicitly recognized that an employer, through ostensible property rights, has an inherent advantage in communicating its views on union organizing efforts.⁴⁶ As such, the need for “prompt disclosure”⁴⁷ of an address list seemed the “obvious” remedy to the lack of access union organizers faced in reaching workers.⁴⁸

Implicit in *Excelsior* is the fact that the list is not designed to directly help unions, but to permit voting employees to make informed decisions.⁴⁹ Cases involving *Excelsior* lists continue to come before the Board for determination. The standard language in a case concerning a dispute over an *Excelsior* list confirms the central role of the list as providing information to the employee. The language reads: “[t]o ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them.”⁵⁰

The *Excelsior* decision analogizes to other types of elections in which voter contact information is a commodity, such as political elections, stockholder elections, and elections for union office.⁵¹ Some critics have challenged this analogy, particularly as it applies to political elections.⁵² However, for the purposes of this Note, the validity of this analogy is presumed as evidence of the intent to inform the worker-electorate of their section 7 right to representation.

45. *Id.*

46. *Id.*

47. *Id.* at 1239.

48. *Id.* at 1241.

49. Were the goal of *Excelsior* to help the union, the list would be made available before it was required to garner enough support from the electorate to be able to file for an election. See Bierman, *Reply*, *supra* note 9, at 524; see also STEPHEN I. SCHLOSSBERG & JUDITH A. SCOTT, ORGANIZING AND THE LAW, 211 (4th ed. 1991); *infra* note 62.

50. *Excelsior*, 156 N.L.R.B. at 1236; N.L.R.B. v. Wyman-Gordan Co., 394 U.S. 759 (1969).

51. 156 N.L.R.B. at 1242.

52. Becker, *supra* note 6, at 516–24 (examining the “common democratic vernacular,” and arguing that “conflation” with political elections “mask[s] the disparity of power” that motivated passage of the NLRA); Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKLEY J. EMP. & LAB. L. 356, 436–55 (1995) (arguing against the “Bokian” conceptualization of the representation election as analogous to the political); Weiler, *supra* note 15, at 1813–15.

2. Home Visits Doctrine

The same day the Board handed down *Excelsior*, it announced in *General Electric Co.* that it would resist making other changes to the procedures of representation elections until the effects of *Excelsior* became known.⁵³ *General Electric* involved a challenge to the practice of employer “captive audience” speeches, a method of communication denied to unions.⁵⁴ The holdings of *Excelsior* and *General Electric*, coupled with two 1957 cases involving a union’s right to approach employees in their homes during representation campaigns,⁵⁵ resulted in what is called the “home visits doctrine.”⁵⁶

For over fifteen years, Professor Leonard Bierman has led the debate over the home visits doctrine, focusing on its sheer ineffectiveness and concern for employee privacy rights in the home.⁵⁷ Professor Bierman suggests that the *Excelsior* doctrine and the derivative home visits doctrine operate under a “tremendous imbalance in organization opportunities.”⁵⁸ A union is not entitled to an *Excelsior* list until seven days after a representation election has been scheduled,⁵⁹ yet a representation election cannot be scheduled without a showing of interest of 30 percent of the employees in the unit petitioning for election.⁶⁰ This has led to additional criticism of

53. *Gen. Electric Co.*, 156 N.L.R.B. 1247, 1251 (1966). The employer held a “captive audience” speech during work time and denied the union the right to be present at the meeting. *Id.* Professor Bierman details this line of cases and states that *General Electric* was a test case attempting to overturn the precedent set forth in *Livingston Shirt* which denied unions the right to speak at an employer’s speech to employees. Bierman, *Home Visits*, *supra* note 9, at 7. The Board in *General Electric* avoided examining the captive speech precedent by citing to *Excelsior* as “an increased opportunity for employees’ access to communications.” *Gen. Electric.*, 156 N.L.R.B. at 1251; Bierman, *Home Visits*, *supra* note 9, at 7.

54. 156 N.L.R.B. at 1250. Unions have no right to reply to a captive audience speech. *Livingston Shirt Corp.*, 107 N.L.R.B. 400, 409 (1953).

55. *Plant City Welding & Tank Co.*, 119 N.L.R.B. 131, 133–34 (1957) (allowing unions to visit employee homes), *overruled on other grounds by* *Harborside Healthcare, Inc. v. NLRB*, 230 F.3d 206 (6th Cir, 2000); *Peoria Plastics Co.*, 117 N.L.R.B. 545, 546 (1957) (finding employer home visits per se coercive); *see also, e.g.*, Bierman, *Home Visits*, *supra* note 9, at 7–9 (discussing *Peoria Plastics*, *Plant City Welding*, *Excelsior*, and *General Electric* as the basis of the home visits doctrine).

56. Professor Bierman adopted the phrase in his article examining this line of cases. It serves as a method of referring to these four cases, which when read together, imply that unions will visit employees in their homes to communicate section 7 information. *See* Bierman, *Home Visits*, *supra* note 9.

57. Bierman, *Home Visits*, *supra* note 9; Bierman, *Reply*, *supra* note 9; Gely & Bierman, *supra* note 3.

58. Bierman, *Reply*, *supra* note 9, at 524.

59. *Excelsior*, 156 N.L.R.B. at 1239–40.

60. 29 C.F.R. § 101.18(a) (2001) states in pertinent part that “it being the Board’s administrative experience that in the absence of special factors the conduct of an election serves

Excelsior in that it provides “too little, too late” in the way of balance.⁶¹ Professor Bierman argues that the timing of the trigger for an *Excelsior* list has “contribute[d] to the general ineffectiveness of union home visits as an organizational ‘balancer.’”⁶²

3. Prior Reform Suggestions

In 1991, student author Randall White proposed extending *Excelsior* by making an *Excelsior* list available before the critical 30 percent prepetition showing of support is garnered for an election.⁶³ His proposed extension of *Excelsior* was aimed at balancing access for organizers against employer property.⁶⁴ However, more than a decade after White’s proposal to extend *Excelsior*, little has changed except for the further entrenchment of employer property rights and the pushing of organizers further from the meaningful communication of section 7 rights.⁶⁵

In the interest of employee privacy, Professor Bierman disagrees with White’s extension as a matter of degree, yet he agrees with the proposal in chief. He notes that reform is even more necessary due to further limitations placed on nonemployee access by the Supreme Court in *Lechmere Inc. v. NLRB*.⁶⁶ Authors Bierman and White offer numerous suggestions for the reform of *Excelsior* and both arrive at the same conclusion—the current standards governing labor representation elections are not effective and are unduly biased in favor of employers.⁶⁷

C. *Lechmere: What Remains of Nonemployee Access?*

The latest restrictions in nonemployee access to workers came from the Supreme Court in 1992 in *Lechmere, Inc. v. NLRB*.⁶⁸ The case involved union organizers trying to solicit workers at a Connecti-

no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees.”

61. Bierman, *Home Visits*, *supra* note 9, at 9; White, *supra* note 9 (commenting on Bierman’s article at 27 B.C. L. REV. 1 (1985)); *see also* Bierman, *Reply*, *supra* note 9, at 524–25 (replying to White’s article, *supra* note 9).

62. Bierman, *Home Visits*, *supra* note 9, at 9.

63. White, *supra* note 9, at 161–66.

64. *Id.*

65. Bierman, *Reply*, *supra* note 9, at 522.

66. *Id.* at 521–22.

67. Bierman, *Home Visits*, *supra* note 9, at 35; Bierman, *Reply*, *supra* note 9 at 532; White, *supra* note 9, at 167.

68. 502 U.S. 527 (1992).

cut shopping center.⁶⁹ They leafleted cars in a publicly accessible parking lot during times it was believed that employees owned most of the cars in the lot.⁷⁰ The employer ousted the organizers from the public parking lot and they were forced to move their operations to a nearby grassy area beside busy highway traffic.⁷¹ From there they recorded license plates that they gave to a contact at the Connecticut Department of Motor Vehicles in an attempt to identify workers for mailings and home visits.⁷² The union also placed advertisements in local newspapers but, despite its efforts, still failed to identify 80 percent of the employees.⁷³

The Board held that it was improper for the employer to exclude the organizers from the parking lot because there was no other reasonable means of communication available to inform workers of their section 7 rights.⁷⁴ The Supreme Court reversed the Board and the First Circuit's affirmation of the Board's decision,⁷⁵ holding that nonemployee union organizers should only be allowed access to an employer's property, even a parking lot, when workers are inaccessible to the union through traditional methods of communication.⁷⁶ Justice Thomas, writing for the Court, stated that, although the Board was given the power to accommodate section 7 rights and property rights, it had given too much weight to *Babcock's* "other reasonable means of communication exception."⁷⁷ The Court held that the exception was intended to be extremely narrow and that the union must show "unique obstacles" to communication.⁷⁸

69. *Id.* at 529.

70. *Id.* at 529–30.

71. *Id.* at 530.

72. *Id.*

73. *Id.* The union identified forty-one employees and obtained one signed authorization card.

74. *Lechmere, Inc.*, 295 N.L.R.B. 92, 94 (1988) (adopting the ALJ's cease and desist order).

75. *Lechmere, Inc. v. NLRB*, 914 F.2d 313 (1st Cir. 1990).

76. *Lechmere*, 502 U.S. at 540.

77. *Id.* at 539–40.

78. *Id.* at 541. *Babcock* stated that the exception should apply to workers whose living quarters place them beyond the reach of the union's message. *NLRB v. Babcock & Wilcox, Co.*, 351 U.S. 102, 113 (1956). *Lechmere* held this to apply only to very limited situations such as mining camps, logging camps, and remote mountain resort hotels. 502 U.S. at 539.

II. REFORM PROPOSAL

A. *Lechmere and Reasonableness*

The *Lechmere* Court found that “[a]ccess to employees, not success in winning them over, is the critical issue—although success, or lack thereof, may be relevant in determining whether reasonable access exists.”⁷⁹ Glossed over and possibly altogether forgotten is that it is not the union’s success in “winning them over” with which the Court should be concerned, but, rather, the success of maintaining meaningful accommodation by protecting the right of workers to hear the union’s message.⁸⁰ If access resulting in a meaningful balance were to be achieved, then “success or lack thereof” may or may not be relevant at all.

Lechmere sparked considerable criticism with its suggestion that it is reasonable for organizers to communicate with employees by standing in traffic with signs while recording license plates.⁸¹ On this point, *Lechmere* signaled an end to any theoretical accommodation of rights and to any effective communication of section 7 information resulting from the unreasonably narrowed *Babcock* exception. While *Lechmere* may have signaled an end to nonemployee access to employer property, new methods of communication can insert reasonableness into representation elections through the neutral mediums of private e-mail and the Internet.

B. *Reform Proposal: New Balancers*

There are numerous ways for technology and new forms of communication to transform representation elections. This Note will limit discussion to readily achievable methods.⁸² E-mail and the Internet are fast becoming the preferred methods of communication and sources of information for millions of Americans. Including employee private e-mail addresses as part of the *Excelsior* doctrine or

79. *Lechmere*, 502 U.S. at 540–41.

80. *Babcock*, 351 U.S. at 112.

81. *Lechmere*, 502 U.S. at 543 (White, J., dissenting) (stating it is “unpersuasive to suggest that the union has sufficient access . . . by being able to hold up signs from a public grassy strip adjacent to the highway leading to the parking lot”); Bierman, *Reply*, *supra* note 9, at 524–25; Estlund, *supra* note 3 at 326–33; Story, *supra* note 52, at 387–88.

82. The reader should keep in mind that there are incalculable permutations to be had with technological reforms.

requiring employers to post notice of organizing on web sites are easily attainable methods of representation election reform. Both would dramatically enhance the ability of workers to receive section 7 information about workplace representation.

The latest Census Bureau estimates show that as of August 2000, fifty-four million American households, comprising roughly fifty-one percent of the population, had one or more computers in the home.⁸³ This figure is up from 42 percent in 1998, reflecting an almost 10 percent increase in two years' time.⁸⁴ It is also estimated that more than two in five households had Internet access in the year 2000, which represents approximately 44 percent of American households.⁸⁵ Because of the increased availability of computers, Internet usage rates are becoming almost synonymous with computer ownership. This is reflected by the fact that in 2000, more than four of five households with a computer claimed Internet usage.⁸⁶

Parties concerned with methods of communication, particularly unions relegated to unreasonable methods of communication, will or have already taken notice of these facts.⁸⁷ In his *Lechmere* dissent, Justice White stated that "mere notice that an organizing campaign exists" is not enough to ensure that workers are aware of their section 7 rights and that "actual communication with nonemployee union organizers" is necessary "to vindicate section 7 rights."⁸⁸ Private e-mail and the Internet can facilitate actual dialogue and give employees more than "mere notice" of a campaign's existence. Congress, the Board, and reviewing courts should embrace the opportunity to use these new methods of communication in representation elections through reforms in legislation, administrative rulemaking, and adjudication.

83. U.S. CENSUS STATISTICS Aug. 2000, *Home Computers and Internet Usage in the United States* 1–2 fig. 1 (Issued September 2001), available at <http://www.census.gov> [hereinafter CENSUS REPORT]. Other sources report even higher rates. For example, one states a rate of sixty-three percent. Julia Angwin, *E-Business: Has Growth of the Net Flattened?*, WALL ST. J., July 16, 2001, at B1.

84. CENSUS REPORT, *supra* note 83, at 1–2.

85. *Id.* In 1997, less than one-half of the households with computers had Internet connections. *Id.*

86. *Id.*

87. *E.g.*, ARTHUR B. SHOSTAK, CYBERUNION: EMPOWERING LABOR THROUGH COMPUTER TECHNOLOGY (Daniel J.B. Mitchell ed., 1999) (offering suggestions for the use of the computer and the Internet by organized labor).

88. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 543 (1992).

1. Private E-mail Accounts

In addition to the information currently supplied in an *Excelsior* list, private e-mail addresses should be included.⁸⁹ Extending *Excelsior* to include private e-mail addresses would likely result in a higher proportion of employees receiving more timely notice of their section 7 rights. E-mail is an efficient and portable means of communication. Therefore, including e-mail addresses in *Excelsior* information offers unions a faster method of communication than traditional mail provides. In addition to the speed with which employees could receive section 7 information, e-mail addresses are not stationary and could provide an additional method of contact—one that does not usually change when a person moves to a new residence. This would increase the likelihood that more employees receive section 7 information because notwithstanding outdated address information, a union may be able to reach an employee through an e-mail address.

Conceivably, the use of private e-mail could also allow employers to maintain sovereignty over access to the electronic property of the corporate e-mail system by lessening the use of corporate e-mail for organizing.⁹⁰ If a union has the private e-mail addresses of employees there will be no need to “hack into” a corporate e-mail system to obtain corporate e-mail addresses for use in organizing.⁹¹ Moreover, employees are often compelled to use an employer’s e-mail system while working,⁹² but there is not usually a compelling reason for employees to check private e-mail while on the clock. Employers may assert that the use of private e-mail to conduct organizing will in fact occur during work time, yet this is an issue internal to the employer. In *E.I. du Pont de Nemours & Co.*, the Board affirmed a ruling against an employer who allowed employees to use its e-mail system to distribute information for non work related topics but had a ban on using e-mail to distribute union literature.⁹³ If an employer wants to institute a broad “no private e-mail policy” then, based on

89. Telephone numbers are not currently included. Keeping with this Note’s proposal, their inclusion should become mandatory.

90. Use of corporate email systems for organizing labor is a growing concern among employers. Malin and Perritt discuss the ease with which unions can gain access to corporate e-mail systems. See Malin & Perritt, *supra* note 10, at 39–40.

91. See *id.*; Stanton, *supra* note 11 (discussing employers’ concerns about unions obtaining corporate e-mail addresses).

92. Angwin, *supra* note 83 (stating that forty-two million workers have internet access at work, which represents “a twenty-three percent jump in one year”).

93. 311 N.L.R.B. 893 (1993).

the reasoning of *E.I. du Pont de Nemours*, it is required not to discriminatorily enforce such a policy.⁹⁴

a) *Implementation*

If an employer has an e-mail system, a union could be allowed a one-time use of that system to advise employees that representation is a right they are afforded under the NLRA. The message could instruct employees to reply to the union with their private e-mail accounts. In the alternative, existing rules already obligate employers to facilitate the collection of addresses and names of all members of the bargaining unit.⁹⁵ Adding e-mail addresses to the information supplied in the list would not pose an undue hardship on the employer. The same resources currently used to maintain payroll information could easily accommodate the change because employees could be asked at the time of hire to provide a private e-mail account as a part of their contact information.

b) *Avoiding Delay*

An important benefit of using private email addresses is that the union messages are not unnecessarily delayed. Employees would not have to wait for traditional mailings to be sent through the postal service before obtaining the information necessary to cultivate an informed choice for workplace representation. Additionally, the current method for checking the accuracy of a list causes more delay.⁹⁶

Unions are only guaranteed *Excelsior* information during the time leading up to an election. In contrast, the employer is able to campaign during work time and, by virtue of having the information, can send antiunion letters to employees at home.⁹⁷ Kate Bronfenbrenner concluded in her study of the effects of employer behavior in elections that “for every additional letter that the company mails out,

94. *Id.*; see also Stanton, *supra* note 11 at 663–64.

95. *Excelsior*, 156 N.L.R.B. at 1239–40.

96. Schlossberg and Scott suggest that organizers immediately check the accuracy of an *Excelsior* list upon receipt. They further suggest that the list be checked by mailing correspondence to the address given by the employer and waiting for returned mail to indicate which contact information was incorrect. SCHLOSSBERG & SCOTT, *supra* note 49, at 210.

97. The Board justified its holding in *Excelsior* based, in part, on the fact that employers already have employee home addresses for mailings and are able to communicate with employees at work. 156 N.L.R.B. at 1240.

the percentage of votes cast for the union declines by 2.5%.”⁹⁸ Thus, the practice of requiring unions to inform employees about their right to representation in a limited amount of time does great injury to the “laboratory conditions”⁹⁹ of the election campaign. Adding more delay through the postal system adds insult to that injury.

Unions must check *Excelsior* information through trial and error,¹⁰⁰ which is an exercise in the inefficient. If addresses supplied in the list are incorrect, the union must wait at least several days, and possibly more than a week, for organizational materials to come back indicating that an incorrect name or address was supplied.¹⁰¹ Even with the prevalent use of mail forwarding, if an employee no longer resides at the address provided, the union’s organizational materials are unnecessarily delayed as they are forwarded. This is simply inefficient in terms of time, energy, and mailing costs. Providing organizers with private e-mail addresses would enable the union to verify the accuracy of an address with the employee before mailing and allow more employees to receive notice of their section 7 right to representation.

c) *Other Efficiency Concerns*

If it is determined that e-mail communication is preferable to written communication in a given campaign, one electronic message could be sent to the bargaining unit and the e-mail addresses would be checked in a matter of minutes by a reply message indicating which, if any, addresses are incorrect. The organizer would then have the option to request that the employer supplement the e-mail address list with correct information or to ask the entire unit, via e-mail, as to whether a correct address is known.¹⁰²

Perhaps a correct e-mail address, phone number, or traditional address could be provided for every member of the unit. Giving employees the option to add a personal e-mail address to the infor-

98. Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW* 75, 82 (Sheldon Friedman et al. eds., 1994).

99. A discussion of the “laboratory conditions” doctrine is beyond the scope of this Note. It refers to the pre-election rules that do not rest on unfair labor practice prohibitions. For an overview of the doctrine see *THE DEVELOPING LABOR LAW*, *supra* note 5, at 337–75.

100. SCHLOSSBERG & SCOTT, *supra* note 49, at 210.

101. Many times employers will not know that information is incorrect, yet some employers deliberately provide false information. *Id.* at 212.

102. See *Technology Services Solutions*, *infra* notes 125–36 and accompanying text. This is exactly the inquiry the ALJ suggested be done over the employer’s e-mail system.

mation supplied in an *Excelsior* list would radically alter their ability to gain information about union representation. Other than the dramatic difference it would make to employees due to more timely receipt of section 7 information, it would have little or no effect on the existing rules of nonemployee access to employer property because organizers would not have to enter an employer's property.¹⁰³

2. Internet Web Sites

The second readily available reform proposal is the use of Internet web sites at the inception of a campaign. The use of Internet web sites in organizing campaigns is not a new idea; most international unions and many locals have web sites.¹⁰⁴ A union, with detailed information specific to an employer, could create a web site, or a link, for a particular group of employees to inform them of their section 7 right to representation.¹⁰⁵ Problematic, however, is that no web site can communicate section 7 information unless employees are given notice of the web site's existence. Employers should be required to post conspicuous notices advising employees of a web site's existence. Further, if an employer has an e-mail system, it should allow a union to send out a one-time notice through its corporate system advising employees of the web site's existence.¹⁰⁶ An employer would still be free to clarify its corporate Internet policy and, if appropriate, instruct employees to only visit organizing sites during nonwork time, preferably at home. Additionally, employers could block access from company computers to the organizing site by using the company's

103. See *supra* notes 22–33 and accompanying text.

104. The AFL-CIO web site contains links to the sites of its affiliates. See <http://www.aflcio.org>. The Communications Workers of America, and the International Brotherhood of Electrical Workers have great organizing materials and links to the sites of many of their locals. See <http://www.cwa-union.org>; <http://www.ibew.org>. The United Mine Workers of America web site offers a map of the United States the user can click on to receive organizational materials from the appropriate affiliate. See <http://www.umwa.org>.

105. SHOSTAK, *supra* note 87, at 43, 46–47 (offering similar suggestions in hypothetical examples).

106. Peter DeChiara suggests that NLRA rights should be posted through government mandated posters as is done for other workplace laws such as wage and hour protections, workplace safety, and antidiscrimination laws. Peter D. DeChiara, *The Right to Know: An Argument for Informing Employees of Their Rights Under the National Labor Relations Act*, 32 HARV. J. ON LEGIS. 431, 432 (1995). Alan Zmija proposes that the government publish and distribute informational pamphlets advising workers of their NLRA rights as a counterbalance to the rules of access. Alan L. Zmija, *Union Organizing After Lechmere, Inc. v. N.L.R.B.—A Time to Reexamine the Rule of Babcock & Wilcox*, 12 HOFSTRA LAB. & Emp. L.J. 65, 132 (1994). The reform suggested in the Note could achieve some of the benefits of both proposals through an electronic notice procedure.

firewall. By simply giving notice of a web site, many of the rules constituting the current access doctrine could be rendered unnecessary because the union could conduct a substantial amount of its section 7 protected communication without having to set foot on the employer's property.

A variation of this proposal may already be occurring in the retail industry where organizers "blitz" an establishment with printed cards directing employees to a web site the employee might find of interest.¹⁰⁷ Posting notice of an organizing web site could promote on-line discussion and debate,¹⁰⁸ while simultaneously eliminating the need for section 7 rights to be covertly communicated to workers through the "blitz" approach. By adopting a web site notice procedure, employees would benefit from a discussion about the section 7 right to representation and employers could avoid having nonemployee organizers on their property.¹⁰⁹

C. *Eliminating the Geographic Limits of Excelsior*

Excelsior recognized that it is difficult, if not impossible, to obtain contact information for all members of a bargaining unit because "in the absence of employer disclosure, a list of names and addresses is extremely difficult if not impossible to obtain."¹¹⁰ Yet mere possession of *Excelsior* information is often not enough to result in an informed electorate. A name and address will not help a great deal in situations where employees do not live close together, such as in suburban settings. The dissemination of section 7 information is also frustrated when the Board makes a bargaining unit determination beyond that for which contact information was supplied in an *Excelsior* list.¹¹¹

107. SHOSTAK, *supra* note 87, at 47.

108. Professor Bierman suggests incorporating workplace debates as part of an extensive overhaul of the representation election. See Bierman, *Home Visits*, *supra* note 9, at 33-34; Gely & Bierman, *supra* note 3, at 183. While in-person debates would likely be more informative and accurate, there is no indication that they would be readily adopted as a reform. Facilitating a web site notice proposal could achieve some of the benefits of a debate reform as it can easily evolve into a less intrusive "cyber-debate."

109. In addition to retail workers, hospital workers are also under constraining access rules. The proposed reform would prove useful in informing them of their section 7 right to representation. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978).

110. *Excelsior Underwear Inc.*, 156 N.L.R.B. 1236, 1241 (1966).

111. Either party to an election can petition to obtain clarification of a bargaining unit. THE DEVELOPING LABOR LAW, *supra* note 5, at 411-12. The power to determine the "appropriate" unit ultimately rests with the Board. 29 U.S.C. § 159(b) (2002).

Critics of the home visits doctrine argue that, as a balance, *Excelsior* has increasingly become ineffective because workers are becoming more decentralized.¹¹² “[T]he home visits doctrine appears to be based on a model of economic life that suggests that employees live in close proximity to the workplace.”¹¹³ Even the *Babcock* Court gave considerable weight to the fact that the employees lived in small towns within a hundred miles of the work site.¹¹⁴ No longer can there be the presumption that a workforce operates from a central location, lives in a nearby small town, or even reports to work at all because many workers can now work from home.¹¹⁵ Yet the doctrines of access and *Excelsior* continue to operate under such paradigms. The introduction of private e-mail and Internet web sites into representation elections would lessen the gap in access created by a suburbanized, decentralized workforce.

Another impasse in communication occurs when bargaining units are large or when they are expanded beyond the scope that a union canvassed with section 7 information. This can present a huge obstacle to organizers who must reach large numbers of employees in a short time. The Act states that the extent of union organizing shall not be determinative of whether a unit is appropriate.¹¹⁶ Although the power ultimately rests with the Board, some employers use the unit clarification petition as a defeat tactic with the understanding that it is harder to organize a larger or modified unit.¹¹⁷ Examining this trend, Bronfenbrenner concludes that when other variables are controlled, “the probability of the union winning an election declines by as much as 15% when the unit is changed after the petition is filed.”¹¹⁸ Adopting the reform suggested in this Note would facilitate better communication with larger units and render a petition to increase unit size a useless employer tactic. Unions would have better opportunities to communicate section 7 rights to all employees determined to be in a larger or expanded bargaining unit.

112. Gely & Bierman, *supra* note 3, at 155–57.

113. *Id.* at 156 (citing *Babcock* and stating that the *Lechmere* court “flatly refused to consider the present day context in which the access question arose”).

114. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 106–07 (1956).

115. Broder, *supra* note 10, at 1639–42 (stating that “going to work” may be an “early casualty of the Digital Revolution”).

116. 29 U.S.C. § 159 (c)(5).

117. SCHLOSSBERG & SCOTT, *supra* note 49, at 217.

118. Bronfenbrenner, *supra* note 98, at 78–80.

D. Additional Improvements to Excelsior and Access

1. Privacy

The home visits doctrine requires employees to sacrifice some level of privacy and autonomy in favor of their employer's property rights.¹¹⁹ Providing unions with private e-mail addresses or giving notice of a web site would enable an employee to determine the forum of campaign contact, be it face-to-face, on the telephone, or in electronic format. If an employee indicates that electronic contact is preferred, then a home visit or a telephone call could be avoided. Employees could be assured of receiving section 7 information without having to sacrifice their home privacy in favor of their employers' property interests.

2. Employee Self-Determination

In addition to protecting employee privacy in the home through a decreased emphasis on home visits and telephone calls, this proposed reform also allows an employee to regulate the actual amount of electronic communication received. The employee who disfavors representation will not likely respond to the one-time use option. Furthermore, when contacted through private e-mail supplied in an employer provided list, the employee who disfavors representation may advise the sender of his or her adverse position and thwart future contact by "blocking" messages from the account.¹²⁰ Both the use of private e-mail and an informational web site would improve the position of the employee in organizing efforts because an undecided employee, and one who favors a union's message, will have more timely information for their decision. In contrast, an employee who resents the presence of organizers will be better able to control the flow of information.

3. The Image of a Competent Representative

Section 7 gives employees a right to the representation of their choice. Those unaware of this right become knowledgeable through a

119. This is Professor Bierman's principal argument against continuation of the home visits doctrine because he perceives it to be an invasion of the home. Bierman, *Home Visits*, *supra* note 9; Bierman, *Reply*, *supra* note 9; Gely & Bierman, *supra* note 3. The proposal in this Note would serve to ease some of Bierman's concerns about protecting home privacy.

120. Most e-mail systems can be set to block messages from a sender.

union seeking to be their representative. A positive image is not conveyed if an entity seeking to act as a representative must stand in traffic and wave a sign to communicate with certain employees. Aside from the actual loss of section 7 information during its transmission in this manner, the psychological impact of such a transaction undoubtedly taints what information is absorbed. Technological reforms could reinforce the union's position of competently representing the employee's interest.

The current practice of excluding nonemployee union organizers from employer property places additional value on the employer's message because the right to exclude organizers is equal to an at-work silencing of the union's message.¹²¹ The value of giving information to the employee about section 7 rights is, by implication, viewed as subordinate to the right of the employer to exclude the organizer.¹²² This image is not consistent with accommodating the interests of all parties as set forth in *Babcock*.¹²³

If, through reforms similar to those proposed in this Note, organizers are able to present a strong image, as one on par with the employer, then employee section 7 rights will more likely come to fruition. The employer could remain sovereign over its property while not lessening the image of the union as a competent representative. The union could have some level of balance in access, and employees would receive timely information about their choice for workplace representation.

4. Correcting the "Too Little, Too Late" Problem

The web site notice proposal or the use of private e-mail addresses can both be utilized to correct the "too little, too late" problem which, according to Professor Bierman, is inherent in the *Excelsior* doctrine.¹²⁴ Congress or the Board could require an employer to post the notice of an organizing web site, or send out a one-time e-mail, when a bona fide union expresses interest in organizing a workforce. As such, the "balance" of the *Excelsior* doctrine could be achieved through extension into the prepetition stages of an election.

121. White, *supra* note 9, at 150 ("[o]n 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").

122. *Id.*

123. NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956).

124. Bierman, *Home Visits*, *supra* note 9, at 9-10; Gely & Bierman, *supra* note 3, at 180; White, *supra* note 9.

This extension could achieve balance without major disruption to the existing doctrine of property access because employees could receive notice of their section 7 rights without the need for nonemployee union organizers to enter the property of employers.

III. CASE EXAMPLE: *TECHNOLOGY SERVICES SOLUTIONS*¹²⁵

Technology Services Solutions (“*Technology Services*”) is a series of administrative rulings and Board decisions involving the same employer and Local 111 of the International Brotherhood of Electrical Workers.¹²⁶ This set of rulings illustrates the need for technological reform in representation elections and, as such, requires closer examination into the context of extending the *Excelsior* doctrine to include private e-mail addresses.¹²⁷ The situation that gave rise to *Technology Services* was a function of a decentralized work force and the resulting geographic obstacles to organizing, combined with the problem of an expanded bargaining unit.¹²⁸

A. Background

Originally, two Colorado-based bargaining units of sixty-three computer service technicians participated in a representation election.¹²⁹ The employer requested a modification to the bargaining unit and the Board found that the appropriate unit¹³⁰ consisted of one

125. Malin, Perritt, and Wilcox examine this case to prove the point that the Board has just begun the long task of incorporating technology into the representation election. Malin & Perritt, *supra* note 10, at 22–24, 33, 37, 50–52; Wilcox, *supra* note 10, at 266 (suggesting private e-mail will be an issue, yet not examining it as a reform proposal).

126. *Technology Services* has been before the Board three times and been twice remanded to the ALJ for reconsideration. The initial Board decision, at 324 N.L.R.B. 298, was remanded to an ALJ and critiqued by commentators. See Malin & Perritt, *supra* note 10, at 50–52. Since that commentary, the case was remanded to the ALJ and the Board partially affirmed that ruling. 332 N.L.R.B., No. 100, slip op. at 1 (Oct. 31, 2000). Most recently, the union filed a motion to modify the notice procedure resulting from the partial victory won in the second Board decision. 334 N.L.R.B., No. 18, slip op. at 1 (May 24, 2001).

127. As previously discussed, there are many ways for technology to reform representation elections. While private e-mail addresses represents one solution, other technology proposals could possibly work just as effectively.

128. 332 N.L.R.B. 1., No. 100, slip op. at 2.

129. *Id.*

130. Section 159(b) states that “to assure to employees the fullest freedom in exercising the rights guaranteed by [the Act],” the Board is to determine in each case what is an appropriate unit. 29 U.S.C. § 159(b) (2000). The proviso of section 159(b) prohibits the inclusion of professional employees within a unit of nonprofessional employees, the disruption of a prior Board determination of appropriateness, and the inclusion of guards within a unit of employees not obligated to protect an employer’s property. *Id.* Other than these guidelines, the Board is

covering all of the employer's 236 employees in its south-central region, which covered the expanse of eight states.¹³¹ The union and the General Counsel invoked, by analogy, the inaccessibility exception to the general access rule of *Lechmere* and requested an *Excelsior* type list of the names and addresses of the new members of the expanded unit.¹³² The Board denied the request stating that the General Counsel "fell short of proving his contention that the Union had no reasonable means of communicating with the bargaining unit employees unless [provided with the list]."¹³³

The Board affirmed the ruling of the Administrative Law Judge ("ALJ") who made suggestions in his decision as to how the union organizer could have communicated with the expanded unit. In doing so, he reasoned that if the organizer had employed his suggested methods, there would have been no need to invoke the exception to *Lechmere*.¹³⁴ The ALJ stated that the organizer should have asked more of the original unit members, such as whether they had the names or contact information for employees elsewhere in the region.¹³⁵ He also suggested that the organizer should have made more extensive use of a particular prounion employee to solicit over an employer's e-mail system.¹³⁶ His final suggestion was that the organizer should have made contacts through the prounion employees who had some face-to-face contact during training sessions or at times when they visited centralized service facilities.¹³⁷

B. *A Technological Solution to Technology Services*

Manifest in *Technology Services* was the great lengths to which the Board was willing to go in avoiding an extension of *Excelsior* into the prepetition stage of the campaign.¹³⁸ Professors Martin Malin and Henry Perritt surmised of the first *Technology Services* decision that,

given wide discretion to make the determination of an appropriate unit on a case by case basis. THE DEVELOPING LABOR LAW, *supra* note 5, at 448–50.

131. *Tech. Servs.*, 332 N.L.R.B., No. 100, slip op. at 2. The unit determination was made in an unpublished opinion. The unit was expanded to include Colorado, New Mexico, Oklahoma, Kansas, Missouri, Arkansas, and parts of Nebraska and Wyoming.

132. *Id.* at 2.

133. *Id.*

134. *Id.* at 22–28.

135. *Id.* at 4.

136. *Id.* at 14.

137. *Id.* at 15–17, 24–27.

138. The impending need to address e-mail, the Internet, and decentralized workforce organizing was also avoided.

in the absence of *Excelsior* information for the entire unit, the alternatives left to the union by the ALJ's decision would have solicitation occurring either via the employer's computer system or during work time.¹³⁹ This critique signals caution because an employer faced with organizing methods such as these will likely raise a challenge to prevent unions from traipsing over its ostensible property rights in its computer systems and seek to prevent the solicitation of workers during work time.¹⁴⁰

Implementation of a reform such as the one proposed in this Note would remedy some of the inconsistency in the *Technology Services* situation. Providing the organizer with the private e-mail address of the original unit of employees would have enabled the organizer to communicate effectively with a decentralized workforce and the expanded unit, while allowing the existing constraining property rights regime to remain unchanged.¹⁴¹ By utilizing private e-mail addresses or having the employer give notice of a web site to its entire workforce, an organizer could likely communicate with an expanded unit without employing methods involving an employer's e-mail system or forcing work time solicitation.

C. *The Other Reasonable Means Exception*

Not only does *Technology Services* provide a case for adding private e-mail addresses to the *Excelsior* doctrine and using web site notices, it also offers an opportunity to examine the limits of technological reform. Not every worker will have access to the Internet and using new methods of communication could run the risk of further limiting the "other reasonable means to communication" exception to the *Babcock-Lechmere* doctrine.¹⁴² The Board and courts may surmise that, because unions have an electronic method of communicating with employees, preserving traditional methods is no longer necessary.

139. Malin & Perritt, *supra* note 10, at 52. Their article provides an extensive examination of the ALJ's rulings and the Board's review of them. Such detail is not warranted in this Note. Subsequent rulings remain consistent on the points critiqued, in that they leave much room for controversy.

140. See THE DEVELOPING LABOR LAW, *supra* note 5, at 87-94, 98-104, for a discussion of these blackletter doctrines regarding access and solicitation.

141. The employees of Technology Services Solutions were computer service representatives and many were former employees of IBM; it is highly probable that many if not most of these employees had a private e-mail account, or could have easily created one. *Tech. Servs.*, 332 N.L.R.B., No. 100, slip op. at 2.

142. See *supra* notes 28-33 and accompanying text.

Even with the potential introduction of technology into the representation election, there should be no further limit placed on nonemployee access or the exception. As widely popular as e-mail and the Internet are, it would be foolish to assume that all workers will have access to,¹⁴³ or will use, these mediums.¹⁴⁴ Unions may stand to gain some degree of access to a certain percentage of workers through the use of private e-mail and web site notice. However, just because unions would stand to gain a new method of contact they should not be prevented from using traditional methods. For example, e-mail, like a phone call, must be received to be effective and, thus, its availability should not supplant doctrines that uphold face-to-face contact.¹⁴⁵

As for the exception doctrine, *Lechmere* itself leaves little room for the *Babcock* exception to survive and, after *Technology Services*, it is now hard to imagine further limitations on organizing than those suggested in that decision. Thus, as a practical matter, even further limiting the *Babcock-Lechmere* exception may not result in any more harm to employee section 7 rights. Using private e-mail addresses and Internet web sites would practically help workers receive more section 7 information while running the risk of further narrowing an unhelpful exception.

IV. CONCLUSION

This reform proposal does not solve the problem of the whole, but lessens the harm to the parts, in that more information is disseminated while giving extreme deference to an employer's interest in property. Forcing unions to work with limited methods of communi-

143. See CENSUS REPORT, *supra* note 83. The Census statistics cite considerable differences in Internet access and computer ownership for different races. For example, Caucasians and Asian and Pacific Islanders reported 57.7% and 66% usage rates, respectively; however, African-Americans only reported 37% and Hispanics reported 35.3%. *Id.* at 7 tbl. C "Access to a Home Computer and use of the Internet at Home by Adults 18 Years and Over: August 2000."

144. Not all Americans readily adopt new technology. It took more than thirty years for televisions to reach the current 98% penetration rate among U.S. households and telephones lingered at 35% from 1920 to 1950 until finally reaching 90% in the 1970s. However, the Internet, now around 57%, has grown faster than many technologies. See Angwin, *supra* note 83.

145. Miles Macik argues that e-mail should not be characterized as solicitation or distribution and should be completely taken out of the *Lechmere/Babcock* context. Miles Macik, "You've Got Mail." *A Look at the Application of the Solicitation and Distribution Rules of the National Labor Relations Board to the Use of E-mail in Union Organizing Drives*, 78 U. DET. MERCY L. REV. 591, 613-15 (2001).

cation serves no party's interest, except that of an employer hostile to union organizing. The addition of private e-mail addresses and web site notice postings into the current regime would reflect the needs of contemporary society and do little injury to existing doctrine, save a more informed electorate.

At its inception, the Board stated that it would defer reconsideration of the rules of access to employees with section 7 information until the "effects of *Excelsior* become known."¹⁴⁶ After standing unchanged for more than three decades—the effects are known. *Excelsior* fails to provide section 7 information to employees or balance nonemployee access.¹⁴⁷ For the sake of American workers, it is time for reform. A situation such as *Technology Services* will undoubtedly arise again and the Board must not stand down from the opportunity to embrace new modes of communication as a way to more fully effectuate the right of employees to receive information about their right to workplace representation.

It has been said that "[t]he reasonable [person] adapts to the world: the unreasonable [person] persists in trying to adapt the world to [him or herself]. Therefore all progress depends on the unreasonable [person]."¹⁴⁸ If it is reasonable for union organizers to effectuate the section 7 rights of workers by adapting to the suggestion that they advise workers of the right to representation while standing on narrow strips of grass found between lanes of rushing traffic—then no progress is to be made in this area. Yet, if Congress, the Board, and reviewing courts succumb to the voice of the "unreasonable" person who insists that the same information can be communicated in a more respectable manner—then representation elections will progress into the twenty-first Century with dignity.

146. General Electric Co., 156 N.L.R.B. 1247, 1251 (1966).

147. E.g., Bierman, *Home Visits*, *supra* note 9; Gely & Bierman, *supra* note 3; White, *supra* note 9.

148. George Bernard Shaw, *Maxims for Revolutionists*, in *MAN AND SUPERMAN* 729, 739 (Dodd, Mead & Company 1962) (1903). In keeping with progress, an alteration of this quote required the use of inclusive language.