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Michael J. Hayes

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## POINTS ABOUT CEDAR POINT: WHAT LABOR ACCESS SURVIVES, AND WHAT *SHOULD* SURVIVE (OR BE RESTORED)

*Michael J. Hayes\**

### INTRODUCTION

On June 23, 2021, the U.S. Supreme Court held that a California regulation, issued in 1975, that gave labor organizations a right to access property of agricultural employers for up to three hours per day on 120 days per year was a *per se* “Taking” under the Fifth and Fourteenth Amendments of the U.S. Constitution.<sup>1</sup> The Court in this *Cedar Point Nursery* decision also called the regulation “a formal entitlement to physically invade the [employers’] land” and therefore “a simple appropriation of private property.”<sup>2</sup> Consequently, the Court found, the regulation was at best a Taking without the compensation required by the language of the Fifth Amendment.<sup>3</sup> The Court reversed the decision of the Ninth Circuit Court of Appeals, which had ruled that the access regulation was not a “*per se* physical taking” and therefore dismissed the employer’s takings claim.<sup>4</sup> The Supreme Court remanded the decision to the Ninth Circuit to reconsider the case consistently with the Court’s decision.<sup>5</sup>

Cedar Point Nursery’s owner said of the decision that it “protects everyone’s freedom to decide for themselves who is—and is not—allowed on their own property.”<sup>6</sup> However, that statement constitutes

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\* Associate Professor, University of Baltimore School of Law. Former Director, Office of Labor-Management Standards, U.S. Department of Labor (Aug. 2013-2016). J.D., University of Virginia and B.S. Cornell University, School of Industrial & Labor Relations. All views expressed in this Article, and all errors, are the author’s own.

1. See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

2. See *id.* at 2080.

3. See *id. passim*.

4. See *Cedar Point Nursery v. Shiroma*, 923 F.3d 524 (9th Cir. 2019), *rev’d sub nom.* *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

5. *Cedar Point Nursery*, 141 S. Ct. at 2080.

6. Erin Mulvaney, *Top Court Swat at Union Access Rights Reaches Beyond Farms*, BLOOMBERG L. NEWS (June 24, 2021, 5:31 AM), <https://>

what has become known as “spin.” The majority’s opinion, as discussed more fully below, discusses multiple situations in which government-mandated or authorized access to private property still will not be treated as a “per se taking,” whether the property owner likes it or not.<sup>7</sup>

The Supreme Court’s Cedar Point Nursery decision likely marks a major change in the law on Takings. However, this article will not discuss the decision’s effects on Takings law except to the extent those are relevant to access to private property for union organizing, representation or protest. The case itself involved access of union organizers and agents, the latest in a series of U.S. Supreme Court decisions on access of, and ability to exclude, such persons.<sup>8</sup> Most of those decisions were discussed in *Cedar Point Nursery*’s majority and dissenting opinions, and one—*Babcock & Wilcox*—was also discussed, and emphasized in Justice Kavanaugh’s concurrence.<sup>9</sup> The petitioner as indicated by his post-decision statement, and others who submitted briefs were apparently seeking a constitutional right to exclude, regardless of the “just compensation” referenced in the Fifth Amendment.<sup>10</sup>

This article will next discuss, in Part I, the U.S. Supreme Court majority’s decision in *Cedar Point Nursery*.<sup>11</sup> Part II of the article summarizes the current federal labor law on nonemployee access to property, beginning with an examination of Justice Kavanaugh’s concurrence in *Cedar Point Nursery*, then explaining the U.S. Supreme Court’s 1992 *Lechmere* decision that restricts property access of nonemployee union organizers, and finally describing the current law on exceptions to that restriction.<sup>12</sup> Part III of this article discuss what access

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[https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/XFS2RN9G000000?bna\\_news\\_filter=daily-labor-report#jcite](https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/XFS2RN9G000000?bna_news_filter=daily-labor-report#jcite) (quoting Mike Fahner, Cedar Point Nursery owner and president).

7. See *infra* notes 9 through 77 & accompanying text.

8. See generally *Cedar Point Nursery*, 141 S. Ct. *passim* (discussing union organizers representing workers at Cedar Point Nursery).

9. See *id.* at 2070.

10. See, e.g., Brief of the Amicus Curiae Liberty Justice Center in Support of Petitioners at 13, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), (No. 20-107), 2021 WL 130105, at \*2. (“When state action is present, as it is here, that common-law right to exclude is a constitutional right to prevent a taking.”); Brief for Amicus Curiae Americans for Prosperity Foundation in Support of Petitioners at 11-19, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), (No. 20-107) (contending that California regulation providing access for organizers is not even for “public use” so that absolute exclusion, not entry and compensation, is appropriate); see also Brief Amicus Curiae of American Farm Bureau Federation in Support of Petitioners at 3-6, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), (No. 20-107) (similarly arguing access authorized by California regulation was not for a “public use.”).

11. See *infra* Part I.

12. See *infra* Part II.

to private property for union—or labor rights—related purposes employees have, or at least should have, without compensating the property’s owner after the U.S. Supreme Court’s *Cedar Points Nursery* decision.<sup>13</sup> Finally, Part IV of the Article first expounds on why the Fifth Amendments Takings Clause is not now and should not in the future be treated as the source of “property rights” in federal labor law, but then analyzes how the Takings clause should be applied if federal courts (or agencies) disagree and apply the Takings clause to federal labor law.<sup>14</sup> That analysis determines that, following the text of the Takings clause, unions should be able to “justly compensate” property owners for access to property, rather than being absolutely excluded from it.<sup>15</sup>

### I. SUMMARY OF THE *CEDAR POINTS NURSERY* SUPREME COURT DECISION

The Court’s majority, in an opinion by Chief Justice John Roberts, began with a sentence summarizing the California Agricultural Labor Relations Board regulation at issue as one that “grants labor organizations a ‘right to take access’ to an agricultural employer’s property in order to solicit support for unionization.”<sup>16</sup> The Court added that under this regulation a labor organization could take such access “for up to four 30-day periods in one calendar year.”<sup>17</sup> Within any single day of access, the regulation authorized access by up to two organizers per work crew (and for crews with forty-five or more workers, one additional organizer per every fifteen workers over thirty in a crew) for “up to one hour before work, one hour during the lunch break, and one hour after work.”<sup>18</sup> The regulation prohibited “disruptive conduct” by organizers, but expressly permitted them to “meet and talk” with workers on employer property.<sup>19</sup>

This regulation, the Court announced at the beginning of Part II, Subpart B of its decision, “appropriates a right to invade the growers’ property and therefore constitutes a per se physical taking.”<sup>20</sup> The Court said this after, in Part II, Subpart A, it discussed some of its past takings decisions that had described legal rules for property as “regulatory

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13. See *infra* Part III.

14. See *infra* Part IV.

15. See *infra* Part IV.

16. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2066 (2021) (citing Cal. Code Regs., tit. 8, §20900(e)(1)(C)).

17. *Id.* at 2069 (citing Cal. Code Regs., tit. 8, §§ 20900(e)(1)(A), (B)).

18. *Id.* (citing Cal. Code Regs., tit. 8, §§ 20900(e)(3)(A)–(B)).

19. See *id.*

20. See *id.* at 2072.

takings” that went “too far,” and recharacterized those as “physical appropriation” cases.<sup>21</sup> After declaring that the “label” regulatory taking “can mislead,” the Court in Part II, Subparts A and B discussed many of its past decisions as supporting its announced position on “physical appropriation” and “physical invasion,” with some of those past decisions finding the taking imposed a “servitude” or impaired an “easement,”<sup>22</sup> and others that had found a taking based on application of the *Penn Central* standard for regulatory takings.<sup>23</sup> The Court also based its ruling on its 2015 decision in *Horne v. Department of Agriculture*,<sup>24</sup> in which the Court found that the government’s “physical appropriation” of raisins was a “per se” taking, even though a regulation that would have had the same economic impact probably would not have been found a taking.<sup>25</sup> Also key to the Court’s decision was its finding, based on many of its past decisions identified above, that the “right to exclude” is a “fundamental” and “essential” property right.<sup>26</sup>

In Part II, Subpart C, the Court majority explained its bases for disagreeing with the Ninth Circuit and the dissent as to whether California “union organizers’ access” regulation was a *per se* physical taking.<sup>27</sup> In response to the dissent’s point that this could not be a *per se* taking because it was not permanent or daily, the Court majority observed that in past decisions it had found government occupations of property to be takings even when “temporary.”<sup>28</sup> The Court added, as will be discussed more fully below, that the duration of a taking “bears only on the amount of compensation.”<sup>29</sup> The Court majority further claimed that takings could be intermittent, based on the only intermittent overflights of property at issue in the Supreme Court’s 1946 decision in *Causby*.<sup>30</sup> The

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21. *See id.* at 2071-72.

22. *See id.* at 2073 (discussing decisions in *Kaiser Aetna v. United States*, 444 U. S. 164 (1979) and then *United States v. Causby*, 328 U. S. 256 (1946)).

23. *See id.* at 2073-74 (discussing decisions in *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987) and then *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). *See also id.* at 2072 (relying on *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U. S. 302 (2002), in which the Court had also applied the *Penn Central* standard, as also supporting its view on *per se* physical appropriations of property).

24. *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2428 (2015).

25. *See Cedar Point Nursery*, 141 S. Ct. at 2074 (citing *Horne*, 135 S. Ct. at 2419).

26. *See id.* at 2072-73 (quoting *Kaiser Aetna*, 444 U.S. 164, 176, 179-80 (1979), then citing three other past U.S. Supreme Court decisions).

27. *See id.* at 2074.

28. *See id.* (quoting *Tahoe-Sierra*, 535 U.S. at 322).

29. *See id.* (citing *United States v. Dow*, 357 U.S. 17, 26 (1958)).

30. *See id.* at 2075 (citing *United States v Causby*, 328 U.S. 256, 259 (1946) where the Court had found a taking even though the overflights “occurred on only 4% of takeoffs and 7% of landings at the nearby airport.”).

Court failed to mention that in *Causby* the Supreme Court had also based its conclusion of a taking on the Court of Claims finding that these noisy low-altitude overflights had diminished the value of the property.<sup>31</sup> The Court majority further based its finding that intermittent access could be a taking on pure speculation: it asserted that though the taking in *Nollan* “happened to involve a legally continuous right of access” there could be “no doubt” the Court would have found a taking “if the easement” at issue was “for only 364 days per year” because that easement “was hardly continuous as a practical matter.”<sup>32</sup>

The next defendant argument the Court majority rejected, again an argument with which the dissent had agreed, was that the access granted by California could not be a taking unless it was a state law easement.<sup>33</sup> The Court majority’s reasoning for rejecting this argument was important, but also probably the most cryptic or at least complex reasoning in the decision. The Court majority began by acknowledging, at least “[a]s a general matter,” that “it is true that the property rights protected by the Takings Clause are creatures of state law.”<sup>34</sup> Perhaps significantly, and arguably making all that followed in the paragraph dicta, the Court stated, “no one disputes that, without the access regulation, the growers would have had the right *under California law* to exclude union organizers from their property. And no one disputes that the access regulation took that right from them.”<sup>35</sup> As these points were undisputed, the Court probably need not have said any more to find a taking.<sup>36</sup>

Nonetheless, the Court added that when this “right to exclude” was taken from the growers by the access regulation, the California agency could not avoid the finding of a taking just because it occurred “in a form that is a slight mismatch from state easement law.”<sup>37</sup> Under the Constitution, property rights “cannot be so easily manipulated.”<sup>38</sup> The

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31. See *Causby*, 328 U.S. at 257, 262-63.

32. See *Cedar Point Nursery*, 141 S. Ct. at 2075 (discussing *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987)).

33. See *id.* at 2075.

34. See *id.* at 2076 (first citing *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998); then citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992)).

35. *Id.* (emphasis added).

36. See *id.*

37. See *id.* (first quoting *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2430 (2015), this time for the proposition that “property rights cannot be so easily manipulated”; then quoting *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) using the language that “a State, by *ipse dixit*, may not transform private property into public property without compensation” in a decision where a Florida county had claimed that just the fact that the funds to purchase a pharmacy had been deposited with the county court justified the county’s keeping the interest earned on that deposit.).

38. See *id.*

Court then called its approach to this issue “intuitive,” and declared “we have recognized that the government can commit a physical taking . . . by simply “enter[ing] into physical possession of property without authority of a court order.”<sup>39</sup> In that situation, the Court stated, “the government’s intrusion does not vest it with a property interest recognized by state law, such as a fee simple or a leasehold. . . . Yet we recognize a physical taking all the same.”<sup>40</sup> The Court then apparently equated a disagreement with its holding as in effect requiring a “formal condemnation” by the government to find a taking, which was not a position taken by the defendant, the dissent, or anyone in the case.<sup>41</sup>

The Court concluded its rejection of the “easement” argument by maintaining that in its past decisions in *Portsmouth*, *Causby*, and *Loretto* it had “never . . . consider[ed] whether the physical invasion sat issue vested the intruders with formal easements according to the nuances of state property law,” and instead “followed our traditional rule: Because the government appropriated a right to invade, compensation was due. That same test governs here.”<sup>42</sup> While the Court was correct that in the three decisions it cited, the Supreme Court did not consider specific state law on easements, none of the three decisions cited support its holding that any trespass constitutes a compensable taking.<sup>43</sup> In *Causby*, as already mentioned, the Supreme Court also relied on evidence of diminution of property value;<sup>44</sup> in *Portsmouth*, the Court based its holding of a possible taking on its prior finding that allowing the War Department to fire guns across the plaintiff hotel’s property would “deprive the owner of its profitable use of that property”; and in *Loretto* the Court applied a “regulatory takings” analysis to find that a “permanent physical occupation” of a landlord’s roof by a cable installation (with possible future multiple cable installations) was a taking.<sup>45</sup>

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39. *See id.*

40. *See id.* (citing *U.S. v. Dow*, 357 U.S. 17, 21 (1958)). Even though it’s at best uncertain that the *Dow* decision supports the proposition for which it’s cited here, because the Supreme Court also stated in that case that the government would obtain actual title to the property, a clear “property interest” after paying the owner the just compensation required by the Fifth Amendment. *See Dow*, 357 U.S. at 21-22.

41. *Cedar Point Nursery*, 141 S. Ct. at 2076.

42. *See id.* (first citing *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922); then citing *United States v. Causby*, 328 U.S. 256 (1946); and then citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

43. *See generally Causby*, 328 U.S. at 267; *Portsmouth*, 260 U.S. at 330; *Loretto*, 458 U.S. at 441.

44. *See Causby*, 328 U.S. at 267.

45. *See Portsmouth*, 260 U.S. at 329; *Loretto*, 458 U.S. at 421.

Part II, Subpart D of the decision was the last place where the Court majority offered reasoning based on—as was true throughout the decision—past Supreme Court decisions whose holdings did not really support the *Cedar Point Nursery* conclusion about temporary trespasses with no showings of financial harm.<sup>46</sup> Especially striking was the Court’s reliance on *Tahoe-Sierra Preservation Council*,<sup>47</sup> a decision in which the Court’s *holdings*, in an opinion by the late Justice John Paul Stevens, were that a government’s temporary moratorium on use of property was *not* a *per se* taking, and that the regulatory takings analysis and not any “categorical rule” should be applied to the moratorium.<sup>48</sup> It would take a considerable leap of reasoning to equate the temporary and limited trespasses authorized by the California regulation in *Cedar Point Nursery* with the temporary moratoria in *Tahoe-Sierra*. Any fair reading of the decisions the majority in *Cedar Point Nursery* relied on would support the conclusion, implied by the dissent, that the majority created a new takings standard in their decision. If that turns out to be so, then the Roberts Court was not fully faithful to *stare decisis*, not for the first time and probably not for the last.

The majority was more clearly faithful to *stare decisis* in the next part of its decision, when explaining what it had not held. In rejecting the defendant’s and dissent’s argument that the decision was inconsistent with the Supreme Court’s 1980 decision in *PruneYard Shopping Center v. Robins*, the majority opinion made significant points about property open to the public.<sup>49</sup> The opinion recounted that given that California law (in that case, the state’s Constitution) was found to provide a right to engage in leafleting at a private shopping center, the U.S. Supreme Court in its decision had found that the protected access was a regulatory and not a *per se* taking.<sup>50</sup> And that applying the *Penn Central* standard for regulatory takings, the Court in *PruneYard* concluded that no compensation was required for the access.<sup>51</sup> Tellingly, to support the importance of public accessibility, Justice Roberts in *Cedar Point Nursery* also cited the Court’s 1964 decision in *Heart of Atlanta Motel*,<sup>52</sup> which his opinion described as rejecting the claim that the Civil Rights Act of

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46. See *Cedar Point Nursery*, 141 S. Ct. at 2077.

47. See *id.* (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302 (2002)).

48. See generally *Tahoe-Sierra*, 535 U.S. at 302.

49. See *Cedar Point Nursery*, 141 S. Ct. at 2077.

50. See *id.* at 2076.

51. See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980).

52. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).



1964's ban on racial discrimination in public accommodations was a Fifth Amendment taking.<sup>53</sup> Based on these precedents, and other past Supreme Court Taking clause decisions, the majority concluded that situations involving businesses "generally open to the public" are "readily distinguishable from regulations granting a right to invade property closed to the public."<sup>54</sup> Given this section of the opinion's reliance on *Heart of Atlanta Motel* as well as *PruneYard*, and the repeated references to "open to the public" as the ground for distinguishing past cases, it's clear that it's simply public accessibility—and not access for rights of expression or status as a public forum, as some had argued to the Court in *Cedar Point* and might try to argue again—that makes an access mandate a regulatory rather than a *per se* taking.<sup>55</sup>

The majority opinion later identified additional access mandates that are not *per se* takings, while addressing what the majority called "unfounded" charges by the defendant and the dissenting Justices that the decision would "endanger a host of state and federal government activities involving entry onto private property."<sup>56</sup> The majority opinion then discussed multiple general situations of property access not treated as takings, and included examples to illustrate.<sup>57</sup> The majority did not say or suggest that the expressly mentioned examples were intended to be exhaustive,<sup>58</sup> and they should not be so treated in the future.

The first category that the majority discussed was access treated as trespass but not as a taking.<sup>59</sup> The majority called these "[i]solated physical invasions, not undertaken pursuant to a granted right of access."<sup>60</sup> The majority stated that this trespass-not-takings distinction was "firmly grounded in our precedent" and that it was this distinction that explained the standard the Court had adopted for "government-induced temporary flooding" cases in 2012 in *Arkansas Game and Fish Commission v. United States*.<sup>61</sup> Justice Breyer's dissent, in commenting on this set of exceptions, questioned what would be deemed "isolated," especially as it was apparently necessary to distinguish an "isolated

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53. *Cedar Point Nursery*, 141 S. Ct. at 2076.

54. *See id.* at 2077 (first citing *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2429 (2015) (distinguishing *PruneYard* as involving "an already publicly accessible" business); and then *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 832, n.1 (1987)).

55. *Id.*

56. *See id.* at 2078.

57. *See id.*

58. *See id.*

59. *See id.*

60. *See id.*

61. *See id.* (discussing *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012)).

physical invasion” from the “temporary” invasions the Court majority had elsewhere declared could be *per se* takings.<sup>62</sup>

The second general situation the majority discussed was that numerous physical invasions authorized by governments will not be treated as Takings because they are “consistent with longstanding background restrictions on property rights.”<sup>63</sup> For this principle the Court first relied on its 1992 decision in *Lucas v. South Carolina Coastal Council*,<sup>64</sup> in which the Supreme Court had treated the common law of nuisance as a “pre-existing limitation upon the landowner’s title.”<sup>65</sup> The Supreme Court in both *Lucas* and *Cedar Point Nursery* reasoned that any aspect or use of property that constitutes a nuisance was “always unlawful”<sup>66</sup> and therefore such nuisance could be abated without compensation.<sup>67</sup> In both decisions, the Court further found that physical invasions by a private *or* governmental party would not be Takings if such invasions were covered by common law torts defenses, such as public or private necessity or the privilege to execute an arrest or enforce criminal law.<sup>68</sup>

As referenced in the preceding paragraph, both *Lucas* and *Cedar Point Nursery* referred to “pre-existing limitations” as allowing physical invasions without compensation.<sup>69</sup> But what does pre-existing mean? Apparently not prior to the specific landowner taking title, because that would make relevant whether Cedar Point Nursery owned the property prior to the 1975 regulation authorizing trespass, a fact never discussed in the decision. The *Cedar Point Nursery* majority did say that such limitations “encompass common law privileges to access private

62. *See id.* at 2088 (Breyer, J., dissenting).

63. *See id.* at 2079.

64. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

65. *See Cedar Point Nursery*, 141 S. Ct. at 2079 (quoting *Lucas*, 505 U.S. at 1028-29).

66. *Lucas*, 505 U.S. at 1030 (emphasis in original).

67. *Cedar Point Nursery*, 141 S. Ct. at 2079 (rephrasing that “[T]he government owes a landowner no compensation for requiring him to abate a nuisance on his property, because he never had a right to engage in the nuisance in the first place.”).

68. *See id.* (citing Restatement (Second) of Torts §196 (1964) (entry to prevent imminent public disaster); §197 (entry to prevent serious harm to a person, land, or chattels); Restatement (Second) of Torts §§ 204–205 (privilege to enter property to effect an arrest or enforce the criminal law); *see Sandford v. Nichols*, 13 Mass. 286, 288 (1816) (no right to exclude a government official engaged in a lawful and reasonable search); *see also Lucas*, 505 U.S. at 1029 (government-authorized physical invasions of real property are not takings if they “do no more than duplicate the result that could have been achieved in the courts — by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.”)).

69. *Cedar Point Nursery*, 141 S. Ct. at 2079.

property.”<sup>70</sup> This prompted the dissent to ask, “Just what [privileges] are they? . . . Do only those exceptions that existed in, say, 1789 count?”<sup>71</sup> The dissent might have intended to be facetious but, in any event, drawing that date line cannot be the answer because the “public necessity” defense was not recognized in many U.S. states until the 19<sup>th</sup> century.<sup>72</sup>

The third and final category of “non-takings” physical invasions discussed by the *Cedar Point Nursery* decision was that “the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking.”<sup>73</sup> The “condition” must also satisfy a standard: it must bear “an ‘essential nexus’ and ‘rough proportionality’ to the impact of the proposed use of the property.”<sup>74</sup> The Court further explained that this category included “government health and safety inspection regimes” because “[w]hen the government conditions the grant of a benefit such as a permit, license, or registration on allowing access for reasonable health and safety inspections, both the nexus and rough proportionality requirements of the constitutional conditions framework should not be difficult to satisfy.”<sup>75</sup> The Court probably did not literally mean that entry to property for an inspection or other purpose was allowed, without requiring compensation, only for activities requiring a “permit, license or registration.”<sup>76</sup> That the Court also meant to include other health and safety inspections was indicated by its language, in the immediately following paragraph, contrasting such inspections from the union organizer access that California required: “And unlike standard health and safety inspections, the [California] access regulation is not germane to any benefit provided to agricultural employers or any risk posed to the public.”<sup>77</sup>

This article, while mostly avoiding extensive discussion of takings jurisprudence, will now briefly examine the *Cedar Point Nursery* majority’s apparent effort to limit exceptions to takings to pre-defined categories, because it is relevant to labor law rules on access to property.

70. *See id.*

71. *See id.* at 2089 (Breyer, J., dissenting).

72. *See generally* Derek T. Muller, Note, “*As Much Upon Tradition as upon Principle*”: A Critique of the Privilege of Necessity Destruction Under the Fifth Amendment, 82 NOTRE DAME L. REV. 481 (2006); *see also* Restatement (Second) of Torts §196 Reporter’s Notes (citations showing that public necessity was discussed only in “dicta” prior to the 19<sup>th</sup> century in England and in the U.S.).

73. *See Cedar Point Nursery*, 141 S. Ct. at 2079.

74. *See id.* (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 386, 391 (1994)).

75. *See id.*

76. *Id.*

77. *See id.* at 2080.

Limiting the exceptions to these categories will almost certainly prove to be unsustainable, as so often happens with attempts to pre-define rules for practically countless and varied situations.<sup>78</sup> The dissent in Cedar Point Nursery demonstrated this with a long list of government-authorized entries for inspection and other purposes that have never been found to constitute a Taking, and many of which do not fit well into any of the majority's categories.<sup>79</sup> In a December 2020 article, Professor John Echeverria identified many more.<sup>80</sup> Consequently, if Chief Justice Roberts and/or his colleagues in the *Cedar Point Nursery* majority insist that the categories and examples stated in the majority opinion are to be regarded as exhaustive and interpreted literally, that will at a minimum generate an enormous amount of litigation and could also risk disrupting countless existing laws and policies at all levels of government.

If instead, the line is to be drawn based on the majority's language on entries being allowed if "germane to any benefit provided to" the landowner or "any risk posed to the public," that creates the possibility of the Supreme Court and other courts basing their takings decisions on little

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78. An excellent example of this at the U.S. Supreme Court level is when one giant of the law of torts, Justice Benjamin Cardozo, wrote a unanimously joined opinion that overruled a rule fashioned only seven years earlier in a unanimous opinion by another torts law giant, Justice Oliver Wendall Holmes, Jr. Justice Holmes in *B. & O.R. Co. v. Goodman*, 275 U.S. 66, 69-70 (1927) established a rule that a motorist approaching a railroad crossing must often get out of their vehicle to look whether there is a "train dangerously near." By 1934 Justice Cardozo found that this "Goodman rule" had "been a source of confusion" and disagreement in federal and state courts, and therefore eliminated Justice Holmes' *per se* rule and held it should be a "jury question" regarding what is reasonable for a motorist to do when approaching a railroad crossing. *Pokora v. Wabash Railway Co.*, 292 U.S. 98, 104, 105-06 (1934). Justice Cardozo explained, with the unanimous agreement of his colleagues, that there is a:

need for caution in framing standards of behavior that amount to rules of law. The need is the more urgent when there is no background of experience out of which the standards have emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without.

*See id.* at 105.

The lesson here is not that *stare decisis* is always incorrect, but that experience—such as the experience of motorists as in *Pokora*—should be considered when deciding whether to establish or apply a *per se* rule. There is not yet any experience with applying Fifth Amendments Takings rules to federal labor law, so it would be unwise for a court or agency to rely on Cedar Point Nursery to repeal and revise existing federal labor law rules. As stated in the Dobbs, et. al. Casebook in discussing this example of an attempted *per se* rule for torts law, "almost all rules of this kind have come to grief, or have caused it." *See* Dan Dobbs, Paul Hayden & Ellen Bublick, *Torts and Compensation* 133 (8<sup>th</sup> ed. 2017). This example seems especially apt to the situation of a state law tort, that of trespass, being invoked against NLRA Section 7-protected "intruders" for violating a property right also based on state law.

79. *See Cedar Point Nursery*, 141 S. Ct. at 2087-88 (Breyer, J., dissenting).

80. John D. Echeverria, *What is a Physical Taking?*, 54 U.C. DAVIS L. REV. 731, 745 (2020).

other than their own policy preferences.<sup>81</sup> This might have already happened in *Cedar Point Nursery* itself, as the majority opinion discounted without discussion that granting union organizers' access to employer property could diminish any risk to the public, while the dissent reasoned that the regulation could promote "labor peace" (thus reducing the risk of agricultural employer-employee discord) and "community health" (by reducing the risk of illness in the agricultural community).<sup>82</sup> The Fifth Amendment's Takings clause should not be used by Supreme Court Justices or lower court judges to impose their own policy preferences, which some scholars have already accused the Justices of doing in *Cedar Point Nursery*.<sup>83</sup>

In sum, unless courts advance a revolution in constitutional jurisprudence, the regulatory takings doctrine should, and almost certainly will, survive *Cedar Point Nursery* and will be applied to permit government-authorized inspections and other entries. And the Supreme Court, as with the "balancing" standard discussed and applied in *Babcock & Wilcox*, has already established that is the correct approach for federal labor law.

## II. CEDAR POINT NURSERY AND "UNION ACCESS" DECISIONS

### A. Justice Kavanaugh's Concurrence in *Cedar Point Nursery*

Justice Kavanaugh wrote the only and non-joined concurring opinion, in which he asserted that the majority's decision was "strongly support[ed]" by the U.S. Supreme Court's 1956 decision in *NLRB v. Babcock & Wilcox*.<sup>84</sup> He began his analysis by observing that in response to the NLRB's position that the petitioner employers were required to allow union organizers to access their private parking lots, some petitioner employers had responded that this would violate "Fifth Amendment property rights" when Congress "even if it could constitutionally do so, has at no time shown any intention of destroying property rights secured by the Fifth Amendment, in protecting employees' rights of collective

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81. See *Cedar Point Nursery*, 141 S. Ct. at 2089 (Breyer, J., dissenting).

82. *Id.*

83. See Erin Mayo Adam, *The Supreme Court struck down a key United Farm Workers win. The decision has some infamous echoes.*, WASH. POST (July 2, 2021), <https://www.washingtonpost.com/politics/2021/07/02/supreme-court-struck-down-key-united-farm-workers-win-decision-has-some-infamous-echoes/>.

84. See *Cedar Point Nursery*, 141 S. Ct. at 2080 (Kavanaugh, J., concurring).

bargaining under the Act.”<sup>85</sup> Justice Kavanaugh next contended that the Supreme Court in *Babcock & Wilcox* had “agreed with the employers’ argument that the [National Labor Relation] Act should be interpreted to avoid unconstitutionality” and had “reasoned that ‘the National Government’ via the Constitution ‘preserves property rights,’ including ‘the right to exclude from property.’”<sup>86</sup> Justice Kavanaugh followed this with the claim that “[a]gainst the backdrop of the Constitution’s strong protection of property rights, the [*Babcock & Wilcox*] Court interpreted the Act to afford access to union organizers only when “needed,”—that is, when the employees live on company property and union organizers have no other reasonable means of communicating with the employees.”<sup>87</sup> Justice Kavanaugh concluded, “[a]s I read it, *Babcock* recognized that employers have a basic Fifth Amendment right to exclude from their private property, subject to a ‘necessity’ exception similar to that noted by the Court today.”<sup>88</sup>

This interpretation of *Babcock & Wilcox* expressed by Justice Kavanaugh is at best strained and very likely misconstrues that decision. The *Cedar Point Nursery* majority apparently recognized that, because it distinguished rather than relied on *Babcock & Wilcox* by pointing out that *Babcock & Wilcox* “did not involve a takings claim” and added, “whatever specific takings issues may be presented by the highly contingent access right we recognized under the NLRA, California’s access regulation effects a per se physical taking under our precedents,” for which the majority cited *Tahoe-Sierra* rather than *Babcock & Wilcox*.<sup>89</sup>

The apparent disagreement of the *Cedar Point Nursery* majority with Justice Kavanaugh’s views is well-justified. Justice Kavanaugh left a great deal of important language from *Babcock & Wilcox* out of his concurrence, and also probably mischaracterized some of the language he did quote.<sup>90</sup> The Court decision in *Babcock & Wilcox*—as recognized by the *Cedar Point Nursery* majority—never mentioned the Fifth Amendment or takings. *Babcock & Wilcox*’s full reference to “preserves

85. See *id.* (quoting Brief for Respondent at 18-19, *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), (No. 250)).

86. See *id.* (quoting intermittently, *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (5th Cir. 1956)).

87. See *id.* (citing *Babcock & Wilcox*, 351 U.S. at 112, 113).

88. See *id.* (citing majority opinion in *Cedar Point Nursery*, 141 S. Ct. at 2079).

89. See *id.* at 2077 (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 322 (2002)). Of course, the very fact that Justice Kavanaugh wrote a separate concurrence might indicate that the Court majority did not agree with his view of the substance and sources of access to employer property under the NLRA.

90. See *supra* Part II. A.

property rights” was “organization rights are granted to workers by the same authority, the National Government, that preserves property rights.”<sup>91</sup>

The “organization rights” in that sentence are not (to date) “preserved” by the U.S. Constitution and the referenced “property rights” might not be meant to be constitutionally preserved either. That these “rights” might be equivalent in their bases (which could be Congress’ commitment to “preserve,” as with—as just one example—providing for national defense) is supported by the next sentence in *Babcock & Wilcox*: “accommodation between the two [sets of rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other.”<sup>92</sup> Justice Kavanaugh’s concurrence did not mention this balancing between rights, but the *Cedar Point Nursery* majority did in explaining why it rejected the defendant’s argument that “Babcock’s approach of balancing property and organizational rights should guide our analysis” of California’s access regulation.<sup>93</sup> That is where the majority next held, as mentioned above,<sup>94</sup> that whatever test the Court has applied under the NLRA is different from what it was applying to that California regulation.<sup>95</sup>

Justice Kavanaugh omitted discussing multiple other holdings in *Babcock & Wilcox*. First, he ignored the Court’s reaffirmation of employees’ rights to engage in pro-union and other Section 7 activity on privately owned property: “no restriction may be placed on the employees’ right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline.”<sup>96</sup> Those important rights are discussed more fully below.<sup>97</sup>

Second, when Justice Kavanaugh discussed the holding of *Babcock & Wilcox* that an employer’s barring non-employee organizers from its property depended on whether such organizers “have no other reasonable

91. *Babcock & Wilcox*, 351 U.S. at 112.

92. *Id.*

93. *Cedar Point Nursery*, 141 S. Ct. at 2077. This reference to *Babcock* involving “balancing” is further evidence that the majority disagreed with Justice Kavanaugh’s interpretation of *Babcock & Wilcox*.

94. *See supra* Part II.A.

95. *Cedar Point Nursery*, 141 S. Ct. at 2077.

96. *Babcock & Wilcox*, 351 U.S. at 113 (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945)).

97. *See infra* Part III.

means of communicating with the employees,”<sup>98</sup> he did not quote that decision’s language, applicable to such organizers, 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.”<sup>99</sup> Third, Justice Kavanaugh left out that the *Babcock & Wilcox* decision also acknowledged that the employer could not “discriminate” against a union in allowing access to engage in organizing.<sup>100</sup> As discussed below, that “no discrimination” rule still applies to union access to private property.<sup>101</sup> Finally, and perhaps more defensibly, Justice Kavanaugh did not discuss that the Court in the *Babcock & Wilcox* decision, while reversing the NLRB in this case, still stated that it would ordinarily defer to the Board in interpreting the NLRA, including the “proper adjustment” of NLRA rights with property rights.<sup>102</sup>

In sum, the holdings and language in the Supreme Court’s *Babcock & Wilcox* decision do not support, and sometimes even conflict with, the meaning that Justice Kavanaugh claimed for that decision in his *Cedar Point Nursery* concurrence.

The historical and constitutional context in which the Supreme Court made its *Babcock & Wilcox* decision might also be relevant. Justice Kavanaugh’s interpretation would likely have surprised many of the Justices who joined Justice Reed’s opinion in the case. Within a few years prior to *Babcock & Wilcox*, many of the same Justices had been on the Court when it rejected Fifth Amendment Taking claims based on condemnation of land for redevelopment even if only for “aesthetic” purposes<sup>103</sup> or on imposition of “maximum carload rates” on railroads,<sup>104</sup> or on Takings and Lanham Act claims based on property owners’ easements rights in land condemned to install sewerage.<sup>105</sup> Nor did the *Babcock & Wilcox* decision mark a change in the Court’s approach to government effects on property, as evidenced by the fact that only a week later, Justice Reed—who authored the sole opinion in *Babcock &*

98. See *Cedar Point Nursery*, 141 S. Ct. at 2080 (Kavanaugh, J., concurring) (citing *Babcock & Wilcox*, 351 U.S. at 113).

99. See *Babcock & Wilcox*, 351 U.S. at 113.

100. See *id.* at 108.

101. See *infra* Part II. C.

102. See *Babcock & Wilcox*, 351 U.S. at 111-12 (“the Board has the responsibility of ‘applying the Act’s general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms.’ . . . We are slow to overturn an administrative decision. . . . The determination of the proper adjustments rests with the Board.”).

103. *Berman v. Parker*, 348 U.S. 26, 33-35 (1954).

104. *Baltimore & O. R. Co. v. United States*, 345 U.S. 146, 147-49 (1953).

105. *United States v. Certain Parcels of Land in Fairfax Cnty.*, 345 U.S. 344 (1953).



*Wilcox*—also wrote the majority opinion in *General Box Co.* that rejected a Takings claim by a timber owner because the confiscation of that timber to build a levee was authorized by Louisiana law.<sup>106</sup> And to those who might emphasize, as Justice Roberts did about certain dissents in Takings cases,<sup>107</sup> that those decisions were “long ago,” that does not change that they were made close to the time *Babcock & Wilcox* was decided and by a majority of the same Justices who decided *Babcock & Wilcox*.<sup>108</sup> Thus, the language of *Babcock & Wilcox*, and the historical and constitutional context in which it is decided in 1956, demonstrates that the decision was not intended to mean and does not mean what Justice Kavanaugh in 2021 claimed it does.

*B. The Lechmere Decision (U.S. 1992) & Nonemployee Union Access*

That *Babcock & Wilcox* has a more limited meaning is also shown by the U.S. Supreme Court’s interpretation of it in its 1992 decision in *Lechmere*,<sup>109</sup> which Justice Kavanaugh cited but did not discuss.<sup>110</sup> In *Lechmere* the Court considered the *Jean Country* standard the Board had developed for access of non-employee union organizers.<sup>111</sup> The Board stated in *Jean Country* that with that standard it was seeking to reconcile *Babcock & Wilcox* with the U.S. Supreme Court’s later decisions in *Hudgens* and *Central Hardware*.<sup>112</sup> The *Jean Country* standard involved the balance the Supreme Court had referenced as long as *Babcock & Wilcox*, between “the degree of impairment of the Section 7 right if access should be denied” and “the degree of impairment of the private property right if access should be granted,” and added that “the availability of reasonably effective alternative means” for the union to communicate with employees or others was “especially significant in this balancing process.”<sup>113</sup> The Board that decided *Jean Country* and established a new

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106. See *General Box Co. v. United States*, 351 U.S. 159 (1956).

107. See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2078 (2021) (discussing Justice Roberts’s opinion’s denigration of those dissenting opinions).

108. See *id.*

109. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992).

110. See *Cedar Point Nursery*, 141 S. Ct. at 2070 (Kavanaugh, J., concurring) (citing *Lechmere*, 502 U.S. at 540-51).

111. See *Lechmere*, 502 U.S. at 531, 535-36 (describing the “three-factor balancing test” the Board adopted in *Jean Country*, 291 N.L.R.B. 11 (1988)).

112. See *Jean Country*, 291 N.L.R.B. at 12 (quoting *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976) and citing *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972)).

113. *Id.* at 14.

standard was comprised of three Republicans and one Democrat, and all of whom had been appointed by Republican President Ronald Reagan.<sup>114</sup>

That did not save the *Jean Country* standard from being abrogated by the Supreme Court four years later in *Lechmere*. The NLRB argued to the Court in *Lechmere* that its *Jean Country* interpretation of Section 7 on the issue of access of nonemployee organizers, which it had applied to union organizers' access to the Lechmere store's parking lot, was entitled to deference.<sup>115</sup> The *Lechmere* majority opinion, by Justice Clarence Thomas, agreed "[that] is certainly true,"<sup>116</sup> but added—as courts are wont to do—that the Court had to first decide whether the agency's interpretation of the statute was "consistent with our past interpretation" of the statute.<sup>117</sup> The majority added, "once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning."<sup>118</sup> The *Lechmere* Court then relied on *Babcock & Wilcox* as the key interpretation of the Section 7 access rights of nonemployee union organizers.<sup>119</sup>

As discussed earlier, the Supreme Court in *Babcock & Wilcox* held that an employer could not "discriminate" against a union in allowing access to its property to try to organize employees.<sup>120</sup> The *Lechmere* majority correctly recognized that the discrimination issue was not present in its case by pointing out in the first footnote of its decision that the employer Lechmere had "consistently enforced" its policy barring soliciting, distribution of literature or trespassing by non-employees inside its store or in its parking lot "against, among others, the Salvation Army and the Girl Scouts."<sup>121</sup> The Court in *Lechmere* found regarding *Babcock & Wilcox* that in that decision it had held as to nonemployee organizers that "the Board was not permitted to engage in [the] same balancing" the Board applied to employees.<sup>122</sup> The *Lechmere* Court

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114. See Chart of "Members of the NLRB Since 1935," NLRB, available at <https://www.nlr.gov/about-nlr/who-we-are/the-board/members-of-the-nlr-since-1935> (last visited Nov. 23, 2021).

115. *Lechmere*, 502 U.S. at 536.

116. *Id.*

117. *Id.*

118. *Id.* at 536-37 (quoting *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990)).

119. See *id.* at 537.

120. See *Babcock & Wilcox*, 351 U.S. at 107-08, 113).

121. See *Lechmere*, 502 U.S. at 530 n.1.

122. See *id.* at 537.

further held that “*Babcock’s* teaching is straightforward: §7 simply does not protect nonemployee union organizers except in the rare case where ‘the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.’”<sup>123</sup> The *Lechmere* Court then explained that this standard’s “reference to ‘reasonable’ attempts was nothing more than a commonsense recognition that unions need not engage in extraordinary feats to communicate with inaccessible employees—not an endorsement of the view (which we expressly rejected) that the Act protects “reasonable” trespasses.”<sup>124</sup>

When the Court in *Lechmere* turned to applying its legal standard to the facts of the case, it held, again relying on *Babcock & Wilcox*, that union organizers’ Section 7 right to access property “does not apply wherever nontrespassory access to employees may be cumbersome or less-than-ideally effective, but only where ‘the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them.’”<sup>125</sup> The Court next identified as “[c]lassic examples” of this rule authorizing access such employer properties as “logging camps, mining camps and mountain resort hotels.”<sup>126</sup> Although *Babcock* had referred to inaccessible plant location and “living quarters,” without stating that those “quarters” must be owned or possessed by the employer, the Court in *Lechmere* declared that, “[b]ecause the employees do not reside on *Lechmere’s* property, they are presumptively not beyond the reach of the union’s message.”<sup>127</sup> This presumption based on employees not living on employer property was new.<sup>128</sup>

The Court in *Lechmere* specifically found that the fact that employees lived in a large metropolitan area “[did] not in itself render them ‘inaccessible’ in the sense contemplated by *Babcock*.”<sup>129</sup> The Court instead found that the employees’ “accessibility is suggested by the union’s success in contacting a substantial percentage of them directly, via mailings, phone calls, and home visits.”<sup>130</sup> The Court immediately made clear, however, that contact through these means was not required

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123. See *id.* (quoting *Babcock & Wilcox*, 351 U.S. at 112).

124. See *id.*

125. See *id.* at 539 (quoting *Babcock & Wilcox*, 351 U.S. at 113).

126. See *id.*

127. See *id.* at 540.

128. See *id.*

129. See *id.*

130. See *id.*

to preclude access, by stating “such direct contact, of course, is not a necessary element of ‘reasonably effective’ communication; signs or advertising also may suffice.”<sup>131</sup> The Court did not rule on the Board’s finding that local newspaper advertising was not reasonably effective because it was costly and uncertain to reach employees, but found such a ruling was unnecessary because the union’s use of signs—even if displayed from the public grassy strip next to Lechmere’s parking lot—were sufficient means to share its message with employees.<sup>132</sup>

Justice Byron White, who, at the time *Lechmere* was decided, was the only Justice appointed by a Democratic President, dissented, joined by Justice Harry Blackmun.<sup>133</sup> Justice White maintained that the majority had misapplied *Babcock*, reasoning “that *Babcock* stated that inaccessibility would be a reason to grant access does not indicate that there would be no other circumstance that would warrant entry to the employer’s parking lot and would satisfy the [Babcock] Court’s admonition that accommodation must be made with as little destruction of property rights as is consistent with the right of employees to learn the advantages of self-organization from others.”<sup>134</sup> Justice White agreed that under *Babcock* a union must show that its “reasonable efforts” without access had “not permit[ed] proper communication with employees.”<sup>135</sup> But Justice White questioned that this access should be limited to as extreme “inaccessible” locations as logging camps.<sup>136</sup> In addition, Justice White contended that *Babcock* also did not require “ignor[ing] the substantial difference between the entirely private parking lot of a secluded manufacturing plant and a shopping center lot which is open to the public without substantial limitation “ or ignoring the fact that employees’ residences are scattered throughout a major metropolitan area.”<sup>137</sup> Justice White pointed out that “*Babcock* itself relied on the fact that the employees in that case lived in a compact area which made them easily accessible.”<sup>138</sup>

Turning to Section 7, Justice White correctly observed that “the Court in *Babcock* recognized that actual communication with nonemployee organizers, not mere notice that an organizing campaign

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131. *See id.*

132. *See id.*

133. *See id.* at 541.

134. *See id.* at 542 (White, J., dissenting).

135. *See id.* at 542-43 (White, J., dissenting).

136. *See id.* at 543.

137. *Id.*

138. *See id.*

exists, is necessary to vindicate §7 rights.”<sup>139</sup> Also quoting *Babcock’s* language that employees have a right to “learn from others the advantages of self-organization,” Justice White found it was “singularly unpersuasive to suggest that the union has sufficient access for this purpose by being able to hold up signs from a public grassy strip adjacent to the highway leading to the parking lot.”<sup>140</sup>

### C. Nonemployee Union Access Since *Lechmere*

#### 1. Inaccessibility

As Justice White’s position favoring broader access was in a dissent in *Lechmere*, that broader view of a right to enter property to “access” employees obviously did not become law.<sup>141</sup> A right for union agents to enter property because employees would otherwise be “inaccessible” to union communication is rarely found because few situations have been found to meet *Lechmere’s* standard that both the employees’ workplace *and* residence locations must put them beyond the reach of reasonable efforts to communicate.<sup>142</sup> Since *Lechmere* was decided, the Board has found inaccessibility met only in a case involving the Laborers union’s efforts to communicate with employees of an oil drilling company who lived and worked in oil fields in remote parts of Alaska.<sup>143</sup> A few years later the NLRB General Counsel found that the exception was met when the employees with whom the union sought to communicate lived and worked on a vessel at sea.<sup>144</sup> Any future applications of the “inaccessibility” exception would have to be similar to these, and also would likely have to involve employees in locations where contact through social media is not possible.

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139. *Id.*

140. *Id.*

141. Robert Carrol & Paul Lynd, *Supreme Court: California Can’t Require Union Access to Employer’s Premises for Organizing*, JD SUPRA (Jul. 6, 2021), <https://www.jdsupra.com/legalnews/supreme-court-california-can-t-require-2065593/>.

142. *See infra* pp. 100-01.

143. *See Nabors Alaska Drilling Inc.*, 325 N.L.R.B. 574 (1998).

144. Advice Memorandum from N.L.R.B., Office of the General Counsel to James G. Paulsen, Acting Regional Director and Rodney Johnson, Assistant to the Reg’l Director, Region 15 (June 19, 2002) (on file with journal).

## 2. Non-Discrimination

As discussed earlier, the NLRA “non-discrimination rule” on access to property was acknowledged by the U.S. Supreme Court in 1956 in *Babcock & Wilcox*<sup>145</sup> and reserved on in 1992 in *Lechmere*.<sup>146</sup> Currently, after the Board’s split decision in 2019 in *Kroger Ltd. Partnership I Mid-Atlantic* (hereinafter “*Kroger*”), the scope of the non-discrimination rule is uncertain.<sup>147</sup> As then-Board Member, now Board Chair Lauren McFerran pointed out in her lone dissent, the Board for more than seventy years had interpreted non-discrimination as meaning that if an employer allowed nonunion outside organizations (e.g. Girl Scouts, the Salvation Army) on its property to solicit and/or to distribute literature or tangible items, the employer had to give union representatives access to the same extent.<sup>148</sup> However, as the Board majority in *Kroger* discussed, at least four federal courts of appeal disagreed with that position and held, on a variety of different grounds, that an employer could permit nonunion outside groups on its property without its bar of union representatives being unlawfully discriminatory.<sup>149</sup> The Board majority acknowledged that two federal appeals courts, one being the D.C. Circuit to which all Board decisions can be appealed,<sup>150</sup> had agreed with the Board that if nonunion outside groups were allowed access to the employer’s property, then union representatives must also be allowed access to some extent.<sup>151</sup> The Board majority ultimately decided that even when an employer had allowed outside organizations on its property to engage in solicitation and/or distribution, an employer did not have to permit union representatives access to solicit customers to boycott the employer.<sup>152</sup>

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145. See *supra* pp. 87-88 (discussing the *Babcock & Wilcox* decision’s recognition of the non-discrimination rule).

146. See *supra* note 121 and accompanying text (describing the footnote in which the *Lechmere* court found the non-discrimination rule inapplicable because no outside groups had been allowed access to the property).

147. See *infra* notes 148-151 and accompanying text.

148. *Kroger Ltd. P’ship I Mid-Atlantic*, 368 N.L.R.B. No. 64, slip op. at 19-21 (2019) (McFerran, Member, dissenting); see also *United Aircraft Corp.*, 67 N.L.R.B. 594, 602-04 (1946) (holding that an employer committed unfair labor practice when it excluded union organizers from property but permitted access to various commercial solicitors).

149. See *Kroger*, 368 N.L.R.B., slip op. at 4-7.

150. See NLRA §10 (f), 29 U.S.C. § 160(f) (“Any person aggrieved by a final order of the Board . . . may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia.”) (emphasis added).

151. See *Kroger*, 368 N.L.R.B., slip op. at 6.

152. See *id.* at 10-11.

The Board majority also stated, in what could be regarded as dicta, that even if an employer permitted access to outside nonunion groups to engage in fundraising, it could still bar union organizers' access to engage in organizing activities unless it allowed access to other outside nonunion groups to recruit members.<sup>153</sup>

The union appealed the Board's *Kroger* decision to the D.C. Circuit but limited its appeal to the question (also raised in dissent by then Member McFerran) whether the employer's denial of access could be found unlawful based on "animus" against the union.<sup>154</sup> In March 2021, a D.C. Circuit panel rejected the union's appeal on the ground that the "animus" argument had not been fully raised to or considered by the Board.<sup>155</sup>

While at present the scope of the non-discrimination rule is in doubt, there are some aspects of it that are settled unless changed by the Supreme Court or Congress. One is that the fact that property is open to the public does not necessarily allow union representatives a right to access it. That was made clear by the facts of *Lechmere*, in which the employer department store (and its parking lot) were open to the general public, unlike the factory (and parking lot) the Supreme Court considered in *Babcock & Wilcox*.<sup>156</sup> So *Lechmere* authorized barring union organizers from property during business hours when nearly all other persons would be allowed access at such times, even though that is "discriminatory" on some level.<sup>157</sup> However, as mentioned earlier, the Supreme Court in the same decision reserved on whether allowing property access to outside groups would make it "discriminatory" to bar unions.<sup>158</sup>

So far the Board in *Kroger* has narrowed the non-discrimination rule by holding it's not unlawful for an employer to allow outside groups on

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153. *See id.* at 15. *But see also id.* at 8 n.13 (distinguishing two courts of appeals decision finding discrimination in access to property on the ground that "Both cases . . . involved union organizational activities, rather than boycott activities like those at issue in this case."). Given how the Board distinguished these two decisions, and that the facts of the *Kroger* case did involve union requests for a boycott, the Board's brief statement on this issue, that allowing nonunion outside groups property access would not be discriminatory against union organizers unless the nonunion groups were also seeking to "organize" membership, should be treated as dicta. Especially because the Board did not offer any further explanation of whether this standard would apply when, for example, while Girl Scouts are selling cookies they also take down contact information from parents and children about the latter joining the Scouts (which the author has witnessed happening), that "triggers" discrimination if union organizers are denied access.

154. *See id.* at 9.

155. *See Food & Commercial Workers Union Local 400 v. NLRB*, 989 F.3d 1034, 1038 (D.C. Cir. 2021).

156. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533 (1992).

157. *See id.* at 535.

158. *See id.*

its property but ban a union that urges a customer boycott of the business.<sup>159</sup> That could be recharacterized as a rule that allows employers to discriminate in access to property against nonemployee persons seeking to harm the employer's business. Even if that were the rule, however, it should be remembered that when unions urge customer boycotts they usually are not asking for a permanent boycott but one that will end as soon as the employer begins treating its employees better in some way.<sup>160</sup> In her dissent in *Kroger*, Member McFerran contended that a union boycott for this purpose is "protected concerted activity" under Section 7 and an employer should therefore be found to have committed unlawful discrimination or interference (or both) when barring union representatives from communicating this message, at least when this employer permits other nonunion groups to communicate with customers.<sup>161</sup>

Whatever happens in the future regarding boycott cases, one principle that should be understood in any correct application of the NLRA is that the "harmful to employer" standard should not be used to authorize differential treatment in access between union organizers and representatives from other outside groups. That would be inconsistent with the NLRA and therefore national labor relations policy because no matter what an enterprise's owner or officials might think about union organizers, they are advancing the Section 7 right of the employer's employees as established by Congress and recognized by the U.S. Supreme Court.<sup>162</sup>

As both the Board majority and Member McFerran in dissent discussed in *Kroger*, a panel of the U.S. Court of Appeals for the Second Circuit in 2008 held that the scope of the non-discrimination rule was that "the private property owner must treat a nonemployee who seeks to communicate on a subject protected by Section 7 less favorably than

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159. *Kroger Ltd. P'ship I Mid-Atlantic*, 368 N.L.R.B. No. 64, slip op. 1 (2019).

160. See generally *id.* (discussing the facts of that case and the facts of "boycott" cases revealed that the union message is that the boycott will continue until the employer makes some improvement(s) in treatment of employees).

161. See *id.* at 11, 16, n.11, n.25 (McFerran, Member, dissenting). See also *UPMC*, 368 N.L.R.B. No. 2 (2019) (Member McFerran, again dissenting, maintained that it amounted to unlawful discrimination for an employer to prohibit nonemployee union organizers from accessing a hospital's cafeteria to speak with employees when other nonemployee members of the public representatives to access).

162. Member McFerran made this point in her dissent in *Kroger*, as when stating that the Board majority standard "abandons any attempt to safeguard statutory rights, sacrificing them instead to the employer's property rights [and that it] is inconceivable that this is what the Supreme Court in *Stowe Spinning* or *Babcock & Wilcox* contemplated, much less what Congress intended when it enacted Section 7 of the National Labor Relations Act." See *Kroger*, 368 N.L.R.B. slip op. at 26.



another person communicating on the same subject.”<sup>163</sup> Even the *Kroger* Board majority held that this was too narrow a definition because, they reasoned, a standard that would allow an outside group to urge customers to boycott an enterprise for a non-Section 7 related reason (e.g. an environmental protest) while barring union agents from access to encourage a boycott over a labor issue “insufficiently accounts for the protection of Section 7 interests” and such differential treatment also “supports an inference of hostility to union activity rather than legitimate opposition to any group that seeks to injure the employer’s business interests.”<sup>164</sup> That analysis is sound. Moreover, the Second Circuit standard could cause confusion in the application of the “no equal time” doctrine that allows employers to deliver anti-union messages at meetings with employees without permitting union representatives access to do the same,<sup>165</sup> at least when nonemployees are also permitted to communicate those messages. Or perhaps even when anti-union nonsupervisory employees are given more “access” to communicate with employees than are pro-union ones.

For now, both unions and employers must proceed with caution if either want to rely on their view of the scope of the non-discrimination rule.

### 3. Negotiated Access Rights

Union employees and representatives have a right to access property when their union represents employees working there, because an employer must grant reasonable access to union representatives whenever such access is relevant to the union’s functions of representing those workers. Such access is a mandatory subject of bargaining, meaning that an employer must negotiate over access and the extent of it at the union’s request and, after the union and employer have agreed on the extent of and conditions for access, the employer cannot unilaterally make any changes in those terms,<sup>166</sup> even after the collective bargaining agreement

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163. See *Run Shopping Center LLC v. NLRB*, 534 F.3d 108, 116 (2d Cir. 2008) (quoted in *Kroger*, slip op. at 6, 10 by majority and at slip op. at 23, n.50 by dissenting Member McFerran).

164. *Kroger*, 368 N.L.R.B. slip op. at 10.

165. See *The Developing Labor Law* § 6.II.B.1.F (2020).

166. See, e.g., *CP Anchorage Hotel 2, LLC, d/b/a Hilton Anchorage*, 370 N.L.R.B. No. 83, 22-23 (2021); *Meadowlands Hotel*, 368 N.L.R.B. No. 119, 1 (2019).

expires.<sup>167</sup> The right of access for union representatives can even be based on a past practice if there is no written agreement providing for it.<sup>168</sup>

That unions representing employees are entitled to access the employer property where those employees work should not be surprising, especially given that unions have a legal obligation to “fairly represent” employees, an obligation the U.S. Supreme Court imposed more than seventy-five years ago.<sup>169</sup> A union cannot represent employees fairly unless its representatives can see and experience in person the conditions under which those employees work, and can have access to anything in the employer’s possession that directly impacts employees’ terms of employment. Therefore, unions must still be able to obtain through negotiations with employers a right of access to property and any reasonable conditions employers might demand for such access.<sup>170</sup>

#### 4. Some “Publicly Accessible” Property Under State Law

As discussed earlier in the examination of *Cedar Point Nursery*, the Supreme Court majority distinguished and left undisturbed the Court’s 1980 decision in *PruneYard Shopping Center v. Robins*,<sup>171</sup> in which the Court had treated as a “regulatory taking,” requiring no compensation to the property owner, an interpretation of the state’s Constitution that established a right to engage in leafleting at a private shopping center.<sup>172</sup> *Cedar Point Nursery*, also relying on *Heart of Atlanta Motel*<sup>173</sup> for the proposition, held that with regard to the Fifth Amendment Takings Clause, enterprises “generally open to the public” are distinguishable from those that are usually closed to the public.<sup>174</sup>

In California, “nonemployee” union representatives can and have relied on the state law right of access to enter shopping centers and malls, even to urge boycotts.<sup>175</sup> Other states in which union “nonemployee”

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167. See, e.g., *Valley Hosp. Med. Ctr.*, 369 N.L.R.B. No. 16 (2020).

168. See, e.g., *SMI/Division of DCX-CHOL Enter. Inc.*, 365 N.L.R.B. No. 152 (2017).

169. See *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944); see also *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962) (establishing that a union’s breach of this “duty of fair representation” was an unfair labor practice).

170. See, e.g., *CP Anchorage Hotel 2*, 370 N.L.R.B. No. 83, slip op. at 22-23; *Meadowlands Hotel*, 368 N.L.R.B. at 1.

171. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2076-77 (2021).

172. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980).

173. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

174. See *Cedar Point Nursery*, 141 S. Ct. at 2076.

175. See, e.g., *Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742, 754 (Cal. 2007) (mall owners could not prevent union members who worked for an employer not located in the mall from leafleting in front of a store to urge customers to boycott the store).

union representatives under current state law might also have rights to access similarly “publicly accessible” properties to engage in solicitation include Colorado<sup>176</sup> and New Jersey.<sup>177</sup> In these, and any other states in the future that might recognize rights of access to specific types of private property to engage in “expressive” activities, nonemployee union representatives could possibly access private property to organize employees and/or to solicit and distribute literature to customers and members of the public.<sup>178</sup>

### III. ACCESS RIGHTS OF WORKERS

#### *A. Access Rights of Employees When Their Employer is the Landowner*

In 1945 the U.S. Supreme Court in its *Republic Aviation* decision<sup>179</sup> established the rule, ever since in place, that employees, when both the speaker(s) and the listeners(s) are on non-working time, have a right to engage in pro-union or other Section 7-protected oral solicitation.<sup>180</sup> That decision also set the still-existing rule that employees have a right to wear or display pro-union, or Section 7-protected, apparel or “insignia” (as on pins or buttons).<sup>181</sup> Both sets of rights are subject to employer restriction when “necessary in order to maintain production or discipline.”<sup>182</sup> For more than sixty years, employees also have had the right to distribute pro-union or other Section 7-protected literature or other tangible items (including again buttons, caps/hats, etc.) in non-working areas during non-working times, subject again to limitations necessary for production and discipline.<sup>183</sup> Some special exceptions to all these rules have been

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176. See *New Bock v. Westminster Mall Co.*, 819 P.2d 55, 61–3 (Colo. 1991) (at least where a city participated financially in the development of a private shopping mall, and government agencies have an “active presence” in common areas of mall, the mall must permit access by political “leafleters”).

177. *Green Party of New Jersey v. Hartz Mountain Indus., Inc.*, 752 A.2d 315 (N.J. 2000); *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty*, 650 A.2d 757 (N.J. 1994), *cert. denied*, 516 U.S. 812 (1995).

178. See *e.g.*, cases cited *supra* notes 175–7.

179. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

180. See *id.* at 803–05; see also *Harbor Freight Tools, USA, Inc.*, 2021 WL 961659 (ALJ Gerald M. Etchingham) (2021) (applying this rule from *Republic Aviation*).

181. See *Republic Aviation Corp.*, 324 U.S. at 803–04.

182. See *id.* at 803 n.10.

183. See, *e.g.*, *Walton Mfg. Co.*, 126 N.L.R.B. 697 (1960), *enforced*, 289 F.2d 177 (5th Cir. 1961); see also *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615, 615–621 (1962).

adopted for patient-care areas in hospitals<sup>184</sup> or for “selling floors” in retail stores.<sup>185</sup> Since then, any controversy over these rights for employees during working hours has largely been limited to under what circumstances “production or discipline” justifies, or does not, their limitation.<sup>186</sup>

By contrast, when employees are at their workplace at times other than their scheduled hours, their rights to engage Section 7-protected activity are more limited or, in the case of so-called “subcontractor” employees who work at locations not owned or managed by their direct employer, at present unknown.<sup>187</sup> With regard to access of “off-duty” employees to a location where they work and their employer is the “landowner,” the Board has allowed some rights of access, since 1976 based on the rule it adopted that year in *Tri-County Medical*.<sup>188</sup> In that decision the Board held that “except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.”<sup>189</sup> The Board has continued to follow and enforce this right of access.<sup>190</sup>

The same right of access applies for employees who work at one location when they seek access to another location of their employer, to that location’s parking lot or other outside nonworking areas.<sup>191</sup> In its 1995 decision in *U.S. Postal Service*<sup>192</sup> the Board specifically rejected the employer’s argument that off-site employees were comparable to nonemployee organizers, and pointed out that the Supreme Court has held that employees engaged in protected activity at another location of their employer retain the legal status as employees of that employer and “not outsiders.”<sup>193</sup>

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184. See *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978).

185. See *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. at 617 n.4.

186. See generally *The Developing Labor Law* §§ 6.II.B.1.C. & 6.II.B.1.E. (2020).

187. See *infra* notes 267-301 and accompanying text.

188. See *Tri-Cnty. Medical Center, Inc.*, 222 N.L.R.B. 1089 (1976).

189. *Id.*

190. See, e.g., *Bemis Co., Inc.*, 370 N.L.R.B. No. 7 (2020); *EYM King of Michigan, LLC*, 366 N.L.R.B. 156 (2018).

191. See, e.g., *ITT Indus., Inc.*, 341 N.L.R.B. 937 (2004), *enforced*, 413 F.3d 64 (D.C. Cir. 2005) (finding unlawful employer’s denial of parking lot access to offsite employees seeking to solicit and distribute for organizational purposes); *Hillhaven Highland House*, 336 N.L.R.B. 646, *enforced sub nom*, *First Healthcare Corp. v. NLRB*, 344 F.3d 523 (6th Cir. 2003) (unfair labor practice found when employer barred its employees from accessing outside nonwork area of facilities other than those at which the employees worked).

192. *Postal Service*, 318 N.L.R.B. 466 (1995).

193. See *id.* (quoting *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976)).

Employers seeking to diminish the access rights of their own employees are not the only persons who have expressed interest in changing these rules. In 2018 Board Member Emanuel in *EYM King of Mich., LLC* declared that he believed “that the Board should revisit *Tri-County Medical Center* to the extent that it allows off-duty employees to engage in Section 7 activities on an employer’s parking lot and other exterior areas of the employer’s property.”<sup>194</sup> The next year in *Southern Bakeries*<sup>195</sup> Member Kaplan joined Member Emanuel in expressing interest in “reconsidering” *Tri-County*, and more specifically the “third prong” that differentiates off-duty access for “union activities” from access for other purposes.<sup>196</sup> The issue in *Southern Bakeries* was a rule found to give the employer “unlimited discretion” to bar off-duty employees from its property, even from outdoor areas to engage in Section 7-protected activities,<sup>197</sup> so it’s reasonable to infer that Members Emanuel and Kaplan sought to consider giving employers such discretion.<sup>198</sup>

The possible rationale for changing the 45-year-old *Tri-County* rule was not and to date has not been identified. Changing the rule could not be justified by technological or other workplace changes that allegedly make it difficult to distinguish between working and non-working time; the interactions of off-duty and off-site employees with co-workers would be in-person and during non-working time, like those in *Republic Aviation*.<sup>199</sup> Members Emanuel and Kaplan apparently just wanted to reset the “balance” between employees’ right to exercise their Section 7 right and the employer’s “property right” to exclude specific persons from its property.<sup>200</sup> The balance they question has not only been applied for decades by the Board but has been upheld by the D.C. Circuit and other federal courts<sup>201</sup> as consistent with the Supreme Court’s NLRA access decisions *Babcock & Wilcox* and *Lechmere*.

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194. *EYM King of Michigan*, 366 N.L.R.B. 156, n.8 (2018).

195. *Southern Bakeries*, 368 N.L.R.B. 59 n.5 (2019).

196. *See id.* at 2 n.4.

197. *See id.* at 1-2.

198. *See id.* at 2 n.5.

199. *See, e.g., Caesars Entertainment*, 368 N.L.R.B. 143, slip op. at 7 (2019) (asserting that employee use of and access to employer’s e-mail system makes it more difficult to distinguish between working and nonworking time).

200. *Cf. NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 109-110 (5th Cir. 1956) (finding that in *Republic Aviation* the Board and Supreme Court had “balanced the conflicting interests of employees to receive information on self-organization on the company’s property from fellow employees during nonworking time, with the employer’s right to control the use of his property.”).

201. *See, e.g., Alcoa, Inc. v. NLRB*, 849 F.3d 250, 260 (5th Cir. 2017); *see also First Healthcare Corp. v. NLRB*, 344 F.3d 523, 538-40 (6th Cir. 2003).

The D.C. Circuit in 2001 in *ITT Industries, Inc v. NLRB*<sup>202</sup> recognized that the access rights of “off-duty” employees were “well-established” and had been approved by other federal appeals courts.<sup>203</sup> Turning to the issue of “off-site” employees, the D.C. Circuit first discussed that with regard to access to property, the key distinction that the Supreme Court drew in *Lechmere* was not between “invitees” and trespassers, or any non-labor law categories, but between employees and nonemployees as defined in the NLRA.<sup>204</sup> The D.C. Circuit further explained that while the Supreme Court “never has professed to define the scope of the term ‘employee’” in *Lechmere* or other decisions relating to employee rights on employer property, these decisions “certainly do not stand for the proposition that all trespassers, whether they be nonemployee union organizers or off-site employees, possess only derivative §7 access rights.”<sup>205</sup> Consequently, the D.C. Circuit in that decision found that “off-site employees might enjoy some measure of free-standing, nonderivative access rights” but that would depend on the Board providing “considered justifications” for recognizing greater access rights for those employees than for “trespassing nonemployee union organizers.”<sup>206</sup> The court remanded the case to offer such “justifications” if it could,<sup>207</sup> and in review of the Board’s second decision in the case, the D.C. Circuit found reasonable the Board’s rationales and reasoning, in *ITT Industries* and other decisions, for why off-site employees should have access rights to outdoor areas of locations of their employer where they did not work.<sup>208</sup>

In the D.C. Circuit’s “second” *ITT Industries* decision it quoted approvingly<sup>209</sup> the Board’s language that the off-site employees “‘are not only ‘employees’ within the broad scope of Section 2(3) of the [NLRA],’” they are “‘employees of the employer who would exclude them from its property.’”<sup>210</sup> The court also quoted the Board’s explanation, in the *ITT* decision on remand itself, that “‘when offsite employees seek to organize

202. *ITT Industries, Inc. v. NLRB*, 251 F.3d 995 (D.C. Cir. 2001).

203. *See id.* at 999 (citing *NLRB v. S. Md. Hosp. Ctr.*, 916 F.2d 932, 939–40 (4th Cir.1990); *NLRB v. Ohio Masonic Home*, 892 F.2d 449, 453 (6th Cir.1989); *NLRB v. Pizza Crust Co. of Pa.*, 862 F.2d 49, 52–55 (3d Cir.1988)).

204. *See id.* at 1002 (citing and quoting *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532, 537 (1992)).

205. *Id.* at 1003.

206. *See id.* at 1004.

207. *See id.* at 1005, 1007.

208. *See generally id.* at 64 (D.C. Cir. 2005).

209. In introducing the language it quoted from Board decisions explaining why off-site employees had rights of access, the D.C. Circuit stated, “the Board not only explained that conclusion, it did so reasonably.” *See id.* at 70.

210. *See id.* at 70 (quoting *Hillhaven*, 336 N.L.R.B. 646, 648 (2001)).

similarly situated employees at another employer facility, the employees seek strength in numbers to increase the power of their union and ultimately to improve their own working conditions.”<sup>211</sup> The D.C. Circuit reasoned that this validated why off-site employees should have greater property access rights than nonemployee organizers: “This reasonably explains the Board’s conclusion that the right claimed by such off-site employees is personal rather than derivative: employees who seek to make common cause with similarly situated employees of the same employer are seeking to advance their own interests—not just those of the employees they target, as is the case for nonemployee organizers.”<sup>212</sup>

Having discussed the “employee right” side of the balance, the D.C. Circuit found also that the Board also paid reasonable attention to the “employer property” side of the balance as well.<sup>213</sup> The D.C. Circuit explained that because the Board had recognized that “the situation of offsite employees implicates some distinct considerations’ from that of either nonemployees or on-site employees” and that the employer’s interests and rights were protected because offsite employees were employed by the property owner and consequently that employer “‘has a lawful means of exercising control over the offsite employee (even regarded as trespasser), independent of its property rights.’”<sup>214</sup> The court added, “[t]hat ability to exercise control provides a reasonable basis for the Board’s conclusion that permitting access by off-site employees trenches less seriously on the employer’s property interests than would permitting access by nonemployees.”<sup>215</sup> Finally, the D.C. Circuit also noted that the Board had acknowledged that due to concerns such as “security, traffic control, personnel, and like issues”<sup>216</sup> a property owner employer might have “heightened private property-right concerns when offsite (as opposed to onsite) employees seek access to its property to exercise their Section 7 rights,” and that the Board would take those into account.<sup>217</sup>

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211. *See id.* at 70-71 (quoting ITT Remand Decision, 341 N.L.R.B. 937, 939 (2004)).

212. *See id.* at 71.

213. *See id.*

214. *See id.* at 72 (quoting *Hillhaven*, 336 N.L.R.B. at 649).

215. *See id.*

216. *See id.* at 73 (quoting *Hillhaven*, 336 N.L.R.B. at 649-50).

217. *See id.* (quoting ITT Remand Decision, 341 N.L.R.B. at 939).

*B. Access Rights (if any) of Employees Who Perform Work at  
Another One or More Employers' Locations*

Starting in 2002 the D.C. Circuit considered another Board standard on worker access to property—this time the rights of access of subcontractor employees working at a property owner's location<sup>218</sup>—and again after a remand eventually upheld the standard the Board adopted.<sup>219</sup> In its 2001 decision in the case, the Board had found that because employees of the Ark restaurant subcontractor within the *New York New York Hotel and Casino* worked “regularly and exclusively” at that location, they had an “off-duty” right of access to inside and outside nonwork areas to engage in the protected activity of area standards handbilling.<sup>220</sup> In reviewing these decisions in 2002, the D.C. Circuit, based on its 2001 *ITT Industries* decision discussed above,<sup>221</sup> repeated that the key distinction in cases involving worker access to property was between “employees” and “nonemployees.”<sup>222</sup> The court observed that with no U.S. Supreme Court decision yet having decided the property access rights of employees of contractors on another employer's property (still true in 2021), there were multiple questions the Board's decisions, and the precedents it cited, had failed to answer about the nature of the rights of such workers.<sup>223</sup> The court therefore remanded the decision to the Board to address such questions.<sup>224</sup>

It took the Board more than eight years to issue the decision doing so, but in March 2011 the Board did that in *New York New York Hotel & Casino*.<sup>225</sup> The Board adopted the standard that a property owner could not deny access to “nonworking areas open to the public, the off-duty employees of a contractor who are regularly employed on the property in work integral to the owner's business, who seek to engage in organizational handbilling directed at potential customers of the employer and the property owner.”<sup>226</sup> The reference to “organizational” handbilling suggests that this standard was also intended to apply to contractor

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218. See generally *New York New York, LLC v. NLRB*, 313 F.3d 585 (D.C. Cir. 2002).

219. See *New York-New York, LLC v. NLRB*, 676 F. 3d 193 (D.C. Cir. 2012).

220. See *In re New York-New York Hotel, LLC*, 334 N.L.R.B. 762, 762-63, 772 (2001).

221. *ITT Industries, Inc. v NLRB*, 251 F.3d 995, 1000 (D.C. Cir. 2001).

222. See *New York-New York LLC*, 313 F.3d at 588.

223. See *id.* at 588-91.

224. *Id.* at 590-91.

225. See *New York, New York Hotel & Casino*, 356 N.L.R.B. 907 (2011). Hereinafter the respondent landowner in that case will be referred to as “NYNY,” and the Board's 2011 decision will be referred to as *NYNY*.

226. See *id.* at 918.



employees who solicit and distribute handbills *to workers* and not just customers, and indeed on review the D.C. Circuit noted that equally protected were handbillers seeking support from other workers and seeking support from customers and members of the public.<sup>227</sup> The Board also added that an employer could deny property access to contractor employees even under these circumstances if and when the employer “demonstrate[d] that the employees’ activity significantly interferes with [the employer’s] use of the property or where exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline.”<sup>228</sup>

In explaining why employees of subcontractors should have the property access rights embodied by its new standard, the Board stated multiple reasons why such employees were more similar to employees of a property’s owner than they are to the “nonemployee organizers” whose rights to access property are limited by the *Lechmere* decision.<sup>229</sup> The first one they mentioned is that, unlike nonemployee organizers, a subcontractor’s employees do not seek property access “for the purpose of urging others to exercise their Section 7 rights” but instead are “statutorily protected employees directly exercising their own Section 7 right to self-organization.”<sup>230</sup> Following up on this mention of subcontractor’s employees Section 7 rights, the Board next decried the unfairness to subcontractor employees if they were treated like nonemployee organizers, because such employees “who work regularly on another employer’s property would be accorded diminished rights based merely on the location of their workplace, without any showing that the resulting limitations on the employees’ rights are necessary to protect any legitimate interests of their employer or the property owner.”<sup>231</sup> This reduction of rights, the Board pointed out, “would be most problematic” for the many types of subcontractor employees who work for employers on property their employer does not own and/or don’t even have a “fixed place of work.”<sup>232</sup> As an example, the Board gave “janitors employed by a cleaning company” who might regularly work in one or more office

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227. See *New York-New York, LLC v. NLRB*, 676 F.3d 193, 196-97 (D.C. Cir. 2012) (“neither this court nor the Board has ever drawn a substantive distinction between solicitation of fellow employees and solicitation of nonemployees. To the contrary, both we and the Board have made clear that NLRA sections 7 and 8(a)(1) protect employee rights to seek support from nonemployees.”) (quoting *Stanford Hospital & Clinics v. NLRB*, 325 F.3d 334, 343 (D.C.Cir.2003)).

228. See *NYNY*, 356 N.L.R.B. at 918-19.

229. *Id.* at 919.

230. See *id.* at 912.

231. See *id.*

232. See *id.*

buildings their employer does not own but who “should not be denied Section 7 rights on the sole grounds that they work on the property of an employer [or employers] other than their own.”<sup>233</sup>

Next discussing statutory language, the Board observed that the NLRA “expressly does not require that employees be employed by a particular employer in order to confer rights on the employees or impose obligations on the employer to respect the employees’ rights.”<sup>234</sup> The Board declared it rejected “establish[ing] such a requirement administratively” because that would “relegate[] some workers to second-class status under the [NLRA] based solely on the location of their work.”<sup>235</sup> The Board then explained it was significant—and consistent with its standard requiring “regular employment” at a location—that the subcontractor employees “worked on the property every day for a party that had both a contractual and a close working relationship with NYNY.”<sup>236</sup> Thus, the NYNY hotel was their workplace, and as the Board noted, the Supreme Court has found that “the workplace is the ‘one place where employees clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.’”<sup>237</sup> For these reasons, and after discussing again at length how the employees were exercising their own Section 7 rights to seek support to form a union, the Board summed up the “employee rights” side of the balance by stating, “[W]e find that the statutorily-recognized interests of the Ark employees, as implicated here, are much more closely aligned to those of NYNY’s own employees (who, under our law, would have been entitled to the access sought) than they are to the interests of the union organizers at issue in *Lechmere* and *Babcock & Wilcox*.”<sup>238</sup>

The Board next considered the “property owner right” side of the balance, recognizing that “there is no question that—countervailing considerations of Federal labor law aside—NYNY, as the property owner, had a right to exclude the Ark employees,”<sup>239</sup> and adding, similarly to what the Supreme Court in 2021 stated in *Cedar Point Nursery*,<sup>240</sup> that “one of the essential sticks in the bundle of property rights is the right to

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233. *See id.*

234. *See id.*

235. *See id.*

236. *See id.*

237. *See id.* at 914 (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978)).

238. *See id.* at 915-16.

239. *See id.* at 916.

240. *See supra* note 21 and accompanying text (discussing the similar statement in *Cedar Point Nursery*).

exclude others.”<sup>241</sup> The Board in this part of the decision also indicated, again as the Supreme Court later did in *Cedar Point Nursery*, that the source and definition of the property owner’s rights were in state law.<sup>242</sup>

The Board added that, perhaps with a property rights as its source, “NYYN also has a legitimate interest in preventing interference with the use of its property.”<sup>243</sup> The Board found that, in terms of the “production and discipline” referenced in *Republic Aviation*, the ALJs had found after a hearing and review of the record, and the Board concurred, that the subcontractor employees’ handbilling had not interfered with discipline and never impaired “the ability of customers to enter, leave, or fully use the facility or the ability of Ark or NYYN employees to perform their work, and it was not a violation of any rule that NYYN attempts to defend as necessary to ensure operations or discipline.”<sup>244</sup>

The Board realized that this so far satisfied the test only for an employer’s own employees, so it went on to consider and weigh the difference between a property owner’s employees and the subcontractor employees who work on its property. The Board conceded that, unlike with off-duty and off-site employees, the property owner might not be able to control and discipline the subcontractors’ employees as directly as it did its own.<sup>245</sup> But the Board further found that the employer did have more control over such employees than it did over nonemployee union organizers, because it could exercise such control through its relationship and contract with their employer, the subcontractor.<sup>246</sup> The Board noted that “NYYN was free to negotiate contractual terms with Ark sufficient to protect its interests in relation to Ark’s employees” and that in fact it had done so as their contract “require[d] Ark to make . . . reasonable efforts to ensure . . . employees abide by any reasonable rules and regulations as [NY NY] may, from time to time, reasonably adopt for the safety, care and cleanliness of [Ark’s premises], or the Hotel or for the preservation of good order thereon or to assure the operation of a first-

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241. See *NYYN*, 356 N.L.R.B. at 916 (quoting *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82 (1980)).

242. Compare *id.* (referring to “state property law” and to NYYN’s “state law property right to exclude,” while also referencing “the well-established principle that state law property rights sometimes must yield to the imperatives of Federal labor law” with *Cedar Point Nursery*, 141 S. Ct. 2063, 2075-76 (2021) (“As a general matter, it is true that the property rights protected by the Takings Clause are creatures of state law.”); see also *supra* note 21 discussing this part of *Cedar Point Nursery*).

243. See *NYYN*, 356 N.L.R.B. at 916.

244. See *id.*

245. See *id.*

246. See *id.* at 917.

class resort hotel facility.”<sup>247</sup> More specifically, the contract required Ark’s employees to be “subject to drug testing” (which Ark’s employee handbook also informed employees Ark could do) and that Ark employees were prohibited from either wearing their uniforms outside the restaurant or entering the bars inside the hotel).<sup>248</sup>

The Board went on to observe that “NYNY and Ark share an economic interest in ensuring that Ark employees do nothing that might interfere with the operations” of the property owner.<sup>249</sup> The Board went on to observe that “NYNY and Ark share an economic interest in ensuring that Ark employees do nothing that might interfere with the operations” of the property owner.<sup>250</sup> The Board next explained that based on its “long and extensive experience with contractual relationships between employer/contractors and property owners,” it found that “such a relationship ordinarily permits the property owner to quickly and effectively intervene, both through the employer and directly, to prevent any inappropriate conduct by the employer’s employees on the owner’s property.”<sup>251</sup> Going into more detail, the Board described how “[p]roperty owners often give directions to employees of contractors through the contractors’ onsite managers and supervisors” which meant contractor employees are subject not only to direction and discipline from what their employer’s supervisors witness or have reported to them, but also direction and discipline the property owner’s agents direct those supervisors to take, and contractor employees also must comply when “property owners themselves often direct contractors’ employees without the mediation of the contractor/employer’s agents.”<sup>252</sup>

The Board next explained that property owners can impose control in even more permanent ways: they can “direct contractors to remove employees from the premises and not permit them to return.”<sup>253</sup> In sum, the Board concluded that “property owners ordinarily are able to protect their property and operational interests, in relation to employees of contractors working on their premises,” without having to exclude such employees as trespassers.<sup>254</sup> The Board pointed out again that this was

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247. *See id.*

248. *See id.* (citing its prior decision in *New York New York Hotel, LLC*, 334 N.L.R.B. 762, 767-768 n.8 (2001)).

249. *See id.*

250. *See id.*

251. *See id.*

252. *See id.* at 917-18.

253. *See id.* at 918.

254. *See id.*

very different than the situation with nonemployee organizers employed by a union.<sup>255</sup>

Several months after its decision in *NYNY*, the Board applied its *NYNY* standard in *Simon DeBartolo Group* (hereinafter “Simon”).<sup>256</sup> The Board in that decision found that the respondent mall owner violated NLRA Section 8(a)(1) by denying access to two of its mall parking lots and outside sidewalks to employees who worked at each mall for a maintenance subcontractor and were giving flyers to customers to seek support for their effort to unionize. The Board majority found that these employee handbillers met its *NYNY* standard because these off-duty maintenance employees “were regularly employed on Simon’s property in work integral to Simon’s business” and engaged in organizational handbilling of mall customers “in exterior, nonworking areas open to the public.”<sup>257</sup> Responding to the contention of dissenting Member Brian Hayes (no relation to the author) that these maintenance employees failed the *NYNY* test because they did not work “exclusively” at the mall they handbilled,<sup>258</sup> the Board majority reasoned that given the “physically enormous” size of each of the malls and the resulting time it would take to clean each mall, “we find it is more likely than not that the janitors’ work at the malls is not so fleeting or occasional as to take this case outside the holding in *NYNY*” and “[t]o require that they work ‘exclusively’ at the mall, as our colleague would do, is too strict a standard.”<sup>259</sup> The Board majority added, “The mall is the janitors’ regular workplace whether they also work at a different location on weekends (or even less frequently) or not.”<sup>260</sup>

Having found that the off-duty employees’ handbilling met the test to be protected, the *Simon* Board turned to whether the mall owner had met its burden under the *NYNY* standard of showing that the employees’ activity “significantly interfere[d]” with the mall owner’s use of the mall property and/or that denying access was “justified by another legitimate business reason.”<sup>261</sup> The respondent, Simon, argued in the alternative, arguing both that it need not show “actual disruption,” but also that “[c]ommon sense” supported the inference that such disruption existed,

255. *See id.*

256. *Simon DeBartolo Grp.*, 357 N.L.R.B. 1887, 1887 (2011).

257. *See id.* at 1888.

258. *See id.* at 1892 (Hayes, Member, dissenting).

259. *See id.* at 1888 n.8.

260. *Id.*

261. *See id.* at 1889 (quoting *New York, New York Hotel & Casino*, 356 N.L.R.B. 907, 918-19 (2011)).

given the record facts that the handbills alleged “cockroaches in the food court” and “the ability of shoppers and the employees of other tenants to come and go from the facility free from harassment or nuisance would be disrupted to some extent by handbillers standing in front of entrance doors.”<sup>262</sup>

The Board rejected Simon’s justifications, in large part based on the reasoning that the concerns Simon expressed about its subcontractor employees “could equally be expressed about its own employees’ comparable activity” if such employees chose to engage in it, because “the law is clear that Simon’s employees have a right to engage in such activity on mall property and thus, under *NYNY*, so do [the maintenance contractor’s] employees.”<sup>263</sup> The Board further found that Simon failed to show that its “blanket prohibition” on contractor employees’ access to the handbill was needed to avert a “heightened risk of interference,” as required by *NYNY*, “of concerns for safety, but based on the facts that “the sidewalk and hallways in which the handbilling occurred were at least 18 feet wide,” the court held that the Board’s findings that the handbilling was safe and did not interfere with passing pedestrians were “reasonable and supported by substantial evidence.”<sup>264</sup> In a separate concurrence, D.C. Circuit Judge Karen LeCraft Henderson discussed extensively the same explanations and reasons from the Board’s *NYNY* decision that were discussed earlier in this article,<sup>265</sup> and concluded by stating, “Given the Board’s findings—supported by substantial evidence—that the Ark employees were “communicat[ing] concerning their *own* terms and conditions of employment in and around their *own* workplace,”<sup>266</sup> she could find the Board’s balance of employee rights versus property rights “‘rational and consistent’ with the NLRA” as interpreted by the Supreme Court.”<sup>267</sup>

Seven years after this D.C. Circuit decision, in August 2019, the Board attempted to overrule both *NYNY* and *Simon DeBartolo Group* and reduced the access rights of contractor employees in *Bexar County Performing Arts Foundation*.<sup>268</sup> In that decision the Board adopted the following new multi-part standard for access of contractor employees to

262. See *id.* (quoting without citation the Brief of Respondent Simon to the NLRB).

263. See *id.* (emphasis added).

264. See *New York-New York, LLC v. NLRB*, 676 F.3d 193, 197 (D.C. Cir. 2012).

265. See *id.* at 197-200 (LeCraft Henderson, J, concurring).

266. See *id.* at 199 (LeCraft Henderson, J, concurring) (quoting *New York, New York Hotel & Casino*, 356 N.L.R.B. 907, 919 (2011)).

267. See *id.* at 200.

268. *Bexar Cnty. Performing Arts Ctr. Found.*, 368 N.L.R.B. No. 46, slip op. at 1 (2019).

property not owned by their employer: (1) “only contractor employees who work regularly and exclusively” on the property in question are permitted to access the property to engage in Section 7-protected activity; (2) contractor employees cannot work “regularly” on an owner’s property unless that contractor “regularly conducts business or performs services there,”<sup>269</sup> and (3) even when 1 and 2 are met, a property owner does not have to allow access if the contractor employees have “a reasonable alternative nontrespassory means to convey their Section 7 message.”<sup>270</sup> About two years later, on August 31, 2021, the U.S. Court of Appeals for the D.C. Circuit found that the Board’s application of its new test was “arbitrary” and remanded the case to the Board to either “proceed with a version of the test it announced and sought to apply in this case or to develop a new test altogether.”<sup>271</sup>

Both the Board and the D.C. Circuit considered facts of a case in which contractor employees represented by the Musicians union engaged in leafleting in February 2017 outside the Tobin Center for the Performing Arts, prior to four weekend performances of the ballet *Sleeping Beauty*.<sup>272</sup> They leafleted to protest Ballet San Antonio’s use of recorded music, rather than symphony musicians, for those performances, which would deprive the musicians of working hours.<sup>273</sup> Each leaflet stated, “[y]ou will not hear a live orchestra performing with the professional dancers of Ballet San Antonio. Instead, Ballet San Antonio will waste the world class acoustics of the Tobin Center by playing a recording . . . You’ve paid full price for half of the product. San Antonio deserves better! DEMAND LIVE MUSIC!”<sup>274</sup> On the evening of February 17, prior to the first performance of the ballet, event staff of the Tobin Center and the property on which the musicians were leafleting, the Bexar County Performing Arts Foundation, along with San Antonio police officers summoned by the landowner, told the leafleters that they could not leaflet anywhere on the Foundation’s property, including sidewalks, and would have to relocate to leaflet.<sup>275</sup> The leafleters complied.<sup>276</sup>

The D.C. Circuit in its decision observed that the Board, in applying the prong that the musicians had not worked “regularly and exclusively”

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269. *See id.* at 3.

270. *Id.*

271. *See Local 23, Am. Fed’n of Musicians v. NLRB.*, 12 F.4th 778, 781-82, 788 (D.C. Cir. 2021).

272. *See Bexar Cnty.*, 368 N.L.R.B. No. 46, slip op. at 4; *Local 23*, 12 F.4th at 780-81.

273. *See Bexar Cnty.*, 368 N.L.R.B. No. 46, slip op. at 4; *Local 23*, 12 F.4th at 780-81.

274. *See Bexar Cnty.*, 368 N.L.R.B. No. 46, slip op. at 4 (quoting the leaflet used).

275. *See id.*; *Local 23*, 12 F.4th at 780-81.

276. *See Bexar Cnty.*, 368 N.L.R.B. No. 46, slip op. at 4; *Local 23*, 12 F.4th at 780-81.

at the Tobin Center, had relied on the fact that they played there “only” twenty-two weeks during the year.<sup>277</sup> After reasoning that “[t]he essential measure of regularity under [the Board’s] approach is the *frequency* of the work,” the D.C. Circuit observed that the Board has also found that an employee’s access to property once a week satisfied “regularly.”<sup>278</sup> The D.C. Circuit then explained that “back-of-the-envelope arithmetic confirms that working once a week (1/7) cannot count as regular presence if working 22 weeks of the year (22/52) does not.”<sup>279</sup> The D.C. Circuit therefore concluded that the Board’s decision, under its own characterization of “regularly”, was “internally inconsistent, and as a result, arbitrary.”<sup>280</sup>

When the Board had applied the third prong of its new test for contractor employee access, the Board additionally found that the musicians had non-trespassory means of communicating with their target audience, for which the Board relied on the fact that the musicians after being told to relocate went across the street where they were able to distribute hundreds of leaflets.<sup>281</sup> However, the Board in its decision also made clear that the alternative need not be so easy or relatively inexpensive, as it also identified as examples of “alternatives” the *Lechmere*-related means of newspaper, TV, radio, and billboards,<sup>282</sup> as well as mailings and websites.<sup>283</sup>

The D.C. Circuit also questioned that Board’s application of this prong.<sup>284</sup> The court found, based on the Board’s language, the property owner must bear the burden of proof on alternative means of communication.<sup>285</sup> The court went on to explain that this must be so because otherwise there would be no difference between the access rights of contractor employees—even those who are “regularly and exclusively” on the property—and nonemployee union organizers as defined by the U.S. Supreme Court’s *Lechmere* decision.<sup>286</sup> The D.C. Circuit further reasoned that without that “burden shift,” the Board’s new test would be “incoherent” because contractor employees who “[work] regularly and

277. See *Local 23*, 12 F.4th at 783 (quoting *Bexar Cnty.*, 368 N.L.R.B. No. 46 at 3).

278. *Id.* at 783-84.

279. *Id.* at 784.

280. *Id.*

281. See *Bexar Cnty.*, 368 N.L.R.B. No. 46, slip op. at 4, 11.

282. See *id.* at 9, n.71, n.72 (citing *Lechmere v. NLRB*, 502 U.S. 527, 540 (1992) and *Oakland Mall (Oakland II)*, 316 N.L.R.B. 1160, 1163-64 (1995)).

283. See *id.* at 12 n.85.

284. See *Local 23*, *Am. Fed’n of Musicians v. NLRB.*, 12 F.4th 778, 786 (D.C. Cir 2021).

285. *Id.*

286. See *id.*; *supra* Part II.B. (discussing the *Lechmere* decision in detail).



exclusively on the property would gain nothing from doing so.”<sup>287</sup> The D.C. Circuit next found that the Board never applied such “burden shifting” in its decision because it had adopted the new test without giving the employer and union parties an opportunity to present evidence in the record on the “alternative means of communication” issue, a Board choice the court deemed to be “arbitrary.”<sup>288</sup> More specifically, the court majority pointed out that the union had never been given the chance to present evidence and arguments on whether having to leaflet across the street, which union agents resorted to after being excluded from Tobin Center property, was a “reasonably effective alternative” based on such factors as “the distance from the public sidewalks to the theater entrances and the proportion of theater patrons who used the sidewalks.”<sup>289</sup>

In this case D.C. Circuit Judge Karen LeCraft Henderson wrote a separate concurring opinion, perhaps seeking to expand on the requirements for contract employee access she had identified in her concurring opinion in the 2012 *New York-New York, LLC* decision.<sup>290</sup> Judge LeCraft Henderson concluded her brief concurrence by stating that if the Board had “adequately explained and applied the ‘exclusivity’ and ‘alternative means’ prongs of its new framework, I believe we would have been obliged to affirm its decision.”<sup>291</sup>

The *Bexar County* case remains pending on remand at the Board, and in January 2022 the current Board invited parties in the case to submit statements of position, by February 1, regarding the issues raised by the remand.<sup>292</sup> One issue the Board should consider on remand and/or in other cases is how the former Board, in its 2019 decision, repeatedly referred to the musicians’ employer, the San Antonio Symphony, as a “licensee.”<sup>293</sup> Although it might be arguable whether this affected the Board majority’s reasoning and conclusion, using that term to refer to the symphony was—as will be explained shortly—probably erroneous.<sup>294</sup> That this likely did affect the Board’s reasoning is indicated by the Board’s statements on the first page of its 2019 decision that “This case . . . involves a different category of workers: off-duty employees of a licensee employer who are neither employees of the property owner nor, like nonemployees, utter

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287. See *Local 23*, 12 F.4th at 786.

288. See *id.* at 786-87.

289. See *id.* at 787.

290. See *supra* notes 265-67 & accompanying text (discussing J. LeCraft Henderson’s concurring opinion in *New York-New York, LLC v. NLRB*, 676 F. 3d 193, 197 (D.C. Cir. 2012)).

291. See *Local 23*, 12 F.4th at 788 (LeCraft Henderson, J., concurring).

292. ES Office Letter, *Local 23*, 12 F.4th 778 (No. 16-CA-193696).

293. *Id.* at 1.

294. See *infra* Part III.B.

strangers to the owner's property. For purposes of an analysis under the Act, a licensee is indistinguishable from an onsite contractor."<sup>295</sup> On the decision's second page the Board asserted, "[u]nder the terms of use agreements, each of these companies has a licensor-licensee relationship with the Respondent."<sup>296</sup>

However, the referenced agreement did not use that terminology, at least with regard to the musicians' employer the San Antonio Symphony.<sup>297</sup> Moreover, under Texas law a "licensee" is defined as one on the property for their own benefit and not the owner's, but with the owner's consent, such as a social guest.<sup>298</sup> Surely the presence of the San Antonio Symphony benefited the Tobin Center for the Performing Arts when such performances were that Center's *raison d'être*, which would make the Symphony an "invitee" under Texas property law.<sup>299</sup> "Onsite contractors" are almost always invitees because the property owner not only consents to their presence but invites them there to perform a service or carry out an activity that benefits that property owner.<sup>300</sup> Consequently, to be consistent with property law, the Board should have found that the musicians were employees of an invitee, not of a licensee.<sup>301</sup>

The Board majority announced it was adopting the new standard so as to exercise its discretion in a way to be "more consistent with the Supreme Court precedent described above," which of course meant the *Lechmere* and *Babcock & Wilcox* decisions on access by nonemployee union organizers.<sup>302</sup> Thus the Board applied a "nonemployee organizer" analysis and test to contractor employees who spent at least twenty-two weeks of a calendar year, out of the thirty weeks per year they worked as musicians, working at the location.<sup>303</sup> This led to denial of any right of access for the musicians in the case, and if the test continues to be followed by the Board or any court would result in greatly reduced access

295. See *Bexar Cnty.*, 368 N.L.R.B No. 46, slip op. at 1.

296. See *id.* at 3

297. See Use Agreement Between the San Antonio Symphony and The Tobin Center, in Joint Appendix for *Am. Fed'n of Musicians Local 23 v. NLRB*, No. 20-1010 (D.C. Cir.), at JA 199-204, <https://www.nlr.gov/case/16-CA-193636>.

298. See generally Susan L. Thomas and Edward K. Esping, 59 *Tex. Jur.* 3d Premises Liability §25 (3rd ed. 2010 Supp. 2021).

299. See *id.*

300. See *id.* ("The test for determining invitee status . . . is whether the claimants had present business relations with the defendants at the time of injury that made their presence of mutual benefit.").

301. See generally *id.*

302. See *Bexar Cnty.*, 368 N.L.R.B No. 46, slip op. at 6.

303. See *id.*

for almost all contractor employees in the future.<sup>304</sup> This will be especially harmful to employees who work only for contractors who in turn perform services on property they do not own and usually do not possess.<sup>305</sup> Therefore it will include tens of millions of employees working in fields such as construction, engineering, building maintenance and cleaning, landscaping, other services to hotels and resorts and governments at all levels, and more, and more every year.<sup>306</sup>

This point was also made in *Bexar County Performing Arts Foundation* by then-Member, now Chairman McFerran in her dissenting opinion when she faulted the majority for “dramatically scal[ing] back labor-law rights for a large segment of American workers . . . employees who work regularly on property that does not belong to their employer.”<sup>307</sup> Dissenting Member McFerran contended that the Board majority’s reasons for overruling the Board’s *NYNY* decision and standard for access of contractor employees were “arbitrary” and in conflict with NLRA Section 7 and Supreme Court precedents interpreting that statute.<sup>308</sup> For example, she found that “[t]here is simply no rational, much less statutory, basis for limiting Section 7 access rights to only those employees who are employed *exclusively* on the property owner’s property—and categorically denying access to all employees who also work somewhere else, even if they are regularly employed on the owner’s property.”<sup>309</sup> In her reasoning, she related this to the “balancing” between employee and property owner rights/interests that the Supreme Court has long applied to property access.<sup>310</sup>

Regarding the “employee” side, she pointed out that the Supreme Court has recognized that the workplace of employees “is the ‘one place where employees clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.’”<sup>311</sup> In addition, that this was “no less true” when employees

304. *See id.* at 15.

305. *See id.*

306. *See generally* David Weil, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR MANY AND WHAT CAN BE DONE TO IMPROVE IT* (Harvard Univ. Press 2014).

307. *See Bexar Cnty.*, 368 N.L.R.B No. 46, slip op. at 15 (McFerran, Member, dissenting).

308. *See id.* at 19.

309. *See id.* at 21 (emphasis added).

310. *See id.* at 19-20.

311. *See id.* at 22 (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978)). The Supreme Court’s quoted point about persuading fellow workers would apply directly to why contractor employees sought access in the *NYNY* case. *See supra* notes 225-37 and accompanying text (discussing the facts of the Board’s *NYNY* decision).

sought to communicate with customers and other “present at the workplace” because “[t]hat is precisely where employees and [customers] intersect.”<sup>312</sup> Regarding these contractor employee rights, Member McFerran also repeatedly emphasized that contractor employees are distinguishable from the nonemployee organizers whose “derivative” Section 7 rights were at issue in *Babcock & Wilcox* and in *Lechmere* because contractor employees are seeking to exercise their own Section 7 rights to communicate with employees (often including co-workers) and/or customers or members of the public entering or also on the property.<sup>313</sup> Member McFerran made clear that such “direct” Section 7 rights should be treated as stronger than and having more weight in the balance than the “derivative” union organizer rights the *Bexar County* majority treated as equivalent with contractor employee rights.<sup>314</sup>

Turning to the weight on the property owner’s side of the balance, Member McFerran found that the weight for property owners for access sought by contractor employees was “the same, regardless of whether contractor employees also work somewhere else,” which supported finding the “exclusivity” requirement to be arbitrary.<sup>315</sup> In addition, Member McFerran observed that any employees who work “regularly” at a location—whether contractor employees or the property owner’s own—have Section 7 rights the property owner should legally expect could be used.<sup>316</sup> By treating contractor employees differently from a property owner’s employees, and applying to the former the same rules that are applied to nonemployee organizers, the majority—Member McFerran charged—was treating “the owner’s mere objection to the employees’ presence” as being sufficient to outweigh the employees’ Section 7 rights and thereby “allow[ing] employees’ rights under the Act to be trumped by the owner’s bare property right to exclude unwanted persons.”<sup>317</sup> Member McFerran added, “[t]he majority offers no reasonable justification for this drastic outcome,” which further supported her conclusion that the majority’s test was arbitrary.<sup>318</sup>

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312. See *Bexar Cnty.*, 368 N.L.R.B No. 46, slip op. at 22 (emphasis in original).

313. See *id.* at 16, 20, 22.

314. See *id.* at 2.

315. See *id.* at 22.

316. See *id.* at 2, 14.

317. See *id.* at 23.

318. See *id.*

*C. Employees Engaging in Section 7-Protected Activity Should Have Access to Non-Working Areas of Property Where They Work, or Where their Employer Performs Work*

Employees should have a right of access to engage in Section 7-covered communications with co-workers or others, when and where the speaker and listener are on non-working time, where their employer operates, and where one or more co-workers perform work. Because the access is for Section 7-related communication, it will relate to the terms and conditions of the communicators' employment and/or a union seeking to positively affect such terms and conditions.<sup>319</sup>

The U.S. Supreme Court indicated this should be so within ten years of the NLRA's enactment when, in its 1945 *Republic Aviation* decision, it upheld the NLRB's rule that "it [is] not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property"<sup>320</sup> It seems worth noting that the U.S. Supreme Court said this on April 23, 1945 about employee rights in a military aircraft factory where the employer and workers were producing planes and other materials during World War II.<sup>321</sup> Any property owner who wants to restrict the Section 7-protected activities of its employees, or any employees who perform work for it, should perhaps be asked to compare the importance and magnitude of the property rights and interests it's defending against the rights and interests *Republic Aviation* could argue it was serving when it limited employee solicitation.<sup>322</sup>

Thirty-three years after *Republic Aviation*, in *Eastex, Inc. v. NLRB*,<sup>323</sup> the Supreme Court again considered the rights of off-duty employees "already rightfully on the employer's property"<sup>324</sup> and therefore the employer's "reliance on its property right is largely misplaced."<sup>325</sup> In *Eastex*, the Court found that it was really the employer's management interests that were at stake,<sup>326</sup> but it added that the "only cognizable property right in this respect is in preventing

319. See generally *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-67 (1978).

320. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802 (1945) (quoting *Peyton Packing Co. Inc.*, 49 N.L.R.B. 828, 843 (1944)).

321. See *id.* at 793-95 (providing the date of the decision and describing what *Republic Aviation* and its employees were doing at the time the employer barred solicitation).

322. See *Eastex, Inc.*, 437 U.S. at 573.

323. See *id.* at 556.

324. See *id.* at 573 (quoting *Hudgens v. NLRB*, 424 U.S. 507, 521-522, n.10 (1976)).

325. See *id.* at 572-73.

326. See *id.* at 573.

employees from bringing literature onto its property and distributing it there—not in choosing which distributions protected by Section 7 it wishes to suppress.<sup>327</sup> Ultimately the Court in *Eastex* decided that the property rights did not outweigh the off-duty employees Section 7 rights.<sup>328</sup> To date, the U.S. Supreme Court has never ruled to the contrary. Neither has the U.S. Court of Appeals for the D.C. Circuit, to which all NLRB decisions can be appealed.<sup>329</sup>

Given that background, employees—including off-duty and off-site employees—should at least retain the rights of access they now possess to engage in solicitation, distribution and other Section 7-protected activity on property in which their employer is a landowner.<sup>330</sup> Employees of subcontractors—who usually work on property in which their employer is not a landowner—should also have rights of access greater than those of nonemployee union organizers and representatives, even though the Board’s 2019 decision in *Bexar County* disagreed.<sup>331</sup> In the 1990s and 2000s the Board held that subcontractor employees who worked “regularly and exclusively” on the property of the landowner, had the same access rights as the landowner’s own employees.<sup>332</sup> In 2011, as discussed earlier, the Board replaced this approach with the test it established in *New York New York Hotel & Casino*.<sup>333</sup> For subcontractor employees, the Board should return to one of those two approaches and the federal courts should reject any challenges to the standard the Board chooses.

Then-Member McFerran rightly noted in her dissent in *Bexar County* that the Board majority’s reduction of the rights of access of subcontractor employees to only the extent of nonemployee organizers in effect stripped “a large segment of American workers” of any rights of access.<sup>334</sup> For

327. *See id.* This point has obvious relevance to access to property to engage in labor protest rather than union organizing, and possibly also to the non-discrimination rule for access to property.

328. *See id.* at 572-73, 575-76.

329. *See* 29 U.S.C.A. § 160(f) (West 2018) (stating that any person aggrieved by an order from the NLRB can file an appeal with the United States Court of Appeals for the District of Columbia).

330. *See, e.g.*, *ITT Indus., Inc. v. NLRB*, 413 F.3d 64, 76 (U.S. App. D.C. 2005); *S. Bakeries, LLC*, 368 N.L.R.B. No. 59, 1-2 (2019); *Tri-County Med. Ctr.*, 222 N.L.R.B. 1089, 1089-90.

331. *Bexar Cnty. Performing Arts Ctr. Found.*, 368 N.L.R.B. No. 46, slip op. at 6 (2019).

332. *Id.*; *see, e.g.*, *Downtown Hartford YMCA*, 349 N.L.R.B. 960, 972 (2007); *Gayfers Dep’t Store*, 324 N.L.R.B. 1246, 1250 n.2, 1251 (1997); *S. Serv.*, 300 N.L.R.B. 1154, 1155 (1990), *enforced*, 954 F.2d 700 (11th Cir. 1992). In these three decisions the Board referred to the subcontractor employees as working “regularly and exclusively” on the property of the landowner who sought to exclude them, but none of these decisions involved subcontractor employees who did not do so.

333. *N.Y. N.Y. Hotel & Casino*, 356 N.L.R.B. 907, 918-19 (2011).

334. *See Bexar Cnty.*, 368 N.L.R.B. No. 46, slip op. at 14-15.

example, according to the Department of Labor's Bureau of Labor Statistics, reliance on subcontractors and their employees is nearly universal for the millions of employees in the construction industry.<sup>335</sup> That more than ten million, or even twenty million, employees will also be affected is shown by the Bureau of Labor Statistics' report on "contingent employment," which found that over 20.5 million workers, or nearly 14% of the total U.S. workforce, were not directly employed by the enterprise for whom they were performing work.<sup>336</sup> For now the number of "subcontractor employees" seems likely to continue to grow.<sup>337</sup> Thus, how their federal labor law rights are treated is of vital importance to millions of employees and will almost certainly increase in importance in the near future.<sup>338</sup>

The D.C. Circuit in its "second" *ITT Industries* decision recognized the "inherent tension . . . between an employer's property rights and the Section 7 rights of its employees"<sup>339</sup> but the court further held that this tension "cannot be resolved merely by reference to the law of trespass."<sup>340</sup> It bears repeating that the law on trespass to property, like all property law, is usually governed by state law.<sup>341</sup> For subcontractor employees, as for all employees who have access to at least outdoor non-working areas, it is the employer on whose behalf they perform work who is seeking to exclude them from the property.<sup>342</sup> One important aspect of that fact, as the Board and the D.C. Circuit pointed out in *ITT Industries* and in *NYNY Hotel & Casino*, is that (as with off-site employees who seek access) the property owner could probably subject them to discipline for a valid business reason, because whether based in the subcontractor-owner contract or not, the subcontractor would likely comply with any lawful

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335. See *Measuring Productivity Growth in Construction*, U.S. BUREAU OF LAB. STATS (Jan. 2018) <https://www.bls.gov/opub/mlr/2018/article/measuring-productivity-growth-in-construction.htm>.

336. See *Contingent and Alternative Employment Arrangements Summary*, U.S. BUREAU OF LAB. STATS (June 7, 2018), <https://www.bls.gov/news.release/conemp.nr0.htm> (using percentages of workers with contingent jobs, independent contractors, on-call workers, temporary help agency workers, and workers provided by contract firms).

337. See generally Weil, *supra* note 306, at 192 (drawing on an example of a construction site to state the proposition that the number of subcontractor employees will likely continue to grow).

338. *Id.* at 22, 209.

339. *ITT Indus., Inc. v. NLRB*, 413 F.3d 64, 72 (U.S. App. D.C. 2005) (quoting *Hillhaven Highland House*, 336 N.L.R.B. 646, 649 (2001)).

340. *Id.*

341. See *N.Y. N.Y. Hotel & Casino*, 356 N.L.R.B. 907, 916, 921 (2011) (showing that all property law is usually governed by state law).

342. *Id.* at 918.

owner request to discipline the employee(s) or bar the employee(s) from that owner's property.<sup>343</sup>

In addition, as the U.S. Supreme Court said in *Eastex* (which then-Member McFerran relied on in her dissent in *Bexar County*) when access is sought for organizing employees, the workplace is the "one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees."<sup>344</sup> This likely remains true among current employees, who when they work outside their home probably prefer not to be bothered with "work issues" while at home, and subcontractor employees and even co-workers might be blocked from access to personal social media sites of other employees.<sup>345</sup>

The *Cedar Point Nursery* decision suggests another line of argument favoring property access for contractor employees.<sup>346</sup> The Court held that the Takings clause of the Fifth Amendment did not apply when the government made "intrusion" by inspectors or others a "condition" of a benefit for the property owner, including in return for a license, permit, or desisting from exercising a police power.<sup>347</sup> A property owner must benefit in some way from having employees other than its own perform work on its property, otherwise that property owner would not do so.<sup>348</sup> For example, in *Bexar County Performing Arts Foundation* itself, the non-profit Foundation itself understandably preferred to use professional musicians already employed by the San Antonio Symphony rather than expending the time, trouble and cost of hiring its own musicians to perform at the Tobin Center.<sup>349</sup> That case involved an especially obvious

343. *ITT Indus., Inc.*, 413 F.3d at 74-77 (discussing and accepting the Board's application of this factor); *NINY*, 356 NLRB at 917-19 (applying this factor); *N.Y.N.Y., LLC, v. NLRB*, 676 F.3d 193, 196, 196 n.2 (U.S. App. D.C. 2012) (accepting the Board's application of this factor).

344. *Bexar Cnty. Performing Arts Ctr. Found.*, 368 N.L.R.B. No. 46, slip op. at 22 (2019) (McFerran, Member, dissenting); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978) (quoting *Gale Prods.*, 142 N.L.R.B. 1246, 1249 (1963)).

345. See generally Shelycy V. Joseph, *Should You Let Your Coworkers Follow You on Social Media?*, FORBES (Feb. 19, 2020, 5:37 PM), <https://www.forbes.com/sites/shelcyvjoseph/2020/02/19/should-you-let-your-coworkers-follow-you-on-social-media/?sh=6c1b77481bf6> (discussing opinions on keeping social media profiles from coworkers); see also Joe Robinson, *The Science of Work Recovery: How to Leave Work Stress at Work*, JOE ROBINSON OPTIMAL PERFORMANCE STRATEGIES, <https://www.worktolive.info/blog/science-of-work-recovery-how-to-leave-work-stress-at-work> (last visited Nov. 24, 2021).

346. See generally *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

347. See *id.* at 2079.

348. See *Bexar Cnty.*, 368 N.L.R.B. No. 46, slip op. at 25.

349. *Id.*



and substantial benefit, but in every situation in which a property owner uses employees other than its own to perform work on its property, the property owner obtains a benefit.<sup>350</sup> A “condition” of that benefit could and should be some acceptance of the Section 7 rights of the employees who benefit the property owner with their work, including the right to be on that owner’s property to engage in solicitation and/or distribution to further their own rights and/or interests, as the casino employees were doing in *NYNY*<sup>351</sup> and the musicians were doing in *Bexar County*.<sup>352</sup>

In *Cedar Point Nursery*, the Court reasoned that the condition for a permit or other benefit for a property owner should “bear[] . . . an ‘essential nexus’ and ‘rough proportionality’ to the impact of the [owner’s] proposed use of the property.”<sup>353</sup> The work the contractor’s employees perform on the property (and sometimes, as in the *NYNY* case, the work of other contractor employees working on that property) establishes the “nexus” with the “use” of the property, a “use” largely defined by, and certainly at least significantly contributed to, by the contractor employees.<sup>354</sup> Also, the other factors the Board in *NYNY* included in its test for contractor employee access strengthen the connection with, and augment the “proportion” of, the contractor employees’ work and the property owner’s “use” of the property: the work is “integral” to the property owner’s use of the property and the employees work “regularly” on that property to further the property owner’s use of it.<sup>355</sup>

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350. *Id.* at 26.

351. *See* N.Y. N.Y. Hotel & Casino, 356 N.L.R.B. 907, 914-15 (2011) (discussing that D.C. Circuit in its *NYNY* decision observed that it had never distinguished, for access purposes, between employees engaging in organizing activity and employees seeking to communicate with consumers and members of the public).

352. *Bexar Cnty.*, 368 N.L.R.B. No. 46, slip op. at 4. As dissenting Member McFerran pointed out in that decision, the U.S. Supreme Court has held that employees have a right to appeal to the public for support. *See id.* at 26 (McFerran, Member, dissenting) (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978)).

353. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021) (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 386, 391 (1994)).

354. *See id.*; *NYNY*, 356 N.L.R.B. at 908, 910.

355. *See Bexar Cnty.*, 368 N.L.R.B. No. 46, slip op. at 1, 2, 3, 5, 16 (discussing the “regular” and “integral” work as part of the *NYNY* test). In the 2019 *Bexar County* decision, the Board criticized the 2011 *NYNY* and *Simon DeBartolo* decisions for dropping the factor that contractor employees worked “exclusively” on the property at issue. *Id.* at 2, 5. However, that fact that the contractor employees might work at one or more other properties in addition to the “target” property to which they seek access seems less relevant to the target property owner’s “use” of the contractor employees on that property, at least compared with whether the contractor employees “exclusively” work there. *See id.* at 3. So the Board’s decision in *Simon DeBartolo Group* to drop a “work exclusively” factor is sensible and consistent with the *Cedar Point Nursery*’s discussion of “conditions” a property owner should accept. *Id.* at 2, 5.

The National Labor Relations Board actually used “condition” reasoning for subcontractors employees, at least when they were represented by a union, in *CDK Contracting*.<sup>356</sup> The Board reasoned that because the respondent controlled access to the jobsite, by virtue of hiring subcontractors, the respondent “thereby ‘necessarily submitted their own property rights to whatever activity, lawful and protected by the Act,’ might be engaged in by union business agents in the performance of their duties vis-a-vis these subcontractors” when expressly by contract or by past practice have granted union business agents access to the site.<sup>357</sup> In *Wolgast Corp.*, the U.S. Court of Appeals for the Sixth Circuit accepted and applied this reasoning, and rejected the property owner’s assertion that *Lechmere* should be applied.<sup>358</sup> It’s just a slight extension of this reasoning to hold that any property owner who relies on subcontractor employees to perform work for it should accept not only contractually-created rights, but also *statutory* Section 7-protected rights of employees to communicate with other employees, and sometimes also consumers and the general public.<sup>359</sup>

The Court in the *Cedar Point Nursery* decision also said that a property owner’s “right to exclude” is a “fundamental element of the property right.”<sup>360</sup> But the adjective “fundamental” could be applied to either side of the property vs. employee rights side of the balance the Supreme Court established in 1956 in *Babcock & Wilcox*.<sup>361</sup> Persons advocating more weight for the latter could accurately point out that the source of the “employee rights” is federal law, including dozens of U.S. Supreme Court decisions, while the U.S. Supreme Court has consistently held that the source of “property rights” is state law.<sup>362</sup> With *Babcock & Wilcox* and *Lechmere*, the U.S. Supreme Court did establish a federal labor law basis for property rights, so the Constitution’s “Supremacy

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356. *CDK Contracting Co.*, 308 N.L.R.B. 1117, 1122 (1992).

357. *Id.*

358. *Wolgast Corp. v. NLRB*, 349 F.3d 250, 253, 255-57 (6th Cir. 2003).

359. See Ian Millhiser, *The Supreme Court Just Handed Down Disastrous News for Unions*, VOX (Jun. 23, 2021, 2:50 PM), <https://www.vox.com/2021/6/23/22547182/supreme-court-union-busting-cedar-point-hassid-john-roberts-takings-clause>. And while the following is broader reasoning applying the Cedar Point Nursery condition reasoning, it has some force, at least when applied to federally protected rights: Ian Millhiser pointed out in Vox, “Nor is it clear why, if the government can require restaurants to admit health inspectors as a condition of doing business, it can’t also require that restaurant to admit union organizers as a condition of employing workers.” *Id.*

360. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (quoting *Kaiser Aetna v. United States*, 444 U. S. 164, 179–180 (1979)).

361. See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1955).

362. See generally *Eastex, Inc. v. NLRB*, 437 U.S. 556, 558 (1978); see *Cedar Point Nursery v. Hassid et al.*, 141 S. Ct. 2063, 2076 (2021).

Clause”<sup>363</sup> does not require that federal Section 7 rights always trump state property rights.

Property rights in one’s residence are surely treasured and deserving of protection, and commercial property rights—defined by state law—of course also are protected by the U.S. Constitution’s Fifth and Fourteenth Amendments.<sup>364</sup> However, unless the “derivative” rights of a renter of property, like for example the excluding employer did in *Kroger*,<sup>365</sup> are intrinsically more deserving of respect than “regularly” working on it, it is difficult to comprehend why the former weigh more heavily in the 65-year old *Babcock & Wilcox* balancing test than the Congressionally-established Section 7 rights of that employer’s employees (or the employees of a subcontractor it retains). The NLRA Section 7 rights of all employees, recognized and upheld by the U.S. Supreme Court since the 1945 *Republic Aviation* decision, are deserving of considerable respect and protection, at least if these rights are given the proper weight in the balance with property rights.<sup>366</sup> As discussed above, using the “condition” language of the Supreme Court’s 2021 *Cedar Point Nursery* decision would be one means by which to apply an appropriate balance.<sup>367</sup> And, of course, as the Supreme Court itself said in *Republic Aviation*, employees of any kind can lose Section 7 protection if their exercise of Section 7 rights interferes with production and discipline at the workplace in question.<sup>368</sup>

This article discussed in Part I,<sup>369</sup> and will again in the following Part IV Sections A and B,<sup>370</sup> why the *Cedar Point Nursery* decision should not be understood or interpreted to create a Fifth Amendment Takings clause source for the property rights recognized in federal labor law.<sup>371</sup> If the Takings clause is applied to federal labor law-protected access to property, it should be applied in the way the Fifth Amendment’s drafters wrote it, meaning “compensation” to the property owner for the intrusion and not near-absolute exclusion as is now applied under *Lechmere* for

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363. See U.S. CONST., art VI (“[T]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”)

364. U.S. CONST. amends. V, XIV.

365. See *Kroger Ltd. P’ship I*, 368 N.L.R.B. No. 64, 2 (2019).

366. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 795-96 (1945).

367. See *supra* Part III.A.; see *Cedar Point Nursery v. Hassid et al.*, 141 S. Ct. 2063, 2079 (2021).

368. See *Republic Aviation Corp.*, 324 U.S. at 803 n.10.

369. See *supra* Part I.

370. See *infra* Part IV.A-B.

371. See *infra* Part IV.A.

nonemployee organizers or other union representatives.<sup>372</sup> The next Part of the article will expand on this point and discuss the complications that would likely be created if the Fifth Amendment Takings clause were applied to employee and union access.<sup>373</sup> Those complications make it undesirable as a policy matter, and likely even to most of the parties involved, to use the Fifth Amendment Takings clause to transform federal labor law.

#### IV. CEDAR POINT NURSERY: OPENING THE DOOR TO “PAY AS {UNION} GOES?”

##### A. Are NLRA “Property Rights” Based in the Fifth Amendment?

To date, no Supreme Court majority has ever held that the Constitution’s Fifth Amendment is the source of the “property rights” that are to be balanced against NLRA Section 7 rights of employees and the “derivative” Section 7 rights of nonemployees. Even in 2021 in *Cedar Point Nursery*, the Court majority said that in general the source of property rights is “state law.”<sup>374</sup> However, that raises the question why such “state law” property rights are not preempted by the federal NLRA, given the U.S. Constitution’s Supremacy Clause.<sup>375</sup> The Supreme Court in its 1945 decision in *Republic Aviation* simply declared that the property/Section 7 right existed, and said eleven years later in *Babcock & Wilcox* that the Section 7 rights were “granted” and the property rights “preserved” by the “National Government.”<sup>376</sup> And the Court’s 1992 *Lechmere* decision relied on *Babcock & Wilcox* as defining the standard to apply for the balance.<sup>377</sup>

The Supreme Court Justice who so far has been clearest about identifying the Fifth Amendment as the source of the “property right” to be considered in NLRA cases is the late Chief Justice William

372. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 540-41 (1992).

373. See *infra* Part IV.C.

374. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2076 (2021).

375. See generally THE BUREAU OF NAT’L AFFS., THE DEVELOPING LABOR LAW, THE BOARD, THE COURTS, AND THE NLRA, CHAPTER 28 FEDERAL PREEMPTION OF STATE REGULATION, BLOOMBERG LAW § 28.I.A. (2020) (discussing how Congress has power over labor law through the Commerce Clause but chooses to leave the sphere open for the states to regulate).

376. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 795-96 (1945) (declaring that a section 7 right existed); see also *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1955) (finding that property rights are preserved by the National Government and that Section 7 rights were granted).

377. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532-533 (1992) (applying the *Babcock & Wilcox* standard to the cases circumstances).

Rehnquist.<sup>378</sup> He did so when dissenting, while a Justice, in the 1978 *Eastex* decision.<sup>379</sup> The majority in that decision held that off-duty employees had a right to distribute in nonworking areas of their workplace a union newsletter, even though their employer had denied them permission to do so.<sup>380</sup> Justice Rehnquist maintained that because the employees had been denied permission by the employer/property owner to engage in distribution, they were trespassers when they did so anyway.<sup>381</sup> In his analysis he asserted that “[in] its earliest cases construing the National Labor Relations Act the Court has recognized the weight of an employer’s property rights, *rights which are explicitly protected from federal interference by the Fifth Amendment to the Constitution.*”<sup>382</sup> By contrast, the *Eastex* Court majority found that because the employees distributing newsletters were “already rightfully on the employer’s property” that therefore “in the context of this case it is the employer’s management interests rather than its property interests that primarily are implicated.”<sup>383</sup> And the late Justice Byron White in a concurrence also opined that the employer’s property rights were likely violated but, like the Supreme Court majorities in *Republic Aviation*, *Babcock & Wilcox*, and *Lechmere*, Justice White did not identify any source for the property right but instead just stated, “[o]wnership of property normally confers the right to control the use of that property.”<sup>384</sup>

In his *Cedar Point Nursery* concurrence, Justice Kavanaugh arguably joined Justice Rehnquist in basing NLRA “property rights” in the Fifth Amendment, but more obliquely.<sup>385</sup> As discussed earlier,<sup>386</sup> Justice Kavanaugh departed from the majority, which rejected *Babcock & Wilcox* as a basis for its ruling, and maintained that *Babcock & Wilcox’s*

378. See generally *Eastex, Inc. v. NLRB*, 437 U.S. 556, 580 (1978) (dissenting and finding that property rights are protected from the federal government’s interference by the 5th amendment of the Constitution and that the 5<sup>th</sup> amendment should be considered the source of property rights in NLRA cases).

379. *Id.*

380. *Id.* at 564. The employer’s main argument in its appeal to the Supreme Court was that distributing the newsletter was not covered by Section 7 because it encouraged employees to “support workers” on issues like minimum wage, which did not involve “self-organization” and were not relevant in the distributors’ workplace where they earned more than minimum wage. *Id.* at 563, 567 n. 17. The Supreme Court majority found these issues were covered by Section 7’s phrases “concerted activity” and “mutual aid or protection.” *Id.* at 563-65.

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

382. *Id.* (emphasis added).

383. *Id.* at 573 (quoting *Hudgens v. NLRB*, 424 U. S. 507, 521-522, n.10 (1976)).

384. See *id.* at 579 (White, J., concurring).

385. See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2080 (2021) (Kavanaugh, J., concurring).

386. See *supra* Section II.A.

holdings on “property rights” strongly supported the *Cedar Point Nursery* majority’s conclusion that the California regulation granting union organizers access to growers’ property without compensating the growers violated the Takings Clause of the Fifth Amendment.<sup>387</sup>

Among the few dozen briefs to the U.S. Supreme Court in *Cedar Points Nursery*, only the amicus brief of the Liberty Justice Center argued that NLRA property rights were based on the Fifth Amendment.<sup>388</sup> That group did so by citing the U.S. Supreme Court’s 1972 *Central Hardware v. NLRB* decision for the proposition that “it [the Supreme Court] has based its requirement that labor rights accommodate private property rights in the fundamental guarantees of our founding documents, since it would ‘constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments’ to subordinate basic rights to property in the name of labor peace.”<sup>389</sup>

Notwithstanding the Liberty Justice Center’s apparent assertion otherwise, *Central Hardware* does not really support the Fifth Amendment as the source of 21<sup>st</sup> century NLRA rights, because the “labor rights” in that case were not based on NLRA Section 7 but rather on the “state action” of the U.S. Supreme Court itself finding a “constitutional” basis for access to property in “public property devoted to public use” in *Amalgamated Food Employees v. Logan Valley Plaza*,<sup>390</sup> a decision that, as even the Liberty Justice Center argued in its *Cedar Point Nursery* brief,<sup>391</sup> was overruled in *Central Hardware*.<sup>392</sup> It was that now-restricted and maybe defunct constitutional right of access for labor protest, not NLRA rights, that the Supreme Court in *Central Hardware* found could “infringe” the Fifth Amendment rights of property owners.<sup>393</sup> Moreover, the Court in *Central Hardware* in the same quoted language also referred to “Fourteenth Amendment” rights that could be infringed by the constitutional right of access, which could mean the Court recognized that property rights were based on state law.<sup>394</sup> Therefore, *Central Hardware*

387. *See id.*

388. Brief of the Amicus Curiae Liberty Justice Center in Support of Petitioners, *supra* note 10 at \*2.

389. *See id.* at \*4 (quoting *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 547 (1972)).

390. *See Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 547 (1972) (referencing *Amalgamated Food Emp. Union Loc. 590 v. Logan Valley Plaza*, 88 S. Ct. 1601 (1968)).

391. *See* Brief of the Amicus Curiae Liberty Justice Center in Support of Petitioners, *supra* note 10, at \*5.

392. *Cent. Hardware Co.*, 407 U.S. at 547-48.

393. *Id.* at 547.

394. *Id.*

also did not settle whether “property rights” in NLRA cases are grounded in the Fifth Amendment Takings Clause.<sup>395</sup>

To find that NLRA access rights are grounded in the Fifth Amendment Takings Clause, a court would have to disregard not only the above-discussed Supreme Court NLRA decisions, but also past Takings decisions in which the Supreme Court stated explicitly that the Constitution is not the source of property rights or interests (such as the right to exclude).<sup>396</sup> A strong example is *Ruckelshaus v. Monsanto Co.*, in which the Court declared it must be “mindful of the basic axiom that ‘[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.’”<sup>397</sup> The *Cedar Point Nursery* majority was “mindful” in that way because, as discussed earlier, it took the time and trouble to observe that were it not for the California regulation on access to agricultural property, California law would allow growers to exclude union organizers as trespassers.<sup>398</sup>

### *B. The Fifth Amendment Takings Clause’s “Public Use” Requirement*

If the U.S. Supreme Court or any federal court were to flout *stare decisis* and decades of understanding of U.S. property law and rule that the “property rights” in NLRA cases are based on the Fifth Amendment Takings clause, that would make relevant the “public use” provisions of the Takings clause.<sup>399</sup> In the *Cedar Point Nursery* case, the brief supporting the petitioners by amicus Americans for Prosperity Foundation contended that the California regulation granting organizers access to property was an example of “the transfer of private property to another private party—not for public use—but for private use in a manner that

395. *See id.*

396. *See generally id.*; *see generally* *Kick v. Twp of Scott*, 139 S. Ct. 2162, 2166 (2019) (“But in the 1870s, as state courts began to recognize implied rights of action for damages under the state equivalents of the Takings Clause, they declined to grant injunctions because property owners had an adequate remedy at law. Congress enabled property owners to obtain compensation for takings by the Federal Government when it passed the Tucker Act in 1887, and this Court subsequently joined the state courts in holding that the compensation remedy is required by the Takings Clause itself.”).

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

398. *See* *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2433 (2015); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

399. *See Cedar Point Nursery*, 141 S. Ct. at 2063.

purportedly may serve a public purpose.”<sup>400</sup> This brief went on to imply that the Court should overrule precedents such as its 2015 decision in *Horne*<sup>401</sup> and 2005 decision in *Kelo*<sup>402</sup> and follow the separate opinions of Justice Clarence Thomas which called for barring, with or without compensation, any “taking” of private property for any purpose other than giving the public use of the property.<sup>403</sup>

Adopting Justice Thomas’ opinion would mean that employee or nonemployee access rights under the NLRA are not for a “public use” and would require overruling not only the precedents mentioned in the prior paragraph, and the NLRA access precedents to date (including the *Lechmere* opinion written by Justice Thomas), but U.S. Supreme Court precedents dating back to the 1940s.<sup>404</sup> In 1946 the Court held that with regard to federal law (like the NLRA), “[w]e think that it is the function of Congress to decide what type of taking is for a public use.”<sup>405</sup> In 1992 the Court further explained, “[w]e have held that the public use requirement of the Takings Clause is coterminous with the regulatory power, and that the Court will not strike down a condemnation on the basis that it lacks a public use so long as the taking ‘is rationally related to a conceivable public purpose.’”<sup>406</sup>

In sum, neither the Supreme Court nor any other federal court could hold that NLRA rights of access to property are not for a “public use” without upending the relationship between those courts and Congress, and settled expectations of a major portion of the United States population regarding that relationship.<sup>407</sup>

### C. The Future for “Compensated Takings” for Union Access?

As was just discussed, there should be no question that NLRA rights of access meet the “public use” requirement for the Takings clause.<sup>408</sup>

400. Brief for Americans for Prosperity Foundation as Amici Curiae Supporting Petitioners *supra* note 10, at 14-15.

401. See *Horne v. Dep’t. of Agric.*, 135 S. Ct. 2419, 2433 (2015).

402. See *Kelo v. City of New London*, 545 U.S. 469, 489-90, 507-11 (2005).

403. See Brief for Americans for Prosperity Foundation as Amici Curiae Supporting Petitioners *supra* note 10, at 17-19.

404. See generally *U.S. ex rel. Tenn. Valley Auth. v. Welch*, 327 U.S. 546, 551-52 (1946) (discussing that it is the function of Congress to decide what type of taking is for a public use, not the Supreme Court).

405. *Id.*

406. *Nat’l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422 (1992) (quoting *Hawaii Hous. Auth. v. Midkiff* 467 U.S. 229, 240-241 (1984)).

407. See generally *Echeverria*, *supra* note 80, at 767-68.

408. See *supra* Part IV.B.



Consequently, what would remain to be decided if such access were (wrongfully) deemed to be a Taking covered by the Fifth Amendment is how the amount of compensation for the Taking would be determined and how much the compensation would be.<sup>409</sup> That is so because, as the U.S. Supreme Court has repeatedly held regarding the Fifth Amendment, “[a]s its text makes plain, the Takings Clause ‘does not prohibit the taking of private property, but instead places a condition on the exercise of that power,’” with that condition being “*compensation* in the event of otherwise proper interference amounting to a taking.”<sup>410</sup> The issue of how to determine compensation might now in fact be under discussion in California, among any officials, politicians, union representatives and others who might want union organizers access to agricultural property to continue.

Property owners seeking to bring a Fifth Amendment takings claim based on “union” or labor-related trespassing, if such claims are ever recognized, would bring such a claim in either a federal district court or the U.S. Federal Court of Claims, which have concurrent jurisdiction.<sup>411</sup> One important principle is that the property owner does not determine the amount of compensation, which is instead based on “fair market” value.<sup>412</sup> With regard to “partial takings” like temporary trespasses, the most common method used to determine “just compensation” for property takings, at least when the property owner is prevented from using the property as they normally do, is the market rental value of the property for the period of the taking.<sup>413</sup> It’s far from clear that this would be appropriate for trespasses by nonemployees or employees to try to organize employees or protest the employer’s treatment of its employees. For temporary takings, courts usually do not admit evidence of lost income or profits during the period of a temporary taking, because the value of the land is the actual issue in the case and the profits from a business are usually considered too speculative for proper consideration

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409. See generally *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536-37 (2005).

410. See *id.* (quoting *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 314, 315 (1987)) (emphasis added).

411. See *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2166 (2019) (holding that Fifth Amendment takings claims can be heard in federal court); see generally John Martinez, GOVERNMENT TAKINGS, TEN CRITICAL STEPS IN TAKINGS LITIGATION, WESTLAW, Part I, § 2 (Oct. 2021). Any attempt by a property owner to bring into state court a takings claim based on federally-covered labor law “intrusions” could be readily removed to federal court by a defendant union, union agent or employee. See 28 U.S.C. § 1441 (federal removal statute).

412. See generally Mark S. Dennison, *Landowner’s Evidence of Market Value in Eminent Domain Proceeding*, 60 AM. JUR. TRIALS 447, III.A. §8 (1996, updated Oct. 2021).

413. See *id.* at § 8.

by the trier of fact.<sup>414</sup> However, a few courts in isolated decisions have permitted triers of fact to consider lost profits in calculating just compensation where such losses could be demonstrated with reasonable certainty, which would likely require expert testimony.<sup>415</sup> Again, though, this method has been used when the property owner is temporarily deprived, completely or substantially, of the ordinary use of their property.<sup>416</sup> As for borrowing the law of trespass damages in determining “just compensation” for a Fifth Amendment taking, that would depart from Fifth Amendment law, and would require determining what state’s law should be borrowed.<sup>417</sup> However, for any enterprise, whether for profit or non-profit, it’s unlikely any damages could be awarded for “emotional” harms.<sup>418</sup>

In sum, any party seeking “just compensation” under the Fifth Amendment for union or labor law related trespassing would be seeking the court to enter an uncharted area.<sup>419</sup> And any “lost revenue or profits” would have to be based on the diminution in value of the property, not any losses the property owner might seek to prove based on customers persuaded by the union’s message.<sup>420</sup> The same uncertain damages issues will be raised if property owners sue for any government or government-authorized intrusions that somehow fail *Cedar Point Nursery’s* “exceptions” but are also temporary and don’t interfere with the property owner’s using the property as it customarily does.<sup>421</sup>

This might not bother the U.S. Supreme Court’s members, but it should trouble any property owner seeking to sue over temporary trespasses that allegedly violate the principles established by *Cedar Point Nursery*. Given the uncertainty, such litigation will likely be expensive and require expert testimony.<sup>422</sup> Although such claims would have to be

414. *Id.*

415. *See id.*; *see, e.g.*, *W.H. Pugh Coal Co. v. State of Wis.*, 460 N.W.2d 787, 791 (Ct. App. 1990).

416. *See* *Dennison*, *supra* note 412, at § 26.

417. *See id.* at § 8.

418. *See* Stuart M. Speiser et. al., AM. L. OF TORTS, STRICT LIABILITY IN TORT AND RELATED REMEDIES; INTENTIONAL TORTS, WESTLAW, §23.37 (Mar. 2021).

419. *See* Jeffery L. Braun & James G. Greilsheimer, *The Supreme Court Further Expands the Definition of a Physical “Taking” of Property That Violates Fifth Amendment Protections*, KRAMER LEVIN (Jul. 30, 2021) <https://www.kramerlevin.com/en/perspectives-search/the-supreme-court-further-expands-the-definition-of-a-physical-taking-of-property-that-violates-fifth-amendment-protections.html>.

420. *See id.*

421. *See id.*

422. *See generally* *Dennison*, *supra* note 412 at §§ 12, 16-18, 20, 26-27, 33, 35-36, 60, 62 (citing numerous cases that utilized expert testimony).

against the federal government for allowing the taking, a property owner would be well-advised to settle with the non-party union on whose behalf the “trespass” for organizing or protest has occurred.<sup>423</sup> A settlement could resolve the property owner’s issues and concerns more quickly and at less cost than suing the U.S. government.<sup>424</sup> If access is important enough, a union might offer to “pay as it goes” for the trespasses it wants to commit, and some property owners may accept this offer to avoid the costs associated with litigation.<sup>425</sup> A union willing to pay an agreed-upon amount for access could seem to many property owners a sensible alternative to expensive and uncertain litigation.<sup>426</sup> Especially if property owners decline offers for union access and instead continue a Fifth Amendment takings suit, the union (or government) might seek to admit into evidence the proof that the union made an offer to pay for access, and the amount of that offer was.<sup>427</sup> Such evidence would probably be admissible because trial judges have considerable discretion in deciding what evidence to admit regarding compensation in a Takings case.<sup>428</sup> Thus, it would not be farfetched for judges to order the amount offered by a union as the amount that has to be paid.

Of course this is all mere speculation as to what could happen if the Fifth Amendment Takings clause is conclusively determined to be the source of property rights in federal labor law, given that “compensation” and not injunctive relief should be the usual remedy when a government

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423. See generally *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (“The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”).

424. See generally Alan E. Friedman, Note, *An Analysis of Settlement*, 22 STAN. L. REV. 67, 88 (1969) (stating that the costs associated with litigation can be expensive, thus parties “should settle their dispute[s] and avoid unnecessary litigation expenses” if they receive a sufficient settlement offer).

425. The property owner’s claim would be against the federal government agency or agencies that permitted the union intrusion and the government would have to pay “compensation” to the property owner. The federal Anti-Deficiency Act bars government agencies from spending funds that are not appropriated or otherwise authorized by federal statute. Thus, the union could not reimburse the government because reimbursement would violate the federal Anti-Deficiency Act. See generally Steven W. Feldman, *Fiscal Law Essentials: The Antideficiency Act*, in GOVERNMENT CONTRACT AWARDS: NEGOTIATION AND SEALED BIDDING at § 1.11, WESTLAW (database updated Oct. 2020).

426. See Friedman, *supra* note 424 at 88 (“Judicial resources are squandered if parties proceed to formal adjudication in cases where settlement would be more profitable for each.”).

427. See, e.g., *Nat’l Fuel Gas Supply Corp. v. Goodremote*, 13 A.D. 3d 1134, 1134 (N.Y. App. Div. 2004) (stating that the court admitted evidence of previous offers for an easement).

428. See, e.g., Daniel F. Sullivan, *Market Value of Single-Family Residence – Market Comparison Appraisal*, in 5 AM. JUR. 2D *Proof of Facts* § 411 at § 3, Westlaw (database updated Nov. 2021); Richard J. Kohlman, *Condemnation of Easements*, in 22 AM. JUR. 2D § 743 at § 43, Westlaw (database updated Oct. 2021).

permits an intrusion.<sup>429</sup> In the future, what really *should* happen is that federal courts and agencies recognize that, notwithstanding *Cedar Point Nursery* and Justice Kavanaugh’s concurrence therein, Fifth Amendment Takings cases under the U.S. Constitution simply do not make sense for the kinds of trespasses that unions, their agents and employees historically committed and are likely to commit in the future.<sup>430</sup> Unless federal courts at any level want to open the door to extensive litigation that will take many years—probably more than a decade—to resolve they should follow the *Cedar Point Nursery* majority and hold that the Takings clause of the Fifth Amendment does not apply to property access that involves established federal labor law.<sup>431</sup>

### CONCLUSION

In its 2021 *Cedar Point Nursery* decision, the “Roberts Court” continued its re-write of Fifth Amendment’s Takings law.<sup>432</sup> This article has maintained that, as the Supreme Court majority avoided doing in *Cedar Point Nursery*, the Court and other federal courts should not also rewrite federal labor law by holding that property owner rights that, under that law, are balanced against NLRA Section 7 rights of employees and union agents, are grounded in and covered by the Takings clause.<sup>433</sup> That would disrupt more than 80 years of Supreme Court precedent that has been applied and relied on, by millions of employees and their employers.<sup>434</sup> The uncertainty created would be harmful and wholly unnecessary.

The article also discusses current federal labor law on access to property and maintains that federal labor law should be interpreted such that all employees covered by it should have some access to the “property” where they or their employer performs work.<sup>435</sup> Finally, this article

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429. See *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2176-78 (2019).

430. See *supra* Part IV.

431. See *supra* Part IV.A.

432. See *Knick*, 139 S. Ct. at 2167-68 (in 2019 the Supreme Court overruled its decision in *Williamson Cty. Reg’l Plan. Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) that held a property owner claiming a property Taking by a local government could not bring that claim in federal court until after a state court had denied that Takings claim); see also *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2433 (2015) (Thomas, J., concurring) (Breyer, J., dissenting) (in Justice Thomas’ concurrence and Justice Breyer’s dissent, both Justices state that the legal rules for determining compensation and for defining regulatory takings that do not require compensation should be changed).

433. See *supra* Part II-IV.

434. See *supra* Part IV.B.

435. See *supra* Part II.

analyzes why the Fifth Amendment Takings clause should not be applied to federal labor law but explains why, if it is, the text of that Clause should be complied with and unions and their “nonemployee” representatives should only owe “just compensation” for access to property and not be absolutely excluded from it as they are now.<sup>436</sup>

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436. *See supra* Part III.