

CEDAR POINT NURSERY AND THE END
OF THE NEW DEAL SETTLEMENT

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INTRODUCTION

In *Cedar Point Nursery v. Hassid*, the U.S. Supreme Court, in a 6–3 decision, ruled that a California state regulation granting labor organizations a limited “right to take access” to agricultural employers’ property constitutes a *per se* physical taking.¹ Under the regulation at issue, a labor organization may come onto property of agricultural employers for up to four thirty-day periods in one year and remain on the property for a total of three hours each day.² Explaining that the effect of the access regulation is to grant “a formal entitlement to physically invade” land, the Court, per Chief Justice Roberts, deemed the regulation “simple appropriation of private property.”³

The outcome and reasoning of the Court’s decision in *Cedar Point* have sparked intense criticism. *Cedar Point* has been called a “potentially transformational development in the law of property rights,” one “likely to hobble government land use regulation.”⁴ Senator Sheldon Whitehouse of Rhode Island, who along with four colleagues filed an

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1. 141 S. Ct. 2063 (2021).

2. *Id.* at 2069.

3. *Id.* at 2080.

4. LINDA GREENHOUSE, JUSTICE ON THE BRINK: THE DEATH OF RUTH BADER GINSBURG, THE RISE OF AMY CONEY BARRETT, AND TWELVE MONTHS THAT TRANSFORMED THE SUPREME COURT 224 (2021); see also Mark Joseph Stern, *The Supreme Court’s Latest Union-Busting Decision Goes Far Beyond California’s Farmworkers*, SLATE (June 23, 2021), <https://slate.com/news-and-politics/2021/06/supreme-court-union-busting-cedar-point-nursery.html> (characterizing the *Cedar Point* majority opinion as “maximalist” and predicting its consequences for government regulation “will be swift and severe”); Nathan Newman, *This Supreme Court Case Could Wreck the New Deal Order*, NATION (Dec. 2, 2020), <https://www.thenation.com/article/society/supreme-court-labor-unions/> (cautioning that a win for the agricultural property owners in the (at the time) pending *Cedar Point* case could signify a “roll back” of “large swaths of the regulatory state and civil rights laws”).

amicus brief in the case,⁵ released a public statement that begins: “The Court that Dark Money Built delivers again for big-money Republican donors.”⁶ Writing in the *Harvard Law Review*, constitutional historian Nikolas Bowie warns that the “principle” of *Cedar Point* could endanger all laws “that mitigate the harms of workplace hierarchies”⁷ and asserts that the case “illustrates how the Supreme Court today is the ultimate supplier of antidemocracy in this country.”⁸ Property law scholar Lee Anne Fennell also takes a dim view of the Court’s decision, seeing *Cedar Point* “as part of an ongoing campaign by the Court to *selectively* apply heightened scrutiny in the land use arena in ways that broadly entrench and maintain status quo patterns of property wealth.”⁹

In this Article, I explain why the objections of *Cedar Point*’s detractors are misplaced. Far from disabling government regulation or fomenting stasis by favoring the “already haves,” *Cedar Point* is best understood as another step in the “normalization” of property rights.¹⁰ In this, *Cedar Point* is in accord with other recent Court

5. Brief of Senators Sheldon Whitehouse et al. as Amici Curiae Supporting Respondents, *Cedar Point*, 141 S. Ct. 2063 (2021) (No. 20-107).

6. Press Release, Sheldon Whitehouse, Whitehouse Slams Partisan SCOTUS Decision Hampering Agricultural Workers’ Ability to Organize for Better Pay, Working Conditions (June 23, 2021), <https://www.whitehouse.senate.gov/news/release/whitehouse-slams-partisan-scotus-decision-hampering-agricultural-workers-ability-to-organize-for-better-pay-working-conditions>.

7. Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 161–62 (2021). See also 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, 7:45 AM), <https://www.washingtonpost.com/politics/2021/07/02/supreme-court-struck-down-key-united-farm-workers-win-decision-has-some-infamous-echoes/> (asserting that the Court’s “conservative majority has dealt what could be a mortal blow” to the ability of farmworkers to combat “abusive labor practices” and suggesting that *Cedar Point* is a harbinger of a return “to an era characterized by judicial opinions that curtailed worker rights”); Meagan Day, *The Supreme Court Just Dealt a Blow to Farmworkers—And All Other Workers, Too*, JACOBIN (July 3, 2021), <https://jacobinmag.com/2021/07/cedar-point-nursery-v-hassid-ufw-california-labor-relations-act-migrant-labor-farm-workers-agriculture> (calling *Cedar Point* “a victory for agricultural employers” and “right-wing organizations” but “bad news for farmworkers and their unions” as well as “other kinds of workers”); Paul Gowder, *The Paradox of Property in the American Rule of Law*, LPE PROJECT (Jan. 17, 2022), <https://lpeproject.org/blog/the-paradox-of-property-in-the-american-rule-of-law/> (maintaining that *Cedar Point* “protects the property rights of farmers by endangering every other legal right that their workers might happen to enjoy”).

8. Bowie, *supra* note 7, at 162.

9. Lee Anne Fennell, *Escape Room: Implicit Takings After Cedar Point Nursery*, 17 DUKE J. CONST. L. & PUB. POL’Y 1, 3 (2022) (emphasis in original).

10. Michael W. McConnell, Horne and the Normalization of Takings Litigation: A Response

decisions, including *Horne v. Department of Agriculture*,¹¹ and *Knick v. Township of Scott*.¹² These cases illustrate how constitutional recognition of property interests, duly enforced by the judiciary, can “serve to protect the interests of the working and middle classes.”¹³ That is no small thing, particularly at a time of well-justified concerns about the outsize influence of elites on the legislative and executive branches of government,¹⁴ with its attendant worries that those who lack power to defend themselves in the political and administrative arenas are vulnerable to “redistribution up.”¹⁵

It is true that this normalization of property rights amounts to a retreat from the “New Deal Settlement,” under which courts declined to subject legislative and administrative actions affecting property rights to significant oversight.¹⁶ But for anyone who cares about the economically vulnerable, the passing of the New Deal Settlement should be cause for celebration rather than alarm. Eighty years on,

to *Professor Echeverria*, 43 ENV'T L. REP. 10749, 10749 (2013) (explaining how in the early 2010s the Court “cut through the morass of arbitrary, clause-specific rules, complications, and obstacles to relief that have accrued” to treat “Takings Clause claims as normal constitutional claims, subject to the same procedural, jurisdictional, and remedial principles that apply to other constitutional rights”).

11. 576 U.S. 350 (2015) (ruling that a reserve requirement imposed on raisin growers pursuant to an agricultural marketing program is a “clear physical taking”).

12. 139 S. Ct. 2162 (2019) (overruling *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), to allow an owner of rural property that was subject to a cemetery access ordinance to resort to federal court without having to first pursue compensation in state court and emphasizing that the Fifth Amendment enjoys “full-fledged constitutional status” among the provisions of the Bill of Rights). See also Ann Woolhandler & Julia D. Mahoney, *Federal Courts and Takings Litigation*, 97 NOTRE DAME L. REV. 679 (2022).

13. James Burling, *Private Property for the Politically Powerful*, 6 BRIGHAM-KANNER PROP. RTS. CONF. J. 179, 182 (2017) (criticizing assertions that “the institution of private property, and the protections given to private property, serve only to protect the haves against the have-nots”).

14. See Julia D. Mahoney, *Takings, Legitimacy, and Emergency Action: Lessons from the Financial Crisis of 2008*, 23 GEO. MASON L. REV. 299, 301 (2016).

15. See BRINK LINDSEY & STEVEN M. TELES, *THE CAPTURED ECONOMY: HOW THE POWERFUL ENRICH THEMSELVES, SLOW DOWN GROWTH, AND INCREASE INEQUALITY* 153–80, 207–10 (2017); Steven M. Teles, *The Scourge of Upward Redistribution*, 25 NAT'L AFFS. 78 (2015); see also Julia D. Mahoney, *Commentary on Kelo v. City of New London*, in *FEMINIST JUDGMENTS: REWRITTEN PROPERTY OPINIONS* 179 (Eloisa C. Rodriguez-Dod & Elena Maria Mary-Nelson eds., 2021).

16. See Frank I. Michelman, *The Unbearable Lightness of Tea Leaves: Constitutional Political Economy in Court*, 94 TEX. L. REV. 1403, 1406 (2016) (explaining that under the “New Deal Settlement” it was understood that courts would leave the “field of political economy” to the political branches); Jamal Greene, *What the New Deal Settled*, 15 U. PA. J. CONST. L. 265 (2012); see also 3 G. EDWARD WHITE, *LAW IN AMERICAN HISTORY: 1930–2000* 510–18 (2010).

it is evident that the costs to many poor communities of judicial abdication in the area of property rights were very high.¹⁷ The careful readjustment now underway does nothing more than recognize property's status as a civil and human right,¹⁸ one that needs serious constitutional protection if people are to flourish as citizens, family members, and workers.

I. THE RIGHT TO "TAKE ACCESS" AND THE RIGHT TO EXCLUDE

The dispute in *Cedar Point* arose from efforts by the state of California to facilitate the unionization of farm workers. To that end, in 1975 the California legislature passed the Agricultural Labor Relations Act ("ALRA"),¹⁹ which provides that agricultural employees have the right to self-organize and that for employers to interfere with these worker rights constitutes an unfair labor practice.²⁰ Soon after the ALRA's passage, California's Agricultural Labor Relations Board promulgated a regulation to secure physical access by union organizers to agricultural employers' property for the purpose of interacting with and soliciting the support of employees.²¹

Two group of agricultural employers sued in state court, challenging the access regulation's validity on constitutional grounds, both state and federal. In 1976, the case reached the Supreme Court of California, which sustained the constitutionality of the access regulation.²² The California Supreme Court's decision was a close one, with three of seven justices concluding that the access regulation

17. See Julia D. Mahoney, *Kelo's Legacy: Eminent Domain and the Future of Property Rights*, 2005 SUP. CT. REV. 103.

18. Cf. Robert H. Thomas, *Emerging Issues in Property Law*, 8 BRIGHAM-KANNER PROP. RTS. CONF. J. 113, 113 (2019) ("I am a property lawyer, which means I am a civil rights lawyer and a human rights lawyer" as "private property is a civil right" and a "federal constitutional right").

19. CAL. LAB. CODE §§ 1140–1166 (West 2021).

20. CAL. LAB. CODE §§ 1152, 1153(a) (West 2021); see also *Gerawan Farming, Inc. v. Agric. Lab. Rels. Bd.*, 405 P.3d 1087, 1089 (Cal. 2017) (explaining that as enacted in 1975, the ALRA "established an elaborate framework governing the right of agricultural workers to organize themselves into unions to engage in collective bargaining with their employers").

21. CAL. CODE REGS. tit. 8, § 20900 (2021). Originally promulgated as an emergency regulation, the regulation was soon certified by the Agricultural Labor Relations Board, thus rendering it indefinite in duration. See *Agric. Lab. Rels. Bd. v. Superior Ct.*, 546 P.2d 687, 692 n.1 (Cal. 1976); Petitioners' Brief on the Merits at 4, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (No. 20-107).

22. *Agric. Lab. Rels. Bd. v. Superior Ct.*, 546 P.2d 687.

amounted to “an unwarranted infringement on constitutionally protected property rights.”²³

The California Supreme Court majority expressed approval of the “governmental policy in favor of collective bargaining,”²⁴ noting that while issues of union organizer access to employer property were not highly familiar to California courts, “our federal brethren have often considered it in the industrial labor context.”²⁵ The California Supreme Court went on to discuss in detail *NLRB v. Babcock & Wilcox Co.*, a 1956 U.S. Supreme Court decision about access rights of union organizers to employers’ property under Section 7 of the National Labor Relations Act (“NLRA”).²⁶ Sidestepping constitutional issues, the Court stated that “when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them 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.”²⁷ The Court added that “if 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, the employer must allow the union to approach his employees on his property.”²⁸ In 1972, in *Lechmere v. NLRB*, the Court characterized the inaccessibility exception laid out in *Babcock* as a “narrow one,”²⁹ that was “crafted precisely to protect . . . those employees who, by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society.”³⁰ *Lechmere* lists logging camps, mining camps, and mountain resort hotels as “classic examples” of situations in which the exception applies.³¹

23. *Id.* at 706 (Clark, J., dissenting). The employers’ appeal to the Court was dismissed “for want of a substantial federal question.” *Pandol & Sons v. Agric. Lab. Rel. Bd.*, 429 U.S. 802 (1976).

24. *Agric. Lab. Rels. Bd.*, 546 P.2d at 694.

25. *Id.* at 695.

26. 351 U.S. 105 (1956).

27. *Id.* at 112.

28. *Id.* at 113.

29. 502 U.S. 527, 539 (1992).

30. *Id.* at 540.

31. *Id.* at 539; see also Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305 (1994) (criticizing *Lechmere* as unduly restrictive in its construction of union organizer access rights under the NLRA).

At the time California's access regulation was put in place, it was more common for agricultural workers to live on their employers' property.³² In addition, the state of information technologies in the 1970s meant that union organizers had fewer means of contacting workers than is the case today,³³ with the consequence that access rights to employer property may have been of greater importance. Even so, it bears emphasis that in its nearly half century of existence the access regulation's effects on efforts to organize workers have been modest. Labor organizers have invoked the access regulation "sparingly,"³⁴ requesting access on only 113 occasions in a six year period from 2014–2020.³⁵

What has not been modest is the access regulation's impact on agricultural enterprise, as even the prospect of intrusion can undermine employers' ability to run their businesses. In October 2015, Cedar Point Nursery, a producer of strawberry plants that employs roughly 100 year-round and 400 seasonal workers, none of whom live on the premises, suffered a significant operational disruption when United Farm Worker organizers entered their facility without providing prior notice. In Cedar Point Nursery's account, the union organizers moved through the plant nursery facility "with bullhorns, distracting and intimidating many of the hundreds of employees who were preparing strawberry plants."³⁶ In February 2016, Cedar Point Nursery filed suit, requesting declaratory and injunctive relief under 42 U.S.C. § 1983 and arguing that the access regulation constitutes a taking of property in contravention of the Fifth and Fourteenth Amendments of the U.S. Constitution.³⁷ Joining Cedar Point Nursery in this litigation was Fowler Packing Company, a shipper of citrus and grapes that employs an estimated 2,300 to 3,000 non-resident workers and was the target of an unfair labor practices

32. See Brief of Western Growers Ass'n et al. as Amici Curiae in Support of Petitioners at 20, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (No. 20-107).

33. See Brief of California Farm Bureau Fed'n as Amicus Curiae in Support of Petitioners at 11–13, *Cedar Point*, 141 S. Ct. 2063 (No. 20-107).

34. Brief in Opposition at 9–10, *Cedar Point*, 141 S. Ct. 2063 (No. 20-107).

35. *Id.*; see also Bowie, *supra* note 7, at 196 (noting that "[f]or its part, the United Farm Workers has rarely taken advantage of the access rule in the decades since the union was most active in the 1970s"); Day, *supra* note 7 (reporting that the United Farm Workers and the Farm Labor Organizing Committee "used the access rule on only sixty-two of California's sixteen thousand farms in 2015, and even less frequently in subsequent years").

36. Petitioners' Brief on the Merits at 11, *Cedar Point*, 141 S. Ct. 2063 (No. 20-107).

37. *Id.* at 12.

charge filed by the United Farm Workers for interfering with union access rights.³⁸

To pursue their case, Cedar Point Nursery and Fowler Packing Company secured high-octane legal representation in the form of the Pacific Legal Foundation, a public interest law firm with an impressive track record of victories in property rights and environmental cases. Experts in the convoluted constitutional doctrine of “takings” law, the Pacific Legal Foundation opted to argue on their clients’ behalf that the access regulation amounted to a *per se* “physical taking” of property rights within the terms of the Court’s precedents, including *Loretto v. Teleprompter*³⁹ and *Nollan v. California Coastal Commission*.⁴⁰ In *Loretto*, the Court held that “a minor but permanent physical occupation of an owner’s property authorized by government”—in this instance, cables and boxes to provide cable television to tenants—was a taking,⁴¹ emphasizing that it has consistently regarded “a physical invasion” as “a government intrusion of an unusually serious character” and that the “power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.”⁴² *Nollan* involved an attempt by the California Coastal Commission to condition its issuance of a permit to rebuild a beachfront home on the owners’ grant of a public easement to cross their property along the shore. Ruling in favor of the complaining property owners, the Court stated that the term “permanent physical occupation” comprises a situation in which “individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.”⁴³

In advancing this *per se* physical takings claim, the plaintiff growers in *Cedar Point* argued that the access regulation fell within one of “two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes.”⁴⁴ (The second category,

38. *Id.* at 11–12.

39. 458 U.S. 419 (1982).

40. 483 U.S. 825 (1987).

41. 458 U.S. at 421.

42. *Id.* at 433, 435.

43. 483 U.S. at 832.

44. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005).

that of government actions that leave land “without economically beneficial or productive options for its use”⁴⁵ in contexts where “the proscribed use interests were not part of” the landowner’s title “to begin with,”⁴⁶ was obviously not applicable, as the affected properties retained substantial value even though subject to the access regulation.) Relying solely on a *per se* takings claim meant the *Cedar Point* litigants avoided becoming embroiled in arguments about whether the access regulation runs afoul of the multifactor “*Penn Central* test.”⁴⁷ Used by courts to determine whether government regulations that fall outside the two *per se* categories amount to takings of property, the *Penn Central* test consists of an *ad hoc* factual inquiry that takes into account “several factors” that “the Court’s decisions have identified” as having “particular significance,”⁴⁸ most notably “the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action.”⁴⁹ Vigorously criticized as confusing and for failing to provide useful guidance to property owners, regulator, and courts,⁵⁰ the *Penn Central* framework is one under which property owners rarely prevail.⁵¹

Yet while the *per se* physical takings claim had the virtue of simplicity, it was not a certain winner. To be sure, the fact that California’s “unique”⁵² access regulation has few analogues makes it an “outlier” and thus potentially more vulnerable to constitutional challenge than a “non-outlier” government regulation on the same subject.⁵³ And the access regulation is clearly an abrogation of the

45. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992).

46. *Id.* at 1027.

47. *See Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104 (1978).

48. *Id.* at 124.

49. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). In *Kaiser Aetna*, the Court clarified, or perhaps “recast,” its analysis in *Penn Central*. THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES & POLICIES* 1252 (3d ed. 2016).

50. *See, e.g.*, Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 *PENN ST. L. REV.* 601 (2014).

51. *See id.*; Ilya Somin, Opinion, *Supreme Court’s Cedar Point Property Decision Protects Both Sides*, HILL (June 23, 2021), <https://thehill.com/opinion/judiciary/559914-supreme-courts-cedar-point-property-rights-decision-protects-both-sides/>.

52. William H. Floyd III, *Supreme Court Reinvigorates Property Rights of Employers*, NEXSEN PRUET (June 30, 2021), <https://www.nexsenpruet.com/publication-supreme-court-reinvigorates-property-rights-of-employers>.

53. *See* KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* 105

right to exclude, a right often called the “*sine qua non*” of property.⁵⁴ At the same time, most “outlier” regulations are never struck down as unconstitutional. As for the right to exclude, even those who assert the right is an essential attribute of property are quick to concede it is not an absolute one.⁵⁵ Put simply, Anglo-American property law has, and so far as I can tell has always had, a number of limitations on the ability of property holders to exclude government actors and private parties.⁵⁶

Thus early American law recognized “numerous and robust rights to enter private property,” many of which were rooted in English common law.⁵⁷ These exceptions included obligations of innkeepers and others pursuing public callings not to refuse service to members of the public without good cause,⁵⁸ the privilege of the public to access navigable waters that had overflowed onto private property,⁵⁹ and rights of individuals to seek refuge in situations of public or private necessity.⁶⁰ Government powers to enter private property to execute reasonable searches, prevent and abate public nuisances, and address imminent harms (such as preventing the spread of fire)

(2007); *see also* Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929, 997–98 (2014) (concluding that “the term’s status as an essential word in the modern constitutional scholar’s vocabulary appears secure” as it “readily conveys the Supreme Court’s rejection of measures found in only a small number of states, a dynamic that applies to many opinions in constitutional law’s canon”).

54. *See* Thomas W. Merrill, *The Right to Exclude II*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 1, 1 (2014) (explaining that *sine qua non* “is a Latin legal term meaning ‘without which it could not be’” and arguing that the right to exclude is “a foundational attribute of property”).

55. *See, e.g., id.* at 8 (acknowledging that “exclusion is not absolute” and defining property as “a general right to exclude *after* certain exceptions grounded in common law and statutes have been subtracted”).

56. *See* Eric Claeys, *Labor, Exclusion, and Flourishing in Property Law*, 95 N.C. L. REV. 413, 448 (2017) (“Historically, in Anglo-American law, property has not been understood as an unqualified right to exclude.”); Brief of Property Law Professors as Amici Curiae in Support of Respondents at 20–22, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (No. 20-107).

57. Bethany R. Berger, *Eliding Original Understanding in Cedar Point Nursery v. Hassid*, YALE J. L. & HUMAN. (forthcoming 2022) (available at <https://ssrn.com/abstract=3926372>); *see also* Brief of Legal Historians as Amici Curiae in Support of Respondents at 6, *Cedar Point*, 141 S. Ct. 2063 (No. 20-107) (surveying the historical record and concluding that “the law at the time of the Founders recognized multiple rights to enter when it served the public interest”).

58. Brief of Legal Historians as Amici Curiae in Support of Respondents at 11–12, *Cedar Point*, 141 S. Ct. 2063 (No. 20-107).

59. *See* Merrill, *supra* note 54, at 8.

60. *See generally* Shelley Ross Saxer, *Necessity Exceptions to Takings*, U. HAW. L. REV. (forthcoming 2021).

have also been long recognized in American law.⁶¹ The growth of the “regulatory state” led to additional exceptions to exclusion rights, such that by the late twentieth century it was widely accepted that government officials have the power to enter onto commercial property to enforce laws designed to maintain public health and safety.⁶² Property owners’ exclusion rights have also been modified by the enactment of civil rights laws at the federal and state level.

Not all physical invasions by or authorized by government, in short, constitute takings. The precedents on point, however, are complicated. As Lynda L. Butler observes: “Permanence of the physical invasion, intent to repeat the invasion, actions of the property owner in opening the property to third parties, and the directness of the correlation between the invasion and the injury” have all influenced how courts evaluate takings claims in this area.⁶³ The upshot is that in application the “seemingly simple and clear” *per se* physical takings rule “has produced confusing and somewhat inconsistent results.”⁶⁴

Unsurprisingly given the complexity and unpredictability of takings doctrine, the grower plaintiffs confronted setbacks on their road to victory. At the federal District Court level, their motion for a preliminary injunction was denied,⁶⁵ and the Agricultural Labor Relations Board’s motion to dismiss was granted.⁶⁶ Characterizing Cedar Point Nursery and Fowler Packing as attempting “to escape the reach of *Penn Central*,” the District Court stated that while “the creation of an easement *may* amount to a taking,” the plaintiffs “go too far by equating this action with a categorical taking.”⁶⁷ On appeal, a divided

61. See Brief of Oklahoma et al. as Amici Curiae in Support of Petitioners at 14–24, *Cedar Point*, 141 S. Ct. 2063 (No. 20-107).

62. See *See v. City of Seattle*, 387 U.S. 541, 543–44 (1967); see also Brief of Local Governments as Amici Curiae in Support of Respondents at 5–8, *Cedar Point*, 141 S. Ct. 2063 (No. 20-107) (describing government inspections of slaughterhouses, fisheries, wastewater treatment systems, elevators, and massage parlors).

63. Lynda L. Butler, *The Governance Function of Constitutional Property*, 48 U.C. DAVIS L. REV. 1687, 1689 (2015).

64. *Id.* at 1690; see also Jessica L. Asbridge, *Redefining the Boundary Between Appropriation and Regulation*, 47 B.Y.U. L. REV. 809 (2022) (concluding that the Court has failed to apply the “physical takings doctrine consistently”).

65. *Cedar Point Nursery v. Gould*, 1:16-cv-00185-LJO-BAM, 2016 WL 1559271 (E.D. Cal. Apr. 18, 2016).

66. *Cedar Point Nursery v. Gould*, 1:16-cv-00185-LJO-BAM, 2016 WL 3549408 (E.D. Cal., June 29, 2016).

67. *Gould*, 2016 WL 1559271, *5.

panel of the Court of Appeals for the Ninth Circuit affirmed.⁶⁸ Judge Paez distinguished the access regulation from the public easement in *Nollan*, stating that while the access regulation’s duration is indefinite, it does not grant union organizers a “continuous right to pass to and fro.”⁶⁹ A petition for rehearing en banc was rejected over a dissent by Judge Ikuta, which seven other judges joined.⁷⁰ Arguing that the Ninth Circuit majority’s conclusion that the access regulation is not a permanent physical occupation contradicts Supreme Court precedent, Judge Ikuta noted that in its current version the access regulation is “not limited to situations where union organizers do not have reasonable access to employees” and gives “union organizers a permanent right to access” agricultural employer property.⁷¹ The Court granted certiorari, and oral argument took place on March 22, 2021.

II. THE DECISION IN *CEDAR POINT NURSERY*

In the end, Cedar Point Nursery and Fowler Packing prevailed. The spectacle of a win for businesses at the apparent expense of union organizers and farm workers elicited cries of alarm, with fears expressed that the Court’s decision represents an opening salvo in a war against the regulatory state⁷² or a cynical gambit to elevate more powerful groups over more vulnerable ones.⁷³ Senator Whitehouse, who as Rhode Island’s attorney general had argued on behalf of the state in the landmark takings case *Palazzolo v. Rhode Island*,⁷⁴ went so far as to accuse the Court of handing “another victory to big-money special interests, just as the armada of dark-money amicus groups in this case instructed.”⁷⁵

A careful reading of Chief Justice Roberts’ majority opinion belies such worries. *Cedar Point* is not a radical decision, but an incremental

68. *Cedar Point Nursery v. Shiroma*, 923 F.3d 524 (9th Cir. 2019).

69. *Id.* at 532 (quoting *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 832 (1987)).

70. *Cedar Point Nursery v. Shiroma*, 956 F.3d 1162 (9th Cir. 2020).

71. *Id.* at 1166 (Ikuta, J., dissenting).

72. See, e.g., GREENHOUSE, *supra* note 4; Adam, *supra* note 7.

73. See, e.g., Bowie, *supra* note 7; Fennell, *supra* note 9; Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 228 (2021) (concluding that *Cedar Point* “takes a sweeping approach to Takings Clause jurisprudence in favor of” employers).

74. 533 U.S. 606 (2001).

75. Whitehouse, *supra* note 6.

one. The Court takes property rights seriously, carefully reviews the relevant precedents, and (slightly) clarifies takings doctrine. The majority notes that “we have recognized that physical invasions constitute takings even if they are intermittent as opposed to continuous” and states the “fact that a right to take access is exercised only from time to time does not make it any less a physical taking.”⁷⁶ These statements are in accord with language in *Nollan* and other precedents to the effect that rights to physically invade property can amount to takings even if no particular person has the right to enter and remain on the property indefinitely. In focusing on the intermittent nature of the access right at issue in *Cedar Point*, the Court clarifies that not all *per se* physical takings involve invasions like the one in *Loretto*, which consisted of the placement of equipment that was expected to remain in place for the foreseeable future. The *Loretto* invasion was understandably termed a “permanent physical invasion,” but with hindsight that appellation was a misleading one. Given how hard it is to predict the future of technological innovation or human preferences,⁷⁷ there was no way to know back in 1982 how long the cable television equipment installed on the Loretto property would remain. The approach of the *Cedar Point* majority makes more sense in that it focuses attention on how the access regulation confers upon union organizers a continual, as distinct from continuous, right to enter onto the plaintiff grower’s properties.

To be sure, the Court sheds little light on where it will draw the line going forward. A continuous right to invade property is easier to discern than a continual one, which by its nature entails interruptions. We are told the outcome in *Nollan* would have been the same if the California Coastal Commission demanded an easement in force for only 364 days each year, and the Court suggests that had the *Nollan* easement been limited to daylight hours that would also have constituted a *per se* taking.⁷⁸ In addition, the Court mentions that the government overflights found to effect a taking in *United States v. Causby*⁷⁹ “occurred on only 4% of takeoffs and 7%

76. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2075 (2021).

77. See Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739 (2002); Julia D. Mahoney, *The Illusion of Perpetuity and the Preservation of Privately Owned Lands*, 44 NAT. RES. J. 573 (2004).

78. See *Cedar Point*, 141 S. Ct. at 2075.

79. 328 U.S. 256 (1946).

of landings at the nearby airport.”⁸⁰ This is all mildly helpful, but many consumers of the Court’s takings jurisprudence would likely appreciate a bit more guidance.

In a similar vein the Court clarifies, without substantially adding to our understanding of, the intersection of its takings jurisprudence role and what is known as “constitutional property federalism,” meaning the “idea that the Constitution protects different interests in different jurisdictions, depending on the content of state-specific law.”⁸¹ While a federal system with variety in property rights has advantages,⁸² there are concomitant dangers, including that state legislatures, courts, and executive agencies will abuse their powers to define property rights so as to evade the protections the Constitution affords property owners. In *Cedar Point*, the Court describes this problem clearly when explaining why it does not matter that the access right at issue fails to correspond with the definition of an easement in gross under California law. The Agricultural Labor Relations Board, cautions the Court, “cannot absolve itself of takings liability by appropriating the growers’ right to exclude in a form that is a slight mismatch from state easement law.”⁸³ Confirming that it has “consistently” followed an “intuitive approach” so as to preclude such manipulation of property rights, the Court simply notes that when governments do not formally condemn property interests but invade property or authorize invasions by third parties, the Court recognizes a physical taking, notwithstanding the fact that the “intrusion does not vest” the government with “a property interest recognized by state law, such as a fee simple or a leasehold.”⁸⁴

Chief Justice Roberts’s minimalist side is also evident in the majority opinion’s ignoring what one might call an elephant in the room, for it fails to tackle the issue of remedies. *Cedar Point Nursery* and *Fowler Packing* sought not financial payment for California’s appropriation of what they asserted (and the Court agreed) amounted to servitudes over their properties, but rather declaratory

80. *Cedar Point*, 141 S. Ct. at 2075.

81. Maureen E. Brady, *Penn Central Squared: What the Many Factors of Murr v. Wisconsin Mean for Property Federalism*, 166 U. PA. L. REV. ONLINE 53, 56 (2017).

82. See generally Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72 (2005).

83. *Cedar Point*, 141 S. Ct. at 2076.

84. *Id.*

and injunctive relief.⁸⁵ Justice Breyer's dissenting opinion, in which Justices Sotomayor and Kagan join, points this out,⁸⁶ noting that the text of the Takings Clause bars government takings of private use without "just compensation."⁸⁷ Justice Breyer goes on to argue, citing the Court's recent decision in *Knick v. Township of Scott*,⁸⁸ that on remand California should have the choice "of foreclosing injunctive relief by providing compensation."⁸⁹ To date, there is no indication California plans to pursue that path, but the point is an important one. If governments can simply "take and pay" for property intrusions, then in many instances owners will have little in the way of protection from loss of their property rights, as governments will not have to pay much.⁹⁰ *Cedar Point*, in short, may turn out to be less significant than its critics anticipate.⁹¹

Where *Cedar Point* breaks the most new ground is in its treatment of the right to exclude. The Court reaffirms the importance of this right, which, quoting *Loretto*, it describes as "one of the most treasured rights of property ownership."⁹² At the same time, *Cedar Point* takes care to specify that the right to exclude has limits and lays out three categories of physical invasions that do not amount to takings of property. By this means, the Court adds welcome nuance to its pronouncements over the years concerning the right to exclude, a

85. See *supra* notes 37–38 and accompanying text.

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

87. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

88. 139 S. Ct. 2162, 2179 (2019).

89. *Cedar Point*, 141 S. Ct. at 2089 (Breyer, J., dissenting).

90. See Somin, *supra* note 51 (speculating that "some regulations that do qualify as takings under" the Court's decision in *Cedar Point* "may not be much impeded by it" due to the low value of the property interests taken).

91. At least one detractor of *Cedar Point* explicitly acknowledges this possibility. See Fennell, *supra* note 9, at 4 (maintaining that *Cedar Point* is "designed to preserve restrictions that broadly conserve the established interests of landowners while scrutinizing and financially burdening any property impositions that do otherwise" but admitting "vulnerability" in this "approach" if "the true goal is to knock out unwanted impositions on property owners" as the "Takings Clause allows the government to simply pay for what it takes"); see also Michael J. Hayes, *Points About Cedar Point: What Labor Access Survives, and What Should Survive (or be Restored)* (U. Balt. Sch. L. Legal Stud. Rsch. Paper 2021) (available at <https://ssrn.com/abstract=3938382>) (discussing the potential benefits of a "pay as it goes" system under which union organizers compensate employers for the (almost surely small) value of the property rights they "take").

92. *Cedar Point*, 141 S. Ct. at 2074.

number of which have been sweeping.⁹³ It also responds to charges, leveled by both the Agricultural Labor Relations Board and Justice Breyer’s dissenting opinion, that, as the majority puts it, “treating the access regulation as a *per se* physical taking will endanger a host of state and federal government activities involving entry onto private property.”⁹⁴ The *Cedar Point* majority disagrees, calling such accusations “unfounded.”⁹⁵

The Court’s first category of physical invasions that do not constitute takings is trespass, by which it means “[i]solated physical invasions, not undertaken pursuant to a granted right of access,” and thus evaluated as torts.⁹⁶ As the Court suggests, distinguishing sporadic, brief invasions from more serious and sustained ones—such as a government-created flooding that was found to be the taking of a flowage easement⁹⁷—rarely poses serious challenges for decisionmakers. The second category comprises government-authorized physical invasions “consistent with longstanding background restrictions on property rights” such that they do not rise to the level of takings.⁹⁸ The Court’s most famous explication of this concept is found in *Lucas*,⁹⁹ which explains that “[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.”¹⁰⁰ As with much of takings doctrine, there are some straightforward applications. Property owners cannot reasonably expect compensation for abating nuisances, tolerating the entry onto their lands of individuals responding to public or private necessity, or hosting public officials who are carrying out reasonable searches or enforcing the criminal law. This second category also includes many hard cases in which courts are called upon to take account of the dynamism of

93. See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (stating that the “right to exclude” is “universally held to be a fundamental element of the property right”).

94. *Cedar Point*, 141 S. Ct. at 2078.

95. *Id.*

96. *Id.*

97. See *id.* at 2078–79 (citing *Ark. Game & Fish Comm’n v. United States*, 736 F.3d 1364 (2013)).

98. *Cedar Point*, 141 S. Ct. at 2079.

99. See *supra* notes 44–46 and accompanying text.

100. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992).

property law while not losing sight of the danger that the power to modify property rights can be misused to shield government from liability.¹⁰¹

The third and final category comprises access rights ceded by property owners in order to obtain government licenses, permits, and other public benefits, an increasingly common practice.¹⁰² Under current constitutional doctrine, as articulated in *Nollan* and *Dolan v. City of Tigard*,¹⁰³ government-imposed conditions, at least in certain circumstances, must have both an “essential nexus” and be “roughly proportional” to the potential impact of the sought property use.¹⁰⁴ In delineating this third category, the Court explains that many public health and safety inspection regimes feature government access rights, including rights to enter onto the premises of participants in highly regulated industries such as pesticide manufacture and nuclear power, that are specifically granted as conditions of obtaining a license or permit and thus almost certainly comply with the *Nollan/Dolan* framework. Here the Court might have made clear that not all government health and safety property access rights stem from a voluntary grant by a property owner seeking to obtain a government benefit. That is, under the Court’s own taxonomy, some government access rights that promote public health and safety slot better into its second category of government-authorized physical invasions “consistent with longstanding background restrictions on property rights.” Had the *Cedar Point* majority opinion done so, it might have been more evident that the Court did not intend, as it has been accused of doing, to depart from the original public understanding of property rights under the U.S. Constitution.¹⁰⁵

Criticisms aside, *Cedar Point* provides a solid foundation for future takings decisions. The Court affirms the centrality of exclusion rights to the institution of property while specifying how such rights are in no way absolute. In so doing, the Court recognizes that

101. See James L. Huffman, *Background Principles and the Rule of Law: Fifteen Years After Lucas*, 35 *ECOLOGICAL L.Q.* 1, 16–26 (2008); see also *supra* notes 57–61 and accompanying text.

102. See generally PHILIP HAMBURGER, *PURCHASING SUBMISSION: CONDITIONS, POWER, AND FREEDOM* (2021).

103. 512 U.S. 374 (1994).

104. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021).

105. See Berger, *supra* note 57, at 25 (maintaining that “*Cedar Point v. Hassid* elides the public understanding of property at the time of the founding”).

the United States is, and indeed for its entire history has been, a sophisticated society that respects the autonomy of individuals and firms while subjecting them to reasonable government actions designed, for the most part, to prevent harms to the public.¹⁰⁶ Far from undermining the regulatory state, *Cedar Point* confirms its importance in American law and society. And while *Cedar Point* represents a victory of agricultural employers over a state government that had mandated access to its property by union organizers, it is not accurate to portray *Cedar Point* as a triumph for corporate behemoths and a stinging defeat for labor. As medium-sized enterprises in a highly competitive sector of the economy, both Cedar Point Nursery and Fowler Packing Company lack substantial political and economic power. Their victory in *Cedar Point* constitutes not an expansion of corporate rights, but a narrowly drawn judicial determination that a business has the right to choose not to allow potentially disruptive organizers on their property absent special considerations, such as, perhaps, the ones set out in *Lechmere*.¹⁰⁷ There is no reason to think that the interests of agricultural workers will be adversely affected by *Cedar Point*.

III. PROPERTY RIGHTS AND THE END OF THE NEW DEAL SETTLEMENT

Toward the close of the New Deal era, the Court looked poised to withdraw almost entirely from the project of “systematically enforcing constitutional rights against legislative majorities.”¹⁰⁸ Judicial review would be for the most part limited to instances of egregious irrationality or obvious abuses by public officials, or so the standard narrative went. That did not happen. As time wore on, it became

106. See Sam Spiegelman & Gregory C. Sisk, *Cedar Point: Lockean Property and the Search for a Lost Liberalism*, 2020–2021 CATO SUP. CT. REV. 165, 166, 168 (2021) (documenting how courts have distinguished “public-harm-preventing” from “public-benefit-conferring” government actions and the importance of this distinction for determining the contours of the police power); see also Claeys, *supra* note 56, at 448–49.

107. See *supra* notes 29–30 and accompanying text.

108. David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 375 (2003); see also Grant Gilmore, *The Storrs Lectures: The Age of Anxiety*, 84 YALE L.J. 1022, 1038 (1975) (“The conventional wisdom of the 1930s was that the judges had had their day, which would not come again” as law was “reduced to statutory form with most of the significant continuing problems being committed to the expertise of administrative agencies.”).

apparent that the Court was again taking on the mantle of enforcer of constitutional rights.¹⁰⁹ In 1954, the Court decided the desegregation cases, *Brown v. Board of Education*¹¹⁰ and *Bolling v. Sharpe*.¹¹¹ Roughly a decade later, in *Griswold v. Connecticut*,¹¹² the Court ventured onto the tricky terrain of reproductive rights.

In the area of property and economic rights, however, the Court continued to exercise a low level of scrutiny.¹¹³ It is not that such rights became complete dead letters.¹¹⁴ But judicial withdrawal went so far that in 1954, the same year it handed down *Brown* and *Bolling*, the Court shrugged off a constitutional challenge to a major urban renewal scheme for the District of Columbia. “Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear,” wrote Justice William O. Douglas for a unanimous Court in *Berman v. Parker*, rejecting the argument that the condemnation of lower and middle class owned properties was not for a “public use” and thus prohibited by the Fifth Amendment.¹¹⁵ In the near term, *Berman* cleared a path for the displacement of tens of thousands of residents and businesses in the nation’s capital,¹¹⁶ together with increased racial and economic segregation.¹¹⁷ In the longer term, hundreds of thousands of property owners in the United States were forced to relinquish their properties as “urban renewal was undertaken on a vastly larger scale.”¹¹⁸ with devastating results for communities.¹¹⁹ The Court’s

109. See Strauss, *supra* note 108, at 377.

110. 347 U.S. 483 (1954).

111. 347 U.S. 497 (1954).

112. 381 U.S. 479 (1965).

113. See WHITE, *supra* note 16, at 510–57.

114. See James W. Ely, Jr., *Still in Exile? The Current Status of the Contract Clause*, 8 BRIGHAM-KANNER PROP. RTS. J. 93 (2019); Woolhandler & Mahoney, *supra* note 12, at 697.

115. 348 U.S. 26, 33 (1954).

116. See Amy Lavine, *Urban Renewal and the Story of Berman v. Parker*, 42 URB. LAW. 423, 469–75 (2010).

117. See Benjamin Ginsberg, *Berman v. Parker: Congress, the Court, & the Public Purpose*, 4 POLITY 48, 49 (1971) (observing that it was “not surprising” that “segregation accompanied redevelopment” in the District of Columbia given that “an examination of census data indicates that urban renewal and segregation have been synonymous in many American cities”).

118. Lavine, *supra* note 116, at 423–24; see also Ginsberg, *supra* note 117, at 49 (characterizing *Berman* as “the crucial precedent for the use of the power of eminent domain” on a widespread basis).

119. See Wendall E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 6 (2003) (describing how the

opinion in *Berman* gave no sign of any awareness, much less concern, about the consequences of its ruling.

Berman was no anomaly. In both analysis and outcome, the decision was in accord with a number of other “ultra-deference” decisions of the 1950s and 1960s in the area of property and economic rights, most notably *Williamson v. Lee Optical*, sustaining as constitutional a law protecting ophthalmologists and optometrists from competition from opticians,¹²⁰ and *Ferguson v. Skrupa*, rejecting a challenge to a statute restricting the “business of debt adjusting” except as incidental to legal practice.¹²¹ As legal historian G. Edward White observes, the Court adopted a “nearly toothless deferential posture” in these cases, one that reversed “the familiar locution.”¹²² Instead of “affirmatively finding that a law bore some ‘reasonable’ connection to a regulatory power of the state,” the Court “needed only to conclude that it could not say that such a connection did not exist.”¹²³

By the late 1970s, it was clear that the Court was taking property claims more seriously. In 1978, the Court decided *Penn Central*, which although resulting in a loss for the owner of New York City’s Grand Central Terminal, which argued that the City’s repeated rejections of its efforts to obtain permission to build a skyscraper over the terminal amounted to a taking of its property rights, at least subjected the government’s conduct to more than cursory oversight.¹²⁴ Victories for property owners soon followed in a number of takings cases, including *Loretto v. Teleprompter*,¹²⁵ *Nollan v. California Coastal Commission*,¹²⁶ and *Lucas v. South Carolina Coastal Council*.¹²⁷ The trend was clear: property rights were looking more like other constitutional rights.

selection of “racially changing neighborhoods” for redevelopment “enabled institutional and political elites to relocate minority populations and entrench racial segregation”); *see also* Martin Anderson, *The Sophistry that Made Urban Renewal Possible*, 30 J.L. & CONTEMP. PROBS. 199, 199–200 (1965) (criticizing the Court’s reasoning in *Berman* for enabling urban renewal programs with “strong racial overtones”).

120. 348 U.S. 483 (1955).

121. 372 U.S. 726 (1963).

122. WHITE, *supra* note 16, at 556–57.

123. *Id.* at 556.

124. *See supra* notes 47–51 and accompanying text.

125. 458 U.S. 419 (1982); *see supra* notes 41–42 and accompanying text.

126. 483 U.S. 825 (1987); *see supra* note 43 and accompanying text.

127. 505 U.S. 1003 (1992); *see supra* note 101 and accompanying text.

The “Property Rights” movement did not win every case. Far from it. But even its highest profile defeat showed how far property rights had come. In 2005, in *Kelo v. City of New London*, the Court upheld the condemnation of fifteen homes in a lower middle-class neighborhood pursuant to an economic redevelopment scheme.¹²⁸ In contrast to *Loretto*, *Nollan*, and *Lucas*, in *Kelo* there was no dispute over whether the government sought to obtain title to the plaintiffs’ properties. Rather, as in *Berman*, the issue before the Court was whether an economic development project counted as a “public use.” While the government did win in *Kelo*, the victory was a close one, in contrast to the unanimous loss for property owners in *Berman*. Moreover, all the opinions in *Kelo*—the opinion for the Court by Justice Stevens, a concurrence by Justice Kennedy, who joined the five member majority, and dissenting opinions by Justices O’Connor and Thomas—departed from *Berman*’s “robotic deference,” instead displaying “at least some grasp of the potentially huge social costs of untrammelled government power to reconfigure property rights” as well as “awareness of the damage that expropriations can inflict on individual lives.”¹²⁹

A post-*Kelo* series of additional victories, culminating in the *Cedar Point* decision in June 2021, have further “normalized” property rights.¹³⁰ To many strong proponents of the modern regulatory and social welfare states, this development threatens institutions they see as essential to early twenty-first century life, including an effective social safety net and government protections of workplace safety. Yet to equate a greater role for the judiciary in protecting property rights with a move toward plutocracy is to misunderstand the Court’s property rights jurisprudence. As in *Cedar Point*, the victors in property rights cases do not tend to be large for-profit companies, but smaller enterprises and individuals.¹³¹ In fact, the “normalization” of property rights now underway appears more likely to enhance than subvert democracy. That is in significant part due to property’s “distinct and irreducible role in empowering people,”¹³² as having rights in property facilitates the creation and

128. 545 U.S. 469 (2005).

129. Mahoney, *supra* note 17, at 115.

130. See *supra* notes 124–27 and accompanying text.

131. See, e.g., *Horne v. Dep’t of Agric.*, 576 U.S. 350 (2015); *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019).

132. HANOCH DAGAN, A LIBERAL THEORY OF PROPERTY 2 (2021).

execution of one's distinct projects. This, in turn, can lead to their becoming more effective citizens and community members.

Such considerations help explain why a key objective of the framers and ratifiers of the U.S. Constitution was the protection of property.¹³³ But that property rights were secure did not mean they were sclerotic. As *Cedar Point* makes clear, the history of American property rights is one of dynamism as well as stability. And while at first glance it may appear a “mystery” that a nation so committed to strong property rights also has a tradition of continual modification of property rights,¹³⁴ in fact there is no mystery. The readjustment of property rights has gone hand in hand with America's meteoric economic development,¹³⁵ as well as its solicitude for the public welfare.¹³⁶

With reconfiguration of property rights comes danger. American history is replete with incidents in which “losers” have received no or inadequate compensation,¹³⁷ resulting in grievous financial and dignitary losses.¹³⁸ Not surprisingly, the brunt of these losses has been shouldered by the less powerful.¹³⁹ In recent years, the Court has made strides toward affording greater constitutional protection for property rights owners, including those who do not wield influence in the corridors of power. The result is that property rights are no longer an obviously lesser constitutional right.

133. See Renee Lettow Lerner, *Enlightenment Economics and the Framing of the U.S. Constitution*, 35 HARV. J.L. & PUB. POL'Y 37, 46 (2021) (“The Framers designed the Constitution to further certain core principles of Enlightenment economic thought: protecting private property, enforcing contracts, preventing monopolies, and encouraging free trade among states and nations.”); Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 270 (1988) (detailing how the structure of the United States Constitution “is designed to promote economic stability and to insulate property rights from popular upheavals”); Woolhandler & Mahoney, *supra* note 12, at 684 (“The Constitution of 1787 manifests the Framers’ desire to protect interests in property and contract in various provisions, including in its provision for federal courts”).

134. Naomi R. Lamoreaux, *The Mystery of Property Rights: A U.S. Perspective*, 71 J. ECON. HIST. 275, 277 (2011).

135. See, e.g., *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837); see also GORDON S. WOOD, *THE POWER OF LIBERTY: CONSTITUTIONALISM IN AMERICAN REVOLUTION 160–62* (2021).

136. See Claeys, *supra* note 56, at 448–49; Spiegelman & Sisk, *supra* note 106, at 166, 168; see also WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

137. See Lamoreaux, *supra* note 134, at 301.

138. See Nicole S. Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 148 (2006).

139. See Lamoreaux, *supra* note 134, at 300–01.

Up until now, the rehabilitation of property rights has been accomplished through a series of decisions that carefully parse existing precedents, many of which are notoriously muddled.¹⁴⁰ The result is that an already complex area of constitutional doctrine risks becoming ever more tortuous.¹⁴¹ A way out of this thicket for the Court may exist, but at a minimum would require the substantial overhaul—and perhaps even the explicit overruling—of more of its precedents, including the highly problematic *Penn Central*. It is unclear whether the Roberts Court is as yet prepared to go this far.

CONCLUSION

Cedar Point represents an evolution, not a revolution, in the Court's property rights jurisprudence. In both outcome and reasoning, the majority opinion offers no surprises, instead confirming that property rights are important to the Roberts Court while for the most part coloring within the lines of existing precedent. To those who liken the enhanced security of property rights to the promotion of inequality and even oligarchy, *Cedar Point* represents a threat. But for those inclined to think that judicial protections matter most for property owners least able to defend their interests in the political arena, *Cedar Point* is a welcome, albeit minor, development.

140. See generally Lynda L. Butler, *Murr v. Wisconsin and the Inherent Limits of Regulatory Takings*, 47 FLA. ST. U. L. REV. 99 (2020); Jeffrey Manns, *Economic Liberty Takings*, 29 GEO. MASON L. REV. 73 (2021).

141. See Thomas W. Merrill, *The Supreme Court's Regulatory Takings Doctrine and the Perils of Common Law Constitutionalism*, 34 J. LAND USE & ENVTL. L. 1 (2018).