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THROUGH THE PRUNEYARD COHERENTLY: RESOLVING THE COLLISION OF PRIVATE PROPERTY RIGHTS AND NONEMPLOYEE UNION ACCESS CLAIMS

HARRY G. HUTCHISON*

And all shall be well and
All manner of things shall be well
By the purification of the motive
In the ground of our beseeching.
. . . .
Quick now, here, now, always—
A condition of complete simplicity
(Costing not less than everything)
And all shall be well and
All manner of things shall be well
When the tongues of flame are in-folded
Into the learned knot of fire
And the fire and the rose are one.[1]

I. INTRODUCTION

As one observer notes: "The persistent tension between private ordering and government regulation exists in virtually every area known to

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1. T.S. ELLIOT, LITTLE GIDDING 7, 13-14, 16 (1942).

the law, and in none has that tension been more pronounced than in the law of employer and employee relations."[2] One area of labor law that remains much debated and analyzed concerns the interstices of nonemployee union access and private property. At issue is whether labor unions, which are the beneficiaries of statutory monopoly power that allows them to wield market power and to influence wages and other terms of employment,[3] should be granted expanded access to private property, especially in an organizational/recognitional campaign context. For example, the question may be whether a union can recruit members on a business's property.

Nonemployee access has been the subject of numerous National Labor Relations Board (NLRB) decisions and is a theme discussed in over a dozen law review articles. Some observers claim that courts, bound by unwritten and unarticulated assumptions and values,[4] have engaged in

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2. Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

3. MORGAN O. REYNOLDS, MAKING AMERICA POORER 3 (1987).

4. JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 2 (1983). Atleson states: "[I]t seems clear that many judicial and administrative decisions are based upon other, often unarticulated, values and assumptions . . . . The belief in the inherent rights of property and the need for capital mobility, for instance, underlie certain rules . . . ." *Id.* Moreover, he asserts that these values are hidden but determinative in many cases. *Id.* at 3. Among the otherwise hidden values and assumptions in his view are:

1) The "inherent right of management to maintain production despite the serious impact upon statutory rights." *Id.* at 7.

2) "[T]hat employees, unless controlled, will act irresponsibly." *Id.* at 7. This raises a concern that greater employee freedom leads to anarchy. *Id.* at 7-8.

3) "[T]he limited status of employees" (while the NLRA only defines employer restrictions, employee restrictions stem from the courts acceptance of the inferior rights of employees). *Id.* at 8. This results in deference to the superior status of employers and limits the scope of permissible concerted behavior by employees.

4) "[T]he 'common enterprise' is primarily under management's control," which "leads to an important focus on the workplace as the property of the employer." *Id.* at 8. How this works out in a property concept is explained later in this Article. *See id.* at 60-63.

Among the criticisms proffered by Atleson is the claim that, "in those areas in which property notions are preeminent, such as solicitation on company property, the [United States Supreme] Court seems confused between some notion of inherent, absolute property rights and rights to manage the enterprise which inhere in possession." *Id.* at 60; *see also* James B. Atleson, *Reflections on Labor, Power, and Society*, 44 MD. L. REV. 841 (1985); Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305 (1994); Jay Gresham, Note, *Still as Strangers: Non-employee Union Organizers on Private Commercial Property*, 62 TEX. L. REV. 111 (1983); Sarah Korn, Note, *Property Rights and Job Security: Workplace Solicitation by Nonemployee Union Organizers*, 94 YALE L.J. 374 (1984). The view exemplified by critics of the NLRB and the courts likely reflects "a widely accepted proposition that large corporations now pose a threat to individual freedom comparable to that which would be posed if government power were unchecked." Epstein, *supra* note 2, at 949 (citing Lawrence E. Blades, *Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1404 (1967)).

constrained decisions and statutory interpretations of the National Labor Relations Act (NLRA)[5] that preclude or unwisely limit access to private property by nonemployee union organizations in violation of Section 7 guarantees.[6] These limits are seen by some observers as a contributing factor in the decline in union membership, power, and influence.[7] Consequently, the otherwise inevitable and highly desirable movement towards "workplace democracy" has been impaired by archaic judicial and statutory property definitions.[8] Others assert that

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5. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-69 (1988)). Sections 7 and 8 of the original NLRA are codified at 29 U.S.C. §§ 157 and 158 respectively.

6. *See* Karl E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1 (1988). Klare asserts that an "area long overdue for reform is the question of access to and use of the workplace for employee self-organization and concerted activity." *Id.* at 45. In particular, nonemployee union organizers should be guaranteed some access to the workplace so that employees may have at least minimal opportunities to learn about collective bargaining. *Id.*

> Existing cases recognize that the workplace is the natural locus of work-related communication, and that '[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others.' Decisionmakers should give life to these basic democratic principles in interpreting existing rules and entitlements.

Id. at 46 (quoting NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956)). *But see* Richard A. Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, *in* ECONOMIC LIBERTIES AND THE JUDICIARY 39 (James A. Dorn & Henry Manne eds., 1987); Roger Pilon, *Legislative Activism, Judicial Activism, and the Decline of Private Sovereignty*, *in* ECONOMIC LIBERTIES AND THE JUDICIARY 183 (James A. Dorn & Henry Manne eds., 1987). Pilon argues that both the legislative and judicial branches of government animated more by policy than principle have eviscerated individual rights and property rights in a manner unimagined by the founders. *Id.* at 183-92.

7. *See* Lee Troy & Neil Sheflin, *Going Public: New Unionism on the Rise*, DET. NEWS, Sept. 6, 1992, at 3B. "Less than 12 percent of the [United States] private sector is unionized down from a peak of 36% in 1953." This percentage is less than union penetration in 1929. *Id.* *See generally* RICHARD B. MCKENZIE, COMPETING VISIONS: THE POLITICAL CONFLICT OVER AMERICA'S ECONOMIC FUTURE (1985) (offering an excellent exposition of the views of labor, intellectual, and business leaders who seek to change the future by realigning in a fundamental way public and private decision making in the United States predicated on expanded worker and union rights).

8. *See* Klare, *supra* note 6, at 17. Klare explicates the goal of expanding and enhancing "democracy". This article seems premised on, among other things, the asserted need for expansive market reconstruction. The author proceeds to engage in a flawed attempt to explicate the myths of the free market. For instance, he correctly points out that a market system, at a minimum, assumes a law of property, contracts, and torts. *Id.* at 20. Then he claims to have discovered incoherence between the notion of a free market and a market free from regulation. *Id.* at 21. In essence, Klare criticizes the free market for not being completely free. This, of course, ignores the fact that all defenders of the free market accept a limited government. *See* Epstein, *supra* note 2, at 953-55. Importantly, Klare concedes that incidents of property ownership, such as what one can do with it, or what one can prevent others from doing with it significantly affect the property's value. *See* Klare, *supra* note 6, at 20; *see also*

limited nonemployee, nonpatron access to private property (especially shopping malls) outside of the explicit parameters of labor law unnecessarily chills political expression[9] and precludes the "uninhibited robust

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ATLESON, *supra* note 4, at 62 ("[F]ederal law does not protect property or the right to exclude but only the right to compensation when property is 'taken' by the state for some public purpose, pursuant to due process and under its power of eminent domain").

In addition, it should perhaps be noted that many critics of the current balance of power between labor and management may be collectivists who "by the very nature of their creed, wish to control and limit the workings of markets. [I]t is assumed that since for a long time now the tendency has been for governments to try to control the economy [or incidents of private property] and to limit the extent of free markets, there is something quixotic, reactionary, or positively wicked in the idea of trying to move in the opposite direction." H.B. Acton, *The Theme of the Essay, in* THE MORALS OF MARKETS AND RELATED ESSAYS 24 (David Gordon & Jeremy Shearmur eds., 1993). If Acton's view is correct, it is unsurprising that the free market is likely to be subjected to incoherent attacks by critics of the current balance of power between labor and management. *But see* Curtis J. Berger, *Pruneyard Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. REV. 633 (1991); Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons From Labor Law*, 1986 U. ILL. L. REV. 689, 690 (1986) (explaining that the values of free speech are no less if exercised in a shopping mall rather than in a company town). Summers objects to rigorous line drawing between state action and private action in constitutional adjudication as this line is largely irrelevant. Furthermore, he claims that to respect private property in the face of the demand of political expression constitutes a denial of personal freedom. *Id.* at 689-93. While this claim possesses a surface appeal, other observers persuasively argue for a rather strict distinction between private as opposed to state action with respect to property. *See* Wesley J. Liebeler, *A Property Rights Approach to Judicial Decision Making, in* ECONOMIC LIBERTIES AND THE JUDICIARY 153 (James A. Dorn & Henry G. Manne eds., 1987). *But see* Republic Aviation Corp. v. NLRB, 324 U.S. 793, 802 n.8 (1945) (the Court seems to accept some inconvenience and even some property right dislocation in order to safeguard the right to collective bargaining).

9. Berger, *supra* note 8, at 636; *see also* Klare, *supra* note 6, at 23. Klare attempts to create, *ex-nihilo*, "a vigorous and systematic program of egalitarian market reconstruction aimed at enhancing direct workplace participation and worker self-realization opportunities." Klare, *supra* note, at 23. He seeks to expand the reconstruction logic of the New Deal labor law system beyond its self-imposed limits to an approach which seeks to systematically mobilize democracy on "every aspect of employment relations." *Id.* at 41. For instance, as a first start down the road of progress, Klare suggests that NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956) and its progeny should be overruled. *Id.* at 45-46. In Klare's view, the employer's common law ownership rights must give way in the face of transparently superior competing statutory rights of employees. *Id.* at 26. In essence, property ownership is to be redefined so that employer ownership rights are more limited than they were under pre-existing common law.

For an incisive view that economic and property rights deserve expanded protection, see BERNARD H. SIEGAN, THE SUPREME COURT'S CONSTITUTION (1987). Seigan eloquently contends that recent Supreme Court jurisprudence fails to implement existing [property] rights. *Id.* at 81. *See also* BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 320 (1980) (contending that "judicial withdrawal from the protection of economic activity [including private property rights] violates Article III of the United States Constitution"). For an argument that voluntary, as opposed to regulated, exchange promotes social welfare, see JAMES D. GWARTNEY & RICHARD L. STROUP, WHAT EVERYONE SHOULD KNOW ABOUT

and wide open" debate that is a precondition for a vital, free, and participatory society.[10] Curtailing political expression, it is averred, by "defining 'public forum' ever more restrictively only serves to 'underscore the privatism of our social lives' and weakens the fabric of a participatory society."[11]

However poignant these claims may be, the United States Supreme Court, in its *Lechmere v. NLRB* decision,[12] has seemingly revitalized the legal doctrine first articulated in *NLRB v. Babcock & Wilcox Co.*,[13] which rather sharply limited nonemployee union access to property held in private hands. This doctrine can be stated as follows: Despite the fact that the employees' right of self-organization depends in some measure on their ability to ascertain the advantages of self-organization from others, the NLRA "[b]y its plain terms confers rights on only *employees*, not on unions or their nonemployee organizers."[14]

In *Lechmere*, a Connecticut retailer established and consistently enforced a no solicitation/no access rule. The rule barred all types of solicitation. The United Food and Commercial Workers Union (UFCWU) commenced an organizing campaign by running a newspaper advertisement aimed at Lechmere's employees. Then the UFCWU began a series of trespasses into the store and onto the parking lot to distribute handbills. The employer ejected the organizers from the store and parking lot. In response, the union filed an unfair labor practice charge, alleging the ejections violated Section 8(a)(1) of the NLRA. The NLRB applied a balancing test and held that the ejections were unlawful.[15]

The Supreme Court disagreed. Instead, it explicitly rejected the NLRB's attempt to balance the union's difficulty in reaching employees against the employer's private property interest and held that the NLRB impermissibly expanded nonemployee union access rights beyond the limits imposed by *Babcock & Wilcox*. In *Lechmere*, the Court reiterated the view that nonemployee organizers need not be accommodated by employers unless the workplace is otherwise inaccessible.[16]

ECONOMICS AND PROSPERITY (1993)(available at the Mackinac Center for Public Policy, 119 Ashman Street, P.O. Box 568, Midland, Michigan, 48640).

10. Berger, *supra* note 8, at 637.

11. *Id.* at 647 (quoting BENJAMIN R. BARBER, STRONG DEMOCRACY 306 (1984)).

12. 112 S. Ct. 841 (1992).

13. 351 U.S. 105 (1956).

14. *Lechmere*, 112 S. Ct. at 845.

15. *Id.* at 844.

16. *Id.* at 849-50. For an article criticizing the Court's decision, see Estlund, *supra* note 4. Among other things, the author states that the Court allowed the employer's "naked property

In light of (1) the *Lechmere* decision, (2) the *Pruneyard Shopping Ctr. v. Robins* decision[17] and its progeny, and (3) the Supreme Court's invitation to states to interpret or adapt, either judicially or legislatively, their own constitutions[18] to insure freedom of expression on private lands, it is a propitious time to examine the collision of nonemployee access and private property definitions from a public choice perspective.[19]

Public choice theory has been aptly summarized by one distinguished observer who, while discussing Wicksell, the progenitor of the public choice school, stated that

> [t]he relevant difference between markets and politics does not lie in the kinds of values/interests that persons pursue, but in the conditions under which they pursue their various interests. Politics is a structure of complex exchange among individuals, a structure within which persons seek to secure collectively their own privately defined objectives that cannot be efficiently secured through simple market exchanges.[20]

Another public choice commentator avers the following:

> From a historical perspective, at least the two ideas of private property and a free society were thought to be so intimately connected as to be all but equivalent. Property rights, it was believed, both enable and describe our freedom, just as the free society is the society defined by property rights that define in turn the relationships between the individuals who constitute the society.[21]

In essence, there are two theories of property: the traditional theory of classical liberalism and the new theory which sees an inevitable opposition between private property and a free society.[22] This new theory,

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right to trump the substantial statutory interests of organized employees in spreading information about and seeking support for unionization." *Id.* at 308.

17. 447 U.S. 74 (1980); *see also* William J. Brennan Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

18. Brennan, *supra* note 17, at 550.

19. *See* PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS (James D. Gwartney & Richard E. Wagner eds., 1988). For an accessible explication of public choice theory, see DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE; A CRITICAL INTRODUCTION (1991).

20. James M. Buchanan, *The Constitution of Economic Policy*, *in* PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS 103, 107-08 (James D. Gwartney & Richard E. Wagner eds., 1988).

21. Roger Pilon, *Property Rights, Takings and a Free Society*, *in* PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS 151, 154 (James D. Gwartney & Richard E. Wagner eds., 1988).

22. *Id.* at 155.

which emanates like penumbras from cases such as *Pruneyard* and from commentators within and outside of the labor law nonemployee access nexus, has undeniable attractiveness. Some observers, on the other hand, have said that if this theory is adopted by our law and legal institutions, society must encounter the risk of "error, confusion and disorder."[23]

In this paper, I consider the acceptance, by a number of states and commentators, of the invitation to discount property rights while extending greater personal expression rights to citizens in light of the nondiscrimination provision of Section 8 of the NLRA[24] and federal preemption issues.[25] First, based on a review of pertinent United States Supreme Court opinions, an analysis of hypothetical cases, and consideration of recent NLRB decisionmaking, I explore the likelihood of confusion, disorder, and incoherence. I conclude that, given the likelihood of confusion and disorder in cases involving nonemployee union organizers, amended federal preemption rules should explicitly preclude state-sponsored expansions of personal expression rights. Second, in light of the fact that such expansions favor narrow special interests as opposed to the larger interest, and given the inevitability of conflict between property owners' rights and access claims by nonemployees, I argue that a return to a principled view of private property rights,[26] which expands the United States Supreme Court's decision in *Dolan v. City of Tigard*[27] by disallowing uncompensated takings, is warranted as a vehicle for insuring coherence in the Pruneyard.

II. THE NLRA AND NONEMPLOYEE ACCESS TO PRIVATE PROPERTY

A. Nonemployee Access and the NLRA Nondiscrimination Requirement

Section 7 of the NLRA grants employees the right to organize, form, join, or assist a labor organization, as well as the right to bargain collec-

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23. *Id.*

24. 29 U.S.C. § 158(a)(1) (1988).

25. *See* ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING, 766-86 (1976) (presenting at least one view of federal preemption). *See also* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). *Garmon* suggests, among other things, that the refusal of the National Labor Relations Board to assert jurisdiction did not leave the state with power over activities it would otherwise be preempted from regulating. *Id.* at 238.

26. For an elegant example of principled analysis which examines the collision of property rights and the First Amendment, see Liebeler, *supra* note 8, at 167-74.

27. 114 S. Ct. 2309 (1994).

tively.[28] In addition, Section 8(a)(1) provides in pertinent part that "[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection [7]."[29] Furthermore, access discrimination with respect to solicitation and distribution of organizing union literature gives rise to an unfair labor practice charge. The parameters of union access depend importantly on whether the organizers are employees or nonemployees. Access rules have been set forth in a number of cases.

For instance, the United States Supreme Court in *NLRB v. Stowe Spinning Co.*[30] held that the National Labor Relations Board could properly find that an employer commits an unfair labor practice violating Section 8(1) of the NLRA when the employer discriminates against a labor organization by denying use of a company-owned meeting hall (the only such hall in town), to a nonemployee union organizer, while freely giving other groups the right to use the facility. The Court upheld the NLRB's finding that the sole purpose of the employer's discriminatory denial was to impede, prevent, and discourage self-organization and collective bargaining by the company's employees within the meaning of Section 7 of the NLRA.[31]

While suggesting it could be argued that the NLRB's determination went further than prior decisions, the Supreme Court said, in a larger sense, that the Board did not in fact exceed earlier legal determinations.[32] Moreover, the Court suggested that there is a difference between a company-dominated mill town and a vast metropolitan center in which a number of halls exist within easy reach of prospective union members,[33] thus giving rise to a stronger access claim in the former case than in the latter. The Court reaffirmed precedent[34] and said that not every interference with property rights constitutes a violation of the Takings Clause of the Fifth Amendment.[35] To the contrary, the Court stated that inconvenience or dislocation of property rights may be necessary in order to preserve collective bargaining rights.[36] In the context of a company-dominated town, the Court decided, the act of discrimination itself

28. 29 U.S.C. § 158(a)(1) (1988).
29. *Id.* § 158(1).
30. 336 U.S. 226 (1949).
31. *Id.* at 233.
32. *Id.* at 229.
33. *Id.* at 230.
34. *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).
35. *Stowe*, 336 U.S. at 232.
36. *Id.*

constitutes an unfair labor practice.[37] Accordingly, the property owners should be precluded from treating the union application to use the company-owned hall, run by a company-dominated fraternal order, any differently from applications for nonunion groups or individuals. In other words, giving access to nonunion groups but not to union organizers is discriminatory, illegal, and in violation of the NLRA.

In *Priced-Less Discount Foods*,[38] the Board adopted the trial examiner's decision, which held that the employer violated Section 8(a)(1) of the NLRA by 1) threatening to have a union organizer arrested, and 2) causing him to be arrested on the company's parking lot in the presence of employees, despite the fact that he was engaged in organizing activities with employees during their *own* time.[39] At the time of his arrest, the union organizer had been receiving union cards from employees and talking to employees about joining the union.[40] He had not distributed any literature.[41] By contrast, the store owner had permitted the high school, junior high school, and other organizations to solicit on the company's parking lot.[42] Accordingly, the trial examiner held that the employer "discriminated against the union in denying it access to its parking lot while permitting the public and approved groups such access," despite its no solicitation notice.[43]

In general, "the Board and courts have found it necessary to accommodate the employees' interest in maximum access to union communications with the employer's interest in the security of his property during working hours."[44] Employers may promulgate rules limiting employee solicitations or constraining the dissemination of literature on company property.[45] However, as the *Republic Aviation Corp. v. NLRB*[46] case states, a no-solicitation rule, even one adopted long before the advent of a union and even where it has been applied in a nondiscriminatory manner, can be a violation of Section 8(a)(1),[47] which prohibits employers from restraining, interfering, or coercing employees who are rightfully on private property.

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37. *Id.* at 233.
38. 162 N.L.R.B. 872 (1967).
39. *Id.* at 873-74.
40. *Id.* at 873.
41. *Id.* at 874.
42. *Id.* at 875.
43. *Id.*
44. GORMAN, *supra* note 25, at 179.
45. *Id.*
46. 324 U.S. 793 (1945).
47. GORMAN, *supra* note 25, at 179-80 (citing *Republic Aviation*, 324 U.S. 793).

On the other hand, when the union organizers are not employees, and are not therefore rightfully on private property, the Board and the courts are disinclined to grant access to private property unless discrimination is present.[48] Consistent with *Babcock & Wilcox*, the Supreme Court has held that employer/property-owner, no-solicitation, no-distribution rules, when applied in a nondiscriminatory manner, are valid against nonemployees "if reasonable efforts [made] by the union through other available channels of communication will enable the [union] to reach employees with [the] message."[49] In *Babcock & Wilcox*, the United States Supreme Court concluded that a substantive distinction exists between employees and nonemployees.[50] As subsequent cases illustrate,[51] "even though employer resistance, or difficulties of geography or work scheduling, render extremely unlikely the success of requesting address lists or bulletin board space or [of] meetings off company property . . . the union must pursue such avenues of communication—at least as a prerequisite to securing an order permitting access to company property."[52]

In *Lechmere, Inc. v. NLRB*,[53] the United States Supreme Court reinvigorated its holding in *Babcock & Wilcox*. Consistent with *Babcock & Wilcox*, the Court held that nonemployee union access rights need not be accommodated unless the workplace is otherwise inaccessible.[54] It is important to note that the employer, by failing to grant access, did not discriminate against the union organizers in favor of other groups.

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48. *Id.* at 185; *see* NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956); *see also* Hudgens v. NLRB, 424 U.S. 507, 521-22 n.10 (1976) (explaining the distinction between employee organizational and nonemployee organizational access to private property).

49. GORMAN, *supra* note 25, at 185 (quoting *Babcock & Wilcox*, 351 U.S. at 112). Note that Justice Powell has placed importance on the fact that in *Babcock & Wilcox* the organizers were not employees and were therefore trespassers, whereas the employees in *Republic Aviation* were not trespassing and therefore allowed to solicit. *Babcock & Wilcox*, 351 U.S. at 113; *see also* Hudgens v. NLRB, 424 U.S. 507, 521-22 n.10 (1976).

50. *Babcock & Wilcox*, 351 U.S. at 113.

51. *See* NLRB v. Tamiment, Inc., 451 F.2d 794 (3d Cir. 1971), *cert. denied*, 409 U.S. 1012 (1972) (upholding no-solicitation rules despite remote employer with living, dining, and recreational facilities on premises, but the court emphasized union's failure to attempt to contact employees by less intrusive means). *See also* NLRB v. Kutsher's Hotel and Country Club, Inc., 427 F.2d 200 (2d Cir. 1970) (upholding no-solicitation rules despite failure to communicate through local newspaper advertisement or at the main gate). *See also* GORMAN, *supra* note 25, at 186.

52. GORMAN, *supra* note 25, at 186.

53. 112 S. Ct. 841 (1992).

54. *Id.* at 850. It should be noted that Justice White vigorously dissented. He argues that the court should "uphold a Board rule so long as it is rational and consistent with the Act, . . . even if we would have formulated a different rule." *Id.* (White, J., dissenting) (quoting NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 787 (1990)).

In *Lechmere*, Local 919 of the UFCWU endeavored to organize employees at a Newington, Connecticut store, which is owned and operated by the petitioner, Lechmere, Inc.[55] The store is in the Lechmere Shopping Plaza.

> Lechmere's store is situated at the Plaza's south end, with the main parking lot to its north. A strip of [thirteen] smaller 'satellite stores' not owned by Lechmere runs along the west side of the Plaza, facing the parking lot. . . . [A] [forty-six]-foot-wide grassy strip, broken only by the plaza's entrance, [abuts the plaza parking lot]. . . . The grassy strip is public property (except for a four-foot-wide band adjoining the parking lot, which belongs to Lechmere).
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> The [labor] union began its campaign to organize the store's 200 employees, none of whom was represented by a union, in June 1987. After a full-page advertisement in a local newspaper drew little response, nonemployee union organizers entered Lechmere's parking lot and began distributing handbills on the windshields of cars which were parked in a corner of the lot, most used by Lechmere employees.[56]

Almost immediately, Lechmere's manager confronted the organizers and informed them of Lechmere's no-solicitation, no-handbill distribution policy.[57]The organizers were asked to leave and they did so. However, "the union organizers renewed this handbilling effort in the parking lot on several subsequent occasions;"[58] each time, upon request, they left. Later, "the organizers . . . relocated to the public grassy strip, from where they attempted to pass out handbills to cars entering the lot during hours before opening and after closing."[59] Furthermore, the union organizers returned to the grassy strip during business hours to picket Lechmere; "after that, they picketed intermittently for another six months."[60] In addition, the organizers "recorded the license plate numbers of cars parked in the employee parking area" and were able to ascertain "the names and addresses of some forty-one nonsupervisory employees. The union sent four mailings to these employees"[61] and made additional efforts "to contact them by phone or home visits."[62] As

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55. *Id.* at 843.
56. *Id.* at 843-44.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*

a result of these organizational efforts, only one signed union authorization card was received.[63]

Given this rather clear failure to organize, the union filed an unfair labor practice charge with the National Labor Relations Board. The union alleged that Lechmere's policy, which barred nonemployee organizers, constrained employee Section 7 rights. Both the administrative law judge and the NLRB held for the union.[64] Relying on *Jean Country*,[65] the NLRB adopted the recommended order. The First Circuit of the United States Court of Appeals, though divided, refused Lechmere's petition for review and chose to enforce the NLRB's order.[66]

To the contrary, relying on its analysis in *Babcock & Wilcox*, the United States Supreme Court held that Lechmere did not commit an unfair labor practice by barring nonemployee union organizers from the property for the following reasons: 1) "By its plain terms, . . . the NLRA confers rights only on *employees*, not on unions or their nonemployees organizers."[67] Thus, as a rule, an employer cannot be compelled to allow nonemployee organizers onto his property; 2) At least as applied to nonemployee union organizers, pursuant to *Babcock & Wilcox*, Section 7 does not protect nonemployee union organizers except in the rare case in which " 'the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels;' "[68] and 3) The facts do not justify the *Babcock & Wilcox* inaccessibility exception.[69] In essence, the Supreme Court reaffirmed the conclusion that the *Babcock & Wilcox* exception is a very narrow one.[70] In light of the narrowness of this exception, nonemployee union organizers have focused on other avenues to maintain access claims to private property.

B. Access Claims under the First Amendment to the United States Constitution

As one commentator points out, in response "to [a] rather sharp limitation upon non-employee solicitation, unions have developed yet another access argument: that many forms of solicitation on company

63. *Id.*
64. *Id.* at 844-45.
65. Jean Country, 291 N.L.R.B. 11 (1988).
66. *Lechmere*, 112 S. Ct. at 845.
67. *Id.*
68. *Id.* at 848 (quoting NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956)).
69. *Id.* at 849; *see* Jean Country, 291 N.L.R.B. 11 (1988.)
70. *Lechmere*, 112 S. Ct. at 849.

property are protected by the free speech provisions of the federal Constitution."[71] As urban centers fragment and economic life increasingly disperses throughout suburbia, it becomes extremely difficult to solicit employees. Accordingly, unions have increasingly pointed to the public attributes of private property surrounding targeted economic establishments[72] which, they claim, give rise to constitutionally protected access rights.

This poignant cry for constitutional access was vindicated in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*[73] The United States Supreme Court held that picketing by nonemployee union organizers at a freely accessible shopping center is a constitutionally protected labor activity.[74] In this case, a nonunion supermarket was located in a shopping center complex, the Logan Valley Mall. The supermarket in issue, Weis Markets, was granted an injunction to protect its property rights from the picketers. The injunction was premised on a trespass claim. Since the picketing took place within a mall to which the public had unrestricted access, the Supreme Court disagreed and held that labor picketing at this privately owned mall could not be enjoined.[75]

This constitutionalizing of nonemployee access claims was rather short-lived. First, in *Central Hardware Co. v. NLRB*,[76] a union solicited employees outside a hardware store that was located within a rather large building surrounded by a parking lot, which was owned by the store owner and used by nonemployees and customers.[77] The Supreme Court declined to vindicate the nonemployee union organizers' constitutional claims. Instead, the case was remanded to ascertain whether the solicitation was protected by virtue of Section 7 of the NLRA.[78] The Court held that an employer could not be subjected to the limitations of the First and Fourteenth Amendments unless the property had assumed "to some significant degree the functional attributes of public property devoted to public use."[79] The Court concluded that the property in is-

71. GORMAN, *supra* note 25, at 187; *see also* Julius Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4 (1984).

72. GORMAN, *supra* note 25, at 187.

73. 391 U.S. 308 (1968), *overruled in part by* Hudgens v. NLRB, 424 U.S. 507 (1976).

74. *Id.* at 315; *see also* GORMAN, *supra* note 25, at 188.

75. *Logan Valley*, 391 U.S. at 325.

76. 407 U.S. 539 (1972).

77. *Id.* at 540-41.

78. *Id.* at 548.

79. *Id.* at 547.

sue, a parking lot open to the public, failed to take on the attributes of public property, thus eviscerating nonemployee union access claims.[80]

Shortly after this decision, and animated by its belief in the right of employers to control their private property, the Supreme Court overruled *Logan Valley*. In *Hudgens v. NLRB*,[81] employees working at the Butler shoe store warehouse went on strike and picketed the company's retail stores, which were located elsewhere. One of these stores was located inside of an enclosed mall. Because the shopping mall owner threatened arrest for trespassing, the union filed a charge under Section 8(a)(1).[82] Overruling the interpretation of both the NLRB and the court of appeal, the Supreme Court reversed on grounds that the shopping mall was not a governmental entity for purposes of the United States Constitution's protection of freedom of speech. Accordingly, the picketers had no constitutional right to be free from arrest for trespass. The Court decided that constitutional protection was available against private property holders only when the property assumed all of the attributes of a municipality, such as post offices, streets, or sewers.[83] On remand, the Board was to determine the picketers' rights under Section 8(a)(1) of the NLRA solely in light of the picketers' status as employees picketing their own employer, rather than as individuals seeking to exercise constitutionally guaranteed freedom of expression of rights.[84]

In sum, it seems clear that, with the possible exception of so-called company towns, "the right of employees and nonemployees to solicit on company property can no longer plausibly be based on the federal Constitution."[85] To the contrary, it "must instead be based upon an analysis of the Labor Act and an accommodation between the Section 7 rights of workers and the property rights of employers."[86]

C. Federal Preemption

Some commentators suggest that state law constitutes a ground on which access claims should rest.[87] Implicitly, such a view challenges the conclusion that nonemployee labor rights are to be governed exclusively

80. *Id.*
81. 424 U.S. 507 (1976).
82. *Id.* at 510.
83. *Id.* at 521.
84. *Id.* at 523.
85. GORMAN, *supra* note 25, at 189.
86. *Id.*
87. Berger, *supra* note 8, at 636.

by the NLRA. To access this view, a brief exegesis of federal preemption of state regulations is in order.

"The most common form of governmental regulation of labor-management disputes until 1935 was state-court relief by injunction or damages against concerted activities . . . ."[88] The United States Supreme Court, in a number of "unclear if not inconsistent"[89] decisions, has pervasively preempted state regulation of concerted activities by employees as set forth in *Garmon*[90] and sustained in subsequent decisions.[91] For instance, the Supreme Court has concluded that a "state could neither enjoin nor award damages against minority-union picketing designed to induce an employer to enter into a union shop agreement against the wishes of its employees."[92] "The rationale for preemption . . . rests in large measure upon our determination that when it set down a federal labor policy Congress plainly meant to do more than simply to alter the then prevailing substantive law. It sought as well to restructure fundamentally the processes for effectuating that policy . . . ."[93] While "there has been a strong strain in Supreme Court opinions, almost uniformly in concurring or dissenting opinions,"[94] which argues for a limited form of preemption that accepts some state remedies.[95] A majority on the Court embraces a more expansive form of preemption,[96] which precludes most state remedies.

In cases involving picketing,[97] the Supreme Court, under the umbrella terms of "arguably protected" under Section 7 or "arguably pro-

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88. GORMAN, *supra* note 25, at 766.

89. *Id.*

90. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). In two earlier cases, *Garner* and *Weber*,

> each union's conduct arguably violated section 8(b) of the Act, [and] the complaining employer could test the propriety of the union's activities by filing a charge with the NLRB. No such opportunity is available, however, when the union's conduct does not involve an arguable section 8(b) violation and the union contends that its conduct is protected by the section 7 of the Act.

THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS AND THE NATIONAL RELATIONS ACT 1662 (Patrick Hardin ed., 3d ed., 1992) (referring to Garner v. Teamsters Local 776, 363 U.S. 485 (1953), and Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955)).

91. *See* Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971).

92. GORMAN, *supra* note 25, at 766.

93. *Amalgamated*, 403 U.S. at 288.

94. GORMAN, *supra* note 25, at 768.

95. *Id.*

96. *Id.*

97. To be sure, picketing is a term capable of several meanings. Pursuant to Section 8 (b)(7) of the NLRA, there is no consistent distinction between organizational, publicity and

hibited" under Section 8, trumps state regulation of conduct[98] when nonemployees picket for organizational purposes because such activity falls within the arguably protected category. Hence, federal preemption of state law seems available.[99]

Again, consider *Hudgens v. NLRB*.[100] There, striking employees at the warehouse of the Butler shoe company engaged in picketing at one of the Butler retail outlets located in an enclosed shopping mall and operated under the terms of a lease.[101] Although the strikers had no constitutional right to picket, the Supreme Court remanded the case for a Board determination of whether the right to picket on the privately owned mall property was statutorily protected against the owner's trespass claim by Section 7 of the NLRA.[102] Invoking the *Babcock & Wilcox* balancing test, the Board said that the status of picketing employees entitles "them to at least as much protection as would be afforded to nonemployee organizers."[103] Furthermore, the distinctions between *Babcock & Wilcox* and *Hudgens* were not dispositive. First, *Hudgens* involved lawful economic strikers' activity rather than union organizational activity; second, the Section 7 authority in *Hudgens* was carried out by employees of Butler, a mall lessee; and third, "the property rights impinged upon [in *Hudgens*] were not those of the employer against whom the [section] 7 activity was directed, but of another."[104] "In sum, the issue . . . is whether . . . the threat by Hudgens' agent . . . to cause the arrest of Butler's warehouse employees engaged in picketing Butler's retail outlet in Hudgen's shopping center . . . violated Section 8(a)(1) of the Act."[105] Premised on the view that employees of employers doing

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area standards picketing. Conceptually, "recognitional picketing is picketing to induce an employer to recognize a union as the bargaining representative of [the] employees." DOUGLAS L. LESLIE, LABOR LAW, IN A NUTSHELL 71 (3d ed., 1992). Recognitional picketing can be an unfair labor practice 1) where the employer has lawfully recognized another union; 2) where within the preceding one year period, a valid election has been conducted; and 3) where organizational picketing continues in excess of a 30 day period without an election petition being filed. Publicity picketing involves advising the public that an employer does not employ members of, or have a contract with a union. Area standards picketing involves a union demand that the employer pay union wages. Confusingly, "area standards" picketing can have a recognitional purpose.

98. GORMAN, *supra* note 25, at 770.

99. *Id.* at 771.

100. 424 U.S. 507 (1976).

101. *Id.* at 509.

102. *Id.* at 523.

103. Scott Hudgens and Local 315, Retail, Wholesale and Dep't Store Union, 230 N.L.R.B. 414, 416 (1977).

104. *Id.* at 417.

105. *Id.* at 415.

business in shopping malls are to be afforded the full protection of the NLRA, the Board affirmed its conclusion that the mall owner, by threatening to cause the arrest of picketing strikers, violated Section 8(a)(1) of the NLRA.[106] Accordingly, "a strong case can be made that such picketing falls within the *Garmon* principle, and that preemption should operate."[107]

On the other hand, in *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters,*[108] the Supreme Court held that "arguable Section 7 claims"[109] do not preempt deployment of state trespass law in protection of private property, in large part because the trespasses of nonemployee union organizers are more likely to be unprotected than protected.[110]

Finding that there existed a significant state interest in the protection[111] of its citizens and that the challenged conduct could be the subject of an unfair labor practice charge, the Court concluded that there is "little risk of interference with the regulatory jurisdiction of the [NLRB]."[112] Therefore, the Supreme Court declined to preempt the application of state trespass law which regulated the locus of the picketing, despite the claim that the picketing was both arguably prohibited under Section 8 and protected under Section 7. Conceivably, it might have been prohibited as a jurisdictional dispute or as recognitional picketing, and it might have been protected as picketing for area standards. In

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106. *Id.* at 418.

107. GORMAN, *supra* note 25, at 775.

108. 436 U.S. 180 (1978); *see also* Riesbeck Food Markets, Inc. v. United Food and Commercial Workers, Local Union 23, 404 S.E. 2d 404 (W. VA. 1991), *cert. denied*, 112 S. Ct. 169 (1991) (state court jurisdiction preempted over informational picketing by union as an activity arguably protected by NLRA).

109. In reality, the Court considered at least two alternative perspectives on the picketing in issue: 1) "The union had engaged in arguably prohibited recognitional picketing subject to Section 8(b)(7)(C) of the Act which could not continue for more than 30 days without petitioning for a representation election." *Sears*, 436 U.S. at 184. 2) The picketing could arguably be protected by § 7 because it was intended to secure work for union members and to publicize the fact that Sears was undercutting the prevailing wage area standards of carpenters. *Id.* In addition, "the legality of the picketing was unclear. Two separate theories would support an argument by Sears that the picketing was prohibited by § 8 of the NLRA, and a third theory would support an argument by the Union that the picketing was protected by § 7." *Id.* at 185.

110. *Id.* at 205. "To gain access, [in nonemployee cases], the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation.... [T]he burden imposed on the union is a heavy one...." *Id.*

111. *Id.* at 196.

112. *Id.*

sum, despite "the potential for conflict presented in *Sears*, the Court refused to preempt the state court proceeding. It viewed the 'primary jurisdiction' rationale of *Garmon*, which requires adjudication in the first instance by the Board, as relatively unimportant,"[113] especially where the injured party does not have "a reasonable opportunity either to invoke the Board's jurisdiction or else to induce his adversary to do so."[114] The Court believed that the union was not disadvantaged by state restrictions and that the union had the opportunity to file unfair labor practice charges against the employer for its trespass action; further, the employer, Sears Roebuck, could neither invoke the Board's jurisdiction, nor compel or induce the union to do so. Consequently, preemption of state remedies was not allowed.[115]

In *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Committee*,[116] the Supreme Court deployed a preemption doctrine that required respect for economic weapons as part of the free play of economic forces envisioned by the NLRA. The Court believed that this area was consciously left free of regulation by Congress and, accordingly, state regulation of conduct which the NLRA neither protects nor prohibits is preempted.[117]

While this case has been the subject of some criticism,[118] the *Machinists* doctrine was applied in *Rum Creek Coal Sales, Inc. v. Caperton*[119] to disallow the application of a West Virginia statute immunizing labor ac-

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113. THE DEVELOPING LABOR LAW, *supra* note 90, at 1680.

114. *Id.; see also* Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 599 P.2d 676 (Cal. 1979), *cert. denied,* 447 U.S. 935 (1980) (holding found that picketing was lawful under state law).

115. THE DEVELOPING LABOR LAW, *supra* note 90, at 1680. In reality, the Court might hold that state court action is preempted "unless, prior to bringing the state court action, the employer threatens the union with state court or state police action. This [threat] provides the basis for the union to file an unfair labor practice charge against the employer. "Absent such a threat, the Board might be without jurisdiction since the Board has held that an employer's resort to state court action does not violate Section 8(a)(1)." LESLIE, *supra* note 97, at 318. *But see* Wisconsin Dep't of Indus., Labor and Human Relations v. Gould, Inc. 475 U.S. 282 (1986) (holding that the NLRA preempts Wisconsin Statute which debars firms that have violated the NLRA three times within a 5-year period from doing business with the State premised on the view that states are not allowed to provide their own remedies for conduct prohibited or arguably prohibited by the NLRA). *See also* Midwest Motor Express, Inc. v. Int'l Bhd. of Teamsters, Local 120, 494 N.W.2d 895 (Minn. Ct. App. 1993), *rev'd*, 512 N.W.2d 881 (Minn. 1994).

116. 427 U.S. 132 (1976) (disallowing a state injunction against a collective refusal to work overtime); *see also* THE DEVELOPING LABOR LAW, *supra* note 90, at 1654-97.

117. *Machinists*, 427 U.S. at 147.

118. *See* Estlund, *supra* note 4, at 341-42.

119. 926 F.2d 353 (4th Cir. 1991).

tivity from state trespass laws.[120] Accordingly, "[u]nder the Fourth Circuit's *Rum Creek* analysis, the *Machinists* doctrine—designed to restrict state intervention in labor disputes—effectively gives employers a federal right to demand state intervention (i.e., a right to call upon police to eject striking employees), even if state law does not recognize that right."[121] Despite the argument that such a view has no grounding in the text of the NLRA,[122] preclusions of state-created remedies in an area that the NLRA neither protects nor prohibits remains an additional prong of federal preemption.

In sum, while the doctrine of federal preemption of state labor regulation is subject to some articulated rules, determining when preemption can be invoked remains an unclear and perplexing question. If an industry affects commerce, even if the NLRB declines to exercise jurisdiction, federal preemption of state jurisdiction seems quite possible.[123]

III. *PRUNEYARD* AND ITS PROGENY: AN INVITATION ACCEPTED

A) California

In March 1979, the Supreme Court of California, in *Robins v. Pruneyard Shopping Center*,[124] held that the distribution of literature and the soliciting of signatures on a petition to the government was an activity protected by the California Constitution. The shopping center in question attracted more than 25,000 daily patrons and "consist[ed] of approximately twenty-one acres—5 devoted to parking and 16 acres occupied by walkways, plazas, and buildings that contain[ed] sixty-five shops, ten restaurants, and a cinema."[125] Assuredly, "[t]he public is invited to visit for the purpose of patronizing the many businesses."[126] High school students, in contravention of Pruneyard's policy precluding any tenant or visitor from engaging in publicly expressive activity, circulated petitions that were not directly related to the commercial purposes for which the mall is held open. The students solicited signatures in support of their opposition to a United Nations resolution against Zionism.[127]

The California Supreme Court considered two main questions:

120. *Id.*
121. Estlund, *supra* note 4, at 342.
122. *Id.*
123. THE DEVELOPING LABOR LAW, *supra* note 90, at 1654-97.
124. 592 P.2d 341 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980).
125. *Id.* at 342.
126. *Id.*
127. *Id.*

(1) Did *Lloyd Corp. v. Tanner*[128] recognize federally protected property rights of such a nature that the Court was barred from ruling that the California Constitution creates broader speech rights within its definition of private property than does the federal Constitution?
(2) "[D]oes the California Constitution protect speech and petitioning at shopping centers?"[129]

In answer to the first question, the California Supreme Court overruled its prior holding in *Diamond v. Bland*.[130] Instead, citing with favor *Eastex, Inc. v. NLRB*,[131] the court said, "Members of the public are rightfully on Pruneyard's premises because the mall is held open to the public during shopping hours."[132] Accordingly, *Lloyd,* viewed in conjunction with other pertinent labor law cases,[133] "does not preclude lawmaking in California which requires that shopping center owners permit expressive activity on their property."[134] Additionally, premised on the "public interest"[135] shibboleth, the court averred that " '[a]ll private property is held subject to the power of the government to regulate its use for the public welfare.' "[136]

Once *Lloyd* and federal constitutional inhibitions were dismissed, it was a rather tiny step to expand the California constitutional provisions at issue beyond their text[137] and protect solicitation of petition signa-

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128. 407 U.S. 551 (1972).

129. *Pruneyard*, 592 P.2d at 343.

130. 521 P.2d 460 (Cal. 1974), *cert. denied*, 419 U.S. 885 (1974).

131. 437 U.S. 556 (1978). This case involved an interpretation of the NLRA and whether there is a statutory basis for protecting employees' right to distribute a four-part newsletter that contained two parts related to organizational request and two parts related to political expression. Consistent with earlier cases, the *Eastex* court held that the employees were rightfully on the employer's premises in order to perform the duties of employment, and if there was in fact an intrusion, it did not vary with the content of the materials being distributed. *Id.*

132. *Pruneyard*, 592 P.2d at 344. A related issue is the determination of how property rights are created. Some interpreters of *Babcock & Wilcox* contend that while *Babcock & Wilcox* explicitly states that the national government preserves property rights, property rights are not created by the federal government but by the states. *See* Bristol Farms, 311 N.L.R.B. 437, 438 (1993).

133. *Pruneyard*, 592 P.2d at 344.

134. *Id.*

135. Public interest, to be sure, is a term incapable of precise meaning. But whatever it means, it seems to trump "mere" property interest. *See* ELLEN F. PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN 185-93 (1987) (indicating that a state may sacrifice one private interest for another private interest once the latter has been shrouded in the guise of the public interest).

136. *Pruneyard*, 592 P.2d at 344 (quoting Agriculture Labor Relations Bd. v. Superior Court, 546 P.2d 687, 694 (1976)).

137. Article I, section 2 of the California Constitution reads: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse

tures on private property by vitiating an important property right: the right to exclude. The court held that Article I, sections 2 and 3 of the California Constitution prevent the enjoining of signature gatherers, even when the center is privately owned.[138]

As the dissent noted, the majority opinion conspicuously ignored the trial court's determinations that:

1) Numerous alternative public fora existed for purposes of signature gathering;
2) The plaintiffs made no attempt to avail themselves of these channels;
3) As a matter of law, there had been no dedication of the center's property to public use and the center was not the "functional equivalent" of a municipality.[139]

The dissent stated that "supremacy principles would prevent us from employing state constitutional provisions to defeat defendant's federal constitutional rights."[140] Furthermore, the dissent said that the majority erred in adopting an "excessively narrow reading of *Lloyd*."[141] In *Lloyd,* the United States Supreme Court admonished that "[i]t would be an unwarranted infringement of property rights to require them to yield to the exercise of the First Amendment rights under circumstances where adequate alternative avenues of communication exist."[142]

While the majority may have unmistakably erred, its opinion was affirmed by the United States Supreme Court. In *Pruneyard,*[143] the Court held that its reasoning in *Lloyd* did not control the instant case. First, *Lloyd* did not "limit a state's authority to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."[144] Second, the distribution of literature and the allowance of solicitation of signatures on privately owned property in the exercise of state-protected rights of free expression does not constitute an unconstitutional taking.[145] The Court stated that appellants had failed "to demonstrate that the 'right to exclude others' is so essential to the use or economic value

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of this right. A law may not restrain or abridge liberty of speech or press." CAL. CONST. art. I, § 2 (a).

138. *Pruneyard*, 592 P.2d at 347.
139. *Id.* at 348 (Richardson, J., dissenting).
140. *Id.* at 349 (quoting Diamond v. Bland, 521 P.2d 460, 463 n.4 (Cal. 1974)).
141. *Id.*
142. *Id.*
143. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).
144. *Id.* at 81.
145. *Id.* at 83.

of their property that the state-authorized limitation of it amounted to a 'taking.' "[146]

To be sure, the Court conceded: 1) "[p]roperty does not lose its private character merely because the public is generally invited to use it for designated purposes;"[147] 2) property does not change its essentially private character "by virtue of being large or clustered with others stores;"[148] and 3) that "one of the essential sticks in the bundle of property rights is the right to exclude others."[149]

However, relying on *Armstrong v. United States*,[150] the Court stated that it is also "well established that 'not every destruction . . . has been held to be a 'taking' in the constitutional sense.' "[151] To the contrary, a claimed violation of the Takings Clause requires a determination of whether the restriction on private property requires some individuals or entities to bear alone "public burdens which, in all fairness and justice, should be borne by the public as a whole."[152] In reviewing the California Supreme Court's rendering of its constitution, no unreasonable infringement of private property was found. Hence, the appeal failed.[153]

In sum, none of the United States Supreme Court Justices voted to uphold the property owner's claims. To the contrary, the Court decided that there was not a taking within the meaning of the Fifth Amendment.[154] The latter decision was reached despite the Court's explicit conclusion that there had in fact been a taking of one of the essential sticks in the bundle of property rights: the right to exclude others.[155] In effect, the Supreme Court extended to state courts and legislatures an open, undefined invitation to expand freedom of expression rights beyond the parameters of merely public property or public fora. The right to exclude others from private lands can be snatched without compensa-

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146. *Id.* at 84. *But see* Klare, *supra* note 6, at 20 (conceding that what a property owner can do with his property or what the owner can prevent others from doing with it significantly affects the property's value).

147. *Pruneyard*, 447 U.S. at 81.

148. *Id.*

149. *Id.* at 82.

150. 364 U.S. 40, 48 (1960).

151. *Pruneyard*, 447 U.S. at 82 (quoting *Armstrong*, 364 U.S. at 48).

152. *Id.* at 83 (quoting *Armstrong*, 364 U.S. at 49).

153. *Id.* at 84. The Supreme Court did allow the property owner to restrict expressive activity by adopting time, place, and manner regulations. *Id.* at 83. For an argument that the Rehnquist opinion fails to offer a coherent account of incidents of ownerships, including exclusive possession, and that the entire matter of investment-backed expectations does not go to the takings issue, see RICHARD A. EPSTEIN, TAKINGS 65 (1985).

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

155. *Id.* at 82.

tion as long as the snatcher does so reasonably. Consequently, it is not surprising that at least a few states and many commentators have accepted this offer.

B. Other States

The invitation presented in the prior subsection has been conceptually advanced by a number of writers who urge states to abridge property interests in response to the imprecatory call of "democracy." As one observer put it, "sensitive citizens" responding to the call should not countenance the decision in *Lloyd* denying relief to five members of a resistance community from a shopping center owner who barred distribution of anti-war handbills.[156] Another writer explicitly questioned whether ownership rights exist in real property at all.[157] Property rights, we are told, must give way in the face of competing and transparently superior First Amendment or labor rights claims.[158] Still others have suggested that what is self-evidently required is the development of an extra-constitutional view of what constitutes a public forum,[159] premised essentially on state-law grounds.[160] At least twenty state courts have wrestled with the knotty issues involved in nonemployee, nonpatron access to private property.[161] Most of the state decisions, whether

156. Summers, *supra* note 8, at 689-90. In addition, one observer claims that the *Sears* decision itself "would seem to leave the states free to define property rights more narrowly, thereby expanding access rights beyond the minimum set by the NLRA." Estlund, *supra* note 4, at 340.

157. Klare, *supra* note 6, at 47.

158. *Id.* at 48-49.

159. Berger, *supra* note 8, at 659-78.

160. *Id.* at 661.

161. The question of nonpatron, nonemployee access to private property has been an issue in a number of opinions. A number of states have held that their state freedom of expression rights protect expression against private enforcement of property rights. *See* Bock v. Westminister Mall, 819 P.2d 55 (Colo. 1991); Robins v. Pruneyard Shopping Ctr., 592 P.2d 341 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980); State v. Schmid, 423 A.2d 615, (N.J. 1980), *appeal dismissed sub nom*, Princeton Univ. v. Schmid, 445 U.S. 100 (1982); State v. Cargill, 786 P.2d 208 (Or. Ct. App. 1990), *aff'd*, 851 P.2d 1141 (1993); Batchelder v. Allied Stores Int'l, Inc., 445 N.E.2d 590 (Mass. 1983); New Jersey Coalition Against the War in the Middle East v. J.M.B. Realty, 650 A.2d 757 (N.J. 1994); Commonwealth v. Tate, 432 A.2d 1382 (Pa. 1981); State v. Dameron, 853 P.2d 1285 (Or. 1993); *see also In re* Lane, 457 P.2d 561 (Cal. 1969) (upholding the right of a labor union to handbill on a privately owned sidewalk in front of a grocery store).

On the other hand, an even larger number of states reject state freedom of expression claims. *See* State v. Lacey, 465 N.W.2d 537 (Iowa 1991) (upholding conviction of nonemployees who distributed handbills urging consumer boycott of restaurant because its owner employed nonunion building contractors at another location); Cologne v. Westfarms Assoc., 469 A.2d 1201 (Conn. 1984); Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assoc., 392 S.E.2d

favorable or unfavorable to freedom of expression claims, have addressed the *Pruneyard* issue under their respective constitutions.[162] Despite the attractiveness of the imprecatory demand for expanded access, it is also clear that most states that have considered these issues have rendered unfavorable decisions to individuals and groups seeking speech-related access.[163]

In light of the demand for expanded access, it is useful to look at a few decisions which favor expanded access. Illustrative of favorable state court decisions granting speech or petition-related access to private property outside of a labor context are *State v. Cargill*[164] and *Batchelder v. Allied Stores Int'l, Inc.*[165] In each of these cases, individuals sought access for purposes of gathering signatures. In addition, in *Batchelder* the individual also sought to distribute literature.[166] In both cases, the state court held that there is a state constitutional right to gather signatures at either a large store and parking lot or at a mall.[167] These forms of property become, in effect, public fora for purposes of freedom of expression analysis.

In *Cargill,* the Oregon Court of Appeals found that there is an implicit right that "people must have adequate opportunities to sign . . . petitions."[168] Accordingly, it held that where the store and parking lot are open to the public and citizens are invited to come and congregate on the premises, the store and parking lot become a forum for assembly by the community, despite the company's policy precluding petitioners on its property, unless there is evidence that the petitioners' activities substantially interfere with the store owner's use of the property.[169] In light of current societal habits to congregate at stores and malls, the *Cargill* court then adapted its state constitution to preclude prosecuting peo-

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8 (Ga. 1990); Woodland v. Michigan Citizens Lobby, 378 N.W.2d 337 (Mich. 1985); SHAD Alliance v. Smith Haven Mall, 488 N.E.2d 1211 (N.Y. 1985); State v. Felmet, 273 S.E.2d 708 (N.C. 1981); Jacobs v. Major, 139 Wis. 2d 492, 407 N.W.2d 832 (1987); Johnson v. Tait, 774 P.2d 185 (Alaska 1989); Fiesta Mall Venture v. Mecham Recall Comm., 767 P.2d 719 (Ariz. Ct. App. 1988); Southcenter Joint Venture v. National Democratic Policy Comm., 780 P.2d 1282 (Wash. 1989); *see also* Berger, *supra* note 8, at 634; William B. Harvey, *Private Restraint of Expressive Freedom: A Post-Pruneyard Assessment,* 69 B.U. L. REV. 929 (1989).

162. Berger, *supra* note 8, at 634.

163. *Id.* at 634.

164. 786 P.2d 208 (Or. Ct. App. 1990), *aff'd,* 851 P.2d 1141 (1993).

165. 445 N.E.2d 590 (Mass. 1983).

166. *Id.* at 591.

167. *Id.* at 595; *Cargill,* 786 P.2d at 214.

168. *Cargill,* 786 P.2d at 211.

169. *Id.* at 212-14.

ple "in areas that have replaced traditional forums for the collection of signatures."[170]

In *Batchelder,* the Supreme Judicial Court of Massachusetts held that solicitors have a right to solicit nominating signatures and distribute associated materials in a reasonable and unobtrusive manner in the common areas of a large shopping mall.[171] This decision was premised on the court's view that the shopping center is a "favorable" solicitation site.[172] While conceding that considerations under the United States Constitution appear to be neutral, the court looked to the *Pruneyard* decision as authority to grant free speech, free assembly, or electoral activity on private property that is held open to the public.[173] In reaching this decision, the court declined to hold that the state action requirement limits the application of Article 9 rights.[174]

In sum, both these cases and several others[175] suggest that, where a private mall issues a broad invitation to the public, that invitation, coupled with an expansive rendering of pertinent state constitution provisions, creates a public forum. Once classified as a public forum, the mall owner's right to exclude others may be compelled to give way in the face of explicitly or implicitly superior freedom of expression, solicitation, petition, assembly, or distribution rights.

On the other hand, state court decisions within a labor context are more problematic. Consider *Bellemead Dev. Corp. v. Schneider.*[176] There, a New Jersey court examined the expressive claims in a park consisting of six office buildings, several warehouses, a motel, an automobile dealer, and an athletic club. The owner of the office park sought to enjoin the distribution of leaflets on the grounds that the attempt was a continuing trespass and a nuisance.[177] In an attempt to resolve this dispute within the " 'constitutional equipoise between expressional rights and property rights,' "[178] the court found that, under the United States Constitution, the union members could be barred from distributing leaflets while on private property. However, noting that the New Jersey

170. *Id.* at 215.
171. *Batchelder,* 445 N.E.2d at 595-96.
172. *Id.* at 595.
173. *Id.* at 592.
174. *Id.* at 593.
175. *See* Bock v. Westminster Mall Co., 819 P.2d 55 (Colo. 1991); State v. Dameron, 853 P.2d 1285 (Or. 1993).
176. 472 A.2d 170 (N.J. Super. Ct. Ch. Div. 1983), *aff'd,* 483 A.2d 830 (N.J. 1984).
177. *Id.* at 173.
178. *Id.* at 174 (quoting State v. Schmid, 423 A.2d 615 (N.J. 1980), *appeal dismissed sub nom,* Princeton Univ. v. Schmid, 455 U.S. 100 (1982)).

Supreme Court had interpreted the New Jersey constitution more broadly than the federal constitution, the court concluded that a sliding scale standard was necessary in order to strike the requisite balance between private property interests and expressional claims. The court held that the facts in the instant case showed that the property owners discouraged public use of their property and that the owner extended a rather limited invitation to the public to use the property. Accordingly, based on the balancing of factors,[179] it found the union's distribution of leaflets constituted a continuing trespass which could be enjoined.[180]

In sum, appending freedom of expression analysis to nonemployee union distribution and access claims within a labor law context has not been met with open arms. To the contrary, there seems to be a tendency to deny nonemployee union organizers freedom of expression claims, thus requiring resort to the NLRA itself as the basis for nonemployee union access to private property.

C. *The Call for New Legislative, New Statutory, and New Common-Law Property Rights Definitions*

The general reluctance of courts to expand access has sparked a growing call for explicit pro-union legislation,[181] which would redistribute power in favor of employees, while diminishing the power of land owners and employers. While some advocates of expanded access focus on federal legislation,[182] other commentators argue that the deployment of state legislatures in the exercise of their regulating power and state courts in their common-law tradition, constitutes a fruitful arena for progress.[183] In the next section, consistent with the public choice view, I consider: 1) the risk of error and disorder implicit in state-sponsored adoptions of property rights redefinitions in a labor access context; 2) the likelihood that narrow special interest groups benefit from these new

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179. The court looked to a three part test which requires that the court review:

> (1) the nature, purpose and primary use of such private property, generally its normal use, (2) the extent and nature of the public's invitation to use the property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property.

Id. at 174 (citing *Schmid*, 423 A.2d at 630). Interestingly, the court found the purpose of speech—promoting unionization—to be inconsistent with the defendant union's access claims. In other words, the decision was solely premised on speech. *Id.* at 177.

180. *Id.* at 177.

181. *See* Estlund, *supra* note 4; *see also* Summers, *supra* note 8 (calling for broadened statutory interpretations favoring access to private property by nonemployees).

182. *See generally* Estlund, *supra* note 4, at 353-55.

183. Berger, *supra* note 8, at 636.

property right definitions; and 3) recent Supreme Court jurisprudence in the property rights arena.

IV. Towards a Public Choice Examination of Nonemployee Access Claims

"The fact of scarcity, which exists everywhere, guarantees that people will compete for resources. Markets are one way to organize and channel this competition. Politics is another. People use both markets and politics to get resources allocated to the ends they favor."[184] Political activity is quite distinct from voluntary exchange in markets.[185]

While democracy allows groups to accomplish many things politically which might be impossible in the private sector,[186] it is also true that the "incentive to engage in rent-seeking activities is directly proportional to the ease with which the political process can be used for personal . . . gain at the expense of others."[187] Accordingly, consistent with the public choice view, it is time to 1) consider the possibility of the risk of error, disorder, and confusion when individuals seek, consistent with the new theory[188] of property, to vitiate private property rights in an effort to expand nonemployee union access claims; 2) determine whether the redistribution of property rights favors the narrow special interest as opposed to the interest of the larger community; and 3) review recent Supreme Court jurisprudence in the private property context.

A. The Possibility of Error and Disorder

Advocates of coherence in the discipline called labor law, especially those who favor expansive nonemployee access to private property, abhor inconsistency.[189] Accordingly, in this subsection, an examination of expanded nonemployee rights with concurrently diminished private property rights is required. The primary focus of this subsection is within the context of union nonemployees who seek access to private property, but it is also important to note that *Pruneyard*, the preeminent example of the Supreme Court's acceptance of state-sponsored expan-

184. Richard L. Stroup, *Political Behavior*, *in* The Fortune Encyclopedia of Economics 45 (David R. Henderson ed., 1993).

185. *Id.*

186. *Id.*

187. James D. Gwartney & Richard E. Wagner, *Public Choice and the Conduct of Representative Government*, *in* Public Choice and Constitutional Economics 22 (James D. Gwartney & Richard E. Wagner eds., 1988).

188. *See* Pilon, *supra* note 21 and accompanying text.

189. *See* Klare, *supra* note 6 and accompanying text.

sion of access claims, occurs outside of a labor law context. Additionally, it is precisely the *Pruneyard* invitation which has spawned much of the argument for the new theory of private property.

1. Supreme Court Decision Making and Coherence

In reviewing Supreme Court decisions in the arena of access to private property, it is difficult to find either consistency or coherence. As the following chart demonstrates, the Supreme Court has permitted access to private property pursuant to the California Constitution, allowed labor picketing pursuant to the United States Constitution, granted access to prevent anti-union discrimination, and admitted political activities, including distribution of literature by employees when merely tangentially related to the employer in issue; notwithstanding, the Court has also disallowed handbilling by Vietnam War protesters and precluded nonemployee union access pursuant to the NLRA.

SELECTED LABOR AND NONLABOR ACCESS CASES

Case Name	Year Decided	Status of Individual or Group Seeking Access		Ownership of Property in Issue		Type of Access Sought				Decision Making		Initial Jurisdictional Court	
Court Supreme		*Nonemployee*	*Employee*	*Employer Owned*	*Nonemployee Owned*	*Organiz.*	*Strike*	*Other Labor*	*Nonlabor Religious and Political*	*Decision re Access*	*Trespass*	*State*	*Federal*
Lechmere	1992	Nonemployee union organizers		Employer		Organization				Access disallowed	Disallowed		NLRB
Pruneyard	1980	Nonemployees solicit signatures			Shopping mall				Solicit signatures political	Access allowed because of California Const.	Allowed	California State Cts.	
Eastex	1978		Employee	Employer				Mutual aid support	Political issues related to labor	Access allowed	Rightfully on employer premise		NLRB
Hudgens	1976	Nonemployees of property owner	Employees of tenant		Mall owners		Economic strike			Access denied on Const. grounds Allowed on NLRA basis	Disallowed on Const. grounds	Georgia Superior Ct.	
Lloyd	1972	Vietnam War protesters			Mall owners				War protestors seek handbills to distribute	Handbilling unrelated to mall operations access disallowed	Trespass can be enjoined		Fed. District Court
Central Hardware	1972	Nonemployee union organizers		Employer		Organization				Disallowed on const. grounds			NLRB
Logan	1968	Nonemployee union			Mall owners	Area stds.				Picketing Const. Protected	Allowed	Penn. Ct. of Common Pleas	
Babcock & Wilcox	1956	Nonemployee organizers		Employer		Organization				Nondiscrim. denial of access upheld	Prohibited		NLRB
Stowe	1949	Nonemployee union organizers		Leased employer hall		Rent hall to solicit memb.				Access allowed re hall b/c discrimination	Allowed		NLRB
Republic	1945		Employee	Employer		Union buttons				Allowed	Non-trespassory b/c employees involved		
Sears Roebuck	1978	Nonemployee union organizers		Employer		Area stds.				Location of picketing can be precluded	Trespass prohibited under Fed. law	Cal. Superior Court	

In sum, the Supreme Court decisionmaking has been neither consistent nor ordered.

2. Hypothetical Case Development

In light of this demonstrable inconsistency by the United States Supreme Court in the arena of access claims, the question to be confronted is whether expanding nonemployee union access, that is premised on state legislative or state constitutional interpretation, assists or deters coherence. Accordingly, it is necessary to deploy hypothetical cases in order to determine whether trivializing the right to exclude individuals and groups from private property, while simultaneously expanding nonemployee free exercise claims, increases the risk of error and confusion or whether coherence triumphs.

Case I: Nonunion, Nonemployee Exercise of Freedom of Expression

a) A nonemployee, nonunion group seeks to demonstrate, gather petitions, distribute handbills, or to otherwise vindicate their asserted freedom of expression rights within a public area of a shopping mall.
b) Consistent with *Pruneyard*, such asserted free-exercise rights are guaranteed either explicitly or implicitly by the pertinent state constitution.
c) Implicit in "b" is the assumption that the property owner's right to exclude is trivial.
d) In a case brought before the United States Supreme Court, the access claims of this nonunion, nonemployee group are upheld in a decision which is in accord with *Pruneyard*.

Case II: Union Nonemployee Exercise Claims Involving an Employer with Employment Locations in Two States

a) A nonemployee union group, as part of an organizational and recognitional campaign, engages in a program of picketing which includes handbilling within the public access areas of employer-owned shopping malls located in the states of *Libby* and *McKay*. The union seeks to persuade mall employees to support the union as their bargaining representative.
b) A valid election covering mall employees under Section 9(c) of the NLRA has been held during the past six-month period.[190]

190. 29 U.S.C. § 159(c) (1988).

c) 1) The State of *McKay* does not have any state statute, constitutional provision, or constitutional interpretation granting access to shopping malls when exercising putative freedom of expression rights.

2) The State of *Libby*, consistent with *Pruneyard*, allows access to privately owned shopping malls pursuant to the state court's interpretation of pertinent provisions of the State of *Libby*'s constitution.

d) The employer threatens the union with state court action and ejectment. Then the employer ejects nonemployee union organizers from malls located in both states.

e) Possible decisions include:

1) State Court Decisions

(a) In a case brought by the union in *Libby*, the Supreme Court of the State of *Libby*, applying the *Sears Roebuck* doctrine, decides that federal preemption is inapplicable. Accordingly, the Court allows nonemployee union access consistent with the United States Supreme Court decision in *Pruneyard*. As such, ejectment by the employer is invalidated;[191]

(b) In a case brought in *McKay* by the union claiming that the ejectment should be disallowed, the Supreme Court of the State of *McKay*, applying the *Sears Roebuck* doctrine, decides federal preemption does not apply. Accordingly, since the organizers violated state trespass laws, the employer's ejectment is upheld.[192]

2) NLRB Decisions

(a) In a case brought by the union in the State of *McKay*, before the NLRB, the Board decides that the employer did not engage in an unfair labor practice violation of the NLRA by ejecting the nonemployee union organizers because a valid election[193] was held within

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191. In Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978), the U.S. Supreme Court held that neither arguable section seven claims nor arguably prohibited conduct preempts the application of state trespass law. The locus of the picketing in *Sears Roebuck* was likely unprotected by the NLRA, however, the conduct apart from the location might be protected. *See supra* notes 111-17 and accompanying text. Here, however, the hypothetical presents conduct which itself is likely to be prohibited by Section 8(b)(7) of the act. *See* 29 U.S.C.§ 158(b)(7) (1988).

192. This decision follows the holding in *Sears, Roebuck* in deciding that federal preemption of the application of state trespass law is unwarranted. *See Sears, Roebuck & Co.*, 436 U.S. at 190-98.

193. *See* 29 U.S.C. § 158(b)(7) (stating that a union commits an unfair labor practice by engaging in organizational picketing where the employees participated in a valid election within the last twelve months).

the past six months. This decision, in effect, validates the ejectment by the employer.

(b) In a case brought by the employer in the State of *Libby*, the NLRB finds that the nonemployee union organizing activities violate Section 8 (b)(7) of NLRA. But then the NLRB decides that state law controls access to private property. Under applicable state law, nonemployee union organizers are allowed to continue to picket on private property.

4) Analysis: Employer with locations in two states confronts labor access rules which vary by application of state law.

Case III: Nonunion, Nonemployee Free Exercise and Concurrent Union, Nonemployee Free Exercise Claim

a) A nonemployee, nonunion group distributes handbills within a public area of a privately owned shopping mall located in the State of *Libby*.
b) Such free exercise rights are guaranteed, consistent with *Pruneyard*, either explicitly or implicitly by the state constitution.
c) Consistent with *Pruneyard*, the mall owner allows access to this nonunion group.
d) A nonemployee union group, as part of an organizational and recognitional campaign, engages in picketing and handbilling within the public access areas of the employer-owned mall. The union seeks to persuade mall employees to join the union.
e) The mall owner threatens state court action and disallows union access on grounds that federal preemption rules preclude nonemployee labor organizer access claims under state law and requires instead that their rights be determined exclusively under the NLRA.
f) Consistent with the teaching of *Babcock & Wilcox* and *Lechmere*, other access alternatives exist.
g) Possible decisions include:

1) In a case before the Supreme Court of *Libby*, the court, consistent with *Pruneyard*, allows access;

2) On appeal to the United States Supreme Court, the Court, animated by its belief that, among other things, uniformity, the doctrine of federal preemption, and the primary jurisdiction of the NLRB to resolve labor disputes, disallows access consistent with *Garmon*. This view accepts the notion that the union's conduct falls within the arguably protected, arguably prohibited category;

3) The union then pursues its access claim before the NLRB. The NLRB, consistent with *Babcock & Wilcox* and *Lechmere*, finds that sufficient alternative channels for pro-union communication exist

and, accordingly, denies the union access claim, as the activity is not protected by the NLRA. In addition to its access claims, however, the union also claims that the employer committed an unfair labor practice by engaging in discrimination against the union. Accordingly, consistent with *Stowe*, the NLRB determines that the mall owner's refusal to allow nonemployee union distribution constitutes an unfair labor practice. Hence, the employer's refusal is invalidated.

Assuredly, this rather short list of hypotheticals fails to exhaust all of the possibilities, permutations, or decisions. These hypotheticals, however, demonstrate that expanding nonemployee access through state law trivialization of property *is* successful in increasing the risk of error, disorder, inconsistency, and conflict. As one of the leading advocates of expanded labor access rights conceded, "[T]he conflict . . . arises (and will now arise more frequently) when a state *permits* labor activity on private property where, under *Lechmere*, that activity is *not* protected by the NLRA."[194]

3. Recent NLRB Decisions

In reality, the NLRB has considered rather directly the essential conflict between state-sponsored access expansions and private property rights. In two recent California cases,[195] the NLRB held that, "by virtue of the state constitutional rights recognized in *Pruneyard*, an employer could not exclude area standards picketers from the sidewalk of a strip shopping center."[196] Accordingly, the employer in issue "thus violated section 8(a)(1) of the NLRA by ejecting the union agents from [their] property."[197] Assuredly, incorporating state law into Section 7 analysis makes "[t]he actual freedom to exercise section 7 rights varies dramatically from state to state, from the minimal access rights enunciated in *Lechmere*, to the more generous access rights recognized in several states."[198] If uncompensated access to private property is granted to labor organizers, or to those exercising freedom of expression rights based on state law as opposed to the NLRA, the question becomes whether a private property owner can deny access to *anyone*, no matter how hostile

194. Estlund, *supra* note 4, at 339.

195. Bristol Farms, 311 N.L.R.B. 437, 439 (1993); Payless Drug Stores Northwest, Inc. and United Food and Commercial Workers, 311 N.L.R.B. 678, 679 (1993).

196. Estlund, *supra* note 4, at 341.

197. *Id.*

198. *Id. But see* Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353 (4th Cir. 1991) (holding that the state statute exempting labor activity from state trespass laws is preempted by NLRA).

that claimant is to the property owner's interest. As the recent record of NLRB cases demonstrates, variability, conflict, and incoherence are the touchstones of state-sponsored access claims. The additional question is whether freedom itself must also become a casualty of this new theory of property.

B. Will State Legislated or Sponsored Redistributions of Property Rights Favor the Narrow Special Interest or the Interest of the Larger Community?

"Politics is a structure of complex exchange among individuals, a structure within which persons seek to secure collectively their own privately defined objectives that can not be efficiently secured through simple market exchanges."[199] To repeat, it is robustly argued that *Lechmere* and *Babcock & Wilcox* embody an "unduly broad conception of private property rights."[200] Accordingly, commentators have suggested that property rights be redistributed to labor and other groups either through state-sponsored legislation, or judicial interpretation of state constitutions, or through statutory or judicial reconceptions of the NLRA.[201]

Before continuing the development of a public choice explanation of attempts to expand nonemployee union access rights and hence enlarge union power, it is useful to examine briefly 1) the returns to labor, and 2) the economic effects of labor unions on income distribution. This is especially useful since public choice theory is an economic theory of legislation.

1) Economic Background

> Few ideas are so deeply engrained in the minds of most people in the Western world as that labor unions have been beneficial to those whose main incomes derive from the sale of labor services. Labor unions are popularly credited with all, or most, of the improvements in real wages and working conditions that workers have enjoyed in the last 100 years.[202]

The federal government, by enacting the NLRA, "has granted labor cartels [unions] legal immunities and privileges."[203] Government protection of cartels should lead to above-market wages, reduced efficiency

199. Buchanan, *supra* note 20, at 103, 107.

200. Estlund, *supra* note 4, at 343.

201. *See* Berger, *supra* note 8, at 633; *see also* Klare, *supra* note 6, at 7.

202. Charles W. Baird, *Foreword*, to W.H. HUTT, THE THEORY OF COLLECTIVE BARGAINING 1930-1974 at xi (1980).

203. REYNOLDS, *supra* note 3, at 3.

and the creation of economic rents.[204] While the meaning of available empirical evidence is the subject of some dispute, it seems clear that:

a) "Issues associated with labor market rents almost certainly dwarf those associated with monopoly rents earned by capitalists;"[205]

b) Some studies suggest that the union wage premium ranges from sixteen to thirty percent above the earnings of similarly skilled nonunion workers;[206]

c) Monopoly wages earned by unionized labor "lower national output due to sub-optimal employment of labor and capital."[207] The net result of the economic rents imposed on the nonunion sectors is eighty billion dollars or two percent of the GNP;[208]

d) The economic rents collected by unions results in unemployed or underemployed workers, who receive incomes substantially lower than the average U.S. wage.[209]

In short, while it has been argued that nurturing labor union traditions moves society towards "egalitarianism and solidarity,"[210] in reality the economic record suggests that "[t]o the extent that unions are successful, they redistribute income toward their members, who are predominately white, male, and well paid, at the expense of consumers as a whole, tax-

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204. *See generally id.* at 2-122. For an illustration of above market wages, inefficiency, and economic rent creation accruing to labor in an international trade context, see Harry G. Hutchison, *Distributional Consequences, Policy Implications of Voluntary Export Restraints on Textiles and Apparel, Steel, and Automobiles*, 38 WAYNE L. REV. 1757 (1992).

205. *See* Lawrence F. Katz & Lawrence H. Summers, *Industry Rents: Evidence and Implications, in* BROOKINGS PAPERS ON ECONOMIC ACTIVITY: MICROECONOMICS 209-10 (1988). (suggesting that capital owners in the United States economy receive few monopoly [economic] rents. Most rents, perhaps 80-85%, went to labor).

206. REYNOLDS, *supra* note 3, at 73; *see also* RICHARD K. VEDDAR & LOWELL E. GALLAWAY, OUT OF WORK (1993). Historical analysis of wage differentials between the unionized sector and nonunion sector shows that prior to 1933 the differentiation hovered at about 5 or 6% and then rose almost continuously in the late thirties, reaching 23% by 1941. "Formal statistical tests of these trends indicate a substantial change in the pattern of behavior of the union-nonunion wage differential commencing at approximately the time the nation's basic policy with respect to trade unions shifted from . . . toleration to . . . encouragement." REYNOLDS, *supra* note 3, at 139. *But see* Dale Belman, *Unions, the Quality of Labor Relations, and Firm Performance, in* UNIONS AND ECONOMIC COMPETIVENESS 41 (Lawrence Mishel & Paula B. Voos eds., 1992).

207. REYNOLDS, *supra* note 3, at 80.

208. *See id.* at 84.

209. *Id.* at 65-84.

210. *See* Klare, *supra* note 6, at 2.

payers, nonunion workers, and the unemployed—groups with lower average incomes than union members."[211]

2. The Public Choice View of Expanded Nonemployee Access Rights

An "important goal of a legal system that desires to promote social stability and social welfare is to *increase* the transaction costs facing parties who seek enactment of legislation that would employ the machinery of the state to effect coercive wealth transfers from one group to another."[212] To be sure, most proposals to expand nonemployee union access specifically, as well as proposals to expand nonemployee access generally, are not premised explicitly on income redistribution. To the contrary, such proposals are grounded on, among other things: 1) the importance of an informed, politically conscious electorate;[213] 2) the needs of employees and the common good;[214] and 3) the need to expand and enhance workplace democracy by increasing opportunities for employees to learn the benefits of collective bargaining.[215]

Generally, advocates of expanded access claim that the owners' presumptive right to exclude must give way to other important interests.[216] However appealing these claims may be, "we cannot simply take for granted that . . . [legislation] represents the public interest. Realistically, we must also consider the possibility that a statute represents private rather than public interests because of the undue influence of special interest groups."[217] We must confront the possibility that either a statute, a proposed statute, or a judicial reinterpretation simply represents an attractive vehicle for creative and coercive wealth and power transfers.[218]

Legislative proposals for expanded access to private property are premised on the view that the state has the right to place conditions

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211. REYNOLDS, *supra* note 3, at 29; *see also* THOMAS SOWELL, MARKETS AND MINORITIES 110 (1981) (rise of government supported labor unions used to constrain black employment).

212. Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 472 (1988). Additionally, even the possibility of coercive transfers reduces the wealth of society. *Id.*

213. Berger, *supra* note 8, at 635.

214. Estlund, *supra* note 4, at 359.

215. Klare, *supra* note 6, at 45-46.

216. Estlund, *supra* note 4, at 346.

217. FARBER & FRICKEY, *supra* note 19, at 1; *see also* Macey, *supra* note 212, at 477 (suggesting that because of the possibility of undue influence, the role of the legal systems is not simply to restrain interest groups, but also to serve as a filter that discards legislation which is simply redistributive).

218. *See generally* BERTRAND DE JOUVENEL, THE ETHICS OF REDISTRIBUTION (1990).

upon the "owner's right to admit or exclude, or to insist that if A is admitted to the property then B must be admitted."[219] On the other hand, as advocates of expanded nonemployee access concede, the incidents of property ownership—such as what one can do with it or what one can prevent others from doing with it—affect the property's value.[220] Furthermore, a principal conception of property "embraces the absolute right to exclude."[221] Accordingly, restrictions upon "exclusive possession of land constitute a partial taking."[222] While it seems clear that restricting a property owner's right to exclude may constitute a taking, an analysis of the empirical data is required in order to determine whether such redistributions of property rights favor the narrow or the public interest.

Efforts aimed at increasing nonemployee union access are, in essence, attempts to expand the size of the unionized sector of the economy.[223] Because 1) the union sector is relatively small, 2) union wage premia exceed wages of similarly skilled nonunion workers, 3) monopoly wages earned by the unionized sector increase unemployment, and 4) the labor market itself receives most of the economic rents that the economy generates, it is difficult to conclude that legislative proposals expanding access and restricting the right to exclude favor the larger national interest. This is especially true in light of the substantial scholarship which demonstrates that "[t]he creation of exclusive rights is a necessary . . . condition for the efficient use of resources,"[224] and that "the right to exclude others may promote economic productivity . . . which may benefit the whole society."[225]

Action to expand nonemployee access within the context of a union organizing, recognitional, or area standards campaign cannot be seen as a redistribution of income from the "richer to the poorer . . . [but as] a redistribution of power from the individual to the state."[226] Such legislative or judicial action benefits a relatively small, relatively affluent special interest group, while placing at risk improved productivity and efficiency, which benefits society as a whole. Therefore, policies which solely benefit unions cannot be seen as benefitting the larger interest. In

219. EPSTEIN, *supra* note 153, at 65.
220. Klare, *supra* note 6, at 20.
221. EPSTEIN, *supra* note 153, at 65.
222. *Id.*
223. *See generally* Klare, *supra* note 6; Estlund, *supra* note 4.
224. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 33 (4th ed. 1992).
225. Estlund, *supra* note 4, at 344-45.
226. DE JOUVENEL, *supra* note 218, at 72.

light of the unions' declining share of the labor market, expanded nonemployee access proposals and legislation emerge as an effort by government "to insulate well-established interest groups from the negative side-effects of economic change."[227]

However defined, explicated, or analyzed, proposals for enlarging nonemployee access through uncompensated extirpation of private property rights can be seen as simply an attempt to deploy the coercive power of the state in order to achieve a wealth transfer. To repeat, consistent with public choice theory, such attempts are a vehicle by which "persons seek to secure collectively their own privately defined objectives that cannot be efficiently secured through simple market exchanges."[228] In addition, and consistent with the public choice view, applying this new theory of property to restrict the right to exclude increases the risk of error, disorder, and confusion.

C. *The Right to Exclude: Recent Supreme Court Decision-Making*

In a recently issued opinion, the United States Supreme Court continued a trend[229] that requires stricter scrutiny of state restrictions on private property. Such a trend implicates the viability of state and federally sponsored nonemployee access expansions. In *Dolan v. City of Tigard*,[230] the city planning commission conditioned approval of Dolan's application to expand her store upon the dedication of some of her land for a public greenway and floodplain along a creek and for a pedestrian/bicycle pathway intended to relieve traffic congestion. Citing *Armstrong* with approval, the Court said that one of the principal purposes of the Takings Clause of the Fifth Amendment of the United States Constitution is to prevent government from forcing some people to bear public burdens alone.[231] Moreover, granting public access would deprive Dolan "of the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' "[232] To be fair, the Court also stated that "[a] land use regulation does not effect a taking if it 'substantially advances legitimate state interests' and does not 'deny an owner economically viable use of his land.' "[233] Restating

227. John Gray, *Introduction* to *id.* at xviii.

228. Buchanan, *supra* note 20, at 108.

229. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).

230. 114 S. Ct. 2309 (1994).

231. *Id.* at 2316.

232. *Id.* (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

233. *Id.* (quoting Agins v. Tiburon, 447 U.S. 225, 260 (1980)).

its adherence to the essential nexus standard of *Nollan v. California Coastal Commission*,[234] the Court also determined that "a use restriction may constitute a taking if not reasonably necessary to the effectuation of a substantial government purpose."[235] Noting that Dolan had already left fifteen percent of her property as open space, an amount sufficient for the floodplain, the Court found that Dolan's loss of the ability to exclude was dispositive, and thus reversed the Oregon Supreme Court's decision which had upheld the city restrictions.[236] In essence, the United States Supreme Court found that the uncompensated vitiation of the right to exclude constitutes an uncompensated taking.

This and several other decisions[237] indicate that the Supreme Court is beginning to take the Taking Clause of the Fifth Amendment seriously. Moreover, these cases suggest that the Court once again believes the right to exclude must be preserved as part of the bundle of private property rights. The implications of this view for nonemployee union access claims will be more fully addressed in the next section.

V. TOWARDS COHERENCE

A. Towards a Coherent View of State-Sponsored Expansions Of Nonemployee Union Access Claims

As section IV and subsections A, B, and C illustrate, developing coherent and consistent standards for access to private property seems quite difficult. Disorder and inconsistency are the hallmarks of cases decided in the area.

Access claims can be a function of employment, free exercise of freedom expression, and labor law itself. More specifically, if one looks at state-sponsored expansions of freedom of expression rights acquired through uncompensated vitiations of the right to exclude, it seems clear that such expansions have the capability of increasing the risk that the NLRA goal of uniformity will be undermined. While attempts by states to regulate labor law directly have been disallowed,[238] it is also clear that indirect efforts which regulate labor law, including state-sponsored expansion of access premised on freedom of expression claims, are also capable of varying the application of the NLRA.

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234. 483 U.S. 825, 834 (1987).
235. *Dolan*, 114 S. Ct. at 2318.
236. *Id.* at 2314.
237. *See, e.g., Nollan*, 483 U.S. 825; *Lucas*, 112 S. Ct. 2886.
238. *See, e.g.*, Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353 (4th Cir. 1991).

In *Bristol Farms*[239] and *Payless Drug Stores*,[240] the right of nonemployee union agents to engage in picketing and handbilling on privately owned lands was upheld by the NLRB. The Board declined to apply *Lechmere* and reversed decisions by the administrative law judge in both cases. Instead, relying on *Pruneyard*, the Board upheld the right of picketers to use privately owned (but leased) property in an effort to dissuade customers from shopping at the Bristol Farms store or the Payless store. While such picketing and handbilling cannot reasonably be related to the economic interest of the employer, the NLRB held that it lacked authority under California law to prevent the picketing because property rights were a function of state law, not federal law. Accordingly, by prohibiting nonemployees from picketing or handbilling, activities directly inimical to its interests, the employer violated Section 8(a)(1) of the NLRA. In essence, the NLRB determined that in these decisions it is authorized to ignore applicable federal decisions such as *Lechmere* and, instead, can decide such cases based on state law.

On the other hand, in cases in which a state, by immunizing labor activity from state trespass law, explicitly interferes with labor law, the state law will likely be disallowed.[241] The inference to be drawn, if *Bristol Farms* and *Payless* are allowed to stand, is that the state can change the parameters of federal labor law so long as it enacts *generally*—as opposed to *specifically*—applicable rules. Indeed, this is precisely what some advocates of expanded access envision.

To the contrary, I argue that if coherence and uniformity are to be attained, reinvigorated federal preemption rules should be deployed when considering an activity arguably protected under Section 7 of the NLRA or arguably prohibited under Section 8 of the NLRA. The Congress of the United States should give life to the principles of uniformity in order to explicitly oust both general and specific state regulation of conduct where strangers picket, handbill or otherwise come onto private lands. The Congress should amend the NLRA to require that the NLRB, Federal and State courts preempt the application of state laws that make the freedom to exercise Section 7 rights vary from state to state. Such an approach will increase coherence and reduce variability.

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239. 311 N.L.R.B. 437 (1993); *see also* WILLIAM B. GOULD IV, AGENDA FOR REFORM (1993) (arguing that *Lechmere* should be overturned).

240. 311 N.L.R.B. 678 (1993).

241. See generally *Rum Creek*, 926 F.2d 353.

B. *Towards a Principled Nonemployee Access and Property Rights View*

Expanded nonemployee union access benefits rent-seeking special interests—comprised of relatively affluent individuals—at the expense of the larger interest. Accordingly, it is time to deploy our limited resources in an effort to "control the temptation of elected officials to sacrifice principle for partisanship."[242] The Fifth Amendment to the United States Constitution applied to the states provides, in pertinent part: "nor shall private property be taken for public use, without just compensation."[243] Words, to be sure, are capable of several meanings. Accordingly, developing a principled definition of private property is a priority in bringing long-term coherence to the Pruneyard. Property does not "lose its private character merely because the public is generally invited to use it for designated purposes, [and] . . . [t]he essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center."[244] Despite that conclusion, the United States Supreme Court, in *Pruneyard,* stated that its reasoning in *Lloyd* does not "*ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."[245] While 1) conceding that a state "may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation,"[246] and 2) conceding that "one of the essential sticks in the bundle of property rights is the right to exclude others,"[247] the Supreme Court, in a decision riven with inconsistency, focused on whether the access claims of the students in *Pruneyard* so substantially impair the "economic value of [the] property"[248] as to constitute a taking. As Epstein forcefully illumines:

> In private cases no injunction against entry is dependent upon showing actual damages. The entry itself is the violation of the right, for which the injunction is available for redress, even if no damages can or should be awarded. It therefore follows that any

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242. Macey, *supra* note 212, at 473.

243. U.S. CONST. amend. V.

244. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (quoting Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972)).

245. *Id.* at 81.

246. *Id.*

247. *Id.* at 82.

248. *Id.* at 84.

> demonstration about the negligible impairment . . . is wholly beside point . . . .[249]

Whatever the status of nonemployee access seekers, the Pruneyard shopping mall issued no invitation to the signature solicitors.[250] Accordingly, state restrictions placed on exclusive possession of private property constitute a partial taking for which compensation is required.[251] While one leading advocate of broadened nonemployee access argues that the *Pruneyard* decision gives rise to the claim that once an employer opens his property to outsiders, it becomes less than truly "private property,"[252] Epstein demonstrates that "private property gives the right to exclude others *without* the need for any justification."[253]

Therefore, improved coherence requires a revitalization of the distinction between private and public property. This revitalization would allow states and the federal government to engage in property redefinitions *only* where compensation is forthcoming. It follows, therefore, that a commitment to coherence requires the withdrawal of *Pruneyard's* invitation to reinterpret, amend or otherwise expand nonemployee access rights without compensation.

As one observer notes:

> An individual who attempts to capture a given property right has three options. First, he can negotiate to buy the right from its owner in a voluntary private exchange. Second, the individual may get the government to seize the right from its present owner and reassign it to him. Finally, the individual can resort to theft . . . . When the government is brought into the game of capturing and reassigning property rights, opportunities for the political manipulation of rights arise. Rent-seeking activities of that sort involve attempts by interest groups to "define, reassign, modify, or attenuate property rights."[254]

Uncompensated expansions of nonemployee access to private property can be seen as an effort by special interest groups to redistribute property rights as part of the new theory of property. Consistent with the public choice view, action which redistributes property rights to a relatively small, relatively affluent, special interest group cannot satisfy that

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249. EPSTEIN, *supra* note 153, at 65.
250. *Id.*
251. *Id.*
252. Estlund, *supra* note 4, at 353.
253. EPSTEIN, *supra* note 153, at 66.
254. John M. Mbaku, *Property Rights and Rent Seeking in South Africa*, 11 CATO JOURNAL 135, 138 (1991) (quoting Bruce L. Benson, *Rent Seeking from a Property Rights Perspective*, 5 S. ECON. J. 398 (1984)).

which is a collective need."[255] Such efforts should, accordingly, be disallowed. Coherence and the larger interest require that the United States Supreme Court expand its decision in *Tigard*, reaffirming the property owner's right to exclude and overturn *Pruneyard* itself.[256]

CONCLUSION

Since the enactment of the NLRA, courts, legislatures, the National Labor Relations Board, and commentators have all confronted the issue of nonemployee union access to private property. While some United States Supreme Court decisions have stated that *Babcock & Wilcox* and its progeny have struck the right balance, many commentators argue—and some NLRB decisions imply—that courts have too frequently engaged in constrained decisionmaking that eviscerates the goals of collective bargaining, workplace democracy, "egalitarianism" and "solidarity." Since *Pruneyard*, states increasingly have been called upon to confront poignant claims for enlarged access to private property based on freedom of expression rights. Unsurprisingly, many labor commentators, state courts, and some NLRB decisions have seized upon putative freedom of expression rights as a vehicle 1) to restrict property owners' right to exclude and 2) to enhance the "common good". To the contrary, public choice analysis indicates that the common good and the larger interest are not served by uncompensated expansions of nonemployee access. Public choice examination suggests that, as our laws and legal institutions embrace expanded nonemployee access, the likelihood of error, confusion, and incoherence rise. Moreover, since exclusive possession increases efficiency and productivity, restricting the right to exclude has a negative effect on the larger interest while, assuredly, regressively redistributing benefits in favor of a small, relatively affluent special interest group at the expense of groups such as nonunion workers, unemployed workers, consumers, and taxpayers who are relatively less affluent.

This, of course, reaffirms the quintessential public choice conclusion that the "relevant difference between markets and politics does not lie in the kinds of values/interests that persons pursue but in the conditions under which they pursue their various interests."[257] Accordingly, restricting property owners' rights to exclude can be seen as a "blatant

255. DENNIS C. MUELLER, PUBLIC CHOICE II 109 (1989).

256. *See* BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 318-31 (arguing for reinterpretation of the Due Process Clause to safeguard economic liberties including property rights).

257. Buchanan, *supra* note 20, at 107.

injustice."[258] While it is perhaps chimerical to believe that advocates of expanded access will be concerned by this "injustice," the United States Supreme Court, by deploying a principled conception of private property rights precluding uncompensated takings of the right to exclude, can return justice, equity, and coherence to the Pruneyard, and thereby enhance the common good.

258. J.G. KNUT WICKSELL, FINANZTHEORETISCHE UNTERSUCHUNGEN 89 (1896).