Golden Gate University Law Review

Volume 7 | Issue 3 Article 3

January 1977

ALRB v. Superior Court: Access to the Fields - Sowing the Seeds of Farm-Labor Peace

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ALRB v. SUPERIOR COURT: ACCESS TO THE FIELDS—SOWING THE SEEDS OF FARM-LABOR PEACE

I. INTRODUCTION

Turmoil has existed in California's agricultural fields for many years. Agricultural labor has been plagued with organizational and legal problems[1] stemming from the refusal of growers to grant union organizers access to the fields.[2] Clashes between

1. For a general review of some of the problems facing farmworkers see, e.g., SEN. COMM. ON LABOR AND PUBLIC WELFARE, THE MIGRATORY FARM LABOR PROBLEM IN THE UNITED STATES, S. REP. No. 83, 91st Cong., 1st Sess. 1, 49 (1969) [hereinafter cited as 1969 SENATE REPORT]; *Hearings on Migrant Labor Before the Subcomm. of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 2d Sess. 192 (1969) [hereinafter cited as *1969 Hearings*]. For additional discussion concerning legal and organizing problems see duFresne & McDonnell, *The Migrant Labor Camps: Enclaves of Isolation In Our Midst*, 40 FORDHAM L. REV. 279 (1971-72); Gould, *The Question of Union Activity on Company Property*, 18 VAND. L. REV. 73 (1964); *Legal Problems of Agricultural Labor*, 2 DAVIS L. REV. 1 (1970) [hereinafter cited as *Legal Problems*]. For a general description of the factors discouraging organization of the farm labor force see, e.g., Daniel, *Problems of Union Organization for Migratory Worders*, 12 LAB. L.J. 636 (1961); Comment, *Agricultural Labor Relations—The Other Farm Problem*, 14 STAN. L. REV. 120 (1961).

For a history of organizing attempts in California agriculture see HOUSE COMM. ON EDUCATION AND LABOR, COVERAGE OF AGRICULTURAL EMPLOYEES UNDER THE NATIONAL LABOR RELATIONS ACT, H.R. REP. No. 1274, 90th Cong., 2d Sess. 23-25 (1968); Cohen, *La Huelga! Delano and After*, 91 MONTHLY LAB. REV., June 6, 1978, at 13; Doziara, *Collective Bargaining on the Farm*, 91 MONTHLY LAB. REV., June 6, 1978, at 3, 7. The following give an overview of the attempts of the farmworkers to organize: P. FUSCO, LA CAUSA: THE CALIFORNIA GRAPE STRIKE (1970) (a photographic essay); P. MATTHIESSEN, SAL SI PUEDES: CESAR CHAVEZ AND THE NEW AMERICAN REVOLUTION (1969); Berman & Hightower, *Battle for Lettuce: Chavez and the Teamsters*, THE NATION, Nov. 2, 1970, at 427; Dunne, *To Die Standing: Cesar Chavez and the Chicanos*, THE ATLANTIC, June 1971, at 39; Meister, *"La Huelga" Becomes "La Causa,"* N.Y. Times, Nov. 17, 1968, § 6 (Magazine), at 52.

2. *See, e.g.*, J. DUNNE, DELANO, THE STORY OF THE CALIFORNIA GRAPE STRIKE (1967) (description of the strong-arm tactics used by growers and local police when confronted with attempts by farmworkers to gain access and union recognition).

Many commentators have stressed the necessity of access onto the growers' premises for farm union organizing and have discussed the legality of access. *See, e.g.*, duFresne and McDonnell, *supra* note 1; Gould, *Union Organizational Rights and the Concept of "Quasi-Public" Property*, 49 MINN. L. REV. 505 (1965); Sherman & Levy, *Free Access to Labor Camps*, 57 A.B.A.J. 434 (1971); Spriggs, *Access of Visitors to Labor Camps on Privately Owned Property*, 21 U. FLA. L. REV. 295, 296-98 (1969); *Privileged Entry Onto Farm Property for Union Organizers*, 19 HASTINGS L.J. 413 (1968) [hereinafter cited as

workers and growers have resulted in numerous deaths and injuries, thousands of jailings and bitter strikes.[3]

Although industrial union organizers are guaranteed the right to organize under the provisions of the National Labor Relations Act (NLRA),[4] agricultural workers were expressly excluded from the coverage of the Act.[5] In the absence of legislative regulations, union organizers relied on federal and state court decisions to allow the access which is essential to effective organizing.[6] In response to the unique problems of farmworkers and the absence of any comprehensive judicial guidelines, the California Legislature enacted the California Agricultural Labor Relations Act (ALRA)[7] "to encourage and protect the right of agricultural workers to full freedom of association, self-organization, and designation of representatives of their own choosing."[8] To implement the policies of the Act, the Agricultural Labor Relations Board (Board) announced a rule allowing union organizers limited access to growers' premises.[9] The validity of the Access Rule was

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Privileged Entry]; Note, *Union Right to Reply to Employer On-the-Job Speeches: The NLRB Takes a New Approach*, 61 YALE L.J. 1066, 1074-76 (1952).

Access to the place of employment has long been recognized by the courts as being crucial to the industrial organizational effort. Employees must be able to hear the advantages and disadvantages of union organization. Republican Aviation Corp. v. NLRB, 324 U.S. 793 (1945); May Dep't Stores Co. v. NLRB, 316 F.2d 797 (6th Cir. 1963); Bonwit Teller, Inc. v. NLRB, 197 F.2d 640 (2d Cir. 1952); NLRB v. Clark Bros., 163 F.2d 373 (2d Cir. 1947); NLRB v. Federbush Co., 121 F.2d 954 (2d Cir. 1941).

3. For documentation of the violence surrounding grower-farmworker relations see, e.g., S. REP. No. 1006, 90th Cong., 2d Sess. 41 (1968).

4. 29 U.S.C. §§ 151-168 (1970). The NLRA established for the industrial worker "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." *Id.* § 157.

5. NLRA § 2(3), *id.* § 152(3). Agricultural employees were specifically excluded from coverage of the NLRA because the labor-oriented members of Congress needed the votes of legislators from agricultural districts to pass the Act. The farm block legislators strongly opposed coverage of farmworkers. *See* Morris, *Agricultural Labor and National Labor Legislation*, 54 CALIF. L. REV. 1939, 1951-56 (1966).

6. *See* cases cited in notes 12-26 *infra* and accompanying text.

7. CAL. LAB. CODE §§ 1140-1166 (West Supp. 1977).

8. *Id.* § 1140.2.

9. CAL. ADM. CODE, tit. 8, § 20900 (1975) (amended 1976). The 1975 Access Rule provided:

> 5. [T]he Board will consider the rights of employees under Labor Code Sec. 1152 to include the right of access by union organizers to the premises of an agricultural employer for the purpose of organizing, subject to the following limitations:
> a. Organizers may enter the property of an employer for a total period of 60 minutes before the start of work and 60 minutes

affirmed by the California Supreme Court in *Agricultural Labor Relations Board v. Superior Court* [hereinafter *ALRB v. Superior Court*].[10]

This Comment will review the *ALRB v. Superior Court* decision, placing it in its historical and social milieu. To explain the need for a legislative solution to the farmworkers' problems, an examination of three judicially created rationales for access will be presented.[11] Through an analysis of the issues raised in *ALRB v. Superior Court,* the remainder of the Comment will demonstrate that the California Supreme Court has significantly contributed to alleviating some of the legal problems which face agricultural union activity. The ruling will bring the possibility

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after the completion of work to meet and talk with employees in areas in which employees congregate before and after working.

b. In addition, organizers may enter the employer's property for a total period of one hour during the working day for the purpose of meeting and talking with employees during their lunch period, at such location or locations as the employees eat their lunch. If there is an established lunch break, the one-hour period shall include such lunch break. If there is no established lunch break, the one-hour period may be at any time during the working day.

c. Access shall be limited to two organizers for each work crew on the property, provided that if there are more than 30 workers in a crew, there may be one additional organizer for every 15 additional workers.

d. Upon request, organizers shall identify themselves by name and labor organization to the employer or his agent. Organizers shall also wear a badge or other designation of affiliation.

e. The right of access shall not include conduct disruptive of the employer's property or agricultural operations, including injury to crops or machinery. Speech by itself shall not be considered disruptive conduct. Disruptive conduct by particular organizers shall not be grounds for expelling organizers not engaged in such conduct, nor for preventing future access.

f. Pending further regulation by the Board, this regulation shall not apply after the results of an election held pursuant to this Act have been certified.

10. 16 Cal. 3d 392, 546 P.2d 687, 128 Cal. Rptr. 183, *appeal dismissed for want of a substantial federal question,* 429 U.S. 802 (1976).

11. For a general discussion of the various rationales for access see Catz & Scher, *Recent Developments in the Law of Access to Migrant Labor Camps,* 8 CLEARINGHOUSE REV. 848, 848-50 (1975); Schwartz, *A Landholder's Right To Possession of Property Versus A Citizen's Right of Free Speech: Tort Law As a Resource for Conflict Resolution,* 45 CIN. L. REV. 1 (1976); Comment, *The Public Forum from* Marsh *to* Lloyd, 24 AM. U.L. REV. 159 (1974) [hereinafter cited as Comment, *The Public Forum];* Note, *First Amendment and the Problem of Access to Migrant Labor Camps After* Lloyd Corporation v. Tanner, 61 CORNELL L. REV. 560 (1976); *Privileged Entry, supra* note 2.

of change closer to reality, as it permits the implementation of the rights created by the ALRA. The realization of these rights will help to eliminate the tensions in the agricultural fields of California.

II. COURT-CREATED ACCESS: AN INADEQUATE SOLUTION

Courts have utilized various rationales to sanction union organizers' access to growers' property, none of which presents a precise or comprehensive framework in which to meet the organizational needs of farmworkers. Under one theory adopted in case law, farmworkers are tenants who have the rights of tenancy, including the right to invite guests of their choosing into their homes without interference of their landlord-grower.[12] This landlord-tenant model presupposes that farmworkers live on the growers' premises and pay rent. The landlord-tenant model also encompasses the notion of a lease contract subject to various agreements between the landlord and tenant. The most obvious deficiency of this theory is that farmworkers do not always live on the property of growers nor do they pay rent.[13] Furthermore, tenants may agree to give up certain rights, including the right to invite guests onto their leased premises.[14]

A second judicial rationale is that only certain interests in land are protected by the fifth and fourteenth amendments. In the absence of constitutionally protected interests, the tort doctrine of necessity may justify trespass onto private property. In

12. *See, e.g.*, Franceschina v. Morgan, 346 F. Supp. 833 (S.D. Ind. 1972), *and* Folgueras v. Hassle, 331 F. Supp. 615 (W.D. Mich. 1971). The *Franceschina* court concluded that the labor the migrants performed for the camp owners was consideration for the "lease" of the camp housing. 346 F. Supp. at 838. In *Folgueras*, the court reasoned that "[t]he [migrants] are citizens of the United States and tenants. As such they are entitled to the kinds of communications, associations, and friendships guaranteed to all citizens, and secured by the Constitution. The owner's property rights do not divest the migrants of these rights." 331 F. Supp. at 625.

13. Payment of rent is often the determinative factor in finding that a leasehold exists. *See, e.g.*, Guiel v. Barnes, 100 Conn. 737, 125 A. 91 (1924). When rent-free housing is involved, the courts have often characterized the relationship as one of master and servant, rather than as one of landlord and tenant. *See, e.g.*, Angel v. Black Bank Consol. Coal Co., 96 W. Va. 47, 122 S.E. 274 (1924). In Folgueras v. Hassle, 331 F. Supp. 615 (W.D. Mich. 1971), the court found the essential elements to be that "[t]he migrant pays the grower for the housing provided." *Id.* at 624.

14. The right of lessors to restrict the use to which their premises are put is well recognized in law. *See* Alabama Fuel & Iron Co. v. Courson, 212 Ala. 573, 103 So. 667 (1925); Danecke v. Henry F. Miller & Son, 142 Iowa 486, 119 N.W. 380 (1909); Lamont Bldg. Co. v. Court, 147 Ohio 183, 70 N.E.2d 447 (1946).

State v. Shack,[15] the New Jersey Supreme Court reasoned that the ownership of real property does not include the right to bar governmental services available to migrant workers.[16] Since landowners may not use their ownership right in land to harm others,[17] the court held that they could not use the trespass laws to bar access to government agents who were attempting to provide services to farmworkers.[18] The court's analysis rested on the established tort doctrine that necessity may justify trespass.[19] The court found that the condition of farmworkers made it necessary for others to enter private land to aid them.[20] The *Shack* court implied that a case-by-case examination must be undertaken in order to determine whether the farmworkers' fundamental rights have been endangered before it may be found that necessity justifies trespass. Moreover, the defense of necessity is usually only available in cases of threatened physical harm or damage to property.[21]

15. 58 N.J. 297, 277 A.2d 369 (1971). In *Shack*, a field worker and an attorney for nonprofit corporations formed to assist migratory farmworkers were convicted of violating a trespass statute. The Supreme Court of New Jersey held that the conduct of the defendants in seeking to see the farmworkers in the privacy of their living quarters and without the farmer-employer's supervision was beyond the reach of the trespass statute. 277 A.2d at 375.

16. *Id.* at 307, 277 A.2d at 374-75. The court stated:

> [T]he employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens. These rights are too fundamental to be denied on the basis of an interest in real property and too fragile to be left to the unequal bargaining strength of the parties.

Id. The court also stated that the grower could not deny access to those whose exclusion would "deprive the migrant worker of practical access to the things he needs." *Id.* at 307, 277 A.2d at 374.

17. *Id.* at 303-05, 277 A.2d at 373. The court noted that "[a] man's right in his real property . . . is not absolute. It was a maxim of the common law that one should so use his property as not to injure the right of others." *Id.* The court concluded that it would be "unthinkable that the farmer-employer can assert a right to isolate the migrant worker in any respect significant for the worker's well-being." *Id.* at 307, 277 A.2d at 374.

18. 277 A.2d at 371.

19. 277 A.2d at 373.

20. 277 A.2d at 372. The court stated:

> Here we are concerned with a highly disadvantaged segment of our society . . . . The migrant farmworkers are a community within but apart from the local scene. They are rootless and isolated. Although the need for their labors is evident, they are unorganized and without economic or political power. It is their plight alone that summoned government to their aid.

Id.

21. *See* Rossi v. DelDuca, 344 Mass. 66, 181 N.E.2d 591 (1962); Ploof v. Putnam, 81 Vt. 471, 71 A. 188 (1908); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 24 (4th ed. 1971).

The "functional equivalency test" or the "company town doctrine" is the third significant access theory. This doctrine advances the rationale of *Marsh v. Alabama,*[22] in which the defendant, a Jehovah's Witness, attempted to distribute religious literature without a permit on the streets of Chicasaw, a town owned by the Gulf Ship Building Company. She refused to leave at the request of the deputy sheriff, who was a company official, and was arrested for trespass on private property. The United States Supreme Court reversed her subsequent conviction and held that a private company, if functionally equivalent to a municipality, is subject to the first and fourteenth amendment guarantees of freedom of speech, press and assembly.[23] If the private organization is functionally analogous to a municipality, a sufficient nexus with the state is established to consider the "private" action to be "state" action. In *Marsh,* the court held that "when a corporation is privately performing a public function it is held to the constitutional standard regarding civil rights and equal protection of the laws that apply to the state itself."[24]

The "company town doctrine" seems to provide a viable access theory for situations in which farmworkers live on their employer's property. While not all farms have housing facilities, the farms that do could be said to resemble towns. It is arguable that when a farmer refuses to allow labor organizers onto his or her property to visit the resident workers, the action is analogous to that of the company in *Marsh.* Unfortunately, in order to apply the doctrine, *Marsh* requires that an employer provide extensive "municipal" services,[25] which are rarely provided for farmworkers. Growers may stifle farmworkers' first amendment rights simply by failing to provide municipal services. An additional impe-

22. 326 U.S. 501 (1946). For a general discussion of *Marsh* see Comment, *The Public Forum, supra* note 11.

23. 326 U.S. at 508-09. The freedom embodied in the first amendment protects the individual from governmental interference. Unless a landowner's actions can be regarded as some form of state action, an access argument based on the first amendment must fail.

24. *Id.* at 509.

25. *Id.* at 502-03. In stating the facts of the case in *Marsh,* Justice Black noted:

> The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated. A deputy of the Mobile County Sheriff, paid by the Company, serves as the town's policeman. Merchants and service establishments have rented the stores . . . and the United States uses one of the places as a post office . . . ."

Id.

diment to the usefulness of the "company town doctrine" is language in *Marsh* which suggests that openness to the public is one of the main elements necessary to establish that the town is analogous to a municipality.[26] Most farms have "no trespassing" signs posted and are restricted to the use of the landowners and their employees.[27] Consequently, the burden of showing state action in order to afford union organizers a right of access is difficult to sustain.[28]

III. THE ALRA ACCESS RULE: A NEW SOLUTION

During the 1960s and 70s, concern developed about agricultural labor on the state[29] and federal[30] levels. In California, legisla-

26. *Id.* at 503. The Court noted:

> Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of thirty feet. There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there. In short, the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.

Id.

27. *1969 Hearings, supra* note 1, at 192.

28. The following cases demonstrate the high standard of proof necessary to show state action under the *Marsh* test: Asociacion de Trabajadores Agricolas de Puerto Rico v. Green Giant Co., 518 F.2d 130 (3rd Cir. 1975); People v. Rewald, 65 Misc. 2d 455, 318 N.Y.S. 2d 40 (1971). In *Rewald,* the court found state action after noting that the camp included public recreational and commercial facilities as well as improved roads and a sewage system. *Id.* at 455, 318 N.Y.S. 2d at 43. Although the camp in *Asociacion* had many attributes of a municipality, it was not generally open to the public and thus *Marsh* was found inapplicable. 518 F.2d at 137-38.

29. For state laws governing agricultural laborers see, e.g., ARIZ. REV. STAT. §§ 23-1381 to 23-1395 (Supp. 1977); HAW. REV. STAT. § 377-1(3) (1976); KAN. STAT. ANN. §§ 44-818 to 44-830 (1973); OR. REV. STAT. §§ 662.805 to 662.825 (1971); WIS. STAT. § 111.02(3) (1974). *See also* Cohen & Rose, *State Regulation of Agricultural Labor Relations—The Arizona Farm Labor Law—An Interpretive and Comparative Analysis,* 1973 LAW & SOC. ORDER 313; Rose, *State Regulation of Agricultural Relations—The Arizona Farm Labor Law—A Constitutional Analysis,* 1973 LAW & SOC. ORDER 373.

30. The most recent federal proposals include two bills which would have amended the NLRA by deleting the agricultural labor exclusion in section 2(3) of the Act. H.R. 4408, 94th Cong., 1st Sess. (1975); H.R. 4179, 94th Cong., 1st Sess. (1975). H.R. 4789, 94th Cong., 1st Sess. (1975), would also have amended the Act to omit the agriculture exclusion and would have added a provision allowing agricultural employees to make an agreement covering agricultural laborers with a bona fide labor organization under certain conditions. H.R. 5521, 94th Cong., 1st Sess. (1975), and H.R. 3256, 94th Cong., 1st Sess. (1975), proposed on Agricultural Labor Relations Act which would establish an agricultural labor relations board to administer the act regulating agricultural industry and

tive efforts to regulate agricultural labor relations[31] culminated in the enactment of the comprehensive Agricultural Labor Relations Act.[32] The Preamble of the ALRA indicates that its purpose is "to bring a sense of certainty and fair play to a presently unstable and potentially volatile condition in the state."[33] The ALRA, modeled after the NLRA,[34] provides that employees shall have the right of self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.[35] The ALRA defines the rights of agricultural employers, workers and labor organizations,[36] requires that bargaining representatives of agricultural employees be selected through secret ballot elections, provides for the conduct of such elections,[37] and defines the eligibility of agricultural workers to vote in them.[38] The legislation specifies those activities of employers and labor organizations that constitute unfair labor practices.[39] It permits secondary boycotts under certain conditions.[40] The ALRA established an Agricultural Labor Relations Board (Board)[41] with power to certify organizations as

labor. For a discussion of legislation regarding agricultural employees *see, e.g.*, Moberly, *Collective Bargaining Laws and Agricultural Employees: Some Necessary Changes*, 1976 U. ILL. L.F. 469.

31. *See, e.g.*, Cal. S.B. 205, 239, 308, and Cal. A.B. 159, 393 (1975); Cal. S.B. 1723, 1724, 1887, and Cal. A.B. 3370, 3816 (1974); Cal. S.B. 493, and Cal. A.B. 9, 1214 (1972).

32. CAL. LAB. CODE § 1140-1166 (West Supp. 1977). For a thorough discussion of the circumstances surrounding the enactment of the ALRA and the content of the ALRA see Levy, *The Agricultural Labor Relations Act of 1975 — La Esperanza De California Para El Futuro*, 15 SANTA CLARA LAW. 783 (1975). This new legislation is the first state law which purports to deal with agricultural problems in a comprehensive manner. For a comparison see, e.g., ARIZ. REV. STAT. §§ 23-1381 to 23-1395 (Supp. 1977); IDAHO CODE §§ 22-4101 to 22-4113 (1972); KAN. STAT. ANN. §§ 44-818 to 44-830 (1973); OR. REV. STAT. §§ 662.805 to 662.825 (1971).

33. 1975 Cal. Stats. 4013 (Third Extra Sess.) For the text of the Preamble see note 74 *infra*.

34. The provisions of section 1152 are identical to the language of section 7 of the National Labor Relations Act (NLRA). *See* 29 U.S.C. § 157 (1970). The provisions of section 1153 of the ALRA are closely modeled after the provisions of section 8 of the NLRA. *See id.* § 158.

35. CAL. LAB. CODE § 1140.2 (West Supp. 1977).

36. *Id.* § 1152.

37. *Id.* §§ 1156.3-1156.7.

38. *Id.* § 1157.

39. *Id.* §§ 1153-1155.7.

40. *Id.* § 1154.5.

41. *Id.* § 1141(a) provides that "[t]here is hereby created in state government the Agricultural Labor Relations Board, which shall consist of five members."

bargaining agents, conduct elections, prevent unfair labor practices, and investigate and hold hearings.[42]

After the ALRA became effective on August 28, 1975, the Board held a public hearing to determine the extent to which union organizers would be permitted access to the agricultural fields for organizational purposes. Following extensive testimony at the hearing,[43] the Board unanimously voted to adopt an Emergency Access Regulation[44] pursuant to its power "to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of the act."[45] The Access Rule became effective on August 29, 1975, and permitted a limited number of union organizers a restricted right of access to growers' premises.[46] Under the terms of the regulation, the right of access is specifically limited in purpose, in time and place, and in the number of organizers permitted to participate.[47] Entry is permitted onto an employer's property for one hour before and one hour after the working day and during the lunch period.[48] The regulation forbids conduct, other than speech, which is disruptive of the employer's agricultural operations or which injures crops or machinery.[49]

As might have been predicted from their previous opposition to unionization,[50] the growers promptly began to challenge the

42. *Id.* §§ 1149-1151.6.

43. Much of the content of the hearing may be found in Petition for Writ of Prohibition and/or Writ of Mandate, Volume 2, Exhibits, Agricultural Labor Relations Board v. Superior Court, 16 Cal. 3d 392, 546 P.2d 687, 128 Cal. Rptr. 183, *appeal dismissed,* 429 U.S. 802 (1976).

44. On August 28, 1975, the ALRB filed with the Secretary of State an Emergency Order Adopting Emergency Regulations of the Agricultural Labor Relations Board. The regulations were adopted as CAL. ADM. CODE, tit. 8, §§ 20900-20910 (1975) (amended 1976). On December 2, 1975, the Board certified that the Emergency Access Rule was to remain in effect. *ALRB v. Superior Court,* 16 Cal. 3d at 400 n.3, 546 P.2d at 692 n.3, 128 Cal. Rptr. at 188 n.3. For some of the key provisions of the Access Rule see note 9 *supra.*

45. CAL. LAB. CODE § 1144 (West Supp. 1977).

46. CAL. ADM. CODE, tit. 8, § 20900 (1975) (amended 1976).

47. *Id.*

48. *Id.* § 20900 (5)(a)-(b).

49. *Id.* § 20900 (5)(e).

50. *See, e.g., Hearings on S. 1085, 1778, 2141, 2498 Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare,* 86th Cong., 1st Sess. 798-801 (1960); CAL. SENATE FACT FINDING COMM. ON LABOR AND WELFARE, CALIFORNIA'S FARM LABOR PROBLEMS Part I, at 202 (1961) [hereinafter cited as CAL. FARM LAB. PROBLEMS]. *See* J. LONDON & H. ANDERSON, SO YE SHALL REAP: THE STORY OF CESAR CHAVEZ & THE FARMWORKERS' MOVEMENT (1970), for a detailed account of the fierce resistance of the growers to unionization; *see also* the materials cited in notes 1-2 *supra.* For a report of

Access Rule in the courts after demands were made by union organizers for access in accordance with the Rule's guidelines.[51] On September 10, 1975, the Superior Court for the County of Fresno issued a peremptory writ of mandate ordering the Board to vacate the Access Rule.[52] On the same day, the Superior Court for the County of Tulare issued a temporary restraining order against the regulation.[53] On September 15, 1975, the Board sought an immediate stay of the superior court orders[54] and a determination of the regulation's validity in the California Supreme Court. The requested stay was issued on September 18, 1975, reinstating the Access Rule to full force and effect, pending final determination of the proceedings before that court.[55]

IV. THE *ALRB v. SUPERIOR COURT* DECISION

On March 4, 1976, in *ALRB v. Superior Court,* the California Supreme Court held that the Access Rule was valid.[56] The court issued a peremptory writ of mandate directing the lower courts to set aside their previous writs ordering the Board to vacate the Access Rule.[57] The decision revolved around four issues: (1) the constitutional validity of the Access Rule; (2) whether the Access Rule comports with federal law and the ALRA; (3) the Board's statutory authority to adopt the Access Rule; and (4) whether the Access Rule takes precedence over trespass law. In a four-to-three

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the threats of arrest made by growers in California's controversy over access to the camps see N.Y. Times, Sept. 4, 1975, at 36, col. 2.

51. On September 2, 1975, Harry Kubo and the Nisei Farmers League sought a temporary restraining order in the Fresno Superior Court against the ALRB to enjoin enforcement of the Access Rule. Kubo v. Governor Brown, No. 172286 (Fresno Super. Ct., filed Sept. 2, 1975). The order was denied.

Jasmine Farms, a corporation, and Pandol & Sons, a partnership, filed an action in the federal district court. Pandol & Sons v. Brown, No. F-75-165 Civ. (E.D. Cal. Sept. 3, 1975). On September 3, 1975, Judge Crocker issued a temporary restraining order against the Board to prevent it from enforcing its rule. The court found that "these Emergency Regulations violate the Fifth and Fourteenth Amendments of the Constitution of the United States in that they deprive Plaintiffs of their property without due process of law and also constitute a taking of Plaintiffs' property for public use without just compensation." *Id.* The temporary restraining order remained in force until noon, September 10.

On September 5, a three-judge federal district panel (McBride, Kennedy and Crocker, JJ.) voted two-to-one to abstain from deciding the validity of the Access Rule. Pandol & Sons v. Brown, No. F-75-165 Civ. (E.D. Cal. Sept. 5, 1975).

52. Kubo v. Mahony, No. 172286 (Fresno Super. Ct. Sept. 10, 1975).

53. Pandol & Sons v. Mahony, No. 80521 (Tulare Super. Ct. Sept. 10, 1975).

54. *ALRB v. Superior Court,* 16 Cal. 3d 392, 546 P.2d 687, 128 Cal. Rptr. 183, *appeal dismissed,* 429 U.S. 802 (1976).

55. *Id.*

56. *Id.*

57. *Id.* at 421, 546 P.2d at 706, 128 Cal. Rptr. at 202.

decision, Justice Mosk, writing for the majority, found that the Access Rule is constitutional, comports with federal law, was validly adopted by a state administrative agency pursuant to authority granted by the legislature, and supercedes trespass law.[58]

A. A Valid Exercise of Police Power

The majority held that the Access Regulation is constitutional, as it does not constitute a taking of property but is a valid exercise of police power.[59] As the court illustrated, it is a well established proposition that an individual's right in property is subordinate to the rights of society.[60] The Access Rule was found not to constitute a deprivation of fundamental personal liberties, but rather a limited economic regulation of the use of real property imposed for the public welfare.[61] The court employed the rational basis standard of review, reasoning that a higher standard of judicial review is not required because the property rights involved are not fundamental. The only limitation on the regulation is that it must not be unreasonable and capricious; the means selected must bear a reasonable relation to the object sought to be attained.[62] A rational basis clearly existed for the Board's conclusion that the Access Rule was necessary to effectuate the purposes of the ALRA. Therefore, the court was justified in finding the regulation valid.

The growers' main assertion was that the Access Rule constituted a violation of property rights protected under the fifth and fourteenth amendments.[63] The dissent agreed and maintained that since property rights are fundamental personal liberties,[64]

58. *Id.* at 409, 417, 416, 420, 546 P.2d at 698, 704, 703, 706, 128 Cal. Rptr. at 194, 200, 199, 202.

59. *Id.* at 403, 546 P.2d at 699, 128 Cal. Rptr. at 190.

60. The majority opinion quoted the following language from State *ex rel.* Carter v. Harper, 182 Wis. 148, 196 N.W. 451 (1923):

> Although one owns property, he may not do with it as he pleases any more than he may act in accordance with his personal desires. As the interest of society justifies restraints upon individual conduct, so, also, does it justify restraints upon the use to which property may be devoted.

16 Cal. 3d at 403, 546 P.2d at 694, 128 Cal. Rptr. at 190, *quoting Carter*, 182 Wis. at 158, 196 N.W. at 453.

61. 16 Cal. 3d at 409, 546 P.2d at 698, 128 Cal. Rptr. at 194.

62. *Id.* at 410, 546 P.2d at 698, 128 Cal. Rptr. at 194.

63. *Id.* at 402, 546 P.2d at 693, 128 Cal. Rptr. at 189. The real parties in interest cited the due process clauses of the fifth and fourteenth amendments which provide that no person shall be deprived of life, liberty or property without due process of the law.

64. 16 Cal. 3d at 429-30, 546 P.2d at 712, 128 Cal. Rptr. at 208. In support of the

the rational relationship test was an improper standard to apply in evaluating the Access Rule. The dissent found that the proper judicial function is to balance the competing interests.[65]

In light of the United States Supreme Court ruling in *Village of Belle Terre v. Boraas*,[66] the dissent was incorrect in arguing that property rights are fundamental personal liberties. In *Belle Terre*, the Court upheld a local ordinance which limited a property owner's right to utilize his property to house more than two unrelated persons.[67] The Court declared that property rights are not fundamental: "The ordinance involved no 'fundamental' right guaranteed by the Constitution, such as voting, the right of association, the right of access to the courts, or any right of privacy. We deal with economic and social legislation where legislatures have historically drawn the lines which we respect. . . ."[68] The standard of review employed by the majority also finds support in numerous federal decisions involving regulations of property interests and laborers.[69] Furthermore, in *DeCanas v. Bice*,[70] the United States Supreme Court reaffirmed a state's police power to regulate matters relating to employment and labor: "States possess broad authority under their police power to regulate the employment relationship to protect workers within the state. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen's compensation laws are only a few examples . . . ."[71]

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proposition that property rights are fundamental and personal, the dissent cited Lynch v. Household Fin. Corp., 405 U.S. 538 (1972), in which the United States Supreme Court stated:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the property in question be a welfare check, a home, or a savings account. . . .

Id. at 552.

65. 16 Cal. 3d at 430, 546 P.2d at 712, 128 Cal. Rptr. at 208.

66. 416 U.S. 1 (1974).

67. *Id.* at 7.

68. *Id.*

69. The United States Supreme Court applied a rational basis test in the following cases in which it upheld the validity of various laws as reasonable exercise of police power: West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (minimum wage law); Nebbia v. New York, 291 U.S. 502 (1934) (setting prices for milk).

70. 424 U.S. 351 (1976).

71. *Id.* at 356. The Court unanimously declared that a California statute which prohibited employers from hiring illegal aliens was within the purview of police power regulation. *Id.*

The dissent further contended that in promulgating such a regulation, the government was requiring property owners to surrender the use of their property, not for public use, but for the use of other private parties—nonemployee union organizers.[72] However, the Access Rule implements the governmental policy favoring self-organization by workers and collective bargaining, which are designed to benefit the public as a whole.[73] Inasmuch as the ALRA is intended to benefit all of the citizens of California by promoting peaceful resolution of farm labor disputes,[74] the Access Regulation does not merely benefit private parties. Rather, the Access Rule is necessary to provide for the communication essential to guarantee the organizational rights granted by the ALRA. In *NLRB v. Babcock & Wilcox Co.*,[75] the United States Supreme Court recognized that the intended beneficiaries of access by union organizers are the employees, who are provided with information essential to their right to organize.[76] This communication serves a crucial public purpose.

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72. 16 Cal. 3d at 430, 546 P.2d at 712, 128 Cal. Rptr. at 208.

73. It cannot be said that an Access Regulation designed to assist self-organization by workers lacks a reasonable relation to a valid public goal. A careful examination of the various limitations as to time, place, purpose and manner which are written into the ALRB's regulation demonstrates that it is neither arbitrary nor discriminatory. For discussions of the proper standard of judicial review under such circumstances see Weinberger v. Salfi, 422 U.S. 749, 768-70 (1975); Nebbia v. New York, 291 U.S. 502, 536-37 (1934).

74. In the ALRA Preamble, 1975 Cal. Stats. p. 4013 (Third Extra Sess.), it is stated:

> In enacting this legislation the people of the State of California seek to ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations.
>
> This enactment is intended to bring certainty and a sense of fair play to a presently unstable and potentially volatile condition in the state. The Legislature recognizes that no law in itself resolves social injustice and economic dislocations.
>
> However, in the belief the people affected desire a resolution to this dispute and will make a sincere effort to work through the procedures established in this legislation, it is the hope of the Legislature that farm laborers, farmers and all the people of California will be served by the provisions of this act.

Id.

75. 351 U.S. 105, 112-13 (1956).

76. As noted by the majority in its *ALRB v. Superior Court* decision, the Court in *Babcock & Wilcox* stated:

> The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. . . . Organization rights are granted to workers by the same authority, the National Government, that preserves property rights.

16 Cal. 3d at 406, 546 P.2d at 696, 128 Cal. Rptr. at 192, *quoting* 351 U.S. at 112-13.

In addition, the dissent overlooked the fact that the challenged Access Regulation is less intrusive than land control provisions regulating real property which have been upheld by the courts. In *Village of Euclid v. Ambler Realty Co.*,[77] the United States Supreme Court sustained the validity of a zoning ordinance which, by prohibiting the plaintiff from using his property for industrial purposes, reduced the land's value from $10,000 to $2,500 per acre. The Supreme Court in *Berman v. Parder*[78] held a redevelopment project constitutional although it resulted in the razing of buildings which were utilized by private developers. Rent control legislation, which may reduce the value of land, has also been sustained.[79]

The majority acknowledged that the challenged regulation might permit access to the property of some growers despite the existence of alternative means of communication.[80] However, general economic regulations are not constitutionally invalid because they may be inappropriate with respect to a few individual property owners. As the United States Supreme Court has explained in the area of economics, classifications may be imperfect.[81] In *Euclid*, the Court noted:

> The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity . . . . [W]e are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance. . . . It cannot be said that the ordinance in this respect "passes the bounds of reason and assumes the character of a merely arbitrary fiat."[82]

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77. 272 U.S. 365 (1926).

78. 348 U.S. 26 (1954).

79. Bowles v. Willingham, 321 U.S. 503 (1944). The California Supreme Court upheld the constitutionality of rent control in Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976).

80. 16 Cal. 3d at 410, 546 P.2d at 698, 128 Cal. Rptr. at 194.

81. The Court in Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61 (1913), stated: "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Id.* at 69-70. This language was quoted with approval in Dandridge v. Williams, 397 U.S. 471, 485 (1970). More recently, the Court in Weinberger v. Salfi, 422 U.S. 749 (1976), stated: "[T]he question raised is not whether a statutory provision precisely filters out those and only those, who are in the factual position which generated the congressional concern reflected in the statute. Such a rule would ban all prophylactic provisions." *Id.* at 776.

82. 272 U.S. 365, 388-89 (1926) (citations omitted).

The United States Supreme Court has also stated in *Weinberger v. Salfi:*[83] "While such a limitation doubtless proves in particular cases to be 'under-inclusive' or 'over-inclusive,' in light of its presumed purpose, it is nonetheless a widely accepted response to legitimate interests in administrative economy and certainty of coverage for those who meet its terms."[84] Therefore, though the Access Rule is not necessary in each case in order to provide the means for organizers to communicate with employees, it is not unconstitutionally overinclusive.

B. Harmony with Federal Law and the ALRA

Since section 1148 of the ALRA provides that "the board shall follow applicable precedents of the NLRA,"[85] the Access Rule must comport with federal precedent. The prominent cases regarding access to employers' property are *NLRB v. Babcock & Wilcox Co.*[86] and *Central Hardware Co. v. NLRB.*[87] In *Babcock & Wilcox,* the Court stated: "When the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with [the workers] through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize."[88] In *Central Hardware,* the Court noted:

> Organizational rights are not viable in a vacuum; their effectiveness depends in some measure on

83. 422 U.S. 749 (1976). In *Weinberger v. Salfi,* the Court upheld certain duration of relationship Social Security eligibility requirements, established to prevent fraud, although the provisions disqualified some beneficiaries who were guilty of no sham. *Id.* at 785.

84. *Id.* at 776.

85. Cal. Lab. Code § 1148 (West Supp. 1977).

86. 351 U.S. 105 (1956). In *Babcock & Wilcox,* an industrial employer had prevented distribution of union literature by nonemployee union organizers on private parking areas next to the employer's plant. The Court held that union organizers had adequate means of communicating with the workers, and therefore access to the employer's property was not required. *Id.* at 112. Communication with the workers was available through the mail, by telephone, through home visits and on the streets of the town near the company. Approximately 40% of the employees lived in the town, located about one mile from the factory where they were employed, and the remainder lived within a 30 mile radius. *Id.* at 106.

87. 407 U.S. 539 (1972). In *Central Hardware,* the Retail Clerks Union attempted to distribute literature in a 350-car parking lot that surrounded Central Hardware's store. The Court denied access because it found that reasonable alternative means of communication were available: the union had a list of the names and addresses of 80% of the employees; the average distance between the employees' homes and the plant was five miles; and the union could make home visits or contact the workers through the mail, by telephone or by personal contact. *Id.* at 547-48.

88. 351 U.S. at 112.

> the ability of employees to learn the advantages and disadvantages of organization from others. Early in the history of the administration of the Act, the Board recognized the importance of freedom of communication to the free exercise of organizational rights.[89]

The majority opinion in *ALRB v. Superior Court* extensively demonstrates that the Access Rule is consistent with the principle, set forth in *Babcock & Wilcox* and *Central Hardware,* that union organizers must be given access to an employer's premises when employees cannot be reached by alternate means of communication.[90] Although the guidelines in *Central Hardware* limited access to nonworking areas,[91] the California agricultural setting is unique in that the growers' premises generally do not provide nonworking areas, such as lunchrooms and parking facilities, which are usually found in industrial settings.[92]

C. Providing Access Through Administrative Regulation Rather Than By Case-by-Case Adjudication

The growers argued[93] that since the NLRB decides questions of access on a case-by-case basis, the Board exceeded its authority when it proceeded by rulemaking. The growers noted that the Board's authority is expressly limited by the ALRA's section 1148[94] mandate to follow applicable NLRA precedent. However, the Board could reasonably construe the word "precedent" in section 1148 as applying to substantive law interpreting the NLRA, not to procedural rules. The suggestion by the growers

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89. 407 U.S. at 543.

90. 16 Cal. 3d at 414-16, 546 P.2d at 702-03, 128 Cal. Rptr. at 197-99.

91. 407 U.S. at 545. The Court stated:

> Moreover, the allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employees' § 7 right. After the requisite need for access to the employer's property has been shown, the access is limited to: (i) union organizers; (ii) prescribed nonworking areas of the employer's premises; and (iii) the duration of organization activity. In short, the principle of accommodation announced in *Babcock* is limited to labor organization campaigns, and the "yielding" of property rights it may require is both temporary and minimal.

Id.

92. For a discussion of the differences between the industrial and agricultural work settings see *ALRB v. Superior Court,* 16 Cal. 3d at 414, 546 P.2d at 702, 128 Cal. Rptr. at 198.

93. *Id.* at 416, 546 P.2d at 702, 128 Cal. Rptr. at 199.

94. Cal. Lab. Code § 1148 (West Supp. 1977).

that the legislature implicitly intended the Board to follow the procedural rules of the NLRA is negated by section 1144,[95] which vests the Board with full rulemaking authority and makes no reference to the practices of the NLRB. As the majority noted, *Babcock & Wilcox* and its progeny were silent on the issue of whether it is constitutionally required to determine employee accessibility on a case-by-case basis.[96]

The Access Regulation was predicated on factual findings which disclose that the Board did not adopt the NLRB practice of case-by-case adjudication because it determined that significant differences exist between the working conditions of industrial workers and those of California farmworkers.[97] The majority in *ALRB v. Superior Court* noted that the NLRB has granted union organizers access to an employer's property when

> (1) the same employees do not arrive and depart every day on fixed schedules; (2) there are no adjacent public areas where the employees congregate or through which they regularly pass; and (3) the employees cannot effectively be reached at permanent addresses or telephone numbers in the nearby community, or by media advertising.[98]

The ALRB found that such conditions are the rule rather than the exception in California agriculture. No alternate means of communication exist for union organizers, as the farmworkers are usually itinerant, illiterate and often do not speak English. The evidence heard by the Board showed that many farmworkers are migrants who arrive in town in time for the local harvest, live in motels, labor camps or with friends or relatives, and then move on when the crop is harvested.[99] Obviously, home visits, mailings or telephone calls are impossible in such circumstances. Other methods of communication, including television, radio and newspaper, are ineffective if the workers are illiterate and cannot speak English.

As the majority indicated, it is a well settled principle of administrative law that in discharging delegated responsibilities,

95. *Id.* § 1144.
96. 16 Cal. 3d at 414, 546 P.2d at 701, 128 Cal. Rptr. at 197.
97. *Id.* at 414-15, 546 P.2d at 702, 128 Cal. Rptr. at 198.
98. *Id.* at 414, 546 P.2d at 702, 128 Cal. Rptr. at 198.
99. *Id.*

the choice between proceeding by general rule or by case-by-case adjudication lies primarily within the discretion of the administrative agency.[100] In deciding to proceed by the general rule of the Access Regulation, the ALRB considered various factors set forth by the United States Supreme Court in *Weinberger v. Salfi*[101] and *Mathews v. Eldridge*,[102] such as the delay and cost inherent in individualized determinations. The NLRB's practice of proceeding by case-by-case adjudication has been criticized by courts,[103] in senate hearings[104] and by various commentators.[105] Employers have used case-by-case adjudication to stall self-organization rights granted by the NLRA by relying on frivolous grounds to pursue a case through the administrative and court systems.[106]

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100. *Id.* at 413, 546 P.2d at 701, 128 Cal. Rptr. at 197.

101. 422 U.S. 749, 777, 784-85 (1975). Pertinent to the discussion is the following language:

> [T]he question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule.

Id. at 777.

102. 424 U.S. 319, 335 (1976).

103. *See, e.g.*, Bryant Chucking Grinder Co. v. NLRB, 389 F.2d 565 (2d Cir. 1967); NLRB v. Majestic Weaving Co., 355 F.2d 854 (2d Cir. 1966); NLRB v. Lorben Corp., 345 F.2d 346 (2d Cir. 1965); NLRB v. A.P.W. Prods. Co., 316 F.2d 899 (2d Cir. 1963); NLRB v. E. & B. Brewing Co., 276 F.2d 594 (6th Cir. 1960), *cert. denied*, 366 U.S. 908 (1961).

104. *See, e.g., Hearings on S. 1663 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. 53-54 (1965).

105. *See, e.g.*, L. FULLER, THE MORALITY OF LAW 170-77 (1964); McFarland, *Landis' Report: The Voice of One Crying in the Wilderness*, 47 VA. L. REV. 373, 433-38 (1961); Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729 (1961); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

Shapiro states in his article: "Courts do not select the issues to be litigated before them, except insofar as they have a discretionary power of review, and it has been suggested that when an agency acts like a court, it too must depend more on the accident of litigation than on conscious planning." *Id.* at 932. He further states that many agencies have the power to formulate policy either through adjudication or through the promulgation of regulations, but have failed to satisfy the demands of their critics for more frequent resort to the latter technique. *Id.* at 922

106. *See* Levy, *supra* note 32, regarding the delay that can result from case-by-case adjudication. Levy states that employer delaying tactics

> often create a two or three year period in which the employer can avoid bargaining with the union, since bargaining can be compelled only after final court enforcement of the board's order. Meanwhile, the employer has managed to delay for a two or three year period any possible increase in wages or fringe benefits that might have resulted from collective bargaining. There is no penalty attached to this use of board and court

Under the ALRA, an election, once authorized, must be held within forty eight hours in case of a strike, and within seven days in other cases.[107] The Board estimated that it would have conducted 1250 elections during the 1976-77 budget year and that in the absence of a general access rule, denial of access would have been an issue in seventy-five percent of the elections. These 938 elections would have required an unfair labor practice hearing to determine the right of access.[108] Even greater delay would have resulted if denial of access prevented the gathering of sufficient authorization to trigger an election. In all of these cases, by the time the ALRB could have made a determination, it would have been likely that the workers had moved to another farm. In addition, since California Labor Code section 1156.4[109] permits elections to be held only during the peak harvest season when the maximum number of farmworkers are employed, it would have been a year before another election could have been held.

Another factor considered by the Board in the decision to proceed by rulemaking was the projected cost of case-by-case adjudication. The Court in *Mathews v. Eldridge* stated that "the government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources, is a factor that must be weighed."[110] The General Counsel of the ALRB estimated that the 938 anticipated access cases for the fiscal year 1976-77 would

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> procedures to avoid the bargaining obligation, and if the legal expense involved in manufacturing the delay is less than the increased costs of earlier bargaining, it is to the employer's advantage to stall. Another advantage of this tactic is that the union's strength may be dissipated during the delay and its ability to bargain effectively impaired.

Id. at 802-803.

107. CAL. LAB. CODE § 1156.3 (West Supp. 1977).

108. ALRB, REPORT ON S.B. 1441 BEFORE THE CALIF. SENATE FINANCE COMM., FINANCIAL IMPACT OF DETERMINATION OF ACCESS ON A CASE BY CASE BASIS (March 29, 1976), Appendix A-1 [hereinafter cited as ALRB REPORT]. This Report was prepared by the Board, The General Counsel and the Board's Chief of Administration.

109. CAL. LAB. CODE § 1156.4 (West Supp. 1977) states in part:

> Recognizing that agriculture is a seasonal occupation for a majority of agricultural employees, and wishing to provide the fullest scope for employees' enjoyment of the rights included in this part, the board shall not consider a representation petition or a petition to decertify as timely filed unless the employer's payroll reflects 50 percent of the peak agricultural employment for such employer for the current calendar year for the payroll period immediately preceding the filing of the petition.

110. 424 U.S. 319, 347-48 (1976).

have added $2,485,700 to the Board's projected $6.7 million budget.[111]

Case-by-case adjudication of the access issue would undermine the legislative intent of the ALRA to encourage and protect the right of agricultural workers to full freedom of association and self-organization. The ALRB concluded that the most effective way to implement the rights of the agricultural employees is through a general Access Rule. The majority's refusal to displace the decision of the ALRB conforms with the holding of the United States Supreme Court that the choice between general rule and case-by-case adjudication lies within the informed discretion of an agency.[112]

D. Precedence over the Trespass Statute

Both the majority and dissent acknowledged the general rule that administrative regulations which violate acts of the legislature are void. Both also acknowledged the "special-general" exception to the rule when the legislature expressly authorizes an agency to promulgate rules which will take precedence in case of a conflict with existing law. The dissent maintained, however, that since the legislature had not expressly given the Board authority to enact an access rule, the special-general exception was inapplicable.[113] The majority stated that a regulation validly adopted pursuant to a special statute has the same effect as the statute and thus prevails over a general statute.[114] This interpretation, coupled with the legislative intent that the Board structure a qualified right of access[115] for organizational purposes, jus-

111. ALRB Report, *supra* note 107, at Appendix A-1. The Report indicated that when a union files an unfair labor practice charge alleging wrongful denial of access, significant costs are generated by investigating the charge, obtaining a superior court injunction if a complaint is issued and by trying the case before an administrative law officer. The Report estimated that an investigation of unfair labor practice charges involving access would take between one and four days per case, including a personal visit to the employer's property by the investigator. The cost of an investigation and a hearing in each access case would be approximately $2650. If injunctive relief were sought, it would add an additional $300 per case. *Id.*

112. *See, e.g.*, NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974), in which the Supreme Court noted that "the choice between rulemaking and adjudication lies in the first instance within the Board's discretion." *Id.* at 294. *See also* Securities Comm'n v. Chenery Corp., 332 U.S. 194, 203 (1947).

113. 16 Cal. 3d at 428, 546 P.2d at 711, 128 Cal. Rptr. at 207.

114. *Id.* at 420, 546 P.2d at 706, 128 Cal. Rptr. at 202.

115. The court reasoned:

> [T]he incorporation in section 1152 of the language of section

tified the conclusion that the Access Rule prevails over the general trespass statute.[116]

V. CONCLUSION

In upholding the validity of the Access Rule, the *ALRB v. Superior Court* decision is significant because it permits the implementation of farmworkers' newly created statutory organizational rights. It is a decision which is sensitive to the agonizing problems of agricultural labor in California. The social and economic deprivation of farmworkers, along with the conflict existing in the agricultural fields,[117] has been well documented.[118] Pos-

> 7 of the NLRA, together with the express direction in section 1144 that the board make regulations necessary to carry out the Act and in section 1148 that it follow applicable NLRA precedents, at least mean that the legislature intended the board to structure a qualified right of entry onto agricultural property for organizational purposes.

Id. at 420, 546 P.2d at 706, 128 Cal. Rptr. at 202.

116. In further support of the court's conclusion, the majority cited CAL. LAB. CODE § 1166.3(b) (West Supp. 1977), which states that "[i]f any other act of the Legislature shall conflict with the provisions of this part [of the ALRA], this part shall prevail." 16 Cal. 3d at 420, 546 P.2d at 706, 128 Cal. Rptr. at 202.

117. *See* notes 1-2 *supra.*

118. Although a comprehensive list of the many sources depicting the plight of the farmworker is beyond the scope of this Comment, the following represent a few: 1969 SENATE REPORT, *supra* note 1; *Hearings on Farmworker Powerlessness Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare,* 91st Cong., 1st & 2nd Sess. 4 (1970); National Broadcasting Company presentation, Transcript of *Migrant, an NBC White Paper,* July 16, 1970 [hereinafter cited as *White Paper*]. For a description of grower hostility to the television crew preparing the *White Paper* documentary depicting farmworkers' living and working conditions see Carr, *Shame is Still the Harvest,* N.Y. Times, July 12, 1970, § D, at 15, col. 5.

Estimates of the annual income of the migrant farmworker in the late 1960s varied from as low as $891 for an individual, *White Paper, supra* at 12, to $3,500 for a family with two adult workers. PRESIDENT'S NAT'L ADVISORY COMM'N ON RURAL POVERTY, RURAL POVERTY IN THE UNITED STATES 452 (1968). The estimated average hourly wage for migrant farmworkers was $1.23 in 1966, ranging from $.74 in South Carolina to $1.41 in New Jersey. *Id.* at 451. *See also Hearings Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare,* 91st Cong., 1st & 2nd Sess. 5425 (1970) [hereinafter cited as *1970 Hearings*].

A number of studies have documented the lack of adequate educational opportunities afforded farmworkers' children. Former Secretary of Health, Education and Welfare Celebrezze has stated:

> Migrant agricultural workers are often described as America's forgotten people and their children are referred to as the most educationally deprived group of children in our nation. They enter school late, their attendance is poor, their progress is slow, they drop out early; consequently, their illiteracy rate is high. Studies indicate that most migrant children are far below grade level and that their school achievement is usually under fourth grade.

sessing little political strength, the farmworkers have not been able to assert their legal rights.[119] Lack of organization has been a major contributing factor to their plight. Perhaps only unionization can create bargaining among equals. However, efforts to unionize farmworkers began over seventy years ago and are just now realizing a semblance of success.

Although the ALRA defines the rights of farmworkers, without the Access Regulation these rights cannot be implemented efficiently. In *Babcock & Wilcox,* the United States Supreme Court stated that the right of self-organization depends in some measure on the ability to learn the advantages and disadvantages of union organization.[120] Although the most effective place to contact the laborers is on the farms, the growers have long exercised their political power to deny access in the name of property ownership.[121] By providing a clearly defined right of access, the regulation affords a realistic opportunity for the communication necessary to organizational success. The ALRB Access Regulation best serves the statutory mandate "to encourage, and protect the

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PRESIDENT'S NAT'L ADVISORY COMM'N ON RURAL POVERTY, THE PEOPLE LEFT BEHIND 49 (1967) (remarks by A. Celebrezze). For a discussion of the educational deficiencies of the children of farmworkers see, e.g., SENATE COMM. ON LABOR AND PUBLIC WELFARE, THE MIGRATORY FARM LABOR PROBLEM IN THE UNITED STATES, S. REP. NO. 71, 90th Cong., 1st Sess. 25 (1967); S. REP. No. 155, 89th Cong., 1st Sess. 11 (1965); S. REP. No. 167, 88th Cong., 1st Sess. 7 (1963). Only one state, New Jersey, began to address the problem twenty years ago by establishing summer schools for the children of farmworkers. Tobin, *One Million Migrants,* SATURDAY REVIEW, Aug. 17, 1968, at 14. *See generally White Paper, supra* at 33-45.

A significantly greater proportion of migrant farmworkers suffer from malnutrition and other diseases than the American populace in general. Dr. H. Peter Chase estimated that malnutrition among migrant children is ten times that of the average American child. N.Y. Times, Feb. 24, 1971, at 24, col. 3. Testimony before a Senate subcommittee indicates that malnutrition often leads to permanent mental, physical and psychological impairment among migrant children. *See 1970 Hearings, supra* at 4982-5128.

119. The electoral weakness of the farmworker is discussed and documented in *Legal Problems, supra* note 1, in which the authors note that because of his or her itinerancy, the migrant farmworker seldom complies with residency requirements in state elections or in congressional districts. *Id.* at 218-34. In ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT ON MIGRATORY LABOR, *reprinted in* 111 CONG. REC. 13328 (1965), it is stated that "[t]he obligation to assure fairness to our migratory workers is particularly compelling because they are generally barred from voting by residence requirements, and hence can exercise little political influence on their own behalf." *Id.* at 13330. *See also* Givens, *Legal Disadvantages of Migratory Workers,* 16 LAB. L.J. 584, 585 (1965).

120. 351 U.S. 105, 113 (1956). *See* note 76 *supra* for relevant language from *Babcock & Wilcox; see also* note 2 *supra* for citations of cases in which courts have stressed the importance of workers discussing the advantages and disadvantages of unions.

121. *See* CAL. FARM LAB. PROBLEMS, *supra* note 50, at 202. *See also* materials cited at notes 1-2 *supra.*

right of agricultural employees to full freedom of association and self-organization."[122]

It is likely that the *ALRB v. Superior Court* decision will have widespread impact. Various other states have enacted or contemplate enacting laws which will govern organizational rights of farmworkers.[123] So far, less than twenty percent of the states have adopted collective bargaining legislation for agricultural employees. Legislatures will be faced with determining the extent to which access to private property is permissible for the purpose of organizing. The California ALRB Access Rule presents a model which, if followed, could help alleviate the plight of farmworkers throughout the United States.

EPILOGUE: SUBSEQUENT HISTORY OF THE ACCESS RULE

Grower opposition to the Access Rule was manifested when Proposition 14 was placed on the November 2 ballot in California in 1976.[124] The proposition was in response to some of the problems faced by the ALRB.[125] Among the proposed modifications of the ALRA was the addition of language which would have incorporated the Access Rule into the Act. A heated public debate ensued over Proposition 14, and the growers' emotional and expensive attack on the Access Rule proved successful.[126]

The growers claimed that the defeat of Proposition 14 represented a mandate to the Board to repeal the Access Rule. Nevertheless, the rule has remained in force, with original amendments

122. CAL. LAB. CODE § 1140.2 (West Supp. 1977).

123. Arizona, Kansas, Idaho, Oregon and Michigan have enacted statutes affecting labor relations between agricultural employers and employees. *See, e.g.*, ARIZ. REV. STAT. §§ 23-1381 to 23-1395 (Supp. 1977); KAN. STAT. ANN. §§ 44-818 to 44-830 (1973); IDAHO CODE §§ 22-4101 to 22-4113 (1972); OR. REV. STAT. §§ 662.805 to 662.825 (1971). In addition, bills have been introduced into the legislatures of Texas, New Mexico, Utah, Hawaii and Washington.

124. 1976 Cal. Stats. A-164.

125. Due to the influence of the growers, the legislature refused to appropriate the funds necessary for the ALRB to operate throughout the 1975-76 fiscal year. By February, 1976, the ALRB offices were shut down, and the program was terminated for the remainder of the fiscal year. The legislature did appropriate $6,688,000 to fund the ALRB for the 1976-77 fiscal year. The ALRB reassembled its staff and recommenced operations in September, 1976.

126. Proposition 14 was defeated by a substantial margin in the general election of November 2, 1976. 1976 Cal. Stats. A-164; M. EU, STATEMENT OF VOTE, GENERAL ELECTION NOVEMBER 2, 1976, at 44.

which became effective on December 1, 1976,[127] and current modifications, effective on April 13, 1978.[128] Among the December, 1976 modifications was a provision to reduce the number of days during which organizers may enter a grower's property.[129] While most recent changes mainly concern eligibility lists, they also provide that the regional director may cause an investigation of any issue raised in connection with a notice of intention to take access.[130]

While the Access Rule has remained in force, opposition has continued. A proposed initiative is being circulated in an attempt to qualify for the November 7, 1978 election.[131] The initiative would amend the ALRA and provide that the exercise of employee rights shall not infringe upon any citizen's private property. In individual situations where employees have no suitable alternative means to receive information necessary to the exercise of self-organization rights, limited access to private property would be allowed.

Benita R. Ventresca

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127. Cal. Adm. Code, tit. 8, § 20900 (1976).

128. Cal. Adm. Code, tit. 8, § 20900 (1978). The hearings were conducted by the ALRB in Sacramento on December 12-13, 1977.

129. Cal. Adm. Code, tit. 8, § 20900 (1976).

130. Cal. Adm. Code, tit. 8, § 20915 (1978).

131. The petitioners have until May 18, 1978 to gather enough signatures to qualify their initiative for the November 7, 1978 ballot.