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# THE LEGAL FOUNDATIONS FOR STATE LAWS GRANTING LABOR UNIONS ACCESS TO EMPLOYER PROPERTY

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## ABSTRACT

*In an era of a more hostile federal legal environment for labor and declining union density in many industries, a number of state and local governments have sought to promote local laws that can support unions' ability to organize workers. Federal courts have struck down many local and state laws supportive of unions as preempted by federal labor law, yet one labor reform seems to be fully within the power of state and local governments to enact: giving labor representatives access to an employer's premises to talk with employees about their rights to form a union.*

*For labor unions and their community supporters, such local and state public access laws may be one of the few ways to effectively expand workers' rights to organize given that the current national political environment makes any changes to federal labor law that are favorable to organizing unlikely in the near future. However, the question raised by employer opponents of these local laws is whether the laws violate employers' federal constitutional rights to property and free speech, and whether they are legal under federal labor law.*

*Laws granting access to employer property inhabit a controversial legal space: the intersection of the federal regulatory state embodied by federal labor law, free speech concerns of the public seeking access and the businesses resisting access, and the role of state and local governments in defining what property rights an owner actually may exercise. As this Article outlines, legal precedents during the last few decades make generally clear that these local laws—even potential laws that would offer more extensive access to employer property not normally accessible to the public—should pass the muster of legal and constitutional tests. More broadly, this Article highlights how federal statutory law, federal constitutional rights, and state law interact to shape property law in a dynamic way, creating the opportunity for creative legislation at the state and local level.*

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## I. INTRODUCTION

In an era of a more hostile federal legal environment for labor<sup>1</sup> and declining union density in many industries,<sup>2</sup> a number of state and local governments have sought to promote local laws that can support unions' ability to organize workers.

Federal courts have struck down many local and state laws supportive of unions as preempted by federal labor law,<sup>3</sup> yet one labor reform seems to be fully within the power of state and local governments to enact: giving labor representatives access to employer property to talk with employees about their rights to form a union. This addresses a critical problem in federal labor law, which, on paper, grants employees certain rights but gives labor union representatives little opportunity to communicate those rights to employees. As labor scholar Benjamin Sachs writes, “the [labor law] regime provides employers with too much latitude to interfere with employees' efforts at self-organization, while offering unions too few rights

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1. See Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy*, 70 LA. L. REV. 97, 107 (2009) (“Far from protecting the right to organize, federal labor law—heralded by the New Deal generation as the labor relations' Magna Carta of its day—bit by bit, decision by decision, morphed in changed circumstances to impede collective bargaining.”).

2. See *id.* at 108; Press Release, Bureau of Labor Statistics, Union Members—2013 (Jan. 24, 2014), available at <http://www.bls.gov/news.release/pdf/union2.pdf>; Steven Greenhouse, *Union Membership in U.S. Fell to a 70-Year Low Last Year*, N.Y. TIMES (Jan. 21, 2011) [http://www.nytimes.com/2011/01/22/business/22union.html?\\_r=0](http://www.nytimes.com/2011/01/22/business/22union.html?_r=0).

3. See, e.g., *United States v. Brown*, 554 U.S. 60, 62, 66 (2008) (holding a California law prohibiting employers from using state funds to promote or deter union organizing was preempted by the National Labor Relations Act (NLRA) and the doctrine set forth in *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976)); *Golden State Transit Corp. v. City of L.A.*, 475 U.S. 608, 610–11, 619 (1986) (holding that *Machinists* preempted the city council's refusal to renew a taxicab franchise until the company settled a labor dispute with drivers' union); *Wis. Dep't of Indus., Labor & Human Relations v. Gould*, 475 U.S. 282, 288–89 (1986) (holding a Wisconsin law barring state procurement from NLRA violators was preempted by the NLRA); *520 S. Mich. Ave. Assocs. v. Shannon*, 549 F.3d 1119, 1122–23, 1139 (7th Cir. 2008) (holding that an Illinois law regulating rest breaks and meal breaks only in the Cook County hotel industry was preempted by *Machinists* as interfering with collective bargaining); *United Steelworkers v. St. Gabriel's Hosp.*, 871 F. Supp. 335, 344 (D. Minn. 1994) (holding that a Minnesota statute requiring a successor employer to honor a predecessor's collective-bargaining agreements was preempted by the NLRA).

to communicate with employees about the merits of unionization.”<sup>4</sup>

A number of states and local governments over the years have passed or considered passing local laws to affirmatively give members of the public access to the property of employers to discuss labor rights with the public and employees. Some states protected the free speech access of unions and other speakers to malls,<sup>5</sup> while California, as will be discussed in some detail, enacted a specific law to protect unions from injunctions when they talk to employees on employer-owned property.<sup>6</sup> A number of state governments extended access to employer property in specific industries such as agriculture and hospitals.<sup>7</sup> In 2004, the city council in Hartford, Connecticut responded to the upcoming opening of a Wal-Mart on city-owned property by approving an ordinance that extended free speech rights to members of the public in parking lots and on sidewalks of any retail store leasing city-owned property.<sup>8</sup> The day the store opened on January 23, 2005, members of the Connecticut Working Families Party, which had led the campaign for the ordinance, were standing at the front door “holding a bake sale, selling brownies to raise money for Wal-Mart employees to buy health coverage”—and obviously raising a pointed criticism of the company on its own property.<sup>9</sup> Other state and local bodies have debated more comprehensive bills to extend access to companies’ property to talk to employees and customers. The Connecticut House Labor and Public Employees Committee voted favorably on a bill in 2004 to give the public access to any “place of public accommodation” to respond to any employer communication made to employees or patrons.<sup>10</sup>

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4. Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1162 (2011).

5. See *infra* notes 134–39 and accompanying text.

6. See discussion *infra* Part III.A.

7. See, e.g., ARIZ. REV. STAT. ANN. §§ 23-1383, -1385 (1995) (providing access for agricultural labor unions); CAL. LAB. CODE §§ 1152–1153 (West 2011).

8. HARTFORD, CONN., CODE OF ORDINANCES ch. 7, art. I, §§ 7-1(b)–(c) (2004), available at MUNICODE, <http://library.municode.com/index.aspx?clientID=10895> (follow “Chapter 7–Assemblies, Festivals, and Parades” hyperlink; then choose the “Article I–In General” hyperlink); see Dan Haar, *New Rule Makes Hartford Hub of Wal-Mart Debate*, THE COURANT (Jan. 5, 2005), available at [http://articles.courant.com/2005-01-05/business/0501050190\\_1\\_wal-mart-workers-walmart-debate-health-coverage](http://articles.courant.com/2005-01-05/business/0501050190_1_wal-mart-workers-walmart-debate-health-coverage).

9. Oshrat Carmiel, *Wal-Mart Set to Open to Cheers, Criticism*, THE COURANT (Jan. 26, 2005), available at [http://articles.courant.com/2005-01-26/news/0501260626\\_1\\_rocky-hill-wal-mart-new-store-store-manager](http://articles.courant.com/2005-01-26/news/0501260626_1_rocky-hill-wal-mart-new-store-store-manager); see Haar, *supra* note 8.

10. H.R. 5447, 2004 Gen. Assemb., Feb. Sess. (Conn. 2004), available at <http://www.cga.ct.gov/2004/fc/2004HB-05447-R000327-FC.htm>. The bill ultimately died in the House of Representatives before a vote. See *Substitute for Raised H.B. No. 5447*,

In Chicago, the city council held hearings in 2004 on a comprehensive ordinance that would extend public access rights to any new retail store, whether on private or public land.<sup>11</sup>

For labor unions and their community supporters, such local and state public access laws may be one of the few ways to effectively expand workers' rights to organize given that the current national political environment makes any changes to federal labor law that are favorable to assisting organizing unlikely in the near future.<sup>12</sup> In addition, the laws are tools for communities to revive a more vibrant public space in a world in which malls and "big box" stores like Wal-Mart have decimated the traditional town square.

However, the question raised by employer opponents of these local laws is whether they violate employers' federal constitutional rights to property and free speech, and whether they are legal under federal labor law. Opponents of these local laws that give the public access to stand-alone stores view them as a "taking" under the Fifth Amendment, as preempted by the National Labor Relations Act (NLRA), and as an infringement on the property owner's First Amendment rights.

However, in 2012, the California Supreme Court in *Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8* rejected a First Amendment challenge to California's 1975-enacted Moscone Act, which granted labor unions access to employer property.<sup>13</sup> The U.S. Supreme Court rejected certiorari on appeal,<sup>14</sup> which, while not definitive on all issues, should give local policymakers confidence, given the totality of precedents that will be outlined in this Article, that local access laws will survive challenges in the courts. Thus, this is a good time for a

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CONN. GEN. ASSEMBLY, [http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill\\_num=5447&which\\_year=2004](http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=5447&which_year=2004) (last visited June 15, 2014).

11. See Press Release, Brennan Ctr. for Justice, Brennan Center Attorney to Testify at Chicago City Council Hearings on Proposed Law to Improve Job Standards at Wal-Mart (Sept. 20, 2004), <http://www.brennancenter.org/press-release/brennan-center-attorney-testify-chicago-city-council-hearings-proposed-law-improve-job>.

12. See Drummonds, *supra* note 1, at 133–35 (noting the difficulty of federal labor law reform historically, and arguing for reform at the state level).

13. *Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8*, 290 P.3d 1116, 1122, 1126 (Cal. 2012). The court found that the law neither restricted speech nor, if it restricted speech at all, concerned a public forum, thus allowing it to survive a federal free speech analysis. *Id.* at 1129.

14. *Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8*, 133 S. Ct. 2799, 2799 (2013).

comprehensive review of the current legal framework under which states should be able to grant labor advocates access to employer property.

Laws granting access to employer property inhabit a controversial legal space: the intersection of the federal regulatory state embodied by federal labor law,<sup>15</sup> the free speech concerns of both the public seeking access and the businesses resisting it,<sup>16</sup> and the role of state and local governments in defining what property rights an owner actually may exercise.<sup>17</sup> As this Article will outline, legal precedents over the last decade make generally clear that these local laws—and even potential laws that would offer more extensive access to employer property not normally accessible to the public—should pass muster under current legal and constitutional tests. More broadly, the Article will highlight how federal statutory law, federal constitutional rights, and state law interact to shape property law in a dynamic way that creates the opportunity for creative legislation at the state and local level.<sup>18</sup>

## II. THE BASIC FRAMEWORK OF FEDERAL LAW ON UNION ACCESS TO EMPLOYER PROPERTY

The issue of labor access to employer property has always been a tangled web of constitutional claims, federal labor law interpretation, and state law property rules. The Supreme Court has careened across the spectrum of possibilities, largely in sway with the partisan makeup of the Court.

While the Supreme Court long held that under the NLRA employees have extensive free speech access to employer property,<sup>19</sup> nonemployee union organizers have had a far less certain right of access. As far back as 1956 in *NLRB v. Babcock & Wilcox Co.*, in which the National Labor Relations Board (NLRB) gave unions access to nonpublic areas of a firm such as employee parking lots, the Court held that “an employer may validly post his property against nonemployee distribution of union literature” unless those nonemployee union organizers had no other

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15. See discussion *infra* Part III.

16. See discussion *infra* Part V.

17. See discussion *infra* Part IV.

18. See discussion *infra* Part VI.

19. See, e.g., *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–02 & nn.7–8 (1945) (noting that it is an unfair labor practice to forbid employees from wearing a union insignia during working hours or to prohibit “union solicitation by an employee outside of working hours . . . on company property”).

reasonable means to reach those employees to inform them of their rights.<sup>20</sup>

However, by 1968 the Court moved leftward, and in *Amalgamated Food Employees Union v. Logan Valley Plaza*, the Court declared that a grocery-workers union had a First Amendment right to picket on company property.<sup>21</sup> Justice Thurgood Marshall, writing for the majority, argued that “peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or manner of the picketing, protected by the First Amendment.”<sup>22</sup>

Within a few years, change in the makeup of the Court would put Marshall and others of the *Logan Valley* majority in the dissent in *Lloyd Corp. v. Tanner*, in which the majority ruled that antiwar protesters could be blocked from distributing handbills in a private mall.<sup>23</sup> The majority distinguished this case by restricting the principle of *Logan Valley* almost solely to labor unions whose message was about a particular business, not general issues of public concern, and thus needed free speech rights at a private establishment because “no other reasonable opportunities for the pickets to convey their message to their intended audience were available.”<sup>24</sup>

Four years after *Lloyd Corp.*, the Court handed down its decision in *Hudgens v. NLRB*, in which the Court explicitly overruled *Logan Valley* and declared even labor unions had no First Amendment rights to public access at a mall.<sup>25</sup> While the Court found no constitutional right to access

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20. NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956). In *Babcock*, the employer had prohibited union organizers from distributing leaflets or speaking with workers in the employee parking lot. *Id.* at 107. The NLRB declared it unreasonably difficult for union organizers to distribute leaflets to employees outside the employer’s property, so the union was granted access to the parking lot and the walkway to the plant gate. *Id.* at 108. The Fifth Circuit reversed the NLRB decision and the Supreme Court affirmed the Fifth Circuit. *See id.* at 108, 114.

21. *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308, 311, 325 (1968).

22. *Id.* at 313.

23. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 556, 570 (1972).

24. *Id.* at 563.

25. *Hudgens v. NLRB*, 424 U.S. 507, 520–21 (1976). Notably, in its 1972 *Central Hardware Co. v. NLRB* decision, the Court had refused to extend its *Logan Valley* analysis on union rights in multistore shopping centers to stand-alone retail stores and had similarly remanded the case to the NLRB for a statutory analysis of access under the NLRA. *Central Hardware Co. v. NLRB*, 407 U.S. 539, 547–48 (1972). The *Hudgens* ruling merely followed this trend. *Compare id.*, with *Hudgens*, 424 U.S. at

by unions, it declared the unions might have a statutory right to access under the NLRA, and so the Court remanded proceedings to the NLRB,<sup>26</sup> which then found a statutory right under the NLRA for nonemployee union access to the mall.<sup>27</sup>

In light of *Hudgens*, the NLRB would spend the next decade struggling with the issue under statutory law, finally settling it in the 1988 *Jean County* ruling on a balancing test between the NLRA and employer property rights.<sup>28</sup> The NLRB stated “our ultimate concern . . . is the extent of impairment of the Section 7 right if access should be denied, in balance with the extent of impairment of the private property right if access should be granted.”<sup>29</sup> These access rights would extend to informational picketing—not just in shopping malls, but also on the premises of a two-store shopping center.<sup>30</sup>

However, following the consolidation of conservative control on the Rehnquist Court, the Supreme Court discarded the NLRB balancing test in 1992 with its decision in *Lechmere, Inc. v. NLRB*.<sup>31</sup> In this case, which involved a multistore shopping center much like that in *Logan Valley*, the right of access to shopping centers by unions articulated in Justice Marshall’s opinion<sup>32</sup> was completely reversed by his successor on the Court, Clarence Thomas, who wrote that not only did union representatives lack a constitutional right to access,<sup>33</sup> but that the NLRB was mistaken in ruling that they had even a statutory right of access.<sup>34</sup> Because the union could hold signs visible to employees as they drove to work or pay for advertising in local newspapers, the Court declared they had all the access to workers required by the NLRA.<sup>35</sup> Only in cases in which employees were physically inaccessible on company property during their nonworking time, such as logging camps, mining camps, and mountain resort hotels, would any access

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520–21.

26. *Hudgens*, 424 U.S. at 523.

27. Scott *Hudgens*, 230 N.L.R.B. 414, 416–18 (1977).

28. *Jean County*, 291 N.L.R.B. 11, 19 (1988).

29. *Id.*

30. *See, e.g.*, *Giant Foods Mkts., Inc.*, 241 N.L.R.B. 727, 728–29 (1979).

31. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538 (1992).

32. *See Amalgamated Food Emps. Union v. Logan Valley Plaza*, 391 U.S. 308, 324–25 (1968).

33. *Lechmere*, 502 U.S. at 534.

34. *Id.* at 540; *see Lechmere*, 295 N.L.R.B. 92, 93 (1989).

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

exception to employer property rights be granted.<sup>36</sup>

So this may seem a simple narrative of the transition of a liberal Court valuing the free speech of union workers to a conservative Court defending the property rights of employers. Yet, a subtler dynamic has been at work in this period as the federalist impulses of the emerging Rehnquist Court—however inconsistent those impulses might be<sup>37</sup>—had to confront the question of whether property rights are the function of some abstract federal constitutional order or the sovereign province of state statutory law.

A decade before *Lechmere*, the Supreme Court faced this issue in another public access case involving a shopping center, but this case had a twist.<sup>38</sup> In *Robins v. Pruneyard Shopping Center*, the California Supreme Court declared, based on the *state* constitution's definition of free speech and property rights, that a shopping center did not have a right to expel from its premises high school students soliciting signatures for a petition opposing a United Nations resolution.<sup>39</sup>

When the case was brought before the U.S. Supreme Court, the question was whether California violated either the property rights guaranteed to employers under the Fifth Amendment's Takings Clause or the company's supposed First Amendment rights to control speech on its property.<sup>40</sup> In the words of the *Pruneyard* decision, notably written by Justice William Rehnquist, "it does not violate the United States Constitution for the State Supreme Court to conclude that access to appellants' property in the manner required here is necessary to the promotion of state-protected rights of free speech and petition."<sup>41</sup> Because the required access did not "unreasonably impair the value or use of [the

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36. *Id.* at 539.

37. *See, e.g.,* *Gonzales v. Raich*, 545 U.S. 1, 25 (2005) (holding that application of the Controlled Substances Act to interstate marijuana growers did not violate the Commerce Clause); *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004) (holding that application of Title II of the Americans with Disabilities Act to the states was valid under the Fourteenth Amendment); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 725, 740 (2003) (holding that state employees could recover damages in federal court for violations of the Family and Medical Leave Act); *Reno v. Condon*, 528 U.S. 141, 150–51 (2000) (upholding the constitutionality of the Driver's Privacy Protection Act against a Tenth Amendment challenge).

38. *See Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 76–77 (1980).

39. *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 347–48 (Cal. 1979).

40. *Pruneyard*, 447 U.S. at 76–77.

41. *Id.* at 85 n.8.

owner's] property," there was no violation of the U.S. Constitution.<sup>42</sup>

Rehnquist's decision for the Court further discounted any First Amendment objection to allowing access for petitioning or leafleting because "no specific message is dictated by the State to be displayed on appellants' property. There consequently is no danger of governmental discrimination for or against a particular message," and a business can always post signs disavowing the message as being sponsored by the business itself.<sup>43</sup>

Significantly, when Clarence Thomas wrote the *Lechmere* decision 12 years later, he never discussed the Fifth or First Amendment rights of employers, but couched his decision as an interpretation of federal labor law statutes so that it did not preempt the operation of state trespass law.<sup>44</sup> And if there was any ambiguity, *Thunder Basin Coal Co. v. Reich* made clear that while the NLRA did not statutorily mandate access to private property, state law potentially could:

[W]e note that petitioner appears to misconstrue *Lechmere, Inc. v. NLRB*. The right of employers to exclude union organizers from their private property emanates from state common law, and while this right is not superseded by the NLRA, nothing in the NLRA expressly protects it.<sup>45</sup>

Subsequent NLRB decisions affirmed this position in giving union organizers access to malls and other property when local constitutional or statutory law offered such access.<sup>46</sup>

This federalist deference to local law seems to suggest that nonemployees could gain access to employer property whenever local or state governments are willing to modify trespass law to give them access. However, the question is whether legal questions of property rights, federal preemption, or takings have different answers if state and local governments legislate access for less "specialized type[s] of property"<sup>47</sup>

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42. *Id.* at 83. Whether this held for a local law that gave *only* labor unions permission to be on employer property was the core issue in the *Ralphs* litigation, which will be discussed later in this Article. See discussion *infra* Part V.A–B.

43. *Id.* at 87.

44. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535 (1992).

45. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 n.21 (1994) (citation omitted).

46. See discussion *infra* Part III.C.

47. This was the phrase used by Justice Lewis Powell in his concurrence with the main *Pruneyard* decision, in which he expressed skepticism that the same result

than the public space of a multistore shopping center.

For example, the enacted Hartford ordinance required that all retail stores leasing city-affiliated property—no matter their size—extend access to the public.<sup>48</sup> The proposed Chicago ordinance similarly required access not just to public outside areas of large retail stores, but also access to any outside “non-business area,” which would include employee parking lots or outside break areas not accessible to the public.<sup>49</sup> California already faced a legal challenge as to whether its statutes granting company property access to labor unions not offered to other members of the public are constitutional.<sup>50</sup> However, as this Article will outline, almost any variation of these access laws should pass muster under the Court’s precedent.

### III. AUTHORITY OF STATES TO GRANT ACCESS TO EMPLOYER PROPERTY UNDER FEDERAL LABOR LAW

As the U.S. Supreme Court explained in *Lechmere*, the NLRA does not preempt state and local laws establishing trespass rules and governing access to private property by nonemployees.<sup>51</sup> In *Lechmere*, this meant that nonemployees had no right of access to the retail store at issue since local Connecticut property laws conferred no such right.<sup>52</sup>

While the 1992 *Lechmere* decision was a defeat for labor because it declared that the NLRB was largely powerless to compel access for nonemployee union organizers to most company property, it largely settled the fact that a state’s trespass law is not preempted by federal labor law under section 7 of that law.<sup>53</sup> Citing to an earlier case, *Sears, Roebuck & Co. v. Carpenters*, the Court declared that “arguable § 7 claims do not preempt state trespass law . . . because the trespasses of nonemployee union

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would hold if access was granted to a smaller stand-alone store. *Pruneyard*, 447 U.S. at 98 (Powell, J., concurring).

48. HARTFORD, CONN., CODE OF ORDINANCES ch. 7, art. I, § 7-1(b)–(c) (2004). The Hartford Municipal Code defines “city-affiliated property” as “property owned by the City of Hartford, by the Hartford Housing Authority, or by any other agency of the City of Hartford.” *Id.* § 7-1(b).

49. See Press Release, Brennan Ctr. for Justice, Hartford Passes “Big Box” Store Public Access Law (Dec. 13, 2004), available at <http://www.brennancenter.org/press-release/hartford-passes-big-box-store-public-access-law>.

50. See *Waremart Foods v. NLRB*, 354 F.3d 870, 870 (D.C. Cir. 2004).

51. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535 (1992).

52. See *id.* at 537.

53. See *id.* at 535.

organizers are ‘far more likely to be unprotected than protected.’”<sup>54</sup>

The earlier decision in *Sears* is critical to the viability of local legislation offering greater access to firm property by nonemployees than the NLRA grants.<sup>55</sup> Following the so-called *Garmon* preemption doctrine, the NLRB will generally preempt local laws regulating conduct arguably protected or prohibited under the NLRA in order to create uniform jurisdiction.<sup>56</sup> However, by emphasizing that the NLRA leaves nonemployees with few rights to access employer property under federal labor law, *Sears* and *Lechmere* conversely indicate that local legislation granting such access is unlikely to face *Garmon* preemption.<sup>57</sup>

Soon after *Lechmere*, the Court made clear in *Thunder Basin* that while the NLRA did not mandate union access to private firm property, other laws governing property access could potentially do so.<sup>58</sup> In a largely procedural decision dealing with access by union representatives to mining property under federal mining regulations, the Court in a footnote stated that “nothing in the NLRA expressly protects” employer rights to exclude organizers from their property when other laws require such access.<sup>59</sup>

*A. How Courts Have Followed Lechmere in Allowing State Law to Accommodate Greater Access to Employer Property*

The Supreme Court dicta in *Thunder Basin* was largely following the practice of other courts in giving access to employer property for nonemployees based on statutes other than what the NLRA allowed.<sup>60</sup> Back in 1978, the Court’s *Sears* case had dealt with the question of whether a state injunction against picketers on private sidewalks at a Sears store was preempted under the *Garmon* doctrine.<sup>61</sup> Because the Court found the injunction was not preempted,<sup>62</sup> the California Supreme Court

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54. *Id.* (quoting *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 205 (1978)).

55. *See Sears*, 436 U.S. at 205.

56. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959).

57. *Compare Lechmere*, 502 U.S. at 537, and *Sears*, 436 U.S. at 205, with *Garmon*, 359 U.S. at 244.

58. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 n.21 (1994).

59. *Id.*

60. *See id.*

61. *Sears*, 436 U.S. at 182–83, 190.

62. *See id.* at 207.

Because the assertion of state jurisdiction in a case of this kind does not create

subsequently had to subsequently decide whether to uphold the injunction itself.<sup>63</sup> The California Supreme Court found that under California law, no injunction against the picketers should be issued because state law granted picketers access to the private property.<sup>64</sup> In 1975, California had passed the Moscone Act<sup>65</sup> that, among other things, declared legal all “peaceful picketing or patrolling involving any labor dispute, whether engaged in singly or in numbers.”<sup>66</sup> As the California court declared:

[T]he Moscone Act, interpreted in light of prior decisions of this court, declares such peaceful picketing to be legal and thus not subject to injunction. Rejecting Sears’ contention that it enjoys a federally protected right to enjoin peaceful picketing on property it has opened to public use, we conclude that the trial court lacks jurisdiction to enjoin the picketing at issue here.<sup>67</sup>

In making its ruling, the California Supreme Court also cited to a number of previous court decisions that granted nonemployee picketers access to private property.<sup>68</sup>

Moreover, the year after *Lechmere*, the NLRB held that California’s law granting public access to private shopping centers was not preempted by the NLRA.<sup>69</sup> The NLRB explained that “[p]roperty interests, of course, are not created by the Constitution,”<sup>70</sup> so the right to exclude access to property is

defined by existing rules or understandings that stem from an independent source such as state law. . . .

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a significant risk of prohibition of protected conduct, we are unwilling to presume that Congress intended the arguably protected character of the Union’s conduct to deprive the California courts of jurisdiction to entertain Sears’ trespass action.

*Id.*

63. *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 599 P.2d 676, 680 (1979).

64. *Id.* at 684.

65. CAL. CIV. PROC. CODE § 527.3 (West 2011).

66. *Id.* § 527.3(b)(2).

67. *Sears*, 599 P.2d at 679.

68. *Id.* at 682–83; see *In re Lane*, 457 P.2d 561, 564 (Cal. 1969); *Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers’ Union Local No. 31*, 394 P.2d 921, 926 (Cal. 1964).

69. See *Bristol Farms*, 311 N.L.R.B. 437, 439 (1993).

70. *Id.* at 438 (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

....

To determine the nature and extent of the Respondent's property interest in the sidewalk in front of its store, we must, therefore, look to the law of the State of California, the State where the Respondent's store is located.<sup>71</sup>

The Ninth Circuit has also found that the NLRA does not preempt local laws that deny a business the right to exclude persons engaged in free speech activities:

State trespass law that does not guarantee the right to exclude causes no conflict [with federal labor law], in that it does not prohibit federally protected conduct; instead, such law grants broader accommodation of protected conduct than is required by the federal labor law. Thus, where California mandates that its shopping center owners grant access to those engaged in expressive activity, "the requisite accommodation has taken place."<sup>72</sup>

In 2007, the California Supreme Court found that, under the state constitution, a union has the right to leaflet in front of a department store inside a mall, including urging a boycott of the store in question.<sup>73</sup> In considering this issue on appeal, the D.C. Circuit Court of Appeals ruled against the department store based on California's definition of its state trespass rules.<sup>74</sup> Other circuit courts similarly found that local trespass and property rights laws—not the NLRA—define when nonemployees have access to business property.<sup>75</sup>

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71. *Id.* at 438–39 (quoting *Roth*, 408 U.S. at 577) (first alteration in original).

72. *NLRB v. Calkins*, 187 F.3d 1080, 1094–95 (9th Cir. 1999) (quoting *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538 (1992)).

73. *Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742, 744, 750 (Cal. 2007).

74. *Fashion Valley Mall, LLC v. NLRB*, 524 F.3d 1378, 1379, 1381 (D.C. Cir. 2008). After the California Supreme Court provided this definition in response to the circuit court's certified question, Fashion Valley argued that the state court's interpretation violated its property rights under the Fifth and Fourteenth Amendments. *Id.* at 1380. However, because the D.C. Circuit determined the constitutional argument was not timely made, the court refused to consider the issue. *Id.* at 1380–81.

75. *See, e.g., Snyder's of Hanover, Inc. v. NLRB*, 39 F. App'x 730, 734 (3d Cir. 2002) (finding that Pennsylvania law permitted an employer to exclude union organizers from a public right-of-way on its property unless provided otherwise in the easement); *UFCW Local 400 v. NLRB*, 222 F.3d 1030, 1035–36 (D.C. Cir. 2000) (finding that, under Virginia law, a snack bar could not exclude nonemployee organizers from the private sidewalks outside its premises in a strip mall); *O'Neil's*

B. *The NLRB and Access to Areas of Employer Property Not Open to the Public*

While many of the federal decisions, especially those involving constitutional issues, focused on access to public areas of a work site, there is nothing in the Supreme Court's *Lechmere* or *Sears* decisions that would apply a different standard of deference to state or local laws that give union or labor advocates access to nonpublic areas of a firm.<sup>76</sup> Notably, *Thunder Basin* involved granting labor representatives access to largely nonpublic areas of mining property.<sup>77</sup>

The earliest precedents for this were established in cases that gave employees access to employer property that they might not otherwise have had the right to access without the statutory requirements of the NLRA. Dating back to its 1945 *Republic Aviation Corp. v. NLRB* decision, the Supreme Court has affirmed that the NLRB could require under Section 7 of the NLRA that employers to give off-duty employees the right to engage in organizing activities on their employer's premises in nonwork areas.<sup>78</sup> The employer may not infringe absent a showing that the ban is necessary to maintain workplace order and discipline.<sup>79</sup>

For on-the-job employees, the NLRB has held that locker rooms, restrooms, lunchrooms, and vending machine areas are all nonwork areas for the purpose of union solicitation.<sup>80</sup> For off-duty employees, access has generally been restricted to "outside" nonworking areas such as parking lots<sup>81</sup> and outdoor break areas,<sup>82</sup> although in *New York New York Hotel* argued for more expansive access rights: "[O]ff-duty employees may engage in protected solicitation and distribution in nonwork areas of the

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*Mkts. v. United Food & Commercial Workers Union Local 88*, 95 F.3d 733, 739 (8th Cir. 1996) (finding that, under Missouri law, a supermarket could not exclude picketers from sidewalks and roadways outside its store for which it shared a nonexclusive easement).

76. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537–38 (1992); *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 205 (1978).

77. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 204–05 (1994).

78. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802 n.8 (1945).

79. *Id.* at 803–04 n.10.

80. *U.S. Steel Corp.*, 223 N.L.R.B. 1246, 1247 (1976); *Plant City Steel Corp.*, 138 N.L.R.B. 839, 848 (1962) (finding employer rule prohibiting union solicitation by employees in parking lots violated the NLRA because it was not restricted to working hours).

81. *Tri-Cnty. Med. Ctr., Inc.*, 222 N.L.R.B. 1089, 1089–90 (1976).

82. *First Healthcare Corp.*, 336 N.L.R.B. 646, 650 (2001).

owner's property unless the owner can show that prohibiting that sort of activity is necessary to maintain production and discipline."<sup>83</sup> So the exact access rights of off-duty or off-site employees are still unclear, but access rights are now well established in all nonwork areas save interior nonpublic areas, over which there remains dispute on what is required under the NLRA. And even that limit is based on statutory interpretations of the NLRA, not on any inherent limit on what access to employer property could be granted by statute.

*C. Access to Nonpublic Areas of Employer Property Granted Under State Law*

In *Johnson & Hardin Co. v. NLRB*, the Sixth Circuit held, pursuant to an NLRB decision, that union organizers could not be excluded from a private driveway leading to a factory plant, notably an area inaccessible to the general public.<sup>84</sup> The court made this ruling because the plant owner only had an easement to the driveway, and under Ohio law, an owner of an easement "can not prevent even a trespasser from using the land, if it does not impede his exercise of its use as a right of way."<sup>85</sup> Based on Ohio's definitions of trespass law, the Sixth Circuit ruled that "the Board's decision that J & H lacked a property right entitling it to exclude the union organizers and that it therefore violated § 8(a)(1) of the Act was rational and consistent with the Act."<sup>86</sup>

In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, the California Supreme Court noted that, while its earlier decisions had been influenced by earlier NLRB decisions protecting nonemployee access to private property and by the short-lived *Logan Valley* decision,<sup>87</sup> "state statutory and administrative law could authorize union access and organizing on a private employer's property."<sup>88</sup>

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83. New York New York Hotel, L.L.C., 334 N.L.R.B. 762, 762-63 (2001). This is an expanded definition of access similar to the dissenting opinion in *Tri-County Medical Center, Inc.*, which argued for equivalent access rights between on-duty and off-duty employees. See *Tri-Cnty. Med. Ctr., Inc.*, 222 N.L.R.B. at 1090 n.5 (Fanning, dissenting).

84. *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237, 239-40, 242 (6th Cir. 1995).

85. *Id.* at 242 (quoting *Wolf v. Roberts*, 1945 Ohio Misc. LEXIS 213, at \*5 (Ohio C.P. 1945)) (internal quotation marks omitted).

86. *Johnson & Hardin Co.*, 49 F.3d at 242.

87. *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 599 P.2d 676, 682-83 (Cal. 1979).

88. *Id.* at 684 (citing *Agric. Labor Relations Bd. v. Superior Court*, 546 P.2d 687, 701-02, 706 (Cal. 1976)).

Similarly, the California Supreme Court has upheld the statutory right of construction unions to enter construction sites for inspections (even against the wishes of property owners with whom they did not have a collective bargaining agreement) when they had collective bargaining agreements allowing site inspections with subcontractors.<sup>89</sup> California trespass law states that “this subdivision shall not be applicable to persons engaged in lawful labor union activities which are permitted to be carried out on the property by the [California] Agricultural Labor Relations Act of 1975 . . . or by the National Labor Relations Act.”<sup>90</sup> Also, a separate part of the trespass code states that the industrial trespass law does not prohibit the lawful activities of labor unions or their members. In particular, it does not prohibit “[a]ny lawful activity for the purpose of investigation of the safety of working conditions on posted property by a representative of a labor union.”<sup>91</sup> In order to effectuate protection of worksites, the California Supreme Court held that the statutes left the property owner without the legal right to invoke the trespass law when union representatives were engaged in lawful union activity.<sup>92</sup>

Such access to employer property under California law is required to be peaceful and nondisruptive.<sup>93</sup> The same year it decided *Sears*, the California Supreme Court conversely noted picketing that blocked customer access and might lead to violence was not protected under the Moscone Act.<sup>94</sup>

From these precedents, access for labor advocates to nonpublic areas of the firm that do not disrupt normal business operations should be upheld as legal.

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89. See *In re Catalano*, 623 P.2d 228, 230, 238 (Cal. 1981); see also *In re Zerbe*, 388 P.2d 182, 185–86 (Cal. 1964) (holding that lawful union activities on a third-party railroad right-of-way serving the employer’s plant were not prohibited).

90. CAL. PENAL CODE § 602(o) (West 2011 & Supp. 2014).

91. *Id.* § 552.1(b).

92. *In re Catalano*, 623 P.2d at 236; see also *CDK Contracting Co.*, 308 N.L.R.B. 1117, 1124 (1992) (finding that general contractors could not exclude union representatives of subcontractors’ employees on the theory that, by hiring the subcontractors, it had accepted the union’s contractual “access” rights with those subcontractors).

93. See *Kaplan’s Fruit & Produce Co. v. Super. Ct. of L.A. Cnty.*, 603 P.2d 1341, 1344 (Cal. 1979).

94. *Id.*

D. *The Rum Creek Exception and State Power to Grant Peaceful Access to Employer Property*

The one seemingly glaring challenge to the states' ability to control access to employer property is *Rum Creek Coal Sales Inc. v. Caperton*, a Fourth Circuit decision that the Supreme Court commented on favorably in a later case,<sup>95</sup> suggesting the NLRA preempted a West Virginia law that refused to enforce trespass laws during strikes.<sup>96</sup> However, the details of the decision actually reinforce the authority of states to decide the conditions for access to employer property outside the context of a strike.<sup>97</sup>

The *Rum Creek* decisions involved a very disruptive, sometimes violent mining strike in West Virginia—one of the largest instances of mass direct action by union members during a strike in modern history<sup>98</sup>—which propelled the current President of the AFL-CIO, Richard Trumka, who was then head of the United Mine Workers, into national prominence.<sup>99</sup> At issue in *Rum Creek I* was a West Virginia state law that been enacted in 1978 directly in response to the Supreme Court decisions in *Hudgens* and *Sears* to clarify that state trespass law could not be used to preempt federal labor law goals of protecting labor rights.<sup>100</sup> But because the law suspended enforcement of the state's criminal trespass laws, including the law against

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95. See *Livadas v. Bradshaw*, 512 U.S. 107, 119 n.13 (1994). The Court cited to the second *Rum Creek* decision, in which the Fourth Circuit struck down a similar neutrality statute rather than the trespass statute. *Rum Creek Coal Sales, Inc. v. Caperton*, 971 F.2d 1148, 1153–54 (4th Cir. 1992) [hereinafter *Rum Creek II*]. However, the Fourth Circuit's analyses concerning each statute seem parallel. *Compare id.*, with *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 365–66 (4th Cir. 1991) [hereinafter *Rum Creek I*].

96. *Rum Creek I*, 926 F.2d at 365–66.

97. Because the *Rum Creek I* decision predated the Supreme Court's 1992 decision in *Lechmere*, the Fourth Circuit did not have the benefit of this most current Supreme Court guidance, which has informed other courts of appeals in deciding later cases. See, e.g., *NLRB v. Calkins*, 187 F.3d 1080, 1094–95 (9th Cir. 1999) (noting that the proper accommodation under *Lechmere* had taken place because “[s]tate trespass law that does not guarantee the right to exclude . . . grants broader accommodation of protected conduct than is required by the [NLRA]”). But regardless of whether *Rum Creek I* is fully consistent with current Supreme Court teaching, a general law giving labor access to employer property would not be preempted even under *Rum Creek I*.

98. See RICHARD BRISBIN, *A STRIKE LIKE NO OTHER STRIKE: LAW AND RESISTANCE DURING THE PITSTON COAL STRIKE OF 1989–1990* 2 (2010).

99. See John H. Richardson, *Richard Trumka, American*, *ESQUIRE* (Nov. 21, 2011), <http://www.esquire.com/features/americans-2011/richard-trumka-1211-2>.

100. *Rum Creek I*, 926 F.2d at 355.

property destruction, *only* during strikes,<sup>101</sup> the Fourth Circuit held that this made it not a neutral definition of property law but a specific intervention in the middle of a labor conflict.<sup>102</sup> In labor law terms, this meant that the question was not *Garmon* preemption,<sup>103</sup> but the more specific question of preemption during defined economic conflict between unions and employers governed by the so-called *Machinists* preemption, under which federal labor law protects the right of each side to “make use of economic weapons, not explicitly set forth in the Act, free of governmental interference.”<sup>104</sup>

The Fourth Circuit stated, “The [West Virginia] Trespass Statute appears, however, to infringe on an area preempted by federal law, namely, the Company’s ability to withstand a strike furthered by violent and illegal means.”<sup>105</sup> The Supreme Court later cited the circuit court’s parallel logic from *Rum Creek II* approvingly: “[A] [s]tate may not, consistently with the NLRA, withhold protections of state antitrespass law from [an] employer involved in labor dispute.”<sup>106</sup>

However, the Fourth Circuit explicitly cited to the difference between the preempted nature of the West Virginia statute and the legally valid approach used by California granting “peaceful, orderly, and nonobstructive” access to private shopping malls—which had been upheld against an NLRA preemption challenge in *Sears*—the difference being the West Virginia law’s failure to stop “violent and illegal means,” including property destruction associated with the strike, in finding the law vulnerable to preemption.<sup>107</sup> The other serious problem was that the law only applied during strikes, while a law allowing union access during

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101. *Id.*

102. *Id.* at 365.

103. *See supra* note 56 and accompanying text.

104. *Rum Creek I*, 926 F.2d at 364 (quoting *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 111 (1989)) (internal quotation marks omitted); *see Machinists v. Wis. Emp’t. Relations Comm’n*, 427 U.S. 132, 147 (1976) (“[R]esort to economic weapons should more peaceful measures not avail’ is the right of the employer as well as the employee, and the State may not prohibit the use of such weapons . . . .” (alteration in original) (citation omitted) (quoting *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 317 (1965)) (internal quotation mark omitted).

105. *Rum Creek I*, 926 F.2d at 365.

106. *Livadas v. Bradshaw*, 512 U.S. 107, 119 n.13 (1994) (citing *Rum Creek II*, 971 F.2d 1148, 1154 (4th Cir. 1992)).

107. *Rum Creek I*, 926 F.2d at 364–65 (citing *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 198 (1978)).

nonstrike situations as well would have likely passed legal muster.<sup>108</sup> As the Fourth Circuit noted:

If West Virginia chooses not to make criminal trespass illegal, then it would appear that the Company could not expect to rely on the statute as a means of withstanding a strike. . . . Our analysis does not imply that states must pass certain statutes to avoid preemption; however, once a statute has become part of the background of permissible methods of legal redress in a nonstrike situation, to remove it solely in strike situations, while leaving it applicable to others in general, may jeopardize the employer's ability to withstand a strike.<sup>109</sup>

Therefore, state laws granting access to employer property for peaceful communication with employees and customers in both nonstrike and strike situations would be valid and not subject to preemption even with the *Rum Creek* precedent.<sup>110</sup>

#### IV. PROPERTY RIGHTS AND PUBLIC ACCESS

Any state law giving labor access to employer property is likely to be charged with violating the Fifth Amendment's Takings Clause.<sup>111</sup> A standard statement in property law is that the "right to exclude" others

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108. See *id.* at 365–66.

109. *Id.* at 365–66 n.17.

110. See *id.* Cautionary precedent for the concerns addressed in *Machinists* regarding the NLRA not applying to more general union access legislation, see *Machinists v. Wis. Emp't Relations Comm'n*, 427 U.S. 132, 153 (1976), can be found in *Aeroground, Inc. v. City & County of San Francisco*, in which a district court cited *Machinists* preemption doctrine in a case concerning an airport rule requiring employers operating on airport premises to enter into neutrality agreements with unions. *Aeroground, Inc. v. City of S.F.*, 170 F. Supp. 2d 950, 952, 957–58 (N.D. Cal. 2001). However, *Aeroground* was more generally decided on *Garmon* preemption principles that would not likely apply to the access legislation proposed in this Article. See *id.* at 956.

111. This claim was made in *Fashion Valley Mall*, charging that California's access rules violated the department store's Fifth Amendment property rights; the D.C. Circuit did not rule on that claim because it was not raised before the NLRB. *Fashion Valley Mall, L.L.C. v. NLRB*, 524 F.3d 1378, 1380–81 (D.C. Cir. 2008); see also Brief for California Retailers Association et al. as Amici Curiae Supporting Petitioner at 8, *Ralphs Grocery Co. v. UFCW Local 8*, 290 P.3d 1116 (Cal. 2012), *cert. denied*, 133 S. Ct. 2799 (2013) (No. 12-1162), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/05/Ralphs-Final-amicus.pdf> (arguing that granting labor access to employers' property violates the Fifth Amendment because "physical invasion is a taking that cannot be accomplished without compensation").

from one's property is the "most fundamental of all property interests."<sup>112</sup> Yet given the myriad federal, state, and local laws governing public access to commercial property, such as antidiscrimination laws and zoning ordinances, it is clear that governments have broad powers to regulate when businesses may exclude others from their property,<sup>113</sup> which would extend to justify almost any sensible public access regulation<sup>114</sup> or law giving unions access to nonpublic areas of a firm.<sup>115</sup>

#### A. *Property Rights Derive from State Law*

The Supreme Court has declared repeatedly that property rights, particularly rights over commercial property, are the product of state law, not an independent emanation of the Fifth Amendment. In *Ruckelshaus v. Monsanto Co.*, Justice Harry Blackmun—writing for himself and six of his colleagues—referred to the "basic axiom that [p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."<sup>116</sup>

The dependence of property rights on state (or occasionally federal) law is clearest when the issue involves intangible property such as trade secrets,<sup>117</sup> interest in funds deposited with a state,<sup>118</sup> or rights to employment,<sup>119</sup> but has been extended to rights over land as well.

An instructive example is the government's ability to grant airplanes the right to fly over land owned by others. While common law once defined ownership of land as extending to the sky—often under the rubric of the Roman law maxim of *cujus est solum, ejus est usque ad coelum* (whoever has the land possesses all the space upwards to an indefinite extent)—both federal and state law have restricted control of airspace to allow passage of airplanes above land by statute.<sup>120</sup> In the case of airspace, the Supreme

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112. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

113. *See* discussion *infra* Part IV.B.

114. *See* discussion *infra* Part IV.C.

115. *See* discussion *infra* Part IV.D.

116. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)).

117. *See, e.g., id.* at 1103–04.

118. *See, e.g., Webb's Fabulous Pharmacies*, 449 U.S. at 164–65.

119. *See, e.g., Bd. of Regents v. Roth*, 408 U.S. 564, 578 (1972).

120. *United States v. Causby*, 328 U.S. 256, 260–61 (1946); Walter S. King, *The Fifth Amendment Takings Implications of Air Force Aircraft Overflights and the Air Installation Compatible Use Zone Program*, 43 A.F. L. REV. 197, 198–200 (1997).

Court found that the federal government had the general right to regulate use of the airspace as an adjunct to its commerce power,<sup>121</sup> which had been ratified in the Civil Aeronautics Act of 1938.<sup>122</sup> But a hard question for the Court was to what extent the plane takeoff and landings might infringe on the property rights of landowners.<sup>123</sup> In determining the extent of the infringement on those rights, the Court in *United States v. Causby* wrote “that while the meaning of ‘property’ as used in the Fifth Amendment was a federal question, it will normally obtain its content by reference to local law,”<sup>124</sup> so the Court looked in this case to North Carolina law to establish whether there was illegal use of property.<sup>125</sup>

This just echoes the fact that the few references to the Fifth Amendment in federal labor law cases discussing employee access to employer property are worried about *federal interference* in state-defined property rights. As Justice Rehnquist noted in his dissent in *Eastex, Inc. v. NLRB*, “[T]he Court has recognized the weight of an employer’s property rights, rights which are explicitly protected from *federal interference* by the Fifth Amendment to the Constitution.”<sup>126</sup>

States, on the other hand, have been recognized as largely defining what rights owners have over the use of their property.<sup>127</sup> The *Eastex* case was decided the same year as *Sears* in which, as discussed earlier, the Court—before *Pruneyard* and *Lechmere*—expressed the assumption that state law was determinative of whether nonemployee union representatives could picket on employer property.<sup>128</sup> Notably, the Supreme Court remanded the case to the California Supreme Court to determine whether the union picketers had the right under state law to access the employer property.<sup>129</sup> On remand, the California Supreme Court in its *Sears II*

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121. See *Causby*, 328 U.S. at 260–61 (“The air is a public highway. . . . Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea.”).

122. Civil Aeronautics Act of 1938, Pub. L. No. 113-74, 52 Stat. 973 (codified at 49 U.S.C. § 401 (2006)).

123. See *Causby*, 328 U.S. at 261–66.

124. *Id.* at 266 (internal quotation marks omitted) (quoting *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 279 (1943)).

125. *Id.*

126. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 580 (1978) (Rehnquist, J., dissenting) (emphasis added).

127. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984).

128. *Eastex, Inc.*, 437 U.S. at 556; see *supra* Part III.A.

129. See *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 185 n.8. As the Court noted,

decision found that under state labor statutes,<sup>130</sup> the unions did have the right to picket on the stand-alone Sears store property.<sup>131</sup>

In light of these early precedents, the *Pruneyard* decision, coming the same year as the Supreme Court denied certiorari on the California Supreme Court's post-remanded *Sears II* decision, was almost unexceptional.<sup>132</sup> As Justice Marshall wrote in a concurrence to the *Pruneyard* decision, Court doctrine had long held that states have a broad right to define and modify property rights: "Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature."<sup>133</sup>

A number of other states would follow *Pruneyard* in upholding similar public access standards as California, each affirming the right of free speech access at shopping malls under their respective state constitutions.<sup>134</sup> Even when state high courts did not grant such access, they often made it clear that the state legislature had the power to do so.<sup>135</sup> The New York Court of Appeals declared in 1985 that there was no free speech access to shopping malls under the New York Constitution.<sup>136</sup> However, while the New York high court found no judicially protected right of access, it did so largely in discussions of separation of powers, seeing the

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The State Superior Court and the Court of Appeal concluded that the Union's activity violated state law. Because it concluded that the state courts lacked jurisdiction to entertain the state trespass claim, the California Supreme Court did not address the merits of the lower court rulings. The Union contends that those rulings were incorrect. Though we regard the state-law issue as foreclosed in this Court, there is of course nothing in our decision on the pre-emption issue that bars consideration of the Union's arguments by the California Supreme Court on remand.

*Id.*

130. Moscone Act, CAL. CIV. PROC. CODE § 527.3 (West 2011).

131. *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 599 P.2d 676, 679 (Cal. 1979).

132. *See Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83–85 (1980).

133. *Id.* at 92 (Marshall, J., concurring) (alteration in original) (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1877)).

134. *See, e.g., N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757, 760 (N.J. 1994); *Bock v. Westminster Mall Co.*, 819 P.2d 55, 61 (Colo. 1991).

135. *See, e.g., SHAD Alliance v. Smith Haven Mall*, 488 N.E.2d 1211, 1212, 1218 (N.Y. 1985).

136. *Id.* at 1218.

extension of such access as part of the legislative role.<sup>137</sup> It described a constitutional decision on the issue disapprovingly as “‘a determination by the court that it, instead of the legislature, will settle conflicting interests among citizens and that it will accomplish this by what it chooses to call a constitutional basis,’ which is then beyond legislative reach.”<sup>138</sup> This is significant because it indicates that the refusal of state high courts like New York’s to grant *constitutional* protection for such access should not be construed to mean that the court saw any constitutional bar to *legislatively* requiring public access to employer property.<sup>139</sup>

B. *The Regulation of an Employer’s “Right” to Select Its Guests*

While the ability of states to grant access to malls or other multifirm operations is clear under *Pruneyard*,<sup>140</sup> the opponents of access laws aimed at single firms have argued that the principles of *Pruneyard* apply only to shopping centers and would not extend to stand-alone stores. Yet the Supreme Court followed *Pruneyard* almost immediately with *Roberts v. United States Jaycees*, which upheld state sex discrimination laws that opened up previously all-male private clubs to women.<sup>141</sup> Citing *Pruneyard*, the Court in *Jaycees* explained, “A State enjoys broad authority to create rights of public access on behalf of its citizens,” even in a private club in which only “quasi-commercial conduct” is involved.<sup>142</sup>

The principle that government may regulate when a business may or may not exclude a person from its premises dates back to *Heart of Atlanta Motel, Inc. v. United States*, which upheld the 1964 Civil Rights Act as not violating the Takings Clause.<sup>143</sup> The only limits on how small of a firm the

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137. *Id.* at 1216–17.

138. *Id.* at 1217 (citation omitted) (quoting *Alderwood Assocs. v. Wash. Envtl. Council*, 635 P.2d 108, 119 (1981) (Dolliver, J., concurring)).

139. *See id.*

140. *See* Richard A. Epstein, *Takings, Exclusivity, and Speech: The Legacy of Pruneyard v. Robins*, 64 U. CHI. L. REV. 21, 35 (1997). As Professor Epstein has stated,

*Pruneyard’s* clear logic grants *all* political groups equal access to shopping centers, and thus rules out any selective preference for the original protesters. So the bottom line is that, so long as state law will oblige, shopping centers can be converted into a limited public forum open to political speech of all shades and opinions.

*Id.*

141. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625–27 (1984).

142. *Id.* at 625 (citing *Pruneyard*, 447 U.S. at 81–88).

143. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258–59

federal civil rights law can regulate are assumed interstate commerce limits—limits not binding on state governments, which would be able to create a right of public access to any size firm under this principle.<sup>144</sup> It is clear that if government can mandate access to a private club without running afoul of the Fifth Amendment, it can regulate public access to a wide range of firms open to the public.<sup>145</sup>

Once a firm allows any public use of its property, the idea that the government then has clear power to regulate when the firm may revoke that license for access pervades case law. One of the earlier examples of this doctrine was in the 1946 *Marsh v. Alabama* decision, in which the Court required a “company town” to allow public protest on its company-owned streets.<sup>146</sup> While couched in First Amendment terms—the case was invoked as precedent for the short-lived *Logan Valley* doctrine<sup>147</sup>—it stated a broader principle of the power of government to require access to private commercial property: “Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”<sup>148</sup> *Pruneyard* is one aspect of this principle,<sup>149</sup> but the Court has extended it to uphold extensive regulations of how businesses allow access to their property. For example, in *Yee v. City of Escondido*, the Court unanimously upheld a city law imposing rent control on mobile home park owners.<sup>150</sup> Because mobile home operators had chosen to go into a business where they rented land to others, they had no constitutional standing to challenge how the government might regulate the conditions of that access.<sup>151</sup> According to the Court, “no government ha[d] required any physical invasion of petitioners’ property. Petitioners’ tenants were invited by petitioners, not forced upon them by the government.”<sup>152</sup> Moreover, citing to both

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(1964) (“[A business] has no ‘right’ to select its guests as it sees fit, free from governmental regulation.”).

144. See, e.g., IOWA CODE § 216.6(6)(a) (2014) (providing that the state’s unfair-employment-practices statute does not apply to employers with fewer than four employees).

145. See *Roberts*, 468 U.S. at 625.

146. *Marsh v. Alabama*, 326 U.S. 501, 507–08 (1946).

147. See *supra* notes 21–24 and accompanying text.

148. *Marsh*, 326 U.S. at 506.

149. See *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83–85 (1980).

150. *Yee v. City of Escondido*, 503 U.S. 519, 527–29 (1992).

151. *Id.* at 529.

152. *Id.* at 528.

*Pruneyard* and *Heart of Atlanta*, the Court added that “[b]ecause they voluntarily open their property to occupation by others, petitioners cannot assert a *per se* right to compensation based on their inability to exclude particular individuals.”<sup>153</sup>

This amounts to what Professor Richard Epstein complains is an “all-or-nothing” version of consent to access by an owner of land,<sup>154</sup> a characterization that is basically correct, but, as he also emphasizes, if this is true, then there is no coherent doctrine to uphold civil rights access under *Heart of Atlanta* and shopping center access under *Pruneyard*, while excluding it for other firms that open their property to public access.<sup>155</sup> As Epstein writes, “[s]peech in public fora is protected on small roads as well as large highways. So long as private property may be pressed into public service, differences in its size, location or use seem irrelevant to the threshold question of public use. . . .”<sup>156</sup>

C. *What About Loretto, Nollan, Dolan? The Need to Allow Time, Place, and Manner Regulations by Land Owners*

In takings cases, the Supreme Court and other state high courts have continuously allowed public access to commercial property, with the caveat that the owner retain the right to impose reasonable time, place, and manner restrictions on public use of its property. In *Pruneyard*, the Supreme Court emphasized that California allowed property owners to adopt “time, place, and manner regulations that will minimize any interference with [their] commercial functions.”<sup>157</sup> With this requirement met, “the fact that [nonemployees] may have ‘physically invaded’ [a firm’s] property cannot be viewed as determinative.”<sup>158</sup> Earlier labor cases had emphasized that the access required for union speech rights under federal labor law did not violate employers’ constitutional property rights because it was for specific purposes and under specific conditions, such as restrictions to nonwork areas: “[T]he principle of accommodation announced in *Babcock* is limited to labor organization campaigns, and the ‘yielding’ of property rights it may require is both temporary and

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153. *Id.* at 531; *see also* *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 259 (1964) (“[A]ppellant has no ‘right’ to select its guests as it sees fit, free from governmental regulation.”).

154. Epstein, *supra* note 140, at 38.

155. *See id.* at 34.

156. *Id.*

157. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1979).

158. *Id.* at 84.

minimal.”<sup>159</sup>

To a large extent, the dramatic takings cases that have overturned local government public access regulations have all been decided based on the fact that the government regulations at issue failed to offer property owners the option of placing time, place, and manner restrictions on public access to their land.<sup>160</sup>

The first case following *Pruneyard* to emphasize this principle was *Loretto v. Teleprompter Manhattan CATV Corp.*, in which the Court found that a local government regulation requiring an apartment owner to allow cable companies to string cable to be unconstitutional.<sup>161</sup> The Supreme Court emphasized that there is a clear constitutional distinction between a *permanent* invasion of property, such as with a cable that is never removed and therefore raises constitutional concerns versus a temporary grant of access like that found in *Pruneyard*.<sup>162</sup> The Court reiterated the principle that so long as a property owner remains able to impose “reasonable time, place, and manner restrictions to minimize interference with the owner’s commercial functions,” a law granting access to private property would not constitute a taking.<sup>163</sup>

In *Dolan v. City of Tigard*, the Court found that conversion of part of a store owner’s property into a public greenway as a condition for a zoning variance violated the Fifth Amendment because the store owner “would lose all rights to regulate the time in which the public entered onto the greenway, regardless of any interference it might pose with her retail store. Her right to exclude would not be regulated, it would be eviscerated.”<sup>164</sup> The Court had earlier emphasized that “[t]he *permanence* and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude,” which the Court found were

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159. *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 545 (1972).

160. *See Dolan v. City of Tigard*, 512 U.S. 374, 394 (1994); *Nollan v. Cal. Coastal Comm’n.*, 483 U.S. 825, 838–39 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434, 438–39 (1982).

161. *Loretto*, 458 U.S. at 421.

162. *Id.* at 427–28, 430, 434. The Court cited cases distinguishing between instances when the government temporarily flooded land during the building of a tunnel versus a permanent flooding that would constitute an unconstitutional taking. *Id.* at 427–28. *Compare* *N. Transp. Co. v. Chicago*, 99 U.S. 635, 642 (1879), *with* *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 181 (1872).

163. *Loretto*, 458 U.S. at 434.

164. *Dolan*, 512 U.S. at 394.

constitutional under *Pruneyard*.<sup>165</sup> But notably, the size of the store in *Dolan* never entered the discussion on distinguishing the case from the multistore shopping center involved in *Pruneyard*.<sup>166</sup>

While additional issues were at stake in *Nollan v. California Coastal Commission*, especially the noncommercial nature of the land, the Court's decision generally followed the same principle.<sup>167</sup> In *Nollan*, the Court prohibited a local government from requiring an easement across a landowner's beachfront property because "individuals are given a *permanent* and *continuous* right to pass to and fro."<sup>168</sup> Even in this extreme case—privately owned, noncommercial land where nobody had been offered any invitation to enter—the Court argued that more limited access to the property might be justifiable if it were less open ended.<sup>169</sup> In discussing such an alternative, a more restricted access provision, the Court held this kind of "condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby whose sighting of the ocean their new house would interfere."<sup>170</sup>

In the 2005 *Lingle v. Chevron U.S.A. Inc.* decision, the Court, in analyzing the use of takings analysis applied to business regulations, sought to cabin the issues involved in *Nollan* and *Dolan* as cases that "involved dedications of property so onerous" as to clearly be takings.<sup>171</sup> Again, the Court's emphasis was on whether any *permanent* physical invasion of property had occurred, citing to *Loretto* as the paradigmatic situation calling for a takings analysis.<sup>172</sup>

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165. *Loretto*, 458 U.S. at 435 n.12 (emphasis added); see *Dolan*, 512 U.S. at 394.

166. See *Dolan*, 512 U.S. at 394.

167. See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987).

168. *Id.* at 832 (emphasis added). *Pruneyard* was distinguished partly because *Nollan*'s property was noncommercial but also because "permanent access was not required" in *Pruneyard*. *Id.* at 832 n.1.

169. See *id.* at 836.

170. *Id.* While the Court noted that such a condition would be constitutional as a requirement for receiving a building permit, it emphasized that such access might be considered a taking if no permit was granted, highlighting the possible difference in analysis between commercial and noncommercial land. *Id.* However, since every business could be legally barred from operating through zoning or other licensing laws, the ability to impose access requirements as a condition of operation in such a case is stronger than in the *Nollan* situation. See *id.* at 836–37.

171. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005).

172. *Id.* at 538 (emphasis added).

As long as the use of the land is for a limited purpose (as opposed to an open-ended easement) the principle articulated in this line of cases consistently supports public access statutes under which landowners do not lose all rights to regulate the conditions for that access.

D. *Extending Nonemployee Access to Nonpublic Areas of a Firm*

While the Supreme Court has clearly stated that the government may regulate on behalf of access for free speech rights anywhere that the public has generally been invited (or given “license” in property law terms), the Court has long recognized that regulations extending access to property not generally accessible to the public are proper functions of government, especially when the access granted is limited in time and manner to the purposes for which access is granted.<sup>173</sup> As the Court stated in *Nollan*, when there is a strong state interest in regulating property, a “broad range of governmental purposes and regulations satisfies” the requirements for a valid infringement of property rights.<sup>174</sup>

Most relevant to our inquiry, the Supreme Court has found no violation of property rights when the federal government has granted access to nonpublic areas of employer property under the NLRA.<sup>175</sup> As the Court explained in its 1945 *Republican Aviation* decision, which upheld employees’ right to ignore employer rules against soliciting union membership on employer property: “[An] employer’s right to control his property does not permit him to deny access to his property to persons whose presence is necessary there to enable the employees effectively to exercise their right to self-organization and collective bargaining.”<sup>176</sup>

Again, the key to the government’s power to intrude on employer property rights is that, unlike the permanent easements granted in *Nollan* or *Dolan*,<sup>177</sup> the access required under labor law is regulated in time and to nonworking areas to avoid disruption of business operations. As the Court wrote in a 1972 case, mandatory access under the NLRA is justified because “the ‘yielding’ of property rights [the NLRA] may require is both

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173. See *Nollan*, 483 U.S. at 834–35.

174. *Id.* at 835.

175. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802 & n.8 (1945).

176. *Id.* (quoting *Le Tourneau Co. of Georgia*, 54 N.L.R.B. 1253, 1259–60 (1944)).

177. See *Dolan v. City of Tigard*, 512 U.S. 374, 394 (1994); *Nollan*, 483 U.S. at 836–37.

temporary and minimal.”<sup>178</sup>

While the Court has made a determination that nonemployee union representatives have limited rights under the law to access employer property, it is significant that in *Lechmere*, the Court emphasized that this is a statutory determination and made no reference to constitutional property rights.<sup>179</sup> As labor scholar Cynthia Estlund has noted, there had been dicta in earlier cases arguing that the distinction between nonemployee and employee rights under the NLRA was based on the property law idea that employees, unlike nonemployees, already had license to be on the property, but *Lechmere* abandoned that line of argument in favor of a pure statutory interpretation of the NLRA.<sup>180</sup>

In a sense, this abandonment of any property rights rationale for its nonemployee access case law is almost mandated by the Court’s rulings in *Loretto*, *Nollan*, and *Dolan*<sup>181</sup> because, while the Court has restricted nonemployee access to employer property,<sup>182</sup> it has not completely prohibited it, such as when employees are especially inaccessible in logging camps and company towns.<sup>183</sup> Under the unforgiving standard of the Court’s current property rights analysis, if mandated access constitutes an uncompensated taking of employer property, *any* kind of mandated access, however limited to those specific cases, would be unconstitutional. While one could argue for a greater public interest in union access to inaccessible locations—which has been salient in the statutory interpretation of the NLRA<sup>184</sup>—such an argument is irrelevant in the takings context, as the Court made clear in the *Lingle* decision in stating that no “means-ends test” is appropriate in a Fifth Amendment case.<sup>185</sup> As Justice Sandra Day O’Connor stated for a unanimous Court, any measure of the public interest in a case affecting property rights only speaks to whether it constitutes a

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178. Cent. Hardware Co. v. NLRB, 407 U.S. 539, 545 (1972).

179. Lechmere, Inc. v. NLRB, 502 U.S. 527, 534–35 (1992).

180. Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305, 323–24 (1994); see *Lechmere*, 502 U.S. at 537–38.

181. See *supra* Part IV.C.

182. See, e.g., *Lechmere*, 502 U.S. at 537, 540.

183. See *id.* at 539–40 (collecting circuit court cases involving circumstances in which “the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them” (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956)) (internal quotation marks omitted)).

184. See Estlund, *supra* note 180, at 311–12.

185. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005).

“public use,” but “such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking.”<sup>186</sup> A regulation of property rights will not therefore be considered a taking just because it serves a lesser public interest than a similar regulation that was not considered a taking.<sup>187</sup> For example, if requiring access to a lumber camp is not a taking, then requiring access to other property cannot be considered a taking merely because the public interest need for the access is considered less compelling. So *Lechmere*’s sole focus on statutory interpretation of the NLRA as the reason nonemployees are *generally* (but significantly not always) barred from access to employer property is a logical outgrowth of the Court’s property rights case law.<sup>188</sup>

Notably, throughout the back-and-forth struggles on the Supreme Court in interpreting when nonemployees may be granted access, not once has a justice, whether in the majority or dissent, ever suggested that there is an absolute Fifth Amendment bar to allowing such access. In fact, it would be hard to square the property access extended to employees under the NLRA with any coherent Fifth Amendment doctrine that was based on the idea that access was only being extended because an employee had already been granted a license to be there. Employee access under the NLRA has not been limited either to normal work hours or just to the limited spaces where the employee may regularly work. The NLRB has repeatedly ruled that off-duty employees have the general right to return to employer property, even on their days off on union business.<sup>189</sup> And the NLRB ruled that employees of a building subcontractor could not be restricted to organizing activity in the construction work site portion of a mall, but had the right to handbill anywhere in the store that did not interfere with the sales floor.<sup>190</sup> This rule has been extended to allow access by employees to

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186. *Id.* at 543.

187. *See id.*

188. *See Lechmere*, 502 U.S. at 537–40.

189. *See, e.g., New York New York Hotel*, 334 N.L.R.B. 762, 762–63 (2001) (“[O]ff-duty employees may engage in protected solicitation and distribution in nonwork areas of the owner’s property unless the owner can show that prohibiting that sort of activity is necessary to maintain production and discipline.”); *Auto. Plastic Techs.*, 313 N.L.R.B. 462, 463 (1993) (“Unlike the nonemployee union organizer . . . , an off-duty employee is a ‘stranger’ neither to the property nor to the employees working there.”); *see also NLRB v. Le Tourneau Co. of Ga.*, 324 U.S. 793, 802 n.8 (1945) (upholding the right of an off-duty employee to be on employer property to solicit for the union).

190. *MBI Acquisition Corp.*, 324 N.L.R.B. 1246, 1250 (1997).

completely different worksites owned by the same employer.<sup>191</sup>

Even dissents from the Supreme Court's NLRA access to employer property cases have couched their arguments in statutory interpretation of the NLRA and deference to state trespass law. For example, while Justice Rehnquist objected fiercely to the *Eastex* decision, which gave employees the right under the NLRA to distribute political information at work in defiance of employer rules,<sup>192</sup> he specifically cited to Texas statutory definitions of trespass for his argument that the NLRB decision was a violation of the employer's property rights.<sup>193</sup>

So on this basis, it is clear that state and local governments can extend access to nonemployees by modifying their trespass laws to accommodate limited intrusions not only to nonpublic areas of business property but to private property of all kinds without Fifth Amendment objections. There is actually a long history of such legislation that traces back to common law and older statutory doctrines, such as the doctrine that a person may access another person's land to retrieve livestock that has escaped or been taken onto that land.<sup>194</sup>

Most directly on point, California's Agricultural Labor Relations Act requires private farm camps to allow union organizers onto their property.<sup>195</sup> Regulations under the law provide that organizers can enter the employer's property to talk to workers before their shift, during their lunch break, and after their shift.<sup>196</sup> The California Supreme Court affirmed that the law and regulations did not constitute an illegal taking, because such property regulation to protect the public welfare was legal under the state constitution: "[A]ll private property is held subject to the power of the government to regulate its use for the public welfare."<sup>197</sup> The Supreme Court granted certiorari in *Kubo v. Agricultural Labor Relations Board* but then dismissed the appeal for want of a substantial federal question.<sup>198</sup> While not definitive on all issues, the Court generally considers such

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191. See, e.g., *First Healthcare Corp.*, 336 N.L.R.B. 646, 648–49 (2001), *aff'd*, 344 F.3d 523 (6th Cir. 2003); *U.S. Postal Serv.*, 318 N.L.R.B. 466, 467–68 (1995).

192. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 572–73 (1978).

193. See *id.* at 580 (Rehnquist, J., dissenting).

194. See Richard A. Epstein, *Property and Necessity*, 13 HARV. J.L. & PUB. POL'Y 2, 6 (1990) (discussing necessity as a defense to an action for trespass).

195. CAL. LAB. CODE §§ 1152–1153 (West 2011).

196. 8 CAL. CODE REGS. tit. Industrial Relations, § 20900(e)(3) (2014).

197. *Agric. Labor Relations Bd. v. Superior Court*, 546 P.2d 687, 694 (Cal. 1976).

198. *Kubo v. Agric. Labor Relations Bd.*, 429 U.S. 801 (1976).

dismissals to constitute dispositions on the merits and, accordingly, to carry precedential weight.<sup>199</sup> In 1977, the Massachusetts Supreme Judicial Court, citing to *Kubo*, upheld a similar state rule giving labor advocates the right to visit farm camps on company property as not violating the Fifth Amendment because “the enjoyment of private property may be subordinated to reasonable regulations that are essential to the peace, safety, and welfare of the community.”<sup>200</sup>

Similarly, as noted earlier, the California Supreme Court has upheld the statutory right of unions in the building trades, based on provisions in state trespass law, to enter construction sites for inspections, even against the wishes of property owners with whom they did not have a collective bargaining agreement, when they had collective bargaining agreements allowing site inspections with subcontractors and when unions were investigating potential safety problems at a worksite.<sup>201</sup> In order to effectuate protection of worksites, the California Supreme Court held the property owner was without the legal right to invoke the trespass law when union representatives were engaged in lawful union activity.<sup>202</sup> None of this constituted a violation of a company’s property rights, as the California Court held, “Defendants’ entry to perform a safety inspection and prepare a steward’s report is an accepted and traditional practice in the construction industry, which does no harm to the economic or property

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199. See *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (“[V]otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case.” (quoting *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959)) (internal quotation marks omitted)).

200. *Consol. Cigar Corp. v. Dep’t of Pub. Health*, 364 N.E.2d 1202, 1207–08 (Mass. 1977) (citing *Durgin v. Minot*, 89 N.E. 144, 146 (Mass. 1909)). New York has not passed legislation similar to Massachusetts, but a 1991 Attorney General’s Opinion Letter indicated that various precedents and common law principles would give unions similar rights of access to such camps. Formal Opinion No. 91-F7, 1991 N.Y. Op. Atty. Gen. 23, 1991 WL 537273, at \*6 (Nov. 25, 1991).

201. *In re Catalano*, 623 P.2d 228, 234, 236 (Cal. 1981). This is based on provisions in California trespass law that state “this subdivision shall not be applicable to persons engaged in lawful labor union activities which are permitted to be carried out on the property by the [California] Agricultural Labor Relations Act of 1975 . . . or by the National Labor Relations Act.” CAL. PENAL CODE § 602(o) (West 2011 & Supp. 2014). A separate part of the trespass code states that the industrial trespass law does not prohibit the lawful activities of labor unions or their members. In particular, it does not prohibit any lawful activity for the purpose of investigating the safety of working conditions on posted property by a representative of a labor union. *Id.* § 552.1.

202. *In re Catalano*, 623 P.2d at 238.

interests of the landowner.”<sup>203</sup>

*E. Do Public Access Rules Require Compensation to Employers?*

This last point, that granting public access to company property does not reduce the value of a company’s property, is ultimately the heart of the takings question. There is little question that property burdened with a permanent easement, as in *Nollan*, or property that cedes acreage to a city, as in *Dolan*, is less valuable than property unburdened with a permanent modification of property rights.<sup>204</sup> For if the owners were no worse off financially, no compensation would be owed and no illegal taking would occur.<sup>205</sup>

But, a regulation requiring public access at certain businesses in no way diminishes the economic value of the underlying property owned by a company. As the Court pointed out in *Yee v. City of Escondido*, because a business can escape temporary regulation of land use by selling the land to an owner unaffected by such regulation, that option means they cannot claim an irreversible physical taking that demands compensation.<sup>206</sup>

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203. *Id.* at 230; *see also In re Zerbe*, 388 P.2d 182, 185–86 (Cal. 1964) (holding that lawful union activities on a third-party railroad right-of-way serving the employer’s plant are not prohibited).

204. *Dolan v. City of Tigard*, 512 U.S. 374, 394 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987).

205. In *Brown v. Legal Foundation of Washington*, the Supreme Court emphasized that compensation owed “is measured by the property owner’s loss rather than the government’s gain.” *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235–36 (2003). Therefore, *Brown* established that “if petitioners’ net loss was zero, the compensation that is due is also zero.” *Id.* at 237. The dissent in *Brown* wanted a different standard—the market value of the property taken—but that different standard has little bearing on this Article’s analysis, even though the elevation of Chief Justice John Roberts likely shifts doctrine to that of the dissent. *See id.* at 250 (Scalia, J., dissenting). *But see Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949) (suggesting that market price is merely “a fair measure of public obligation to compensate the loss incurred by an owner as result of the taking”).

206. *Yee v. City of Escondido*, 503 U.S. 519, 527–28 (1992). In discussing why a burdensome rent control law preventing mobile home park owners from evicting tenants was not a taking, the Court argued,

Petitioners voluntarily rented their land to mobile home owners. At least on the face of the regulatory scheme, neither the city nor the State compels petitioners, once they have rented their property to tenants, to continue doing so. To the contrary, the Mobilehome Residency Law provides that a park owner who wishes to change the use of his land may evict his tenants, albeit with 6 or 12 months notice.

The alternative is that a business could claim that access legislation constitutes a regulatory taking, namely the idea that it frustrates reasonable “investment-backed expectations” of profit.<sup>207</sup> Where a company makes its income from regulating access to its property, as a marina did in *Kaiser Aetna v. United States*, mandated access does undercut the very rationale for which investments to create the property were made because the marina owner would no longer be able to charge membership fees.<sup>208</sup> But, as the Supreme Court emphasized by distinguishing public access law as that in *Pruneyard* from the situation in *Kaiser*, businesses that do not depend on regulated access to their land as an income source—which covers most businesses—are not frustrated in their purposes in investing in the property.<sup>209</sup> And even for businesses earning income from regulating and charging for general public access to their property, such businesses would lose no income from specific access granted for a limited purpose such as educating workers or the public on labor issues.<sup>210</sup>

Because businesses often vociferously oppose public access rules, scholars such as Epstein argue that businesses obviously suffer economic damages from these rules, including the costs of implementing time, place, and manner regulations and the loss of “ambience.”<sup>211</sup> Yet such economic losses are just the normal staple of all garden variety regulations, which always impose compliance costs, restrain aesthetic design choices, and may lead to other costs unrelated to the property value, as with an access law favoring stronger labor unions potentially leading to higher labor costs. Because public access rules impose no permanent deprivation of value or use of the underlying property, but only the normal adjustments to profits that any regulation may impose, a business suffers no economic loss

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*Id.*

207. This standard for regulatory takings was first articulated in *Penn Central Transportation Co. v. New York City*, which stated that a “statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a ‘taking.’” *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978) (citing *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414–15 (1922)). The Court recently restated this in *Lingle*, finding that a regulatory taking is evaluated based on “the extent to which the regulation has interfered with distinct investment-backed expectations.” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538–39 (2005) (quoting *Penn Cent.*, 438 U.S. at 124) (internal quotation mark omitted).

208. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); see *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1979).

209. *Pruneyard*, 447 U.S. at 84.

210. See *id.*

211. Epstein, *supra* note 140, at 48–49.

cognizable under a takings analysis that would distinguish them from all manner of wage, environmental, and health and safety regulations.<sup>212</sup>

At least in the case of public areas of the firm, Frank Michelman argued that businesses have even less standing to oppose public access rules than with most regulations because the very value of property is enhanced by the “social commons” of urban culture<sup>213</sup>—what Carol Rose calls the comedy of the commons.<sup>214</sup> “Lawmakers may conclude with good reason that processes of suburban and exurban development have been a direct contributing cause of the socially costly degradation suffered by urban-center spaces,” so it is irrational for the government to have to compensate businesses for the “public nuisance actions contributing to the degradation of pre-existing, urban-center social capital.”<sup>215</sup>

#### F. *The Fourth Amendment and Labor Access to Employer Property*

A more complicated question is what procedures might be required to exercise the right of access by nonemployee labor advocates, especially in light of Fourth Amendment concerns that such access mandated by government—particularly to nonpublic areas of a firm—might constitute something analogous to a warrantless search.

On one hand, the *Pruneyard*-related and NLRB line of cases governing employee organizer access to company property may be sufficient to show that there is little constitutional worry under the Fourth Amendment in extending mandated access to nonemployees serving a public interest. Constitutionally, the courts have a complex and conflicting set of doctrines covering when government agents must have a warrant to access private property.<sup>216</sup> Because much of that legal focus has been based on fears of administrative inspection abuse to find criminal violations,<sup>217</sup>

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212. As the Court wrote in *Penn Central*, while regulatory takings analyses are “essentially ad hoc, factual inquiries,” the underlying police power of government to serve the public interest means that “government may execute laws or programs that adversely affect recognized economic values” without engaging in unconstitutional takings. *Penn Cent. Transp. Co. v. New York City*, 483 U.S. 104, 124 (1978).

213. Frank Michelman, *The Common Law Baseline and Restitution for the Lost Commons: A Reply to Professor Epstein*, 64 U. CHI. L. REV. 57, 63–64 (1997).

214. Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 768 (1986).

215. Michelman, *supra* note 213, at 64.

216. See generally Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254 (2011).

217. See Geoffrey G. Hemphill, *The Administrative Search Doctrine: Isn't This*

nongovernment agent access may not implicate the same concerns. However, there are at least some procedural issues that might have to be addressed to make such access viable under court precedents.

If such an access law is considered analogous to a warrantless administrative search, the Supreme Court has been inconsistent in determining when warrants are required to enforce regulations in commercial establishments. Initially, the Court held the Fourth Amendment's warrant requirement applied only to searches undertaken to procure evidence of criminality and not to administrative inspections or searches undertaken to implement a regulatory scheme.<sup>218</sup> The Court, however, abandoned that position in *Camara v. Municipal Court* and *See v. City of Seattle*, holding instead that the Fourth Amendment applies to searches undertaken for regulatory purposes as well as to searches for criminal evidence, although administrative warrants do not need probable cause to be valid since they "are neither personal in nature nor aimed at the discovery of evidence of crime."<sup>219</sup>

However, shortly after *Camara* and *See* were decided, the Supreme Court declared in *Colonnade Corp. v. United States* and *United States v. Biswell* that the Fourth Amendment does not demand a warrant for an inspection or search of business premises when the particular industry is subject to close governmental supervision<sup>220</sup> and, as found in a subsequent case, when there is a "pervasiveness and regularity of the federal regulation."<sup>221</sup> In a series of cases, the Court would zig and zag on what degree and kind of government regulation justified warrantless administrative searches.<sup>222</sup>

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*Exactly What the Framers Were Trying to Avoid?*, 5 REGENT U. L. REV. 215, 239 (1995) ("The Fourth Amendment secures a right against unreasonable searches just as the Fifth Amendment protects criminal defendants against self-incrimination. . . . Simply going into business does not translate into a voluntary, knowing and intelligent waiver of one's right against unreasonable search and seizure.").

218. *See Frank v. Maryland*, 359 U.S. 360, 365–66 (1959).

219. *Camara v. Municipal Court*, 387 U.S. 523, 537–38 (1967); *see See v. City of Seattle*, 387 U.S. 541, 543–44 (1967).

220. *United States v. Biswell*, 406 U.S. 311, 315–16 (1972); *Colonnade Corp. v. United States*, 397 U.S. 72, 77 (1970).

221. *Donovan v. Dewey*, 452 U.S. 594, 606 (1981).

222. *See New York v. Burger*, 482 U.S. 691, 702 (1987) (holding that warrantless searches of car junkyard records and property were reasonable because "the privacy interests of the owner [were] weakened and the government interests in regulating [the industry were] concomitantly heightened"); *Donovan*, 452 U.S. at 605–06 (holding that quarry inspections did not require a warrant because of the

Clarity on where nonemployee labor advocates may be and any conditions that they not disrupt the operations of the business will likely be needed in any access law—especially ones giving access to nonpublic areas of a firm—to sustain the standards set in these cases, such as the California building site inspection statutes that allow access in pursuit of “lawful labor union activities” so “long as they do not interfere with the work in progress.”<sup>223</sup> In *Utah Power & Light Co. v. Secretary of Labor*, the Tenth Circuit upheld the right of union representatives under the Federal Mine Safety and Health Act to “walk around” mine properties as part of government inspections, noting that any fears of abuse by union representatives could be dealt with by taking “action against individual instances of abuse when it discovers them” rather than by excluding the representatives,<sup>224</sup> an analysis endorsed by the Supreme Court in *Thunder Basin*.<sup>225</sup>

There are two other concerns that this line of case law addresses, namely that multiple visits to a firm will be protected as legal and that there is no rigid definition of who may be designated to enforce regulatory rules in the workplace. The Supreme Court has supported inspection statutes “authorizing warrantless inspections even when such statutes did not establish a fixed number of inspections for a particular time period.”<sup>226</sup> Similarly, the Court has given states discretion to designate who would enforce its regulatory system: “[W]e decline to impose upon the States the burden of requiring the enforcement of their regulatory statutes to be carried out by specialized agents.”<sup>227</sup>

So the law should be able to establish that labor advocates are reasonable agents to enforce an employment regulatory scheme, both because of underfunding of enforcement agencies and the likelihood of establishing trust with exploited employees in some cases in which

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“pervasiveness and regularity of the federal regulation” of the mining industry); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 313 (1978) (holding that, outside of industries with “a long tradition of close government supervision,” OSHA inspections require warrants).

223. *In re Catalano*, 623 P.2d 228, 234, 239 (Cal. 1981); see CAL. PENAL CODE § 552.1 (West 2011).

224. *Utah Power & Light Co. v. Sec’y of Labor*, 897 F.2d 447, 452 (10th Cir. 1990).

225. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 (1994).

226. *Burger*, 482 U.S. at 711 n.21; see, e.g., *United States v. Biswell*, 406 U.S. 311, 312 n.1, 316 (1972) (permitting a warrantless search of a firearms dealer under a statute providing for no set number of searches and no set timeframe).

227. *Burger*, 482 U.S. at 718.

government officials cannot. Additionally, the law should be able to establish a reasonable basis for allowing multiple visits by labor advocates to talk with employees—such as different shifts and the need to give employees time to gain the confidence to approach the advocates—in order to support a more open-ended set of visits.

Alternatively, the Second Circuit, which similarly upheld inspections in nursing homes in *Blue v. Koren*, gave another basis for encouraging warrantless inspections:

Many patients at nursing homes are helpless, and their physical and mental well-being and quality of life are often at the mercy of the operators and staff. . . . Mistreated patients may find it difficult or impossible to contact regulatory officials or to rebut denials by the operator or staff regarding conditions of care. Unannounced, on-site inspections are thus essential to the regulatory scheme.<sup>228</sup>

Given the argument that the labor advocate access law is designed to educate workers who are either uninformed of their rights or afraid to exercise them, a broad right of access protected on a basis analogous to the argument in *Koren* could be compelling.<sup>229</sup>

One condition that might ease constitutional approval of access for nonemployee advocates is a legal provision that those given access will not be able to independently testify if they witness criminal violations on site but can only encourage employees themselves to exercise their right to come forward.

A potential access ordinance could define the access available to labor advocates and establish that if an employer denied them entry they would have the right to go to court to enforce their rights and be awarded attorney fees if they prevail in court. This should satisfy the due process concerns that pervade this case law.<sup>230</sup> Some system of bonding or conducting background checks on those seeking access might be required to uphold employer property concerns related to security. The NLRB stated in at least one case that off-site employees seeking access might be required to meet security measures beyond those of on-site employees to

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228. *Blue v. Koren*, 72 F.3d 1075, 1080–81 (2d Cir. 1995).

229. *See id.*

230. *See, e.g., Mem'l Hosp. v. Axelrod*, 499 N.Y.S.2d 505, 508 (Sup. Ct. App. Div. 1986), *aff'd*, 503 N.E.2d 97 (N.Y. 1986) (imposing a civil fine on a hospital for refusing to allow inspectors to examine patients as required by law, thereby forcing the government to obtain a warrant to confirm its right to the records).

protect those property interests.<sup>231</sup>

However, some states may have stricter rules for warrantless searches under their own state constitutions. For example, in New York, interpreting Article I Section 12 of the New York constitution, the state high court in *People v. Scott* expressed concern that administrative searches not be used to further research toward a criminal indictment.<sup>232</sup> The New York court also declared that only firms with more than pro forma regulation could be subject to warrantless searches.<sup>233</sup> Along with barring warrantless searches in the automobile junkyards at issue in *Burger*, New York has also barred warrantless inspections for residential commercial property as a condition for renewing the license to rent it.<sup>234</sup> On the other hand, the state has approved warrantless searches at racing tracks,<sup>235</sup> in television repair shops,<sup>236</sup> and in nursing homes.<sup>237</sup> The Court of Appeals of New York did draw a distinction between “[t]he power to enter and inspect buildings, a ‘typical’ administrative inspection where the goal is to ensure statutory or regulatory compliance” versus much tougher standards for “the seizure of confidential *patient files*, for the purpose of obtaining evidence to prove a targeted professional misconduct case.”<sup>238</sup>

Still, even with any additional state concerns, a labor access bill with procedural safeguards both respecting employer security and not interfering with the normal functioning of the firm should pass legal muster.

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231. See *First Healthcare Corp. v. NLRB*, 344 F.3d 523, 535 (6th Cir. 2003) (“Appropriate measures might also be justified, for example, to require apparent trespassers to identify themselves . . . .” (quoting *First Healthcare Corp.*, 336 N.L.R.B. 646, 650 (2001))).

232. See *People v. Scott*, 593 N.E.2d 1328, 1345 (N.Y. 1992) (“[I]nspection provisions must be part of a comprehensive administrative program that is unrelated to the enforcement of the criminal laws.”).

233. *Id.* at 1343–44.

234. See *Sokolov v. Village of Freeport*, 420 N.E.2d 55, 57 (N.Y. 1981) (“It is beyond the power of the State to condition an owner’s ability to engage his property in the business of residential rental upon his forced consent to forego certain rights guaranteed to him under the Constitution.”).

235. *Anobile v. Pelligrino*, 303 F.3d 107, 118 (2d Cir. 2001).

236. *Glenwood TV, Inc. v. Ratner*, 480 N.Y.S.2d 98, 99 (Sup. Ct. App. Div. 1984).

237. *Mem’l Hosp. v. Axelrod*, 499 N.Y.S.2d 505, 508 (Sup. Ct. App. Div. 1986).

238. *Shankman v. Axelrod*, 535 N.E.2d 1323, 1324 (N.Y. 1989).

## V. THE FIRST AMENDMENT AND LIMITS ON ACCESS TO PUBLIC AREAS OF A FIRM

In its 2012 *Ralphs Grocery* decision, the California Supreme Court rejected a challenge to the Moscone Act when a grocery store owner argued that giving labor unions—and only labor unions—access to its property to picket violated the First Amendment by favoring one form of speech over others in a public forum.<sup>239</sup> The employer's arguments had been accepted by a California appellate court<sup>240</sup> and echoed a 2004 decision by the D.C. Circuit Court of Appeals,<sup>241</sup> but the California Supreme Court held that giving labor access to employer property posed no First Amendment problem.<sup>242</sup> The U.S. Supreme Court rejected a petition for certiorari appealing the California Supreme Court's decision,<sup>243</sup> indicating that, at least for now, state laws granting labor access to employer property are safe from constitutional challenge.<sup>244</sup>

*A. Does Labor Access to Publicly Accessible Areas of a Firm Violate the First Amendment by Favoring Labor Speech over Other Speech?*

In both *Walmart Foods* and *Ralphs Grocery*, the labor picketing at issue occurred in front of grocery stores in areas not generally protected by the state constitution as a public forum open to free speech activity.<sup>245</sup> In both, therefore, only the Moscone Act's protection of labor picketing from state injunction was at issue.<sup>246</sup>

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239. *Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8*, 290 P.3d 1116, 1118 (Cal. 2012), *cert. denied*, 133 S. Ct. 2799 (2013).

240. *See Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8*, 113 Cal. Rptr. 3d 88, 92 (Cal. Ct. App. 2010).

241. *See Walmart Foods v. NLRB*, 354 F.3d 870, 871 (D.C. Cir. 2004). The California Supreme Court refused to answer the questions the D.C. Circuit had certified to it, forcing the circuit court to determine the meaning of California law under the First Amendment. *Id.*

242. *Ralphs Grocery Co.*, 290 P.3d at 1127–28.

243. *See Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8*, 133 S. Ct. 2799 (2013).

244. *See Ralphs Grocery Co.*, 290 P.3d at 1127–28.

245. *See Walmart Foods*, 354 F.3d at 874 (“[S]tate law does not provide a free speech right to those seeking to engage in expressive activities on the private sidewalks or in the private parking lots of stand-alone supermarkets.”) (citations omitted); *Ralphs Grocery Co.*, 290 P.3d at 1121 (“[T]o be a public forum under our state Constitution’s liberty-of-speech provision, an area within a shopping center must be designed and furnished in a way that induces shoppers to congregate for purposes of entertainment, relaxation, or conversation, and not merely to walk to or from . . .”).

246. *Walmart Foods*, 354 F.3d at 874; *Ralphs Grocery Co.*, 290 P.3d at 1121.

The case for the unconstitutionality of the Moscone Act is relatively straightforward. As the D.C. Circuit argued in *Waremart Foods*, the Supreme Court decided in two separate decisions that local laws allowing labor unions to engage in speech, when others could not, were unconstitutional:

In *Police Department of City of Chicago v. Mosley*, a local ordinance prohibited picketing in the vicinity of schools during school hours. In *Carey v. Brown*, a state law prohibited picketing of residences. Both the ordinance and the state law contained an exemption for labor picketing. In both cases, the U.S. Supreme Court held that the exemption constituted content discrimination in violation of the First Amendment.<sup>247</sup>

However, both *Mosley* and *Carey* dealt with access to public streets and sidewalks, traditional public fora where First Amendment concerns are clearest.<sup>248</sup> In those cases, the government had barred most of the public from free speech activity on publicly owned property, which is a traditional area for the public forum doctrine.<sup>249</sup> As the California Supreme Court held in *Ralphs Grocery*, precisely because the employer property in question was neither publicly owned nor treated as a public forum (as with malls under California doctrine), the First Amendment doctrine on public forums and content neutrality did not apply.<sup>250</sup>

One difference is the Moscone Act is specifically about limiting government action in labor disputes on such privately owned property because it was modeled on the 1932 federal Norris-LaGuardia Act, which restricts federal government intervention in strikes and other labor

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247. *Waremart Foods*, 354 F.3d at 875 (citations omitted); see *Carey v. Brown*, 447 U.S. 455, 457, 466 (1980); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 92–93, 95 (1972).

248. See, e.g., *Shuttlesworth v. Birmingham*, 394 U.S. 147, 149, 152 (1969) (striking down an ordinance that required citizens to obtain a permit before organizing or participating in a public demonstration); *Gregory v. Chicago*, 394 U.S. 111, 111–12 (1969) (overturning a conviction of disorderly conduct when protesters peacefully marched from city hall to the mayor's house); *Thornhill v. Alabama*, 310 U.S. 88, 105–106 (1940) (“[The] streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.” (alteration in original) (quoting *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939))) (internal quotation marks omitted).

249. See *Carey*, 447 U.S. at 460; *Mosley*, 408 U.S. at 96.

250. *Ralphs Grocery Co.*, 290 P.3d at 1127.

disputes.<sup>251</sup> While the laws in both *Mosley* and *Carey* were legislative interventions by the government to restrict the free speech of the public—with what the courts deemed an unconstitutional exception for labor union speech—no one had free speech rights on the employer property at issue in *Ralphs Grocery*.<sup>252</sup> Therefore, the state refusing to enforce trespass laws against labor is not a free speech issue but a property rights regulation and a regulation of labor relations, notably one given approval by the courts in cases such as *Thunder Basin* and *Rum Creek I*.<sup>253</sup> As the California Supreme Court held, “California’s Moscone Act and section 1138.1, insofar as they protect labor-related speech in the context of a statutory system of economic regulation of labor relations, are hardly unique.”<sup>254</sup>

B. *Union-Related Speech in and Around Workplaces Under the First Amendment*

To the extent that unions are using access to employer property to convey a message to the public, rather than to the employees at the company, it might seem that such speech implicates the First Amendment. As Justice Ming Chin argued in his dissent to *Ralphs Grocery*, the result could be differential treatment of union speech and nonunion speech even on the same subject: “As applied to medical clinics, it apparently means, for example, that nurses can picket on clinics’ parking lots and walkways—including, presumably, protesting against being required to aid in providing abortion services—but antiabortion protesters, and others with their own message, may not do so.”<sup>255</sup>

That is the import of the decision; a nurse talking about his or her work conditions, even if it touches on the morality of abortion, has a different status under the law compared to someone talking about the morality of abortion, but having no economic relationship with the clinic.<sup>256</sup> Courts have always treated union speech in and around workplaces

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251. *Id.* at 1128.

252. Compare *Carey*, 447 U.S. at 460, and *Mosley*, 408 U.S. at 94, with *Ralphs Grocery Co.*, 290 P.3d at 1129.

253. See *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 (1994) (giving nonemployee labor representatives access to employer property under the federal Mine Act); *Rum Creek I*, 926 F.2d 353, 366–67 n.17 (4th Cir. 1991) (recognizing modifying property law as valid approach to remove state government from involvement in labor disputes as long as modification applies in both strike and nonstrike situations).

254. *Ralphs Grocery Co.*, 290 P.3d at 1128.

255. *Id.* at 1142 (Chin, J., dissenting).

256. See *id.*

differently from speech by other actors, even when both are engaged in similar-seeming speech, and laws have largely regulated such union speech differently without running afoul of the First Amendment.<sup>257</sup> As Judge Goodwin Liu argued in concurrence, “the Supreme Court has consistently rejected First Amendment challenges to content-based speech regulations in the context of labor relations.”<sup>258</sup> Not only is speech by employers and union members within the workplace both protected and restricted in multiple ways by the NLRA, but speech by unions directed to the public has also been regulated and restricted in numerous ways that would be unconstitutional if not part of a labor relations framework.

Even when union speakers are located on public sidewalks or other quintessential public forums, they have been prohibited from engaging in picketing designed to force an employer to recognize a union through promoting customer boycotts<sup>259</sup> and from engaging in secondary picketing when the union seeks to persuade the customers of a related business to stop doing business with that secondary employer in order to put pressure on the primary employer with whom they have a dispute.<sup>260</sup> Notably, the U.S. Supreme Court in *NAACP v. Claiborne Hardware Co.* protected the right of nonlabor actors to engage in secondary boycotts that unions might not be allowed to engage in, arguing that “[s]econdary boycotts and picketing by labor unions may be prohibited, as part of ‘Congress’ striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.”<sup>261</sup>

This different legal status of labor-related speech as part of the generalized regulation of the workplace is, as the California Supreme Court argued, no different from the way the

Securities and Exchange Commission “engages in pervasive content-based control over speech” in regulating securities: it prohibits companies from making offers and advertisements without advance approval, regulates the statements candidates may make in proxy contests, and prohibits the transmission of accurate inside information

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257. *See id.* at 1137–38 (Liu, J., concurring).

258. *Id.* at 1136.

259. National Labor Relations Act, 29 U.S.C. § 158(b)(7) (2012).

260. *See* 29 U.S.C. § 158(b)(4)(ii)(B); *NLRB v. Retail Store Emps. Union*, 447 U.S. 607, 614–15 (1980).

261. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982) (quoting *Retail Store Emps. Union*, 447 U.S. at 617–18 (Blackmun, J., concurring in part)).

from “tipper” to “tippee” in the insider trading context.<sup>262</sup>

Similar government regulation exists for speech under antitrust law, trademark law, fraud, conspiracy, and criminal solicitation laws.<sup>263</sup> As a way to protect collective bargaining without governmental interference, the Moscone Act is therefore, in the words of the California Supreme Court, “[l]ike a price-fixing statute [that] fall[s] outside the scope of First Amendment concern.”<sup>264</sup>

*C. The First Amendment and Access to Nonpublic Areas of a Firm to Talk with Employees*

One thing is clear, any law granting labor advocates access to nonpublic areas of a firm to talk with employees will face no First Amendment challenges. Within the workplace, the NLRA pervasively regulates speech by both employers and employees in ways that protect labor-related speech in dramatically different ways than other speech.<sup>265</sup> Employees have the right to speak for or against a union on an employer’s premises, even though the employer may prohibit solicitations on other topics.<sup>266</sup> While employers may express their opinion about the merits of unionization, they cannot threaten employees with termination or to close a plant location if a union wins an election.<sup>267</sup> In fact, a wide range of federal employment laws contain content-based speech protections offering greater or lesser protection for various kinds of speech in the workplace, from whistleblower and antiretaliation provisions<sup>268</sup> to bans on racial, sexual, and other workplace harassment.<sup>269</sup>

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262. *Ralphs Grocery Co.*, 290 P.3d at 1136 (quoting Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1778, 1779 (2004)).

263. See Schauer, *supra* note 262, at 1783–84.

264. *Ralphs Grocery Co.*, 290 P.3d at 1138.

265. 29 U.S.C. § 158.

266. *Id.* §§ 157, 158(a)(1); see *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802 n.7 (1945) (“[T]he right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity, and the respondent’s curtailment of that right is clearly violative of the Act.” (quoting *Republic Aviation Corp.*, 51 N.L.R.B. 1186, 1188 (1943))).

267. *NLRB v. Gissell Packing Co.*, 395 U.S. 575, 618 (1969); *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274 n.20 (1965).

268. See, e.g., 29 U.S.C. § 660(c)(1) (stating it is unlawful to retaliate against an employee reporting an OSHA violation).

269. See, e.g., 42 U.S.C. § 2000e-2(a) (2006) (prohibiting status-based employment practices).

That the law may give unions or other designated labor advocates access to employer property to speak with employees but not give similar access to other outside speakers does not violate the First Amendment because the courts have clearly stated that speech within the workplace is not a public forum. For example, the Court has found that even when a particular union or other designated actor is given preferred access to a workplace, this does not mean that other actors wishing access must be given similar rights.<sup>270</sup> In *Perry Education Association v. Perry Local Educators' Association*, the Court established that when a union with collective bargaining status was given access to the internal communication systems within a workplace, a rival union did not have the right to similar access since such access is not subject to heightened scrutiny under the First Amendment.<sup>271</sup> The Court has since reaffirmed that when the property is not a traditional public forum, such regulation is examined only for reasonableness.<sup>272</sup>

While this case applies to restrictions on use of workplace mail in a public school system, the Supreme Court specifically noted that the government could—and does—support differential access to the workplace pervasively in labor relations law: “Differentiation in access is also permitted in federal employment, and, indeed, it may be an unfair labor practice under 5 U. S. C. § 7116(a)(3) (1976 ed., Supp. V) to grant access to internal communication facilities to unions other than the exclusive representative.”<sup>273</sup> Similarly, *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, determined that there were no equal access rights under the First Amendment to participate in federal employee charitable contribution systems because it was part of a workplace communication system and therefore not even a limited public forum.<sup>274</sup> As the *Cornelius* Court held:

Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. . . . [A] speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the

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270. See *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 46–47 (1983).

271. *Id.*

272. See *United States v. Kokinda*, 497 U.S. 720, 726–27 (1990).

273. *Perry Educ. Ass'n*, 460 U.S. at 52 n.11 (citation omitted).

274. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 805–06 (1985).

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purpose of the forum . . . .<sup>275</sup>

On this basis, an access law providing for its use only by those people or organizations wishing to inform employees of their rights under employment laws and for no other purpose should pass muster under this line of First Amendment cases.

#### VI. DESIGNING STATE AND LOCAL ACCESS LEGISLATION

As outlined in this Article, local legislation granting labor advocates access to employer property exists at a complex nexus of federal labor law, property law, and First Amendment doctrine. While the conservative turn of the Supreme Court has made it challenging for local governments to support unions through state or local legislation in recent decades, decisions like *Lechmere* favoring deferral to state property law exhibit a countertrend, seeming to create space for local access laws.<sup>276</sup> Similarly, the strengthening of Fifth Amendment “takings” law over recent decades has largely focused on striking down perpetual easements and modifications of property rights that permanently lower property values, while a temporary grant of access for labor advocates should widely escape the confines of that doctrine.<sup>277</sup> Finally, the specificity of access to what is largely considered the nonpublic fora of the workplace means that such laws should largely escape the constraints of First Amendment restrictions.<sup>278</sup>

That said, elected officials designing a local access law face a number of decisions that can encourage a higher likelihood of a court upholding the law. When access is granted to publicly accessible areas of a firm, a law granting all comers access to exercise free speech rights will avoid almost any potential First Amendment challenge—as has been true in a number of states for malls.<sup>279</sup> The burden on employers can be reduced in such circumstances with clear time, place, and manner regulations, as well as potentially establishing bonding requirements to reduce casual invocation of such laws. For laws granting access to nonpublic areas of the firm, such as meal and break rooms, establishing clear limits on the number of visits per month and clear notice requirements can avoid charges that such access creates an overly burdensome regulation under the Fourth Amendment.

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275. *Id.* at 806 (citations omitted).

276. *See supra* Part III.

277. *See supra* Part IV.

278. *See supra* Part V.

279. *See supra* notes 134–39 and accompanying text.

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Conversely, to be effective the legislation should have clear enforcement mechanisms, including specifying—as with the California Moscone Act<sup>280</sup>—that state trespass law does not apply when labor advocates follow rules set out by the access law, as well as granting legal fees and potentially additional damages when employers fail to grant access required under the law.

The last four decades have been a time that combined both global economic changes and legal changes that have weakened the position of unions. Strengthening the ability of labor advocates to communicate with employees in the workplace about their rights can be one step in reversing those trends.

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280. See CAL. CIV. PROC. CODE § 527.3 (West 2011).

## APPENDIX A: EMPLOYEE REPRESENTATIVE ACCESS MODEL ACT

Rationale: Workers often lack full information of their rights in the workplace, and worker representatives often lack simple access to provide information on those rights to employees. The result is a skewed system in which employers can provide one-sided, often distorted information on workers' rights without employees receiving alternative information. Under Supreme Court precedent, particularly the 1992 *Lechmere Inc. v. NLRB* decision, state property law—not federal labor law—governs whether employers can exclude union representatives from company property. Following the framework of a number of state laws that currently give unions expanded physical access to employer property to talk about workers' rights, this [act] provides a well-regulated framework for providing that access.

Summary: Defines how labor representatives can gain access to employer property, the filing requirements with local police and the employer to gain that access, the number of days such access must be provided each year to any labor organization, the number of representatives who may gain access at any time, and outlines the times and places of access for talking with employees on employer property. The [act] prohibits disruptive conduct by labor representatives granted access and provides for sanctions against labor organizations whose representatives repeatedly violate provisions of the [act]. It also provides for the right of labor representatives to seek injunctions against employers refusing access and court sanctions and civil fines against individual managers and companies violating the [act]. It further details rules for access to employees working off-site and employees working in dangerous areas.

SECTION 1. SHORT TITLE. This may be referred to as the “Employee Representative Access [Act].”

## SECTION 2. DEFINITIONS.

(a) “Representative labor organization” means any organization, defined as a labor organization under the Labor–Management Reporting and Disclosure Act of 1959, that any two or more employees have designated as their representative organization.

(b) “Nonemployee representative” or “representative” means any person or persons who act as agents for a labor organization that have been designated by two or more employees as their representative labor

organization.

(c) "Employer" means any employer or any group or association of employers engaged in an industry affecting commerce (1) which is, with respect to employees engaged in an industry affecting commerce, an employer within the meaning of any law of the United States relating to the employment of any employees; or (2) which includes any person acting directly or indirectly as an employer or as an agent of an employer in relation to an employee but does not include the United States or any corporation wholly owned by the government of the United States or any state or political subdivision thereof.

(d) "Contractor" means any employer or any group or association of employers engaged in an industry affecting commerce, which leases to, subcontracts to, or otherwise controls physical access to the worksites of any other employer, when nonemployee representatives seek access.

### SECTION 3. FILING REQUIREMENTS.

(a) A nonemployee representative shall file the information required by Section 4 with the local police department of the community in which the plant or office to which they seek access is located. Concurrently, the representative shall provide a copy of this information to the employer.

(b) Labor organizations may appoint the representatives designated for access on any particular day.

### SECTION 4. FILING PROCEDURES.

(a) The following information shall be filed by a representative with the police department with local jurisdiction, along with copies given to the employer. This information shall be kept current:

(1) The names, addresses, and telephone numbers of the representatives, as well as the name, address, and telephone number of the labor organization and the titles or positions of the representatives and their work telephone numbers;

(2) The name and address of the employer where the represented employees work;

(3) A copy of the document evidencing the designation of the labor organization as the representative of employees at the work site;

(4) A statement that copies of all information filed pursuant to this Section have been delivered to the employer, prior to or concurrently with the filing of this statement; and

(5) A statement certifying that all information filed is true and correct followed by the signature of the representative

**SECTION 5. ON-SITE ACCESS BY NONEMPLOYEE REPRESENTATIVES.**

(a) Access under this section onto an employer's property shall be available to any single labor organization for no more than 60 days in any calendar year.

(b) With at least one business day's prior notice, or less with mutual agreement with an employer, a representative of the labor organization shall have reasonable access to the employer's premises.

(c) This regulation establishes the terms upon which a labor organization may take access. However, it does not preclude agreements by the parties to permit access on terms other than those set forth in this part, provided that any such agreement shall permit access on equal terms to any labor organization that agrees to abide by its terms. For the purpose of facilitating voluntary resolution by the parties of problems which may arise with access, the notice of intent to take access shall specify a person or persons who may reach agreements on behalf of the labor organization with the employer concerning access to his/her property. The parties are encouraged to reach such agreements and may request the aid of the regional director and board agents in negotiating such agreements; however, no such attempts to reach an agreement, be they among the parties themselves shall be deemed grounds for delay in the taking of immediate access once a labor organization has filed its notice of intent to take access.

**SECTION 6. TIME AND PLACE OF ACCESS.**

(a) Organizers may enter the property of an employer for a total period of one hour before the start of work and one hour after the completion of work to meet and talk with employees in areas in which employees congregate before and after working. Such areas shall include parking lots, break rooms, buses provided by an employer in which employees ride to and from work, and any other area where employees congregate during non-work time.

(b) In addition, representatives may enter the employer's property during the working day for the purpose of meeting and talking with employees during their lunch or break periods, at such location or locations as the employees eat their lunches or other meals.

(c) When an employer operates in a space controlled by another contractor, that contractor shall give representatives access to representatives in conformity with this [act]. The contractor may require that the labor organization provide the same notice as required for the employer.

SECTION 7. NUMBERS OF REPRESENTATIVES; IDENTIFICATION; PROHIBITED CONDUCT.

(a) Access shall be limited to two representatives if there are no more than 30 employees at a particular site. If there are more than 30 workers at a work site, there may be one additional representative for every 15 additional workers.

(b) Upon request, representatives shall identify themselves by name and labor organization to the employer or his agent. A representative shall also wear a badge that clearly states the representative's name and the name of the organization that the representative represents.

(c) The right of access does not permit conduct disruptive of the employer's property or operations, including injury to machinery or interference with the work process. Speech by itself shall not be considered disruptive conduct. Disruptive conduct by particular representatives shall not be grounds for expelling representatives not engaged in such conduct, nor for preventing future access.

SECTION 8. VIOLATIONS.

(a) Any representative who violates the provisions of this [act] may be barred by a court from exercising the right of access by the employer for up to six months. Any labor organization or division thereof whose representatives repeatedly violate the provisions of this [act] may be barred by a court from exercising the right of access at that employer for six months.

(b) Representative labor organizations may seek an injunction against any employer refusing required access under this [act], with individual managers subject to contempt of court sanctions for continued violations and the employer subject to fines of up to \$1,000 per day per representative refused legal access.

SECTION 9. MOBILE WORK CREWS.

Upon the proper filing and service to the employer and by the representative labor organization, the employer shall keep the union informed of the places and times at which the employer's crews may be

found on days the labor organization requests access. For purposes of this provision, crews consisting of three or fewer workers may be excluded, if the employer has no knowledge of the specific locations in which such crews will be working during the day. As to such crews, the employer will provide the union with as specific a description as possible of the area in which such employees will be working. Should the employer and the union fail to establish a mutually agreeable plan for providing the union with the aforesaid information, the following procedures shall be observed:

(a) The employer shall, upon request, prepare a schedule showing the place and time where each crew will be working, including the time each crew will begin work, take its lunch break, and end work each day and directions to the location(s) where each crew will be working. Posting shall occur at the location from which the employer dispatches its crews, and the employer will advise the labor organization of that location. The labor organization representatives shall be afforded reasonable access to the place where the employer posts the schedules.

(b) Should the labor organization desire to take access on any given day, it shall so notify the employer in advance of the taking of access and provide a phone number at which it may be contacted pursuant to subsection (c) below.

(c) Once posting has occurred, the employer may find it necessary to change the time or place at which a crew will be working. In that event, the employer shall make reasonable efforts to notify the labor organization of the new time or location.

#### SECTION 10. DEALING WITH DANGEROUS AREAS.

(a) The employer shall clearly mark and post areas of prohibited access, consistent with the above prohibitions.

(b) To the extent that employees are permitted to remain in the prohibited areas established herein during their lunch period or during the period of one hour before the start of work and one hour after the completion of work, the employer shall be deemed to have waived the special limitations of this section and shall not prohibit access thereto.

#### SECTION 11. EFFECTIVE DATE.

This [act] shall become effective 90 days after it is adopted. This [act] is intended to have prospective effect only.

#### SECTION 12. SEVERABILITY.

If any part or provision of this [act], or the application of this [act], to

any person or circumstance, is held invalid, the remainder of this [act], including the application of such part or provisions to other persons or circumstances, shall not be affected by such a holding and shall continue in full force and effect. To this end, the provisions of this [act], are severable.<sup>281</sup>

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281. See Federal Mine Safety & Health Act of 1977 § 103(f)–(g), 30 U.S.C. § 811 (2012); CAL. LAB. CODE § 1140 et seq. (West 2014), available at [http://www.alrb.ca.gov/content/pdfs/statutesregulations/statutes/ALRA\\_010112.pdf](http://www.alrb.ca.gov/content/pdfs/statutesregulations/statutes/ALRA_010112.pdf).