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REPLY

JUSTICE THOMAS AND LECHMERE, INC. v. NLRB: A REPLY TO PROFESSOR ROBERT A. GORMAN

Leonard Bierman*

I. INTRODUCTION

In a recent article in this journal Professor Robert A. Gorman attacked the U.S. Supreme Court’s January 27, 1992 decision in the case of Lechmere, Inc. v. NLRB. Apart from the important principles regarding union access to employer property which were announced by the high court in that decision, the court’s opinion received considerable attention because it was the first majority opinion authored by the court’s controversial new member, Justice Clarence Thomas.

Justice Thomas’s opinion in the case, which held that employers can broadly exclude non-employee union organizers from their property, was quickly hailed in some quarters as representing the high Court’s positive protection of private property rights and the sensitivity of the Court’s newest member to such rights. Professor Gorman,

* Associate Professor, Graduate School of Business, Texas A&M University. The author served as a “special assistant” to Justice Thomas when he was Chairman of the EEOC. The views expressed herein, however, in no way reflect those of either Justice Thomas or the EEOC. The author thanks Professors Reginald Alleyne, Rafael Gely and Clyde Summers for their assistance in the preparation of this article.

3. See id.
5. 112 S. Ct. at 843-50.
7. Id.; see also Lab. Rel. Week (BNA), Feb. 12, 1992, at 149-50 (statement of John
however, did not see the decision in such a favorable light.

Professor Gorman states that Justice Thomas's opinion in *Lechmere* erred on a number of counts. The decision primarily concerns the rights of non-employee union organizers to access employer property. Professor Gorman argued that the *Lechmere* opinion erred by limiting its analysis to whether or not non-union organizers had alternative means of reaching the workers. Professor Gorman agreed with Justice White's dissenting opinion in the case which upheld the National Labor Relations Board's (NLRB) "accommodation" approach to the issue.

Under the NLRB approach, a variety of factors are considered when determining whether outside union organizers may gain access to employer property, including, the degree of "openness" or "closedness" of the property involved. Professor Gorman supported this line of analysis, arguing that a shopping mall parking lot of the kind in the *Lechmere* case is "freely accessible" to the public and should be accorded less "property rights" protection than, for instance, the inside of a somewhat secluded manufacturing plant.

Professor Gorman also chastises Justice Thomas's opinion for its failure to defer to the NLRB's "35 years of accumulated experience in addressing the issue of non-trespassory communication by union organizers," particularly in light of the Supreme Court's decision in *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, which mandates general judicial deference to agency action. Professor Gorman disputed Justice Thomas's assertion that the relevant statutory language was sufficiently clear with regard to the rights of non-employee union organizers so as to obviate the need for judicial deference to the NLRB, calling this assertion by Justice Thomas, "little short of mind-boggling." According to Professor Gorman, Congress in the National Labor Relations Act "says not a word remotely bear-

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8. See Gorman, supra note 1, at 10-14.
10. This approach was most directly enunciated by the NLRB in the case of *Jean Country*, 291 N.L.R.B. 11 (1988).
11. See Gorman, supra note 1, at 13.
12. See id. at 14-18 & n.68.
15. Gorman, supra note 1, at 15.
ing upon the issue of employer private-property rights.” 16 Thus, in Professor Gorman’s opinion, 17 the NLRB’s policy and factual determinations in this area should be entitled to great deference. Gorman further argues that if the Supreme Court wanted to reject the Board’s “balancing” approach, they should have remanded the case to the NLRB for reconsideration in light of the Court’s single-factor analysis rather than simply proceeding to evaluate the facts on its own. 18

What is striking, though, about both Professor Gorman’s analysis of, and Justice Thomas’s opinion in Lechmere, is the lack of broad historical context and regulatory perspective. While both the Thomas opinion 19 and Gorman critique 20 generally trace the history of direct union access to employer property, neither examines the Lechmere decision in the context of the broad mosaic of rules governing union organizing, specifically, the “home visits doctrine”, 21 the Excelsior doctrine, 22 and the rights of “off duty” employees. 23 Moreover, neither Justice Thomas nor Professor Gorman discuss the proposed Labor Law Reform Act of 1977-78 which passed the U.S. House of Representatives but was successfully filibustered in the U.S. Senate, and which addressed some of the various issues at bar in Lechmere from a number of perspectives. 24

The Lechmere decision has important implications on the “home visits doctrine”, the Excelsior doctrine, and on the rights of “off duty” employees. Lechmere puts pressure on Congress to again consider the reforms which were part of the proposed Labor Law Reform Act of 1977-78. This response is an attempt to develop some of the important implications of the Lechmere decision which were not meaningfully addressed by Professor Gorman in his critique of Justice Thomas’s opinion.

16. Id.
17. Id. at 17.
20. Gorman, supra note 1, at 3-7.
II. HISTORICAL CONTEXT

A. Republic Aviation, Babcock, "Captive Audiences" and Nutone

The rules governing labor organizing at the workplace are fraught with an inherent underlying conflict between the rights of employees to form, join, or assist labor organizations under section 7 of the National Labor Relations Act and the right of employers as property owners and managers. One of the key early cases addressing this conflict is the United States Supreme Court's 1945 decision in Republic Aviation Corp. v. NLRB. In this case the Court made a sharp distinction between workplace organizing during work time and that conducted during nonwork time. The Court held that employer rules prohibiting union activity during work time are presumptively valid, while such rules when applied to nonwork time are presumptively invalid.

The Supreme Court in Republic Aviation did not make any distinction between employee organizers and non-employee organizers, and the NLRB subsequently afforded both groups broad freedom to organize at the workplace during nonworking hours. The Court, however, in its seminal decision eleven years later in NLRB v. Babcock & Wilcox Co., sharply reversed the NLRB on this issue and strongly differentiated between the workplace organizing rights of employees and non-employee or outside union organizers. Babcock is the precedent directly underpinning Justice Thomas's opinion in Lechmere.

The Supreme Court in Babcock held that employers were free to deny access to their property and the workplace to outside/non-employee union organizers so long as "reasonable efforts through other available channels of communication" would enable the union to

26. See generally Leonard Bierman, Toward A New Model For Union Organizing: The Home Visits Doctrine and Beyond, 27 B.C. L. REV. 1, 3-8 (1985).
27. 324 U.S. 793 (1945).
28. Id. at 801-05 & nn.8 & 10.
31. Id. at 112-14.
reach employees with its message. The Court in Babcock emphasized that in that case a large percentage of the company’s employees lived in a nearby small town, and as a result those employees were reasonably accessible to the union at their homes and through other means, thus obviating the need for union access to employer property.

The Republic Aviation and Babcock cases set forth the proposition that employers can develop general rules prohibiting on-site solicitation by outside union organizers, and any union solicitation during working time. They do not address, however, the question of how these rights might be impacted by an employer’s decision to wage a vigorous campaign against a union at the work-site during working time. This question has arisen most frequently in the context of an employer’s decision to give a “captive audience” speech, i.e., an anti-union speech given to all gathered employees at the workplace during working time. Various observers have characterized such speeches as perhaps the most potent weapon in an employer’s anti-union arsenal.

For this and related reasons, the NLRB has at times in the past found such “captive audience” speeches to violate the Labor Act or required employers who choose to make such speeches to give the requisite union the opportunity to come onto company premises to reply. Later NLRB cases, though, have denied unions any workplace reply to employer speeches of this kind, and this general approach was affirmed by the U.S. Supreme Court in its 1958 decision in NLRB v. United Steelworkers (“Nutone”). In Nutone, the Supreme Court held that an employer can lawfully enforce a workplace no-solicitation rule against unions while at the same time “violating” this policy by engaging in anti-union solicitation at times and places prohibited by the rule. Citing Babcock, the Court

33. Babcock, 351 U.S. at 112.
34. Id. at 106-07.
35. See Penn Comment, supra note 24, at 780 (citing statement by Professor Howard Lesnick); see also Robert Lewis, The Law and Strategy of Dealing with Union Organizing Campaigns, 25 LAB. L.J. 42, 46 (1974).
36. See, e.g., Clark Bros. Co., 70 N.L.R.B. 802, 804-05 (1946), enforced, 163 F.2d 373 (2d Cir. 1947).
38. See, e.g., Livingston Shirt Corp., 107 N.L.R.B. 400 (1953).
40. Id. at 358, 364.
41. Id. at 363.
noted that under the National Labor Relations Act unions have other available avenues of communication, and they are not “entitled to use a medium of communication simply because the employer is using it.”42 However, Justice Felix Frankfurter writing for the Court in Nutone, recognized that employers were not free to implement rules in this manner where a substantial “imbalance in the opportunities for organizational communication” exist.43

B. The Home Visits Doctrine

The NLRB in the late 1950’s, in apparent partial response to some of the U.S. Supreme Court’s decisions limiting union organizational opportunities, developed its so-called “home visits doctrine.” Under this doctrine, unions are allowed to campaign by visiting employees at their homes, while employers are prohibited from engaging in this method of campaigning.

The Board’s differentiation between unions and employers in this regard rests on two prongs. First, the NLRB has found employer campaign visits to employee homes to be *per se* coercive,44 and has stated that unions are never in the position of “control over tenure of employment and working conditions” of the kind which imparts the coercive effect to employer home visits.45

Second, and far more significantly, the NLRB has also held that unions should be allowed to visit employee homes while employers are not so permitted in order to offset the lack of union access to employees at the workplace and in other contexts.46 It is this latter prong concerning the need for union home visits to offset employer organizational advantages which has over time emerged as the major underlying theme of the “home visits doctrine.”47

C. Excelsior/General Electric

The notion of union home visits as an “organizational counterbalance” to employer advantages in reaching employees at the workplace was further solidified by the NLRB in its famous 1966 holdings in

42. Id. at 364.
43. Id. at 362.
46. See id. at 133.
47. See generally Bierman, supra note 26.
the companion cases of *Excelsior Underwear, Inc.* and *General Electric Co.* In *General Electric*, unions sought greater access to employees at the worksite, particularly the ability to directly respond to employer "captive audience" speeches. The Board, however, while refusing to grant unions such workplace access, did hold in *Excelsior* that unions would within seven days of Board's ordering of a representation election be provided with a list of names and addresses for all employees in the given election unit.

The *Excelsior* decision was clearly intended to facilitate the ability of unions to contact employees at home, thereby offsetting employer organizational advantages at the workplace. Yet the question remains whether the ability to engage in home visits really offsets employer communication advantages at the workplace. In *General Electric*, the NLRB ruled that broader union organizational access issues should be deferred “until after the effects of *Excelsior* become known.” Yet, it is now over a quarter-century since these cases were decided, and the NLRB has never squarely reconsidered this issue.

D. Proposed Labor Law Reform Act of 1977-78

Congress did attempt to step into the breach left by the *Excelsior* and *General Electric* cases in the proposed Labor Law Reform Act of 1977-78. The introduced legislation contained various proposals designed to broaden union organizational access to employees. Among these proposals was legislative language which would have essentially overturned the Supreme Court’s decision in *Nutone* and provided outside union organizers with the opportunity to respond at the worksite to all employers workplace anti-union campaigning, as well as language permitting union workplace replies to employer

50. Id. at 1250.
52. Id. at 1246 n.27.
55. See supra note 24 and accompanying text.
56. See Bierman, supra note 26, at 20-22.
57. Id.
“captive audience” speeches. In tandem with these legislative proposals calling for increased union access to employees, Republican members of the House of Representatives offered an amendment to overrule the NLRB’s “home visits doctrine” and allow employers to campaign by visiting employees at their homes. Some House Democrats chastised this proposal as the “trick or treat” amendment, while other members of Congress questioned whether either unions or employers should be permitted to campaign by visiting employees at their homes. Ultimately, the proposed “home visits” amendment was tabled and the entire proposed legislation died on June 22, 1978 when Senate Democrats failed to break a filibuster by Senate Republicans on the legislation.

III. LECHMERE AND UNION ORGANIZATIONAL OPPORTUNITIES

The Supreme Court’s strong endorsement of the Babcock & Wilcox distinction between employee and non-employee organizers in Lechmere sharply limits the abilities of unions to reach employees at the worksite. While it is not completely unknown for unions to have experienced outside union organizers “hire into” a targeted workplace, absent such “trojan horses” the Lechmere decision essentially prevents non-employee union organizers from reaching employees at the workplace. Instead, unions must reach employees outside the worksite, with visits to employee’s homes being among the most important of these alternative union campaign methods. The question then becomes whether such alternative union campaign methods are truly effective, or whether they, as Professor Gorman might put it, really “trivialize” the section 7 right of employees to learn about the union.

58. Id.
59. Id. at 22-23.
60. Id. at 22.
61. Id. at 23.
62. Id.
63. Id. at 22; see also Penn Comment, supra note 24, at 795.
65. See Bierman, supra note 26, at 30; see generally Judd H. Lees, Hiring the Trojan Horse: The Union Business Agent as a Protected Applicant, 42 LAB. L.J. 814 (1991).
66. See Gorman, supra note 1, at 20.
IV. LECHMERE AND THE "HOME VISITS DOCTRINE"

One obvious implication of the Supreme Court's decision in *Lechmere* is to further increase the importance of the "home visits doctrine" and the importance of the union home visit as an organizational "counterbalance" to employer opportunities to reach employees at the workplace. Indeed, the Supreme Court in *Lechmere* specifically discusses attempts by the instant union to make home visits, and notes that unions can reach employees via home visits instead of reaching them at the workplace (which the *Lechmere* decision forcefully prohibits). Practitioners commenting on the *Lechmere* decision have also directly noted that the decision is going to lead to a greater emphasis on union home visitation, although Professor Gorman surprisingly fails to discuss this issue in his piece.

The "home visits doctrine" is flawed and needs to be overturned by Congress. Thus, to the extent the Supreme Court's decision in *Lechmere* further solidifies this doctrine the decision is also flawed and needs to be overturned. Moreover, as one leading management labor lawyer has put it, while Justice Thomas's opinion in *Lechmere* is "very direct" and "straightforward", the decision lacks a comprehensive understanding of the day-to-day realities of union organizing and of the broader legal framework under which union organizing exists. Thus, while Professor Gorman may have not fully developed the *Lechmere* decision's impact on the "home visits" and other doctrines, his overall assessment of the decision as representing a "mechanical approach" to the law may well be correct.

The "home visits doctrine" is flawed from two perspectives. First, as Professor Gorman insightfully pointed out in his piece, we live in a society considerably different from that which existed in the

69. Professor Gorman's failure to discuss this issue is especially surprising since it is one which has commanded considerable attention from his mentor and labor law casebook co-author professor and former Harvard University President Derek C. Bok. See Derek C. Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act, 78 HARV. L. REV. 38, 95, 97, 100-01, 105 (1964); ARCHIBALD COX ET AL., CASES AND MATERIALS ON LABOR LAW (11th ed. 1991).
70. See LAB. REL. WEEK (BNA), supra note 7, at 150 (statement of John S. Irving).
71. Gorman, supra note 1, at 10.
late 1950's when the "home visits doctrine" was developed and the Supreme Court decided Babcock & Wilcox. It must be remembered that the Supreme Court's decision in Babcock turned in significant degree on the fact that forty percent of the company's employees lived in a small town only one mile from the jobsite, and thus were arguably accessible to the union off working premises.

Today, however, unlike the late 1950's, employees tend to live scattered over a wide area. The interstate highway system, in particular, has made it the norm for many present-day employees to drive considerable distances to their workplace. Therefore it is fair to say, as other observers have also pointed out, that current employee residential patterns make it harder for unions to reach employees at their homes today than it was three or four decades ago.

Ironically, Justice Thomas, in Lechmere specifically points out that the employees in that case live spread out over a large metropolitan area (Greater Hartford). Justice Thomas then goes on, however, to hold that "that fact does not in itself render them 'inaccessible' in the sense contemplated by Babcock." However, he in no way ties this to the history of the "home visits doctrine" or the residential patterns existing in the 1950's such as in Babcock (which he does discuss earlier in his opinion).

Moreover, even if a union organizer does indeed reach employees at their homes, it seems a bit foolhardy to think that such campaign visits effectively "counterbalance" the employer's ability to reach employees at the workplace. As Professor Howard Lesnick has insightfully pointed out, when an employer gathers his employees for a group meeting on paid company time to deliver a "captive audience" anti-union speech, he is implicitly telling them that he cares more about their position on unionization than about their work. However, unlike at the workplace, no person can be a "captive audi-

72. Id. at 12.
75. See Bierman, supra note 26, at 10.
76. See Getman, Goldberg & Herman, supra note 74, at 94-95.
78. Id.
79. See id. at 845.
80. See Bierman, supra note 26, at 13-15.
81. See Penn Comment, supra note 24, at 780 & n.148.
ence” in his or her own home. At home, employees may be distracted by numerous other responsibilities and relationships, and may, as one observer has put it, simply wish to “compartmentalize” their lives and forget about what goes on at work. The recent advent of the two-worker family may further increase the desire for such “compartmentalization.”

Thus, even apart from whether unions find home visits to be an effective organizing technique, such home visits may represent a significant encroachment on employee privacy rights. This is one of the considerable ironies of the Lechmere decision, for while the decision is being hailed as one exemplifying the high court’s sensitivity to “property rights”, it protects employer property rights only at the considerable expense of employee property rights. Employees are now going to have more union organizers knocking at their front doors. Aside from the fact that employees should arguably have the right to be left alone at home, the underlying premise of the “home visits doctrine,” that employer home visits are intimidating while union home visits are not is a bit disingenuous. One need only read some of the recent work by Professor Clyde W. Summers and others regarding organized crime infestation of certain unions to come to the conclusion that home visits by officials of some unions might be quite intimidating. Finally, while the Supreme Court has in other contexts emphasized the value of door-to-door solicitation as a method of promoting free speech, Professor Derek Bok argues that these precedents are not binding in any legal sense because labor election home visits can be successfully differentiated from the sale of encyclopedias or life insurance and other such door-to-door solicita-

82. See Gresham, supra note 29, at 159 n.276.
83. Id. at 159.
84. The author is indebted to his colleague Professor Stuart A. Youngblood for this insight. Also, the parents of teenage workers may simply forbid them from talking to union organizers. See Gorman, supra note 1, at 8.
85. See Bierman, supra note 26, at 18-20.
86. See supra notes 6 and 7 and accompanying text.
89. See, e.g., Martin v. City of Struthers, 319 U.S. 141 (1943).
90. See, Bok, supra note 69, at 100.
The "home visits doctrine" is flawed both from the perspective that given the demographics of today it is a relatively ineffective organizing technique, and that it unduly encroaches on employee privacy and property rights. Although Professor Gorman did not develop the impact of the *Lechmere* decision on the "home visits," the decision's impact on the doctrine is clear and explicitly developed by Justice Thomas in his opinion. By sharply foreclosing union access to all employer property (including shopping center parking lots open to the public at large) unions are going to be increasingly forced into using the flawed home visits approach. This issue is ripe for careful re-consideration by Congress.

V. *LECHEMERE* AND THE "*EXCELSIOR* DOCTRINE"

While only parenthetically mentioned in a footnote by Professor Gorman and nowhere directly discussed by Justice Thomas, the *Lechmere* decision has important implications for the so-called "*Excelsior* doctrine," and it starkly underscores the flaws in that doctrine. As noted above, unions are, pursuant to *Excelsior*, given a list of employee names and addresses seven days after a labor representation election has been scheduled.

Such elections are not scheduled, however, until the union has already provided the NLRB with evidence that at least thirty percent of the employees in the given bargaining unit are interested in being represented by the union. Moreover, most unions, for strategic purposes, do not seek to schedule such elections until at least fifty percent of the given employees have expressed such interest. Thus, during the entire early stage of an organizing campaign when a union is trying to garner enough support to have an election scheduled the union simply has no rights under *Excelsior*.

This situation is dramatically illustrated in the *Lechmere* case itself where union organizers were forced to stand on a public grassy strip next to a busy highway and record the license plate numbers of

91. See Gresham, supra note 29, at 160.
92. See Gorman, supra note 1, at 18 n.71.
93. See supra notes 48 to 53 and accompanying text.
cars parked in the parking lot (from which they were excluded). Then, according to the U.S. Supreme Court, the union apparently had a "mole" at the Connecticut Department of Motor Vehicles who gave them the names and addresses of the individuals who owned these cars. Through this method the U.S. Supreme Court in Lechmere noted that the union was ultimately able to obtain the valid names and addresses of about twenty percent of the employees it was trying to organize and to send mailings to them and to reach some of them by phone and by way of home visits. Justice Thomas in Lechmere then noted the union's "success" in reaching employees in this manner, and the fact that union had "reasonable access" to employees of a kind which offset employer worksite access to employees and obviated the union's need to reach employees by coming onto employer private property.

Justice Thomas's conclusions as to union "success" and "access" are open to dispute, and the Lechmere decision supports Professor William Gould's contention that the rights afforded unions under Excelsior may be too little, too late. Even through its assiduous (some may say "pathetic") efforts involving recording employee license plates, the union only obtained the names and addresses of about twenty percent of the workforce. Indeed, in the Lechmere case the union never even got to the point where a representation election was formally scheduled — and Excelsior rights were triggered.

An earlier "triggering" of Excelsior rights (perhaps when a union has demonstrated a ten percent showing of interest) would address this problem. The somewhat pathetic picture painted in Lechmere of union organizers standing on a dangerous grassy strip next to a busy highway copying auto license plates so that through the "cooperation" of someone at the motor vehicles department they could get

97. Id.
98. Id.
99. Id. at 849-50.
101. Lechmere, 112 S. Ct. at 844.
102. Id. Apparently the union's efforts resulted in only one signed authorization card. Id.
employee names and addresses, would help heighten recognition of the flaws in the *Excelsior* doctrine as it currently stands, and perhaps help prompt reform in this area.

VI. **Lechmere** and "Off-Duty" Employees

The *Lechmere* decision may also focus closer attention on the rights of "off-duty" employees in the organizing context, and force unions to try to make greater use of such employees in their organizing efforts. Over the years there has been some confusion regarding the scope of organizational access afforded such employees pursuant to the Supreme Court's holdings in *Babcock* and *Republic Aviation*. In the 1973 case of *GTE Lenkurt, Inc.*, the NLRB likened the status of off-duty employees to that of non-employees, and held that they would be subject to the same workplace organizing restrictions as non-employees. Three years later, however, in the case of *Tri-County Medical Center, Inc.*, the Board shifted its views and developed what appears to be its current position on the issue. Under *Tri-County*, "off-duty" employees are given significantly greater rights of organizational access than non-employees, and are permitted to engage in union organizational activity so long as such activity is conducted outside "the interior of the plant and other working areas."

Thus, Professor Gorman seems correct, at least under current NLRB doctrine (although this would not have been the case under *GTE Lenkurt*), that the *Lechmere* decision does not limit the ability of an "off-duty" employee to place "a handbill under the windshield wiper of an automobile known to belong to a fellow employee." Unlike non-employees, who pursuant to *Lechmere* are completely excluded from employer-owned parking lots, "off-duty" employees are under *Tri-County* permitted to engage in organizational activity in such areas. Professor Gorman does not explore whether the *Lechmere* decision will force unions to make greater use of "off-duty" and other

105. See generally Bierman, supra note 26, at 32-33; White, supra note 103, at 138 n.61.
109. 222 N.L.R.B. at 1089.
110. See Gorman, supra note 1, at 21.
similarly situated employees (which it seems it would), or whether the NLRB’s position regarding the rights of “off-duty” employees should perhaps be reformed in light of the Supreme Court’s *Lechmere* decision.

With respect to the latter question, at least one commentator has argued that the interior versus exterior off-duty employee workplace access “compromise” fashioned by the NLRB in *Tri-County* is a rather artificial one. More specifically, if the concern regarding off-duty employee organizational access is one based on protection of employer property rights, the theory developed in both *Lechmere* and *Babcock* as the justification for keeping non-employee organizers off employer premises, then off-duty employees should simply be treated like non-employees and barred from the work premises.

On the other hand, if *Republic Aviation*-type managerial interests are being protected, then there should be no differentiation between off-duty employees and on-duty employees who are permitted to engage in union organizing activity inside the workplace but only in nonworking areas during nonworking time. Under *Tri-County* though, managerial interests are advanced to prohibit individuals who have already been admitted onto the property from talking to fellow workers in contexts which would appear to present little real threat to managerial integrity. Given the *Lechmere* decision’s sharp proscriptions against non-employee access to employer property, a relaxation of the standards governing access rights of off-duty employees giving them the same rights as on-duty employees may well be appropriate.

Finally, one implication of the *Lechmere* decision is that unions will try and make greater use of both sympathetic on-duty and off-duty employees in an attempt to reach workers at the worksite. Some observers have questioned whether such “untrained” employees can convey the union’s appeal with anything comparable to the effectiveness of professional union organizers. One way around this problem for unions may, in light of *Lechmere*, be to attempt to have

112. Id.
113. See Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).
114. See Korn, supra note 111, at 380 n.40.
115. See generally Bierman, supra note 26, at 33.
116. See Gresham, supra note 29, at 153-54; see also NLRB v. S & H Grossinger’s, Inc., 372 F.2d 26, 29 (2d Cir. 1967).
experienced union organizers "hire into" a workplace targeted for union organization. The relevant legal standards governing attempts by unions to "hire in" such "trojan horses" have recently been the subject of much controversy, which is likely to increase in light of the Supreme Court's decision in Lechmere.

VII. LECHMERE AND CONGRESSIONAL LABOR LAW REFORM

The Lechmere decision strongly reinforces the basic union organizational "blueprint" developed by the NLRB in 1966 Excelsior/General Electric companion cases. Under this blueprint, unions are prohibited from coming onto the employer's property and must reach employees outside of the workplace. When the NLRB decided these cases it stated that it would defer any significant shift in these organizing parameters until after the affect of the cases "became known". Now, almost three decades later, the affects of these decisions seem fairly clear. Unions, for a variety of demographic and other reasons, have not found their ability to engage in home visits to be a particularly effective counterbalance to the ability of employers to reach workers at the workplace. For these and other reasons the percentage of the private sector workforce which is unionized has fallen to recent lows. In Lechmere, the Supreme Court rebuffed the NLRB's attempt to even modestly alter the rules of the game in the favor of unions by giving unions access to shopping center parking lots generally open to the public. Thus the time seems quite ripe for Congress to step into the breach, as it attempted to do with the proposed Labor Law Reform Act of 1977-78.

While the precise parameters of congressional reform need to be developed, reform is needed to provide unions with greater organizational opportunities and access to employees. Absent such reform, the rights afforded workers under section 7 of the National Labor Relations Act will, as Professor Gorman might put it, become ever-

117. See supra notes 64-66 and accompanying text.
118. See Loes, supra note 65.
120. See generally Bierman, supra note 26.
121. See BUREAU OF LABOR STATISTICS, U.S. DEP'T. OF LABOR, Union Members in 1990, USDL 91-34, (Feb. 6, 1991), in LAB. L. REP. INSIGHT (CCH), No. 234, Issue 54, Mar. 1991, at 1. Overall union membership currently stands at 16.1 percent of the envelope with private sector membership standing at 12.1 percent. Id.
122. See generally Penn Comment, supra note 24; Bierman, supra note 26.
increasingly "trivialized."\textsuperscript{123}

VIII. CONCLUSION

Professor Gorman in his recent article in this journal does outline many of the problems with Justice Thomas's opinion in the \textit{Lechmere} case. In many respects, though, Professor Gorman's analysis of the case does not dig deep enough. For the \textit{Lechmere} decision not only undercuts traditional judicial deference to administrative expertise, but it also strongly reinforces earlier precedents which have made it extremely difficult for unions to effectively organize employees. The decision's impact on the "home visits doctrine" is particularly deleterious. The \textit{Lechmere} decision should spark renewed congressional consideration of broad-scale reforms of the union organizing law similar to those proposed in the 1977-78 Labor Law Reform Act.

\begin{footnotes}
\footnote{123. See Gorman, \textit{supra} note 1, at 20.}
\end{footnotes}