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What's Your Damage?! The Supreme Court Has Wrecked Temporary Takings Jurisprudence

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In Cedar Point Nursery v. Hassid, *the U.S. Supreme Court unnecessarily expanded the Fifth Amendment's Takings Clause. In doing so, the Court veered away from established precedent and overturned prior case law—without expressly admitting to doing so.*

In 2021, the Court held that a California law allowing union organizers to access private property under certain conditions took away a landowner's right to exclude others and was (apparently) immediately compensable under the Fifth Amendment's Takings Clause. Prior law had subjected temporary takings to an uncertain, unpopular, and ambiguous balancing test—but the Cedar Point *holding turned temporary takings jurisprudence on its head by finding a per se taking in an ordinance allowing limited and temporary physical invasions. In doing so, the Court left several questions unanswered, further muddied a murky area of the law, and likely invited a panoply of new lawsuits and varied legal opinions.*

The measure of damages and the remedy for a temporary taking are entirely unclear after Cedar Point*—as this (rather important) issue was virtually ignored by the Court's majority. Further, the Court never explained its departure from*

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existing balancing tests or the need for a new per se test. This confusing decision has led to more lawsuits that allege a further expansion of takings law.

Property must be secured, or liberty cannot exist. [**]

[A]n owner must expect to find the absoluteness of his property rights curtailed by the organs of society, for the promotion of the best interests of others for whom these organs also operate as protective agencies. [***]

[**] 6 CHARLES FRANCIS ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 280 (1851).

[***] 10 MICHAEL ALLAN WOLF, POWELL ON REAL PROPERTY § 69.01 (2019).

INTRODUCTION

The Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation."[1] Whether property has been "taken" such that "just compensation" is due has been the subject of considerable expansion over the last century.[2] Originally meant to apply only to physical governmental appropriations of private property,[3] takings jurisprudence under the Fifth Amendment has expanded to include government regulations that significantly restrict the uses to which private property may be put.[4] If a regulation "goes too far," it may be considered a "taking" for which compensation is due.[5]

In 1978, the U.S. Supreme Court decided a landmark case that guided most present-day regulatory takings analyses: *Penn Central Transportation Co. v. New York City*.[6] *Penn Central* introduced a widely criticized three-part ad-hoc balancing test to determine

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[1] U.S. CONST. amend. V. The Fifth Amendment applies to the states through the Fourteenth Amendment: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. *See generally* Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 241 (1897) (holding that the Fifth Amendment applies to states through the Fourteenth Amendment).

[2] *See, e.g.*, Murr v. Wisconsin, 137 S. Ct. 1933, 1938, 1942 (2017).

[3] "Before the 20th Century, the Takings Clause was understood to be limited to physical appropriations of property." Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071 (2021) (citing Horne v. Dep't of Agric., 576 U.S. 350, 360 (2015)).

[4] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 321–22 (2002).

[5] Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."). *See generally* United States v. Miller, 317 U.S. 369, 373–74 (1943) (measuring just compensation by "fair market value").

[6] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138 (1978).

whether a regulation has effected a taking.[7] Under *Penn Central*, a regulation may rise to the level of an unconstitutional taking for which compensation is due.[8] When a regulation impedes the use of property without depriving the owner of all economically viable use, "a taking may be found based on 'a complex of factors,' including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct[9] investment-backed expectations; and (3) the character of the governmental action" (the "*Penn Central* test").[10]

A subset of the Fifth Amendment takings analysis concerns when the government physically enters private property or enacts a regulation allowing a third party to do so.[11] These cases have been set aside as particularly egregious acts of government that constitute a per se taking—where compensation is immediately due upon a showing of a physical invasion.[12] Historically, a physical invasion

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[7] *See* Thomas W. Merrill, *The Character of the Governmental Action*, 36 VT. L. REV. 649, 650–51 (2012) (calling the *Penn Central* test "problematic" and "mysterious"); Richard A. Epstein, *Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property*, 8 ECON J. WATCH 223, 226–27 (2011); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective* on Penn Central Transportation Co. v. City of New York, 13 WM. & MARY BILL RTS. J. 679, 680 (2005).

[8] *Penn Cent.*, 438 U.S. at 123.

[9] The Court later changed the test from "distinct" to "reasonable" investment-backed expectations—without explanation—in Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

[10] Murr v. Wisconsin, 137 S. Ct. 1933, 1937 (2017) (citing Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001)).

[11] *See, e.g.*, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021).

[12] *See* Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 31 (2012) ("[W]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 322 (2002))). In other words, if there is a permanent physical invasion, the Court will bypass *Penn Central*'s three-part ad hoc balancing test. This is also true of non-physical regulations that eliminate the economic viability of property. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1004 (1992) (stating that a regulation which denies all economically viable, beneficial, or productive use of land will require compensation under the Takings Clause—unless the regulation is consistent with background principles of property and nuisance law). Under the *Lucas* decision, deprivation of all economic viability of property is analogous to a physical invasion of property: "We have never set forth the justification

had to be "permanent" in nature to effect a taking.[13] Physical invasions that were temporary were subject to a balancing test to determine if "just compensation" was due.[14]

The 2021 *Cedar Point v. Hassid*[15] decision expands and changes that rule to add "temporary" takings to the mix of per se takings. This is a significant change to takings jurisprudence, and one that does not follow this prior-established law.[16]

Cedar Point involved a California law that allowed union organizers to enter private agricultural property under limited time, frequency, and behavioral circumstances.[17] The Court found this law (or perhaps the invasion itself) to suffice as a per se physical taking, regardless of the temporal element, and immediately compensable. It held that the permanent or temporary nature of an invasion only bears on the amount of compensation due, not on its status as a taking.[18] In doing so, the U.S. Supreme Court conflated temporary invasions with permanent ones.[19]

Even more frustrating, the majority offers no guidance on the remedies available to property owners whose properties have been temporarily taken via a physical invasion.[20] The Fifth Amendment and supporting case law generally do not provide for injunctive relief—only for "just compensation" when a taking is proven.[21]

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for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." 505 U.S. at 1017 (citing San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 653 (Brennan, J., dissenting)).

[13] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434–35 (1982).

[14] *See Ark. Game & Fish*, 568 U.S. at 36.

[15] *See Cedar Point*, 141 S. Ct. at 2074.

[16] *See id.*

[17] *Id.* at 2069.

[18] *Id.* at 1067.

[19] *See* Aziz Z. Huq, *Property Against Legality: Takings After* Cedar Point, 109 VA. L. REV. 233, 238–39 (2023) (discussing how *Cedar Point* fails to define the term "appropriation").

[20] *Cedar Point*, 141 S. Ct. at 2089 (Kavanaugh, J., concurring).

[21] An injunction may be allowed in limited circumstances. *See* 42 U.S.C. § 1983 ("[I]njunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."). The plain language of the Takings Clause expressly allows takings, unless the government fails to provide just compensation. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984) ("Equitable relief is not available to enjoin an alleged taking of private property

Therefore, the *Cedar Point* case may have outlined a new constitutional violation for temporary takings without any real available redress if compensation is only due for limited entry on one's land.[22] That cannot be what the aggrieved property owners sought, despite the case being hailed as a victory for property rights advocates.[23] Perhaps compensation is due for the value of the right of entry as a whole, but the Court grappled with the nature of that interest and the value is (again) questionable.[24]

The Supreme Court had options to deal with this case that would have evaded confusion and unnecessary expansion of takings law—and still granted the landowners a victory. The aggrieved property owners did not even argue that the offending California union access regulation violated any established balancing test for temporary permanent invasions authorized by the government.[25] It may well have satisfied the applicable test,[26] and there would have been a compensable taking under the applicable and settled prior law. This matter could also have been easily handled as a trespass case (assuming the union organizers failed to meet the statutory notice and decorum requirements as alleged) with damages concomitant to a temporary physical invasion.[27] The Court could have also decided for the union

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for a public use . . . when a suit for compensation can be brought against the sovereign subsequent to the taking." (citing Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682, 697 n.18 (1949))); Knick v. Scott, 139 S. Ct. 2162, 2176 (2019) (stating that injunctive relief is generally unavailable under the Takings Clause). *See, e.g.*, Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 740–41 (2010) (Kennedy, J., concurring).

[22] *See Cedar Point*, 141 S. Ct. at 2067–68; *see id.* at 2089 (Kavanaugh, J., concurring).

[23] *See* Cynthia Estlund, *Showdown at Cedar Point: "Sole and Despotic Dominion" Gains Ground*, 2021 SUP. CT. REV. 125, 125–26 (2022).

[24] *See* Jessica L. Asbridge, *Redefining the Boundary Between Appropriation and Regulation*, 47 BYU L. REV. 809, 821 (2022) (discussing the fact that physical appropriations frequently have limited compensatory damages).

[25] *See Cedar Point*, 141 S. Ct. at 2070 (stating that the growers had made no attempt to satisfy *Penn Central*'s multifactor ad-hoc balancing test).

[26] *Id.* at 2072.

[27] If the union organizers entered without legal authority—under the Act or otherwise—it is arguably an actionable trespass because there was no permission to enter. *See* Ralph's Grocery Co. v. Victory Consultants, Inc., 225 Cal. Rptr. 3d 305, 317 (Cal. Ct. App. 2017) ("The elements of trespass are: (1) the plaintiff's ownership or control of the property; (2) the defendant's intentional, reckless, or negligent entry onto the property; (3) lack of permission for the entry or acts in

organizers under established precedent that weighs society's interest in protecting agricultural workers against the rights of individual property owners.[28]

I. THE *CEDAR POINT* CASE

A. *Background: Balancing Societal Interests and Private Property Rights*

In 1975, California enacted the Agricultural Labor Relations Act (the "Act") that gave agricultural employees a right to self-organize and made interference with that right an "unfair labor practice."[29] The purpose of the Act was "to ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations[;] [t]his enactment is intended to bring certainty and a sense of fair play to a presently unstable and potentially volatile condition in the state."[30] According to the Act:

> [T]he policy of the State of California [is] to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.[31]

California's Agricultural Labor Relations Board (the "Board") subsequently promulgated regulations providing that those "self-organizing" rights include "the right of access by union organizers to

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excess of permission; (4) harm; and (5) the defendant's conduct was a substantial factor in causing the harm.").

[28] *See, e.g.*, NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112–13 (1956).

[29] CAL. LAB. CODE §§ 1152–1153(a) (West 2023).

[30] California Agriculture Labor Relations Act, 3rd Ex. Sess., ch. 1, § 1 (1975).

[31] LAB. § 1140.2.

the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support."[32] The regulations are specific about when a labor organization can "take access" to an agricultural employer's property: A labor organization can enter private property for up to four thirty-day periods per calendar year;[33] the organization must file a written notice with the Board and notify the employer property owner;[34] and two organizers per work crew, plus one additional organizer for every fifteen workers over thirty workers on a crew, may enter the employer's property for up to one hour before or after work, or during a lunch break.[35] Organizers are free to meet and talk with employees but may not engage in "disruptive" conduct.[36] If an employer interferes with the union's right of access, it may constitute an unfair labor practice, subject to penalties.[37]

Soon after its enactment, the regulations were challenged. In *Agricultural Labor Relations Board v. Superior Court of Tulare County*,[38] two groups of growers attacked the validity of the regulation and sought to prevent enforcement.[39] The California Supreme Court upheld the union access regulations.[40] The court found that there was no due process violation because this was a limited economic regulation on the use of real property, imposed for public welfare.[41] More to the point, the court also found no taking of private property without just compensation.[42] According to the court, "[i]ncidental damages to property resulting from governmental activities, or laws passed in the promotion of the public welfare, are

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[32] CAL. CODE REGS. tit. 8, § 20900(e) (2023).

[33] § 20900(e)(1)(A).

[34] § 20900(e)(1)(B).

[35] §§ 20900(e)(3)(A)–(4)(A).

[36] § 20900(e)(4)(C).

[37] § 20900(e)(5)(C); *see* Harry Carian Sales v. Agric. Lab. Rels. Bd., 703 P.2d 27, 54 (Cal. 1985).

[38] Agric. Lab. Rels. Bd. v. Superior Ct. of Tulare Cnty., 546 P.2d 687, 692 (Cal. 1976).

[39] *Id.* at 692.

[40] *Id.* at 706.

[41] *Id.* at 698.

[42] *Id.* at 693.

not considered a taking of the property for which compensation must be made."[43]

The *Tulare County* court was concerned about the greater interests of society.[44] "Property rights cannot be used as a shibboleth to cloak conduct which adversely affects the health, the safety, the morals, or the welfare of others."[45] The court balanced the rights of property owners against their ability to restrict union activities during non-work hours.[46] Although property rights advocates—and the current U.S. Supreme Court—would likely be alarmed by the idea that denying a property owner the right to exclude would be characterized as an "inconvenience," the *Tulare County* court justifiably compared the competing interests.[47]

The *Tulare County* court relied primarily on two cases: *Republic Aviation Corp. v. National Labor Relations Board* and *National Labor Relations Board v. Babcock & Wilcox Co.* (which was also considered by the various *Cedar Point* opinions as the case wound its way to the U.S. Supreme Court).[48] Both cases balanced property rights and society's interest in enforcing labor standards.[49] According to the *Republic Aviation* Court, "'It is not every interference with property rights that is within the Fifth Amendment . . . . Inconvenience or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining.'"[50]

In *Babcock*, property owners "refused to permit distribution of union literature by nonemployee union organizers on company-

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[43] *Id.* at 694 (quoting Miller v. Bd. of Pub. Works, 234 P. 381, 385 (Cal. 1925)). Of course, this case was decided before either *Loretto Teleprompter* or *Penn Central* were decided.

[44] *See Tulare Cnty.*, 546 P.2d at 694.

[45] *Id.* at 694–95 (quoting Richard R. B. Powell, *The Relationship Between Property Rights and Civil Rights*, 15 HASTINGS L.J. 135, 149–50 (1963)).

[46] *See id.* at 695 (quoting NLRB v. Cities Serv. Oil Co., 122 F.2d 149, 152 (2d Cir. 1941)).

[47] *See id.* at 707–08. *Contra id.* at 712–13 (Clark, J., dissenting).

[48] *See id.* at 695; Cedar Point Nursery v. Shiroma, 923 F.3d 524, 534 (9th Cir. 2019); Cedar Point Nursery v. Shiroma, 956 F.3d 1162, 1166 (9th Cir. 2020), *denied en banc*, 923 F.3d 524 (9th Cir. 2019) (Ikuta, J., dissenting).

[49] *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945); NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 109–11 (1956).

[50] *Republic Aviation*, 324 U.S. at 802 n.8 (quoting *Cities Serv. Oil Co.*, 122 F.2d at 152).

owned parking lots."[51] The Court found that employee access on company property was "unreasonably difficult" and concluded that access to nonemployee union organizers can only be denied "if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message."[52] In other words, the property rights of employers—or the rights to exclude union workers from their property—are not paramount to agricultural workers' ability to disseminate information to self-organize.[53] "[E]mployers' property rights must give way whenever the two interests are found to be in irreconcilable conflict."[54]

Elevating the greater interests of society over the rights of an individual property owner is an established legal application of Jeremy Bentham's traditional utilitarian theory.[55] For example, in *State v. Shack*,[56] the Supreme Court of New Jersey upheld a similar law allowing access to migrant agricultural workers on private property.[57] There, a union organizer was allowed to enter private farming

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[51] *Babcock*, 351 U.S. at 106.

[52] *Id.* at 106, 112.

[53] *See id.* at 112.

[54] *Tulare Cnty.*, 546 P.2d at 696.

[55] *See, e.g.*, Jason Lloyd, Note, *Let There Be Justice: A Thomistic Assessment of Utilitarianism and Libertarianism*, 8 TEX. REV. L. & POL. 229, 231–32 (2003) ("Because the maximization of the pleasure of society at large is thus the primary concern for Bentham, this necessarily implies that the individual is completely subjugated to the will of society, for his interests are served by the legislator only insofar as they conform to societal interests that maximize pleasure and minimize pain."); John Hasnas, *From Cannibalism to Caesareans: Two Conceptions of Fundamental Rights*, 89 NW. L. REV. 900, 928–29 n.97 (1995) ("[F]or Bentham the purpose of any governmental act must be 'to augment the happiness of the community.'" (quoting JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 3 (1948))); Roscoe Pound, *The Progress of the Law: Analytical Jurisprudence, 1914–1927*, 41 HARV. L. REV. 174, 196 (1927) ("For Bentham, it is the happiness of each and thus of all.").

[56] State v. Shack, 277 A.2d 369, 374 (N.J. 1971).

[57] *Id.* at 374. *See generally* JEREMY BENTHAM ET AL., *THEORY OF LEGISLATION* 110–13 (R. Hildreth trans., 6th ed. 1890), discussed in Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1211–12 (1967) (discussing Bentham's understanding of property as "the collection of rules which are presently accepted as governing the exploitation and enjoyment of resources. So regarded, property becomes 'a basis of expectations' founded on existing rules; that is to say, property is the institutionally established understanding that extant rules gov-

property to meet with farm workers, despite claims of trespass.[58] The court similarly elevated the needs of society over the rights of a landowner to exclude others,[59] reasoning that:

> Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law. Indeed[,] the needs of the occupants may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity.[60]

In deciding for the union organizers over the property owners' rights, the court weighed their respective interests and concluded:

> We find it unthinkable that the farmer-employer can assert a right to isolate the migrant worker in any respect significant for the worker's well-being. The farmer, of course, is entitled to pursue his farming activities without interference, and this defendants readily concede. But we see no legitimate need for a right in the farmer to deny the worker the opportunity for aid . . . .[61]

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erning the relationships among men with respect to resources will continue in existence . . . . It is supposed that men will not labor diligently or invest freely unless they know they can depend on rules which assure them that they will indeed be permitted to enjoy a substantial share of the product as the price of their labor or their risk of savings").

[58] *Shack*, 277 A.2d at 370–71.

[59] *Id.* at 373 ("Such an owner must expect to find the absoluteness of his property rights curtailed by the organs of society, for the promotion of the best interests of others for whom these organs also operate as protective agencies."); *see* Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 675 (1988) (discussing that in cases like *Shack*, "non-owners have a right of access to property based on need or on some other important public policy").

[60] *Shack*, 277 A.2d at 372; *see* Rashmi Dyal-Chand, *Pragmatism and Postcolonialism: Protecting Non-Owners in Property Law*, 63 AM. U. L. REV. 1683, 1691 (2014).

[61] *Shack*, 277 A.2d at 374.

Therefore, the union representative had invaded no possessory rights of the farmer and there was no trespass.[62]

The weighing of societal interests in determining whether there has been a "taking" such that just compensation is due stood as the Fifth Amendment takings test until the *Cedar Point* case came out in 2021.[63] *Cedar Point* therefore reflects a drastic change in how government may authorize third party entry onto private property. Prior cases that employed a balancing test have effectively been overturned by *Cedar Point*'s new per se exception.

B. *The Temporary "Invasion" of Private Property:* Cedar Point Nursery

Decades after the California Supreme Court upheld the constitutionality of the Act in *Tulare County*, the *Cedar Point* case was filed by two aggrieved property owners against the Chair of the Board (currently Victoria Hassid).[64] In each of the two cases, none of the agricultural employees lived on the property.[65] The property owners argued that California's organized labor access regulations effected an unconstitutional per se physical taking under the Fifth and Fourteenth Amendments.[66] The property owners sought declaratory and injunctive relief under 42 U.S.C. § 1983.[67]

According to the complaint, Cedar Point Nursery, a strawberry grower in Dorris, California, employed "over 400 seasonal workers and around 100 full-time workers, none of whom live[d] on the property."[68] In October 2015, at 5:00 a.m., union organizers entered

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[62] *Id.* at 375.

[63] *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2067, 2072, 2080 (2021) ("When the government physically acquires private property for a public use, the Takings Clause obligates the government to provide the owner with just compensation . . . . A different standard applies when the government, rather than appropriating private property for itself or a third party, instead imposes regulations restricting an owner's ability to use its own property.").

[64] *Id.* at 2063; Cedar Point Nursery v. Shiroma, 923 F.3d 524, 528 (9th Cir. 2019).

[65] The Cedar Point Nursery workers were housed in hotels in Klamath Falls, Oregon, near the farm. *Cedar Point*, 923 F.3d at 528.

[66] *Id.* at 526, 528.

[67] *Id.* at 529.

[68] *Cedar Point*, 141 S. Ct. at 2069.

Cedar Point's property without providing prior notice.[69] The organizers disrupted operations, calling through bullhorns and causing workers to join the protest or leave the worksite.[70] Cedar Point alleged that the union had "taken access" without giving notice.[71] The union, in turn, alleged that Cedar Point had committed an unfair labor practice.[72]

The other complainant, Fowler Packing Company, is a citrus and grape grower based in Fresno, California.[73] At the time of the case, it had roughly 2,300 to 3,000 employees among its field operations and packing facilities.[74] None of the employees lived on Fowler's private property.[75] In July 2015, union organizers attempted to enter Fowler's property, but the company prevented them from doing so.[76] The union filed an unfair labor practice charge under the Act.[77] Fowler subsequently filed suit in federal district court, due to concerns the union would attempt to enter their private property once again.[78] Fowler alleged that the Act's access regulation effected a per se unconstitutional taking under the Fifth and Fourteenth Amendments because the access laws effectively constituted an easement for unions to enter their private property.[79]

After denying the growers' motion for injunctive relief as to the Fifth Amendment claim, the federal district court granted the Board's motion to dismiss.[80] The court reasoned that the access regulation did not "allow the public to access their property in a permanent and continuous manner for whatever reason."[81] The district court stated that the access regulation was subject to *Penn Central*'s

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[69] *Id.*

[70] *Id.* at 2070.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Cedar Point*, 141 S. Ct. at 2070.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] Cedar Point Nursery v. Gould, No. 1:16-cv-00185-LJO-BAM, 2016 WL 3549408, at *5 (E.D. Cal. June 29, 2016).

[81] Cedar Point Nursery v. Gould, No. 1:16-cv-00185-LJO-BAM, 2016 WL 1559271, at *5 (E.D. Cal. Apr. 18, 2016).

three-part ad-hoc balancing test—which the petitioners made no attempt to satisfy.[82]

The Ninth Circuit Court of Appeals affirmed, holding in a divided panel that the regulations did not effect a permanent physical invasion, relying on *Penn Central*.[83] The appellate court, applying established precedent, identified three categories of regulatory actions in takings jurisprudence: (1) regulations that impose permanent physical invasions;[84] (2) regulations that deprive an owner of all economically viable use of their property;[85] and (3) the remainder of all regulatory actions.[86] The first two scenarios are per se takings under which compensation is automatically due—the third scenario applies the three-part ad-hoc *Penn Central* balancing test.[87] For the Ninth Circuit, this case constituted a simple application of existing law and did not constitute a permanent physical invasion, nor did it deprive the owner of all economically viable use of the property.[88]

Judge Leavy dissented, focusing on the nature of the workers' living arrangements.[89] According to Leavy, the Supreme Court had never allowed labor organizers to enter an agricultural employers' private property when the employees lived off premises.[90] Ninth Circuit Judge Ikuta subsequently dissented to the court's denial of a rehearing *en banc*.[91] Ikuta would have found a per se taking, reasoning that the access regulation appropriated from the growers an easement in gross that transferred that interest to the union organizers.[92]

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[82] *Id.* at *4.

[83] *See* Cedar Point Nursey v. Shiroma, 923 F.3d 524, 530, 533–34 (9th Cir. 2019).

[84] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

[85] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992).

[86] *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 128 ("[G]overnment actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute 'takings.'").

[87] *Cedar Point*, 923 F.3d at 530–31.

[88] *See id.* at 533.

[89] *See id.* at 536 (Leavy, J., dissenting).

[90] *See id.*

[91] Cedar Point Nursery v. Shiroma, 956 F.3d 1162, 1165 (9th Cir. 2020), *denied en banc*, 923 F.3d 524 (9th Cir. 2019) (Ikuta, J., dissenting).

[92] *See id.* at 1170–72.

Then, the U.S. Supreme Court granted the petitioners' writ of certiorari[93] and a new era of temporary takings jurisprudence commenced. According to the Supreme Court, a state regulation that authorizes temporary takings (or intrusions) that restrict owners' ability to "use" their property now constitutes a per se taking and the aggrieved party is thus entitled to compensation.[94]

According to the Court:

> The access regulation appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking. The regulation grants union organizers a right to physically enter and occupy the growers' land for three hours per day, 120 days per year. Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude.[95]

And the right to exclude is one of the most essential sticks in the bundle.[96] The Court goes on to erroneously state that "we have held that a physical appropriation is a taking whether it is permanent or temporary."[97] In so stating, the Court skipped over or misrepresents prior holdings that draw a sharp distinction between government authorized takings that are either "permanent" or "temporary" in nature.[98]

The *Cedar Point* dissent and majority quibbled over whether the Act constitutes a "regulation" or authorizes a physical invasion of the property. But this distinction is not necessarily material to whether the offending regulation constitutes a per se taking. Regulations that destroy all economically viable use of the property can

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[93] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071 (2021).

[94] *Id.* at 2072.

[95] *Id.*

[96] *Id.*; *see supra* notes 109–10 and accompanying text.

[97] *Id.* at 2074.

[98] *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 428–29 (1982) (differentiating between "permanent" and "temporary" invasions).

constitute a per se taking—and (historically) not all physical invasions have been considered per se takings.[99] Rather, the question lies in whether the invasion was permanent or not.

Cedar Point's extension of takings law relating to temporary physical invasions is a departure from established law and the well-established Fifth Amendment cases discussed below.

II. *LORETTO*: PERMANENT AND TEMPORARY PHYSICAL INVASIONS ARE SUPPOSED TO BE DISTINGUISHABLE

In *Loretto v. Teleprompter Manhattan CATV Corp.*, the U.S. Supreme Court considered whether a New York law that required landlords to permit cable television companies to install equipment on their buildings constituted a taking.[100] The Court held that the installation amounted to a permanent physical occupation of the property and, hence, a per se taking.[101] On remand, the invasion was valued at one dollar.[102]

The *Loretto* Court distinguished permanent physical invasions (like having a cable box on a landlord's property) and temporary physical invasions (like having union organizers enter property in off-work hours):[103] "[P]ermanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude."[104] In other words, under *Loretto*, permanent physical invasions are per se takings,[105] while temporary physical invasions are not. Therefore, under the plain language of *Loretto*, the union access regulation at issue in *Cedar Point* is not a taking because it only authorizes temporary invasions.[106] Moreover, under

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[99] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992); *see also Loretto*, 458 U.S. at 428.

[100] *Loretto*, 458 U.S. at 421.

[101] *Id.* at 441.

[102] *See* Timothy M. Mulvaney, *Non-Enforcement Takings*, 59 B.C. L. REV. 145, 209 n.258 (2018).

[103] *See Loretto*, 458 U.S. at 428–29.

[104] *Id.* at 435 n.12.

[105] *See id.* at 441.

[106] *See id.* at 428; *see also* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2081 (2021) (Breyer, J., dissenting) ("[O]ur prior cases make clear that the regulation before us allows only a *temporary* invasion of a landowner's property and that this kind of temporary invasion amounts to a taking only if it goes 'too far.'").

Loretto, the California statute allowing union organizers to enter private property is not a per se taking.[107] Yet, the *Cedar Point* majority repeatedly cited *Loretto* as supporting its position.[108]

The *Loretto* Court also addressed the adage that property rights operate as a bundle of sticks—which has been used to delineate the scope of property rights to determine if there has been a Fifth Amendment taking.[109] When there is a permanent physical occupation of property, it "does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand," effectively destroying "the rights to possess, use and dispose of it."[110]

To the extent *Cedar Point* applies the per se permanent physical invasion status to an ordinance authorizing a temporary invasion of private property, *Cedar Point* is (at best) inconsistent with, or overturns *Loretto*.[111] One might argue that the ordinance in *Cedar Point* is "permanent" in that it is an ongoing statute that authorizes entry onto private property. But the nature of the "invasion" was entirely different in *Loretto*.[112] There, the invasion itself was permanent—there was a cable box on a landlord's property that could not be moved without violating the law.[113] In *Cedar Point*, the invasion itself was not permanent—it was regulated by particular hours and had parameters like prior notice and restrictions on disturbances.

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[107] *See Loretto*, 458 U.S. at 449–50 (Blackmun, J., dissenting) ("[T]he Court . . . recognizes that temporary invasions by third parties are not subject to a *per se* rule.").

[108] *See Cedar Point*, 141 S. Ct. at 2073–74.

[109] *Loretto*, 458 U.S. at 433 ("[T]he servitude took the landowner's right to exclude, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979))).

[110] *Id.* at 435 (citing Andrus v. Allard, 444 U.S. 51, 65–66 (1979)).

[111] *See* Jevons v. Inslee, 561 F. Supp. 3d 1082, 1105 (E.D. Wash. 2021) ("Through *Cedar Point*, it appears the Court implicitly overruled its previous rationale under *per se* jurisprudence that distinguished between 'permanent physical occupations' and 'temporary physical invasions.'" (citing *Loretto*, 458 U.S. at 434)).

[112] *Cedar Point*, 141 S. Ct. at 2085 (2021) (Breyer, J., dissenting) ("[T]he regulation here at issue provides access that is 'temporary,' not 'permanent.' Unlike the regulation in *Loretto*, it does not place a 'fixed structure on land or real property.' The employers are not 'forever denie[d]' 'any power to control the use' of any particular portion of their property." (quoting *Loretto*, 485 U.S. at 436, 437)).

[113] *See Loretto*, 458 U.S. at 421, 423.

However, the access regulation is (arguably) itself a permanent legal fixture on the books.[114] The nature of the intrusion is therefore greater in *Loretto*, and the two cases are inconsistent. One is a permanent physical invasion. The other is not.

III. *TAHOE-SIERRA*: IT'S ONE OF A BUNDLE OF STICKS

The U.S. Supreme Court's decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* was cited favorably by the *Cedar Point* majority eight times (and once by the dissent).[115] But the cases are difficult to reconcile.[116] In *Tahoe-Sierra*, there was no per se taking after the government denied all building for thirty-two months—because there was not a great enough deprivation of property rights.[117] In *Cedar Point*, a brief entry onto private property by union organizers was a per se taking and compensable.[118] If we look at property rights as a bundle of sticks, the sticks taken by the thirty-two-month moratorium on development in *Tahoe-Sierra* did not "go far enough" to constitute a taking.[119] But the entry of union organizers onto private agricultural land to reach workers in *Cedar Point* was held to be a per se taking.[120] The apparent difference is the nature of the particular stick in the proverbial bundle.[121] The difference is certainly not in the level of damages.[122]

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[114] *See Cedar Point*, 141 S. Ct. at 2063, 2072.

[115] *See id.* at 141 S. Ct. 2063, 2067, 2071, 2072, 2074, 2075, 2077, 2078; *see also id.* at 2087 (Breyer, J., dissenting).

[116] *See* Anne Lee Fennell, *Escape Room: Implicit Takings After* Cedar Point Nursery, 17 DUKE J. CONST. L. & PUB. POL'Y 1, 40–41 (2022) (discussing the "asymmetry" between *Cedar Point* and *Tahoe-Sierra*).

[117] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 341–42 (2002).

[118] *See Cedar Point*, 141 S. Ct. at 2071–72.

[119] *See Tahoe-Sierra*, 535 U.S. at 326 ("If regulation goes too far it will be recognized as a taking." (quoting Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922))).

[120] *See Cedar Point*, 141 S. Ct. at 2072.

[121] *See* Fennell, *supra* note 116.

[122] *See Cedar Point*, 141 S. Ct. at 2074 ("The duration of an appropriation—just like the size of an appropriation . . . bears only on the amount of compensation.").

Tahoe-Sierra involved a thirty-two-month moratorium on development in the Lake Tahoe basin.[123] The purpose of this regulation was to protect the region's precarious environmental stability by giving jurisdictions time to implement an area-wide land use plan.[124] The regulation was never intended to be a permanent restriction.[125] Aggrieved landowners alleged a *Lucas*-style taking of their property under the theory that the moratorium denied all economically viable use of the property and was therefore a per se taking that was compensable under the Fifth Amendment—without having to prove a taking under *Penn Central*'s three-part ad-hoc balancing test.[126]

The Supreme Court denied the petitioners' claims that the regulation constituted a per se taking of their property.[127] The Court relied on the "bundle of sticks" analogy to property rights, finding that the restriction did not deprive the petitioners of enough sticks in the bundle to constitute a per se—or automatic—taking.[128] The Court looked at both the physical aspect of property ownership and the temporal (or time) aspect[129] as separate sticks in the bundle:

> Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of 'the parcel as a whole,' whereas a temporary restriction that merely causes a diminution in value

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123 *See Tahoe-Sierra*, 535 U.S. at 306–07.

124 *See id.* at 306.

125 *See id.* at 316.

126 *See id.* at 320 ("Petitioners make only a facial attack . . . . They contend that the mere enactment of a temporary regulation that, while in effect, denies a property owner all viable economic use of her property gives rise to an unqualified constitutional obligation to compensate her for the value of its use during that period. Hence they 'face an uphill battle.'" (quoting Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470, 495 (1987))).

127 *See id.* at 306, 323–24 ("[W]e do not apply our precedent from the physical takings context to regulatory takings claims. Land-use regulations are ubiquitous and most of them impact property values in some tangential way . . . . Treating them all as per se takings would transform government regulation into a luxury few governments could afford.").

128 *See id.* at 327.

129 The average building time between lot purchase and home construction in the Lake Tahoe basin was twenty-five years. *Tahoe-Sierra*, 535 U.S. at 315.

> is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.[130]

In other words, for the Court, the right to use property for a given period of time was one segment within the bundle of sticks.[131] Because the property owner retained so many of the sticks in the bundle—despite the moratorium—there was no per se taking.[132] The aggrieved property owners might, however, have had a valid claim under a *Penn Central* balancing test.[133]

Yet, the temporal nature of property rights was not an exclusive deciding factor in *Tahoe-Sierra*.[134] Rather, it was one factor to be taken into consideration—i.e., one stick within the bundle of

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[130] *Id.* at 332.

[131] *See* Raymond Dake, *Trout of Bounds: The Effects of the Federal Circuit Court of Appeals' Misguided Fifth Amendment Takings Analysis in* Casitas Municipal Water District v. United States, 36 COLUM. J. ENV'T L. 59, 107–08 (2011) (Under *Tahoe-Sierra*, "[w]hen a property owner possesses a full bundle of property rights, the removal of one of the sticks from the bundle does not constitute a taking."); Philip R. Saucier, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*: The Reemergence of* Penn Central *and a Healthy Reluctance to Craft Per Se Regulatory Takings Rules*, 55 ME. L. REV. 543, 548–49 (2003) ("[A]ny diminution in value must be considered in light of the entire bundle of sticks of rights that a property interest entails, including the 'estate' sticks (such the right to use, possess, and exclude) as well as the more abstract sticks such as vertical (surface and air rights), horizontal (all contiguously owned property considered separately or within types of land such as wetland), and temporal rights (present and future interests along a timeline).").

[132] *See Tahoe-Sierra*, 535 U.S. at 327, 332 ("[A] permanent deprivation of the owner's use of the entire area is a taking of 'the parcel as a whole,' whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.").

[133] *See id.* at 331 ("[T]he District Court erred when it disaggregated petitioners' property into temporal segments . . . . The starting point . . . should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* was the proper framework.").

[134] Fennell, *supra* note 116, at 40 ("The Court declined to treat the total taking of a time slice as a Lucas taking, holding instead that this sort of temporary regulation was better handled under the Court's general-purpose approach for regulatory takings, the multi-factor Penn Central test.").

sticks.[135] The "'[t]emptation to adopt what amount[s] to [a] per se rule[] in either direction'" must be resisted.[136]

Like *Cedar Point*, the *Tahoe-Sierra* petitioners sought to avoid the *Penn Central* balancing test and urged the Court to find a per se taking.[137] One found a taking, and the other did not.[138] The difference lies in the nature of the stick that was taken—because *Cedar Point* involved the "exclusion" stick, the apparent temptation to adopt a per se rule could not be overcome.[139]

In *Cedar Point*, the property owner maintained the vast majority of their sticks in the bundle.[140] All that was taken by the California union access law was the right to exclude a particular set of others, with limits on time, notice, and behavior.[141] Under the reasoning in *Tahoe-Sierra*, this is not a per se taking.[142] Most of the bundle remains intact.[143] The only way to reconcile the two is to find that the

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[135] *Id.*

[136] *Tahoe-Sierra*, 535 U.S. at 321 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 636 (O'Connor, J., concurring)); *see* Angela Schmitz, Note, *Taking Shape: Temporary Takings and the* Lucas *Per Se Rule in* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Authority, 82 OR. L. REV. 189, 219 (2003) ("While no one would argue that the lines between physical and regulatory takings and partial and total takings are the product of a unified, deliberate process, they are also certainly not arbitrary. As the Supreme Court affirmed in *TRPA*, the lines reflect important differences in the severity of the invasion and the impact on the landowner. Furthermore, in an area where lines must surely be drawn 'if government is to go on,' the Court offers rational and fair places to draw those lines.").

[137] *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2070 (2021).

[138] *See id.* at 2080; *see also Tahoe-Sierra*, 535 U.S. at 306, 337.

[139] *See Cedar Point*, 141 S. Ct. at 2072, 2073.

[140] Rights of possession, as well as vertical, horizontal, and temporal rights, do not appear implicated by the governmental policy described in *Cedar Point*. *See generally id.* at 2069, 2070.

[141] *See id.* at 2072.

[142] *See Tahoe-Sierra*, 535 U.S. at 327, 324 n.19 ("Condemnation of a leasehold gives the government possession of the property, the right to admit and exclude others, and the right to use it for a public purpose. A regulatory taking, by contrast, does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others.").

[143] *Cedar Point*, 141 S. Ct. at 2082 (Breyer, J., dissenting) ("From the employer's perspective, [the regulation] restricts when and where they can exclude others from their property. At the same time, the provision only awkwardly fits the term[] 'physical taking' . . . . The 'access' that it grants union organizers does

right to exclude is a different type of "stick" that is far more important than the other sticks in the bundle. So important that it renders the other sticks in the bundle meaningless. Or rather, that it transcends the bundle of sticks analogy. The difference is that one involves a regulatory taking and the other involves a temporary physical invasion.[144] Conversely, taking the "use" stick over thirty-two months probably results in a greater financial burden to the landowner than does taking the "exclusion" stick in these cases.[145]

Under *Loretto*, a permanent physical invasion of property, no matter how small, constitutes a compensable per se taking under the Fifth Amendment.[146] The size of the taking only bears on the compensation, an ostensibly separate stick.[147] For the *Loretto* Court, a permanent physical invasion transcended the sticks analogy, as the right to exclude ostensibly cuts through all the other sticks in the bundle.[148] For *Cedar Point*, the "use" stick (or right to exclude) in the bundle analogy extends now to temporary as well as physical invasions.[149]

As a practical matter, of course, the aggrieved Cedar Point Nursery property owners retained the right to use their agricultural land exactly as intended.[150] The decades-old California access regulation was a minor stick in the bundle. Therefore, under a strict reading of *Tahoe-Sierra*—and its bundle of sticks reasoning by analogy—there is no per se taking under the facts of *Cedar Point*.[151]

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not amount to any traditional property interest in land . . . . [n]or does it provide the organizers with a formal easement.").

[144] *See Tahoe-Sierra*, 535 U.S. at 322; *see also Cedar Point*, 141 S. Ct. at 2072.

[145] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 (1992) (noting that the rule that considers deprivation of use as a taking may be rooted in the perspective that such deprivation is equivalent to the government's seizure of the value of that property).

[146] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434–35 (1982).

[147] *See id.* at 437–38.

[148] *See id.* at 435–36.

[149] *See Cedar Point*, 141 S. Ct. at 2072–74.

[150] *See id.* at 2072 ("Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude.").

[151] *See generally* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 327 (2002).

The *Tahoe-Sierra* Court also looked at the *Armstrong* rule in determining whether there should be a per se taking: "[W]e will consider whether the interest in protecting individual property owners from bearing public burdens 'which, in all fairness and justice, should be borne by the public as a whole.'"[152] "[T]he ultimate constitutional question is whether the concepts of 'fairness and justice' that underlie the Takings Clause will be better served by one of these categorical rules or by a *Penn Central* inquiry into all of the relevant circumstances in particular cases."[153] In *Cedar Point*—as in many alleged takings—the totality of the circumstances, as contemplated under a balancing test, would better determine whether the farmers were asked to bear a burden that should be shouldered by society. Applying a per se test eliminates that analysis.

IV. *ARKANSAS GAME & FISH*: TEMPORARY TAKINGS ARE A THING—AND ARE (WERE) SUBJECT TO A BALANCING TEST!

In *Arkansas Game & Fish Commission v. United States*, the Court reiterated that permanent physical occupations are per se takings, but temporary invasions are not.[154] Temporary takings are subject to a complex balancing process to determine whether they are a compensable Fifth Amendment taking.[155]

In *Arkansas Game & Fish*, a state agency sued the federal government over its flood control practices on the Clearwater Dam along the Black River in Northern Arkansas.[156] The periodic flooding damaged timber on state-owned lands and the state alleged a Fifth Amendment taking.[157] The Federal Court of Claims agreed and awarded the State of Arkansas $5.7 million.[158]

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[152] *Id.* at 332 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[153] *Id.* at 334.

[154] *See* Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 38–39 (2012); *see also Cedar Point*, 141 S. Ct. at 2079 (dismissing the *Ark. Game & Fish* test as "nothing more than an application of the traditional trespass-versus-takings distinction to the unique considerations that accompany temporary flooding.").

[155] *Ark. Game & Fish*, 568 U.S. at 36, 38–39.

[156] *See id.* at 27–29.

[157] *See id.* at 26, 29.

[158] *See id.* at 30.

In *Arkansas Game & Fish*, the U.S. Supreme Court held that a temporary taking was theoretically possible for government-induced seasonal flooding on the aggrieved party's property.[159] The only question the Court considered was whether a temporary physical invasion claim was categorically exempt from a Fifth Amendment takings claim, and the Court held that it was not.[160] Temporary physical invasion claims are actionable; however, any such claim would still have to meet criteria based on the three-part ad hoc *Penn Central* test.[161] Under the new test for temporary takings, the "invasion" should be evaluated based on: (1) the duration of the physical invasion; (2) "the degree to which the invasion is intended or is the foreseeable result of authorized government action;" (3) "the character of the land at issue;" (4) "the owner's 'reasonable investment-backed expectations' regarding the land's use;" and (5) the "[s]everity of the interference."[162]

Applying the *Cedar Point* facts to the *Arkansas Game & Fish* analysis, there is probably not a per se taking, but the agricultural property owners should have been able to demonstrate whether they

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[159] *Id.* at 38 ("We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection.").

[160] *See id.* at 27 ("We disagree and conclude that recurrent floodings, even if of finite duration, are not categorically exempt from Takings Clause liability.").

[161] *Ark. Game & Fish*, 568 U.S. at 39 (stating that the *Penn Central* factor related to the owner's reasonable investment-backed expectations is part of the analysis in determining whether a temporary physical taking is compensable); *see* Bridge Aina Le'a, LLC v. Haw. Land Use Comm'n, 950 F.3d 610, 627, 631–33 (9th Cir. 2020) (applying the diminution in value *Penn Central* factor to a temporary taking and concluding that the valuation evidence does not support the applicant's Fifth Amendment takings claim). *But see* Brian T. Hodges, *Will* Arkansas Game and Fish Commission v. United States *Provide a Permanent Fix for Temporary Takings?*, 41 B.C. ENV'T AFFS. L. REV. 365, 388–92 (2014) (arguing that the test is the same for both temporary and permanent physical takings).

[162] *Ark. Game & Fish*, 568 U.S. at 38–39; John D. Echeverria, *What is a Physical Taking?*, 54 U.C. DAVIS L. REV. 731, 749 (2020); *see* Steven J. Eagle, Penn Central *and its Reluctant Muftis*, 66 BAYLOR L. REV. 1, 40 (2014) ("Dicta in *Arkansas Game and Fish* also discussed permanent versus temporary takings, and physical versus regulatory takings, a manner that both made those distinctions murkier, and perhaps hinting that all of those questions should be considered under the rubric of *Penn Central*.").

complied with the balancing test in showing a compensable taking.[163] The *Arkansas Game & Fish* facts were arguably a more egregious physical invasion of property. Damages in the form of lost timber were clear, evident, compensable, and calculable.[164] There was a real interference with the owner's investment-backed expectations in the timber.[165] In contrast, the damages to the Cedar Point Nursery were more difficult to calculate.[166]

Of course, with a permanent physical invasion, the damages are irrelevant.[167] The damages in *Loretto* were arguably zero (and perhaps the landlords actually benefitted from the permanent physical invasion because tenants had access to cable television).[168]

V. *PRUNEYARD*: ANOTHER EXCEPTION TO PERMANENT PHYSICAL INVASIONS

In *PruneYard Shopping Center v. Robins*, the U.S. Supreme Court failed to find a Fifth Amendment taking despite the existence of a physical invasion.[169] The Court astonishingly, in the context of *Cedar Point*, found that "appellants [] failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value

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[163] *See Ark. Game & Fish*, 568 U.S. at 36 ("The Court distinguished permanent physical occupations from temporary invasions of property, expressly including flooding cases, and said that 'temporary limitations are subject to a more complex balancing process to determine whether they are a taking.'" (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 n.12 (1982)); *see also* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021) (reasoning that the *Penn Central* test is applied to determine when a use regulation effects a taking, not whether a regulation results in a physical appropriation of property to become a per se taking).

[164] *See Ark. Game & Fish*, 568 U.S. at 30.

[165] *See generally id.* at 30 (discussing how the damage to over eighteen million board feet of timber led to $5.7 million in compensation).

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

[167] *See Loretto*, 458 U.S. at 434–35, 441 ("The issue of the amount of compensation that is due, on which we express no opinion, is a matter for state courts to consider on remand.").

[168] *See id.* at 450 (Blackmun, J., dissenting) ("If anything § 828 leaves appellant better off than do other housing statutes, since it ensures that her property will not be damaged esthetically or physically without burdening her with the cost of buying of maintaining cable.").

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

of their property that the state-authorized limitation of it amounted to a 'taking.'"[170]

In *PruneYard*, a group of high school students who sought to solicit support for their opposition to a United Nations resolution against "Zionism" set up a card table in a courtyard of a privately owned shopping center in Campbell, California.[171] The students peacefully asked passersby to sign petitions, which would be sent to the President and members of Congress.[172] A security guard asked the students to leave because they were violating the shopping center's policy, which prohibited any visitor or tenant from engaging in any "publicly expressive activity, including circulation of petitions, that is not directly related to its commercial purposes."[173] The policy had been applied consistently in a nondiscriminatory fashion.[174] The students left and filed a lawsuit, seeking to enjoin the shopping center from denying them access for the purpose of circulating petitions.[175]

The shopping center contended that "a right to exclude others underlies the Fifth Amendment guarantee against the taking of property without just compensation . . . ."[176] Strangely, however, the appellant shopping center failed to allege that there was a taking for which compensation is due under the Fifth Amendment.[177] Nevertheless, the Court found that "there has literally been a 'taking' of" "one of the essential sticks in the bundle of property rights . . . the right to exclude others."[178] "But it is well established that 'not every destruction or injury to property by governmental action has been held to be a "taking" in the constitutional sense.'"[179]

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[170] *Id.* at 84 (citing Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 233, 236–37 (1897)).

[171] *PruneYard*, 447 U.S. at 77.

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] *Id.* at 82.

[177] *PruneYard*, 447 U.S. at 82 n.5 (The appellant tied the Fifth Amendment argument to an alleged deprivation of due process, alleging that "[t]he rights of a property owner . . . are rooted in the Fifth Amendment guarantee against . . . deprivation of property without due process of law.").

[178] *Id.* at 82.

[179] *Id.* (quoting Armstrong v. United States, 364 U.S. 40, 48 (1960)).

So the *PruneYard* Court found a physical invasion and a taking of an essential stick in the proverbial bundle.[180] But no compensable taking.[181] "[H]ere appellants have failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'"[182] This seems squarely at odds with the reasoning in *Cedar Point*.[183] Fundamentally, both expressly involve a physical "invasion of private property" and both concern a "taking" of the stick dealing with the right to exclude others.[184] But the outcomes are diametrically opposed—*PruneYard* finds no taking (compensable or otherwise) and *Cedar Point* finds a per se taking. The two appear in opposition.

But *Cedar Point* attempts to distinguish *PruneYard*, apparently without overturning it.[185] According to the *Cedar Point* Court, "[l]imitations on how a business generally open to the public [such as in *PruneYard*] may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public."[186] But this is a dubious post-hoc distinction, and was not a line drawn by the Court in *PruneYard* itself.[187] The

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[180] *See id.* at 82, 84.

[181] *See id.* at 84 ("[T]he fact that they may have 'physically invaded' appellants' property cannot be viewed as determinative.").

[182] *Id.* at 84.

[183] *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072, 2077–78 (2021) ("[W]e have stated that the right to exclude is 'universally held to be a fundamental element of the property right . . . .'").

[184] *See* Gregory C. Sisk, *Returning to the* PruneYard*: The Unconstitutionality of State-Sanctioned Trespass in the Name of Speech*, 32 HARV. J.L. & PUB. POL'Y 389, 409 (2009) ("To be sure, while formulating a categorical approach toward physical invasions of property, the Supreme Court has paused from time to time to make perfunctory and increasingly strained efforts to distinguish *PruneYard* from more recent cases involving governmentally mandated grants of easements on private property. For example, the Court suggested in *Loretto* that *PruneYard* involved only a 'temporary physical invasion' . . . .").

[185] *See* Sarah Haddon, Note, *Property Rights: Fiercely Contested, Strongly Guarded, and Continually Defended. How the Supreme Court's Decision in* Cedar Point *Emphasized the Court's Devotion to Property Rights*, 71 AM. U. L. REV. 349, 362–63 (2021).

[186] *Cedar Point*, 141 S. Ct. at 2077.

[187] *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980) ("It is . . . well established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a

PruneYard Shopping Center could close itself periodically to change the nature of its public access rules.[188] And "closed to the public" is not a defined term—many private businesses have limited public access for tours, open houses, farmer's markets, etc.[189]

Cedar Point also cites to *Horne v. Department of Agriculture*, which distinguishes *PruneYard* as "involving 'an already publicly accessible' business."[190] But *Horne* involved the government's taking of farmers' raisins and extended the Takings Clause to personal rather than just private property.[191] In *Horne*, the Court found a taking in which the raisin growers were entitled to just compensation under the Fifth Amendment.[192] The raisin program at issue required the physical surrender of raisins and the transfer of title thereto—and the growers lost all right to their disposition in the raisins.[193] *Cedar Point* is far more analogous to *PruneYard* than it is to *Horne*. Both *Cedar Point* and *PruneYard* involved a limited physical "invasion" of property while the use of the property was allowed to continue in its usual and intended purpose.[194] In one case, it was a farm, and in the other, a shopping center.[195]

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taking without just compensation or contravene any other federal constitutional provision.").

[188] *See id.* at 77, 81 (The Supreme Court has stated that private property "does not 'lose its private character merely because the public is generally invited to use it for designated purposes.'").

[189] *See id.* at 83 (where PruneYard has the ability to limit certain activity by "adopting time, place, and manner regulations").

[190] *Cedar Point*, 141 S. Ct. at 2077 (citing Horne v. Dep't of Agric., 576 U.S. 350, 364 (2015)).

[191] *Horne*, 576 U.S. at 357. In *Horne*, the question and answer presented was "[w]hether the government's 'categorical duty' under the Fifth Amendment to pay just compensation when it 'physically takes possession of an interest in property' . . . applies only to real property and not personal property. The answer is no." *Id.* Under the Raisin Marketing Order at issue in the case, the government would physically set aside a percentage of a growers' crop and would sell or otherwise dispose of the raisins in a manner that was best suited to an orderly market. *Id.* at 354.

[192] *Id.* at 362, 370. *But see* Andrus v. Allard, 444 U.S. 51, 67–68 (1979) (finding no taking for a government regulation restricting the sale of eagle feathers).

[193] *Horne*, 576 U.S. at 364.

[194] *See Cedar Point*, 141 S. Ct. at 2069–70; *see also PruneYard*, 447 U.S. at 84.

[195] *See Cedar Point*, 141 S. Ct. at 2069; *PruneYard*, 447 U.S. at 77.

Further, *PruneYard* spoke in generalities—its express language is clear—and was not limited to "accessible" businesses.[196] In fact, the *Cedar Point* property was arguably more accessible to the union organizers than the property at issue in *PruneYard* because there was an express statute authorizing entry for union organizers.[197]

VI. *CAUSBY* AND *KAISER AETNA*: THESE ARE ACTIONABLE PHYSICAL INVASIONS

Two prior U.S. Supreme Court cases that the *Cedar Point* Court relies on are arguably more on point and support the Court's conclusion.[198] They are just older (decided in 1946 and 1979), distinguishable, and predate the Court's subsequent jurisprudence applying a balancing test to temporary physical invasions.[199]

In *United States v. Causby*, a landowner in Greensboro, North Carolina argued that the federal government had "taken" his property; therefore, the landowner believed just compensation was due because the military flew planes over his property.[200] The military planes flew low, as the landowner lived a half mile from the airport, and the noise interfered with the enjoyment of his property.[201] Vibrations killed more than 150 chickens on the property.[202] The Court first found that the federal government had a right to navigable airspace, and that Mr. Causby's property did not extend indefinitely upward.[203]

However, the Court later found that the offending flights occurred outside of navigable airspace, and the invasions of the airspace over Causby's property are "in the same category as invasions of the surface."[204] According to the Court, "there was a diminution

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196 *See PruneYard*, 447 U.S. at 88.

197 *Cedar Point*, 141 S. Ct. at 2069.

198 *Id.* at 2073. *See e.g.*, United States v. Causby, 328 U.S. 256, 258 (1946); Kaiser Aetna v. United States, 444 U.S. 164, 166 (1979).

199 *Cedar Point*, 141 S. Ct. at 2072.

200 *Causby*, 328 U.S. at 258.

201 *Id.* at 258–59.

202 *Id.* at 259.

203 *Id.* at 260–61 ("It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe–*Cujus est solum ejus est usque ad coelum*. But that doctrine has no place in the modern world.").

204 *Id.* at 265.

in value of the property and [] the frequent, low-level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude has been imposed upon the land."[205] Compensation was due for the use of Causby's land below the navigable airspace and not for the lost value of the chickens.[206] The holding in *Causby* is analogous to the holding in *Cedar Point*. This was a temporary invasion of the lower airspace above the property and a compensable taking.[207]

However, the flights over Causby's property were ongoing and not temporary in nature.[208] The flights constituted a greater physical invasion than the union organizers did in *Cedar Point*—particularly when considering the attendant time, notice, and decorum requirements of the union organizers' entry.[209]

In *Kaiser Aetna v. United States*, a property owner expanded and dredged a marina on private property to include access to an adjacent navigable waterway that connected to the Pacific Ocean surrounding Hawaii's Island of Oahu.[210] The owners had been advised by the Army Corps of Engineers that they did not need permits for the improvements.[211] After construction, the petitioner property owner controlled the marina and access thereto.[212]

The Army Corps of Engineers subsequently filed suit against the marina owner, alleging that the marina needed to obtain authoriza-

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[205] *Id.* at 267.

[206] *See Causby*, 328 U.S. at 269–70 n.2.

[207] *See* Neal S. Manne, Note, *Reexamining the Supreme Court's View of the Takings Clause*, 58 TEX. L. REV. 1447, 1460 (1980) ("The Tenth Circuit, however, viewed *Griggs* and *Causby* as departures from the balancing approach of *Pennsylvania Coal*. Instead, it understood *Griggs* and *Causby* to rest squarely on the physical invasion component.").

[208] *Cf.* Argent v. United States, 124 F.3d 1277, 1285 (Fed. Cir. 1997) ("The [physical] taking of an avigation easement by the Government occurs when the Government begins to operate aircraft regularly and frequently over a parcel of land at low altitudes, with the intention of continuing such flights indefinitely." (quoting Lacey v. United States, 595 F.2d 614, 618 (Ct. Cl. 1979)).

[209] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2069, 2072 (2021).

[210] Kaiser Aetna v. United States, 444 U.S. 164, 166–67 (1979).

[211] *Id.* at 167.

[212] *Id.* at 168.

tion for future improvements under the Rivers and Harbors Appropriation Act of 1899.[213] The Army Corps also alleged that petitioners could not deny public access to the marina because, by virtue of opening to a bay, the marina was now in "navigable water[s] of the United States."[214]

The U.S. Supreme Court agreed that because the marina connected to navigable waters, the Army Corps could regulate the property owner and the marina could not deny access to the public.[215] But whether this expansion of authority by the Army Corps of Engineers constituted a Fifth Amendment taking was an entirely separate question.[216] After a passing reference to *Penn Central*, the Court held "that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without [just] compensation."[217] The imposition of a "navigable servitude" is an "actual physical invasion" of the privately owned marina.[218]

The *Kaiser Aetna* case, in concert with cases like *Causby* and *Loretto*, found a per se style taking for a permanent physical invasion of property.[219] That is not quite the *Cedar Point* case, but it is in the same neighborhood.[220] *Kaiser Aetna* opened private property to the public via a navigable waterway.[221] The entrance to the bay and to the previously privately owned marina could now be accessed

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213 *Id.* at 167.

214 *Id.*

215 *See id.* at 174.

216 *Kaiser Aetna*, 444 U.S. at 174.

217 *Id.* at 174–75, 179–80.

218 *Id.* at 180.

219 *See* Morgan Lewis, Comment, *Good Fences Make Good Neighbors, But Do They Make Good Cents?: A South-of-the-Border Fence Guide to Theories of Compensation for Property*, 41 TEX. TECH L. REV. 1193, 1231 (2009) ("[T]he precedent of *Causby* and *Kaiser Aetna* suggest that the court does not favor allowing even the slightest right of a landowner to go uncompensated once taken to advance the interests of government."). *But see* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 84 (1980) (distinguishing *Kaiser Aetna* in the context of *Penn Central*'s "reasonable investment backed expectations").

220 *See Kaiser Aetna*, 444 U.S. at 166, 168 (where permanent physical invasion of a previously private waterway is of concern); Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021) (where temporary physical invasion of a private growing nursery is of concern).

221 *See Kaiser Aetna*, 444 U.S at 167, 180.

by the public.[222] This is more akin to *PruneYard*—where there was not a taking—than *Cedar Point* because the public was allowed to come and go as they pleased.[223] But in *Cedar Point*, the union organizers—not the general public—were only allowed to enter at a certain time, with notice, under certain conditions.[224] The physical invasion was therefore not permanent in the same way that the servitude was in *Kaiser Aetna*.[225]

VII. *YEE V. ESCONDIDO*: IT IS STILL GOOD LAW. OR IS IT?

Yee v. Escondido is another case apparently at odds with the *Cedar Point* majority—and the uncertainty between the two cases has spurred other cases seeking to expand the scope of Fifth Amendment takings.[226]

Yee involved a pair of regulations that limited the rights of mobile home park landowners.[227] Under the regulations, the bases under which a park owner may terminate a mobile home owner's tenancy are limited[228] and the owners' ability to set rents is restrained.[229] Because the laws limited the owners' right to evict a tenant or convert the property to other uses, the property owners alleged that the law creates perpetual tenants of the mobile home parks and "represents the right to occupy a pad at below-market rent indefinitely."[230] The property owners alleged, *inter alia*, a "compelled physical invasion" of their property under *Loretto*.[231]

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[222] *See id.*

[223] *See PruneYard*, 447 U.S. at 77, 88; *Kaiser Aetna*, 444 U.S. at 167.

[224] *Cedar Point*, 141 S. Ct. at 2069, 2072.

[225] *See Kaiser Aetna*, 444 U.S. at 167, 180.

[226] *See, e.g.*, *supra* notes 200–17 and accompanying text. *But see* Guy Yedwab, *The Stable Legal Foundation of Commercial Rent Stabilization*, 20 RUTGERS J. L. & PUB. POL'Y, 1, 28 (2022) ("In *Yee*, although some limitations were placed on evictions, the rent control laws were not a physical occupation because 'tenants were invited by the petitioner, not forced upon them by the government' as was the case with the union organizers in *Cedar Point*." (quoting Yee v. City of Escondido, 503 U.S. 519, 528 (1992)).

[227] *See Yee*, 503 U.S. at 524.

[228] *Id.*

[229] *Id.* at 524–25.

[230] *Id.* at 527.

[231] *See id.*; *see also* Richard J. Lazarus, *Putting the Correct "Spin" on* Lucas, 45 STAN. L. REV. 1411, 1416 (1993) ("Justice O'Connor's opinion for the Court

But, the U.S. Supreme Court disagreed.[232] According to the Court, "[p]etitioners' tenants were invited by petitioners, not forced upon them by the government."[233] The Court acknowledged that the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property," but did "not find that right to have been taken from petitioners on the mere face of the Escondido ordinance."[234] Rather, the Court found that the ordinances merely regulated the use of property by regulating the landlord-tenant relationship, and therefore there was no taking.[235] There was also no physical invasion.[236]

So for the *PruneYard* Court, it was the government-imposed entry onto the property (or lack thereof) that would constitute a physical invasion of the property.[237] But once on the property, the inability to eject that invitee constitutes a different and less important stick in the proverbial bundle under the majority's reasoning.[238] The nature of that stick would be tested under *Cedar Point*'s expansive view of what constitutes a "physical invasion."

VIII. WHAT'S THE DAMAGE? TRESPASS? IT'S NOT AN EASEMENT. IS IT A LICENSE? AN EQUITABLE SERVITUDE?

Conspicuously absent from the *Cedar Point* majority opinion is any discussion of a remedy for a regulation authorizing temporary entry onto a landowner's property.[239] It is entirely unclear what has been "taken" such that compensation is due.[240] The aggrieved property owners did not, in fact, seek compensation—only injunctive

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in *Yee v. City of Escondido* rejected the property owner's efforts to expand the Court's per se physical invasion takings test to encompass regulation of mobile home parks. The Court also declined to consider the petitioner's alternative contention that, although no actual physical invasion occurred, the county ordinance amounted to a 'regulatory taking' because it deprived mobile home park owners of the economic use of their property.").

232 *See Yee*, 503 U.S. at 527.

233 *Id.* at 528.

234 *Id.*

235 *Id.* at 528–30.

236 *See id.* at 529–30.

237 PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 84 (1980).

238 *See id.* at 82.

239 Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2063 (2021).

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

and declaratory relief.[241] But if compensation were available—as it was here—injunctive relief should have been unavailable.[242] Indeed, the plain language of the Fifth Amendment freely allows the government to "take" private property as long as "just compensation" is paid.[243]

The employers can—and should—have a cause of action against the unions for failure to adhere to the clear regulations. Organizers allegedly failed to provide the requisite notice and disrupted operations.[244] Accordingly, the organizers were on the growers' property without legal authority.[245] That is a trespass, and the growers had an action in state law for the ensuing damages.[246] In fact, the growers had an action both in trespass and under the express terms of the Act itself.[247] But this issue was blithely dismissed by the *Cedar Point* majority: "[O]ur holding does nothing to efface the distinction between trespass and takings. Isolated physical invasions, not undertaken pursuant to a granted right of access are properly assessed as individual torts . . . ."[248] But the growers specifically alleged that access to their properties was outside of the granted right of access because the union organizers failed to adhere to the regulations.[249]

Assuming *arguendo*, that the union organizers had in fact complied with the notice regulations, and there is no nuisance or trespass claim, a law that allows third parties a *permanent* entrance to private

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241 *Id.*

242 *See, e.g.*, Knick v. Township of Scott, 139 S. Ct. 2162, 2166 (2019).

243 U.S. CONST. amend. V.

244 *See Cedar Point*, 141 S. Ct. at 2069–70.

245 *See id.*

246 *See* Smith v. Lockheed Propulsion Co., 56 Cal. Rptr. 128, 136 (Cal. Ct. App. 1967) ("The law [in California] respecting liability for trespass is in accord with the view expressed in the Restatement of Torts: 'There is no liability for a trespass unless the trespass is intentional, the result of recklessness or negligence, or the result of injuries in an extra-hazardous activity.'").

247 *See Cedar Point*, 141 S. Ct. at 2068 (distinguishing trespass because "isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right"); *see also* Ridge Line, Inc. v. United States, 346 F.3d 1346, 1355 (Fed. Cir. 2003) (stating that a plaintiff must show "that treatment under takings law, as opposed to tort law, is appropriate under the circumstances").

248 *See Cedar Point*, 141 S. Ct. at 2078.

249 *Id.* at 2069–70 (describing how the union organizers allegedly failed to provide notice and disrupted operations).

property is unquestionably actionable and may likely be a "taking."[250] This is the *Loretto* test[251] and was the case in *Causby*[252] and particularly *Kaiser Aetna*.[253] It is also the subject of the balancing test in *Arkansas Game & Fish*.[254] But the Act in *Cedar Point* does not appropriate any traditionally defined interest in land.[255] Both the dissent and majority agree there is no easement granted to the union organizers because it does not burden any particular piece of property, as required under any traditional definition of "easement."[256] The regulation simply gave the union organizers the right to temporarily invade a portion of the owners' land—at certain times, with advance notice, and with limits on activities.[257]

Both *Causby* and *Kaiser Aetna* refer to the interest "taken" by the government entity as a "servitude."[258] And an equitable servitude is probably the best analogous property interest to the access regulation granted by the California Act. If the Court meant that the regulation itself, and not the entry, is the offending action that triggered a taking, then it would be valued as a limited servitude on the property.[259] It might also be considered a license under the same theory.[260] It is probably not a covenant, which generally requires a

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[250] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

[251] *See id.*

[252] *See* United States v. Causby, 328 U.S. 256, 256 (1946).

[253] *See* Kaiser Aetna v. United States, 444 U.S. 164, 164 (1979).

[254] *See* Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 23 (2012).

[255] *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2069 (2021).

[256] *See id.* at 2086–87 (Breyer, J., dissenting). *See, e.g.*, Jevons v. Inslee, 561 F. Supp. 3d 1082, 1107 (E.D. Wash. 2021) (erroneously stating that "[w]hile *Cedar Point Nursery* announced that a non-continuous, intermittent *easement* created by California's access regulation affected [sic] a per se physical taking . . . ."). The *Jevons* court is understandably confused. But the access regulation in *Cedar Point* is not an easement. The grower petitioners dropped that argument and the Supreme Court agreed. *See Cedar Point*, 141 S. Ct. at 2075 (stating that the Board cannot absolve itself of takings liability simply because the authorized invasion did not fit within the state's definition of "easement"). *Contra id.* at 2076 ("The Court has often described the property interest as a servitude or easement.").

[257] *See Cedar Point*, 141 S. Ct. at 2069.

[258] *See Causby*, 328 U.S. at 256; *see also Kaiser Aetna*, 444 U.S. at 164.

[259] *See Cedar Point*, 141 S. Ct. at 2075.

[260] *See id.* at 2079.

writing of both parties (horizontal privity) to be effective and run with the land.[261]

The problem with an equitable servitude in this context is that the only remedy available is an injunction.[262] Therefore, the value of such a servitude is limited because monetary damages (usually provided as "just compensation") are unavailable.[263]

Of course, government entities should not be permitted to manipulate property interest definitions so that compensation for Fifth Amendment takings can be evaded. This is a valid concern by the *Cedar Point* Court—but even universally accepted definitions of property interests established by common law do not fit the interests created by the California regulation.[264] The regulation is not an easement.[265] It is not a covenant.[266] It might be squeezed into the definition of an equitable servitude or license, but a state-wide regulation allowing limited access under limited circumstances is not a traditional property interest vested in a third party or otherwise.[267]

But even if a servitude has been "taken," damages only play into the equation under the *Penn Central* test–or the analogous test for

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[261] *See, e.g.*, Monarch Midstream, LLC (*In re* Badlands Energy, Inc.) v. Badlands Prod. Co., 608 B.R. 854, 867 (Bankr. D. Colo. 2019).

[262] *See, e.g.*, Amos B. Elberg, *Remedies for Common Interest Development Rule Violations*, 101 COLUM. L. REV. 1958, 1969 (2001) ("Being creatures of equity, servitudes were enforceable by injunction." (citing Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177, 1280–81 (1982))).

[263] *See id.* at 1969–70 ("Being creatures of equity, servitudes were enforceable by injunction . . . even without a balancing of the equities or a lack of sufficient remedy at law.").

[264] See *Cedar Point*, 141 S. Ct. at 2072 ("Government action that physically appropriates property is no less a physical taking because it arises from a regulation.").

[265] *Compare* CAL. CODE REGS., tit. 8, § 20900(e) (2020), *with* Elberg, *supra* note 262, at 1965 ("Usually, an easement require[s] the owner of the servant tenement to permit some use of the tenement by the owner of the dominant tenement, or to refrain from engaging in some activity on it.").

[266] *Compare* tit. 8, § 20900(e), *with* Elberg, *supra* note 262, at 1965–66 ("A covenant [runs] with the land and [can] impose a wider range of duties than an easement, but [can] only be enforced at law and only after meeting a host of technical requirements.").

[267] *Compare* tit. 8, § 20900(e), *with* Elberg, *supra* note 262, at 1967–69 (noting that equitable servitudes create property rights and are further differentiated from covenants because they require actual notice, do not require horizontal privity, and are enforceable by injunction).

temporary physical invasions under *Arkansas Game & Fish.*[268] If an aggrieved party cannot prove "diminution in value" under the applicable balancing test, they are unlikely to prove there is a compensable taking.[269] But under *Loretto*'s physical invasion test, a taking is automatic upon a showing of government intrusion—there is no need to show damages.[270] This is the gravamen of *Cedar Point*—now, apparently temporary physical invasions no longer need to show any damage.[271] There is no balancing of the parties' interests.[272]

IX. WHERE *CEDAR POINT* LEAVES US

A. *A Narrow Legal Thread*

The *Cedar Point* case lays waste to a number of prior precedents and hangs on four legal threads: (1) whether the ability to exclude is a single stick in the proverbial bundle of sticks—or whether the loss of the right to exclude cuts through all sticks; (2) whether farm workers live on their worksite or commute to work—creating a greater "necessity" for union organizers to enter property and thus an exception to Fifth Amendment takings jurisprudence under a utilitarian theory; (3) whether the "intruder" was ever invited onto the property; and (4) whether union access to farm workers in California is a "background principle of law" that precludes Fifth Amendment takings.

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[268] *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978); Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 32, 38–39 (2012).

[269] *Penn Cent.*, 438 U.S. at 124, 131 (noting that the economic impact of the regulation is a relevant consideration but "uniformly reject[ing] the proposition that diminution in property value, standing alone, can establish a 'taking'").

[270] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434–35 (1982).

[271] *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2089 (2021) (Breyer, J., dissenting) (noting that the plaintiffs did not even allege damages in the case).

[272] *See Penn Cent.*, 438 U.S. at 124.

First, the right to exclude has been characterized as "one of the most essential sticks" in the proverbial bundle.[273] This "stick" is implemented traditionally through the tort doctrine of trespass.[274] But if it is only one of the sticks, one cannot reconcile *Tahoe-Sierra* with *Cedar Point*. If only one of the sticks is affected—and property rights are temporal—then there is no taking.[275] If the right to exclude cuts across all sticks, the cases are easier to reconcile, but it means that the right to exclude is not a "stick" at all, but a superior right over all other rights.[276]

Second, that ostensibly superior right—in the context of union organizers accessing farm workers—hinges entirely on the dwelling situation of individual farm workers.[277] This is a ridiculous measure upon which to value a constitutional right, yet that is where *Cedar Point* leaves us.[278] Any farmer—or other property owner with onsite employees—wishing to enjoy constitutional protection under the Fifth Amendment's Takings Clause should simply house workers on an adjacent parcel of land. This would eliminate the "necessity" of entering private property to reach farm laborers.[279]

This was entirely the subject of Justice Kavanaugh's *Cedar Point* concurrence: "As I read it, *Babcock* recognized that employers have a basic Fifth Amendment right to exclude from their private property, subject to a 'necessity' exception similar to that noted by the Court today."[280] The "necessity" at issue in *Babcock* concerned

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[273] Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

[274] *See, e.g.*, 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 209 (Garland Publishing, Inc. 1978) ("Every unwarrantable entry onto another's [s]oil[,] the law entitles a tre[spass] . . . ."); RESTATEMENT (SECOND) OF TORTS § 158 (Am. L. Inst. 1965) ("One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally . . . enters land in the possession of the other, or causes a thing or third person to do so . . . .").

[275] *See* Dake, *supra* note 131 ("When a property owner possesses a full bundle of property rights, the removal of one of the sticks from the bundle does not constitute a taking.").

[276] *See Cedar Point*, 141 S. Ct. at 2072 (noting that "[t]he right to exclude is 'one of the most treasured' rights of property ownership" but does not go as far as to explicitly say it is the most superior right).

[277] *See* State v. Shack, 277 A.2d 369, 374 (1971).

[278] *See Cedar Point*, 141 S. Ct. at 2080 (Kavanaugh, J., concurring).

[279] *See Shack*, 277 A.2d at 374.

[280] *Cedar Point*, 141 S. Ct. at 2080 (Kavanaugh, J., concurring).

whether the agricultural employees lived on the property—if they lived on the growers' private property, there was a "necessity" for union organizers to enter private property.[281] If the employees lived elsewhere, as was the case in *Cedar Point*, there was no "necessity," and therefore the ordinance and subsequent entry constituted a Fifth Amendment taking for which compensation was due.[282] If the employers live on the premises where work is performed, there is "necessity" under both *Babcock* and Justice Kavanaugh's concurrence.[283] This is a fairly narrow factual distinction that can be manipulated by employers to ensure that employees are housed on a separate legal parcel. That is a thin legal thread on which to hang an important constitutional right.

Third, both *Yee* and *Cedar Point* ostensibly remain good law, although the two are inconsistent.[284] The difference only lies in whether the landlord initially invited the intruders onto the property.[285] If so, there is no per se taking and a landlord must avail themselves of the *Penn Central* balancing test—even if there are demonstrable damages and the government precludes an eviction or other ejection.[286] If the intruders were never invited, it is a per se taking and there is no need for the aggrieved property owner to show damages.[287]

Fourth, if a law is consistent with "background principles of nuisance and property law," its application will not be considered a per se taking.[288] The *Cedar Point* majority concedes this point: "[M]any government-authorized physical invasions will not amount to tak-

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281 *See* NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 105 (1956) ("[I]f 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").

282 *See id.* at 113.

283 *See id.*; *Cedar Point*, 141 S. Ct. at 2080 (Kavanaugh, J., concurring).

284 *See* Yedwab, *supra* note 226 ("*Yee*'s application of the regulatory taking test to rent regulations is unlikely to be disturbed by [the *Cedar Point* ruling].").

285 *See id.* ("In *Yee*, although some limitations were placed on evictions, the rent control laws were not a physical occupation because 'tenants were invited by the petitioner, not forced upon them by the government' as was the case with the union organizers in *Cedar Point*.").

286 *See id.*

287 *See id.*

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

ings because they are consistent with longstanding background restrictions on property rights."[289] It further clarifies these background limitations "also encompass traditional common law privileges to access private property," including entry in case of emergency, criminal law enforcement, and to avert harm to persons or chattels.[290]

But the *Cedar Point* majority goes on to obtusely sidestep this point. There is a colorable argument (which might have been suitable to consider on remand) regarding whether the union access regulation itself may have been a "background principle" of California law.[291] Agricultural farmers and labor leaders have a long history of fighting for and advancing worker's rights in California, which is a state that continues to recognize a federal commemorative holiday devoted to Cezar Chavez and his labor movement efforts.[292] Because of the history of farmworker protections, perhaps a farmer employing hundreds of workers should expect that union access under a decades-old statute that memorializes decades more of union organization could be considered a "background principle" of California law that impacts their property rights.[293] At a minimum, it would have been an interesting issue for the lower courts to consider, had the case been remanded.

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[289] *Id.*

[290] *Id.*

[291] *See id.* ("[T]he government does not take a property interest when it merely asserts a 'pre-existing limitation upon the land owner's title.'" (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028–29 (1992))).

[292] *See, e.g.*, Alonso Martínez, *Cesar Chavez Day: What's the History Behind It and What Does It Celebrate*, EL PAÍS (Mar. 29, 2023, 20:32 EDT), https://english.elpais.com/usa/2023-03-30/cesar-chavez-day-history-and-what-does-it-celebrate.html ("Cesar Chavez dedicated his life to fighting for the rights of farm workers and promoting nonviolent social change. He also advocated for better housing and access to education for these workers and their families. His work raised awareness of the struggles faced by farmworkers and migrant families.").

[293] *See* Huq, *supra* note 19, at 285–86; *see also* Michael C. Blumm & Lucus Ritchie, Note, Lucas*'s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENV'T L. REV. 321, 368 (2005) ("[J]udicial use of background principles seem likely to expand, as government defendants continue to present various categories of *Lucas* defenses to state and federal courts.").

B. *New Landlord Tenant Lawsuits Seek to Expand the Court's Holding*

The *Cedar Point* dissent and the Board warned that "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."[294] And that is exactly what has happened. Since *Cedar Point* was decided, a number of landlords have alleged that the government's restriction on their ability to evict tenants under COVID era restrictions constituted a physical invasion or eradication of their right to exclude others.[295] Those cases have been largely unsuccessful because the landowners invited the tenants onto the property in the first place and have other contractual remedies.[296]

The *Cedar Point* Court made only a passing reference to *Yee*,[297] a Fifth Amendment rent control case that denied a Fifth Amendment claim for limits on a landlord's ability to evict mobile tenants, which is apparently still good law after *Cedar Point*. But litigants are understandably confused about the reach of *Yee* after *Cedar Point*.

In *301, 712, 2103 & 3151, LLC v. City of Minneapolis*, owners and managers of various multi-unit residential buildings brought a Fifth Amendment takings action against the City of Minneapolis, Minnesota.[298] Their challenge was prompted by an ordinance that

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[294] *Cedar Point*, 141 S. Ct. at 2078.

[295] *See, e.g.*, Elmsford Apartment Assoc., LLC v. Cuomo, 469 F. Supp. 3d 148, 155, 160 (S.D.N.Y. 2020).

[296] *See* Charles Kausen, Comment, *Taking One for the Team: COVID-19 Eviction Moratoria as Regulatory Takings*, 59 SAN DIEGO L. REV. 345, 368, 370 (2022) (discussing how taking claims made by landowners are likely to fail because the landowners initially invited the tenants onto the property and the landowners have other contractual remedies with the government through the relief programs).

[297] *See Cedar Point*, 141 S. Ct. at 2072 (citing *Yee* for the unrelated proposition that "[o]ur cases have often described use restrictions that go 'too far' as 'regulatory takings'"); *see also* GHP Mgmt. Corp. v. City of Los Angeles, No. cv-21-06311-DDP, 2022 WL 17069822, at *3 (C.D. Cal. Nov. 17, 2022) ("Although the [*Cedar Point*] Court did cite *Yee*, it did so only once, and then only as an example of a decision that has 'described use restrictions that go "too far" as "regulatory takings."'" (quoting *Cedar Point*, 141 S. Ct. at 2072)).

[298] 301, 712, 2103 & 3151, LLC v. City of Minneapolis, 27 F.4th 1377, 1380 (8th Cir. 2022).

limits the ability of landlords to reject rental housing applicants because of criminal, credit, or rental history.[299] The landlords argued there was either a per se physical invasion taking under *Cedar Point* or a taking under *Penn Central*'s balancing test.[300] Both arguments were unsuccessful at the Eighth Circuit Court of Appeals.[301] The court held that because the ordinance had an option that would allow landlords to make an "individualized assessment" of a tenant's application, including providing a written explanation of the rejection, this was not a "physical-invasion taking."[302] Rather, "the Ordinance is a restriction on the landlords' ability to use their property, not a physical-invasion taking."[303] Still, the court acknowledged that "an ordinance that would require landlords to rent to individuals they would otherwise reject might be a physical-invasion taking".[304]

Another theme in post-*Cedar Point* litigation has been to seek compensation under a Fifth Amendment takings theory for eviction moratoria that were passed in response to the COVID-19 pandemic.[305] For example, in *Jevons v. Inslee*, the Washington governor issued a proclamation that established a moratorium on evictions to curb homelessness and the spread of disease.[306] Plaintiff landlords alleged that the moratorium leads to a "physical invasion" under *Cedar Point*, and "thereby 'takes' plaintiffs' rights to exclude."[307] But the court found no taking, reasoning that "the moratorium regulates the landlords 'use of their land by regulating the relationship between landlord and tenant.'"[308]

The same outcome occurred in *Southern California Rental Housing Association v. County of San Diego*,[309] where a group of California landlords sought Fifth Amendment takings compensation

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299 *Id.*

300 *Id.* at 1381.

301 *Id.* at 1383–84.

302 *Id.* at 1383. The court also found that none of the *Penn Central* factors support a compensable taking. *Id.* at 1384.

303 *Id.* at 1383.

304 *301, 712, 2103 & 3151, LLC*, 27 F.4th at 1383.

305 *See, e.g.*, Jevons v. Inslee, 561 F. Supp. 3d 1082, 1089 (E.D. Wash. 2021).

306 *Id.*

307 *Id.* at 1102.

308 *Id.* at 1106 (quoting Yee v. Escondido, 503 U.S. 519, 528 (1992)).

309 *See* S. Cal. Rental Hous. Ass'n v. Cnty. of San Diego, 550 F. Supp. 3d 853, 867 (S.D. Cal. 2021).

for COVID eviction restrictions.[310] In denying the claim, the court reasoned: "No 'physical invasion' has occurred here. Although renters cannot be evicted during the temporary duration of the Ordinance, landlords have not lost their right to exclude as did the owners in *Cedar Point*."[311]

But other courts have found enough evidence to support a Fifth Amendment takings claim for COVID restrictions imposed on landlords.[312] In *Heights Apartments, LLC v. Walz*, the court found:

> According to [plaintiff's] complaint, the [offending regulation] "turned every lease in Minnesota into an indefinite lease, terminable only at the option of the tenant." [Plaintiff] has sufficiently alleged that the [] [d]efendants deprived [plaintiff] of its right to exclude existing tenants without compensation. The well-pleaded allegations are sufficient to give rise to a plausible *per se* physical takings claim under *Cedar Point Nursery*.[313]

Walz involved a regulation enacting a statewide moratorium on evictions and went a step further.[314] It also forbade the nonrenewal and termination of ongoing leases, even after they had been materially violated, unless the tenants seriously endangered the safety of others or damaged property significantly.[315] This was enough to distinguish *Yee* and tip the balance in favor of a taking.[316]

In *Gallo v. District of Columbia*, a federal district court similarly dismissed a landlord's lawsuit alleging a Fifth Amendment taking due to a COVID-19 eviction moratorium.[317] The court unsurprisingly dismissed the takings claim based on *Yee*: "[Like *Yee*,] [t]he

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[310] *Id.* at 857–58.

[311] *Id.* at 866. For a similar outcome, see Willowbrook Apartment Assocs., LLC v. Mayor of Baltimore, 563 F. Supp. 3d 428, 444 (D. Md. 2021).

[312] *See, e.g.*, Heights Apartments, LLC v. Walz, 30 F.4th 720, 733 (8th Cir. 2022).

[313] *Id.*

[314] *Id.* at 724–25.

[315] *Id.* at 725.

[316] *Id.* at 733.

[317] Gallo v. District of Colombia, 610 F. Supp. 3d 73, 79 (D.C. Cir. 2022), *motion for reconsideration granted* Gallo v. District of Columbia, 2023 U.S. Dist. LEXIS 34186 (D.C. Cir. Mar. 1, 2023). Although the court granted the plaintiff's

District's laws do not force Gallo to give anyone access to his property that he did not invite. So he does not suffer the same infringement on his right to exclude as the growers in *Cedar Point*."[318] The court clarified: "[I]t is the invitation . . . that makes the difference."[319] The court determined that there was no per se taking and that Gallo's claim should be considered under *Penn Central*'s three-part ad-hoc balancing test.[320] The court found no taking.[321]

The *Gallo* court distinguished *Walz*,[322] relying in part on *Block v. Hirsh*,[323] a World War I era emergency regulation that prohibited tenant evictions based on an emergency state.[324] The *Hirsh* Court reasoned "that in times of emergencies, the government could pass ordinarily impermissible laws. Because '[h]ousing is a necessary of life' and '[a]ll the elements of a public interest justifying some degree of public control are present,' the Court found for the tenant."[325] The *Gallo* court was also unimpressed with the reasoning in *Walz*:

> Respectfully, the Court is unconvinced by *Walz* [] on this point. *Walz* [] characterized the landlords in *Yee* as seeking "to exclude future or incoming tenants *rather than existing tenants.*" . . . But the plaintiffs in *Yee* also alleged they were unable to evict current tenants . . . *Walz* [], then, chose to follow *Cedar*

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motion for reconsideration and to file an amended complaint, the court indicated that it would not amend its ruling on the issues related to *Yee* and Walz discussed here.

318 *Id.* at 88.

319 *Id.* (quoting FCC v. Fla. Power Corp., 480 U.S. 245, 252 (1987)).

320 *Id.* at 89.

321 *Id.* at 91; *see* GHP Mgmt. Corp. v. City of Los Angeles, No. CV 21-06311 DDP (JEMx), 2022 WL 17069822, at *3 (C.D. Cal. Nov. 17, 2022) (holding that *Yee* precluded a per se takings claim brought under a *Cedar Point* theory for a COVID era eviction moratorium); *see also* Farhoud v. Brown, No. 3:20-cv-2226-JR, 2022 WL 326092, at *10 (D. Or. Feb. 3, 2022) ("Like the park owners in *Yee,* Plaintiffs here voluntarily invited their tenants onto their property. This fact draws a critical distinction from *Cedar Point*, which conferred a unilateral right on third parties to take access of an employer's property.").

322 *Gallo*, 610 F. Supp. 3d at 85.

323 Block v. Hirsh, 256 U.S. 135 (1921).

324 *Id.* at 135–37.

325 *Gallo*, 610 F. Supp. 3d at 85 (quoting *Hirsch*, 256 U.S. at 156).

> *Point* rather than *Yee* because it misinterpreted the *Yee* plaintiffs' claims.[326]

Gallo raises a good point here. *Walz* finds a *Cedar Point* per se taking in part because it misrepresents the holding of *Yee*.[327] But *Gallo*'s reliance on *Hirsh* is less compelling. A 1921 takings case predates all modern notions of Fifth Amendment takings law.[328] The case came out more than fifty years before the *Penn Central* test and per se takings were established—and the nature of the exigency was different (and arguably much greater) during World War I.[329]

In *Rental Housing Association v. City of Seattle*,[330] a group of landlords brought suit against the City of Seattle, challenging three ordinances:

> [O]ne limiting a landlord's ability to evict a tenant for nonpayment of rent during three winter months, one prohibiting a landlord from evicting a tenant for nonpayment of rent for six months after the end of the COVID-19 civil emergency, and one requiring the landlord to accept installment payments of unpaid rent for a certain period of time after the end of the civil emergency.[331]

The plaintiffs brought a *Cedar Point* per se taking claim, but the court—again—denied the claim based on *Yee*.[332] According to the court, "[t]his case is more analogous to *Yee* than to *Cedar Point* . . . The Landlords voluntarily invited the tenants to live in their homes and the ordinances regulate a landlord-tenant relationship that has already been established by the parties."[333] But the court also conceded that language in *Yee* "appears to create an exception—if the

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[326] *Id.* at 88 (quoting Heights Apartments, LLC v. Walz, 30 F.4th 720, 733 (8th Cir. 2022).

[327] *Walz*, 30 F.4th at 733.

[328] *See Hirsh*, 256 U.S. at 135.

[329] *See id.*

[330] Rental Hous. Ass'n v. City of Seattle, 512 P.3d 545 (Wash. Ct. App. 2022).

[331] *Id.* at 550.

[332] *Id.* at 557–58.

[333] *Id.* at 558; *see, e.g.*, El Papel, LLC v. Durkan, No. 2:20-cv-01323-RAJ-JRC, 2021 WL 4272323, at *16 (W.D. Wash. Sept. 15, 2021) ("Here, too, the government has not required a physical invasion of plaintiffs' property. Instead,

ordinance compelled a landlord to rent to someone over the landlord's objection, or prohibited the landlord from ever terminating the tenancy, a takings claim would arise."[334]

In each of the Fifth Amendment takings claim under these COVID restriction cases, the respective courts relied on *Yee*, which apparently survives *Cedar Point*. But those cases are difficult to reconcile.[335] Courts are going to continue to be divided over this issue,

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plaintiffs have voluntarily rented their land to residential tenants and temporarily lost the ability to evict tenants in certain situations during the COVID-19 crisis and for six months after September 30, 2021. Contrary to plaintiffs' arguments, none of the restrictions are permanent. Plaintiffs retained the ability to sue their tenants for unpaid rent due to COVID-19 under the State moratorium, except where the resident had not been offered or was complying with a repayment plan . . . . The City allows tenants to take advantage of a repayment plan, but neither the City nor the State has forgiven or cancelled unpaid rent."); Elmsford Apartment Assocs., LLC v. Cuomo, 469 F. Supp. 3d 148, 163 (S.D.N.Y. 2020) (stating that a temporary inability to expel tenants facing COVID-related financial setbacks did not rise to the level of a physical taking); Auracle Homes, LLC v. Lamont, 478 F. Supp. 3d 199, 220–21 (D. Conn. 2020) (finding no physical taking had occurred because the landlords had voluntarily rented their premises to the tenants and regulations affecting the economic relationships between landlords and tenants are not a physical invasion); Baptiste v. Kennealy, 490 F. Supp. 3d 353, 388 (D. Mass. 2020) ("Plaintiffs are unlikely to prove that a physical taking occurred when the Moratorium was enacted because plaintiffs voluntarily rented their properties to their tenants."). The *Baptise* plaintiffs also failed to show a taking under the *Penn Central* test. *Id.* at 390.

[334] *Rental Hous. Ass'n*, 512 P.3d at 558.

[335] *See, e.g.*, Williams v. Alameda Cnty., No. 3:22-cv-01274, 2022 WL 17169833, at *11–12 (N.D. Cal. Nov. 22, 2022) (failing to find a taking for covid-related landlord restrictions under *Yee* and distinguishing *Cedar Point*); *see* Jon Houghton, *The Misapplication of* Yee v. Escondido *in Eviction Moratorium Cases*, 39 PRAC. REAL EST. LAW. 17, 18 (2023) ("[M]any rental property owners filed suit after these various Covid eviction bans were enacted. Most claimed that the bans were an unconstitutional physical taking [under *Cedar Point*]. Virtually all of the owners lost, either in whole or in part, because of *Yee*."). *But see* Paul J. Larkin, *The Sturm und Drang of the CDC's Home Eviction Moratorium*, 2021 HARV. J.L. & PUB. POL'Y PER CURIAM 1, 28 (2021) ("[T]he CDC's interpretation of Section 264 legally compels a property owner to suffer the presence of a lessee on his or her property without payment of rent. That is an unconstitutional taking of the landowner's property. As the Supreme Court made clear earlier this year in *Cedar Point Nursery v. Hassid*, 'government-authorized physical invasions' of someone else's property 'are physical takings requiring just compensation,' regardless of whether they are 'permanent or temporary.' That is precisely what the CDC has ordered here.").

unless it is ultimately resolved.[336] The apparent distinction is in the status of renters as invitees to the landlord's property.[337] It does not matter to the respective courts that the tenants are no longer welcome on the property.[338] Once on the property, government regulations can keep tenants on a landlord's property for a significant (but probably not indefinite) period.[339] This is a narrow distinction upon which to hang a constitutional right.

There are other examples of creative plaintiffs seeking to extend *Cedar Point*. In *Orlando Bar Group v. DeSantis*, a group of bar owners sued Florida's governor for COVID restrictions on their bars.[340] The bar owners alleged a Fifth Amendment taking under *Cedar Point* because the offending regulations "violated 'the right of property owners to allow others access to their properties.'"[341] According to the court, "[t]he Supreme Court's holding in *Cedar Point* did not address and does not support this alleged right."[342] The court also found the bar owners failed to prove a taking under the three-part ad-hoc *Penn Central* balancing test.[343]

C. Cedar Point *Is Inconsistent with (or Overturns) Prior Case Law*

In the end, *Cedar Point* seems to *de facto* overturn (or strongly distinguish) *Loretto*, *Lucas*, *Tahoe-Sierra*, *Arkansas Game & Fish*, *Yee*, and *PruneYard*.[344] Under the facts of *Cedar Point*, there is

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[336] *See* Huq, *supra* note 19, at 263 ("Until a litigant is able to persuade a judge that *Cedar Point* and *Yee* cannot plausibly coexist, such lower courts judges are likely to experience themselves as bound by the 1992 decision.").

[337] *See Rental Hous. Ass'n*, 512 P.3d at 557.

[338] *See id.*

[339] *See id.*

[340] Orlando Bar Grp., LLC v. DeSantis, 339 So. 3d 487, 490 (Fla. Dist. Ct. App. 2022), *review denied*, SC-22-881, 2022 WL 6979346 (Fla. Oct. 12, 2022), *cert. denied*, 143 S. Ct. 980 (2023).

[341] *DeSantis*, 339 So. 3d at 492.

[342] *Id.*

[343] *Id.* at 493–94; *see* Shelley Ross Saxer, *Necessity Exceptions to Takings*, 44 U. HAW. L. REV. 60, 133 (2022).

[344] *See* Josh Blackman, Cedar Point Nursery v. Hassid *Quietly Rewrote Four Decades of Takings Clause Doctrine*, THE VOLOKH CONSPIRACY (June 25, 2021, 12:39 AM), https://perma.cc/P53G-Y8QT; *see also* Terence J. Centner, *Invasions of Dicamba Particles: Holding States Accountable for Taking Offsite Property*

likely no taking under the reasoning of any of those cases—or, at a minimum, the *Cedar Point* takings claim would have had to undergo a balancing test to determine if just compensation is due under the Fifth Amendment.[345] To be consistent with existing (prior) law, the grower petitioners should have been given the opportunity to show how the entry of union organizers would have satisfied existing balancing tests.[346] If the matter would have been resolved under an existing balancing test, particularly in favor of the growers (which it might have been!) there is absolutely no need for a per se rule.[347] Finding a successful Fifth Amendment taking utilizing a balancing test would have been no less outlandish than the *Cedar Point* ruling itself. The problem, although not insurmountable: is *damages*.[348]

Cedar Point extends the categories of per se takings.[349] Under prior law, permanent physical invasions under *Loretto* and regulations that constitute a total wipeout of all economically viable uses of the property under *Lucas* are per se takings.[350] Temporary physical invasions, like the type at issue in *Cedar Point*, were considered under a modified *Penn Central* balancing test in *Arkansas Game & Fish*.[351] Now the line is blurred between temporary and physical invasions.[352] They are—apparently—one in the same; although courts

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Owners' Right to Exclude, 91 U. CIN. L. REV. 353, 381 (2022) (calling *Cedar Point* a "retreat" from earlier interpretations of Fifth Amendment takings law).

345 *See e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 428 (1982) (explaining that courts have always distinguished between permanent and temporary takings).

346 *See e.g.*, Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 38–39 (2012) (determining a temporary flooding is not a per se taking and the court must balance different interests to determine if there is a taking).

347 *See id.* at 38–40 (reversing and remanding lower court's decision to determine if, by balancing the interests, temporary flooding constituted a taking rather than making a blanket rule).

348 *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2078, 2089 (2021) (Breyer, J., dissenting) (discussing how the majority did not address damages).

349 *See* Bethany R. Berger, *Property and the Right to Enter*, 80 WASH. & LEE L. REV. 71, 74 (2023) (describing how *Cedar Point* represents a "new incursion" on legal rights of entry).

350 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).

351 *See Cedar Point*, 141 S. Ct. at 2078–79.

352 *See* Asbridge, *supra* note 24, at 855–56 (arguing for a new test to define the parameters of "regulation" and "appropriation").

are still drawing a distinction based on *Yee*.[353] But in *Arkansas Game & Fish*, there were greater damages than the temporary physical invasion—or the existence of a regulation authorizing invasions—at issue in *Cedar Point*.[354]

Moving forward, the complicated balancing tests are the best means to determine whether a property has been taken.[355] *Penn Central* looks at the interests of the government and the interests of the landowner in terms of the diminution in value of the property and how the regulation interferes with the property owners' reasonable investment backed expectations.[356] But property rights advocates complain that few takings cases are successful under a *Penn Central* analysis.[357] The temptation to implement bright line rules has complicated decades of takings jurisprudence and invited litigation—for those seeking to move the Fifth Amendment takings line.

CONCLUSION

Cedar Point unnecessarily complicates the already-confusing area of Fifth Amendment takings law.[358] Under prior law, temporary takings were subject to a balancing test of societal interests, the government action, and the economic expectations of the owner.[359]

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[353] *See id.* at 821 n. 50.

[354] *Compare* Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 30 (2012) (finding damages to be $5.7 million) *with Cedar Point*, 141 S. Ct. at 2089 (Breyer, J., dissenting) (finding plaintiffs alleged no damages).

[355] *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123–24 (1978) (using a balancing test allows the court to engage in ad-hoc factual inquires on a case-by-case basis).

[356] *Id.* at 124–25.

[357] *See, e.g.*, James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 59 tbl. 2 (2016) (finding that fewer than 10% of regulatory takings claims are successful in lower courts when applying a *Penn Central* analysis).

[358] *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2089 (Breyer, J., dissenting) ("I recognize that the Court's prior cases in this area are not easy to apply. Moreover, words such as 'temporary,' 'permanent,' or 'too far' do not define themselves. But I do not believe that the Court has made matters clearer or better. Rather than adopt a new broad rule and indeterminate exceptions, I would stick with the approach that I believe the Court's [prior] case law sets forth. 'Better the devil we know . . . .'").

[359] *See id.* at 2067 (majority opinion).

Now, statutes that authorize third party temporary invasions are (apparently) a per se taking that requires just compensation without balancing the varied interests.[360] In doing so, the Supreme Court expands and overturns decades of precedent without expressly doing so.[361]

Cedar Point may ultimately be limited to similar fact patterns. Temporary invasions like the ones at issue in California's Agricultural Act are rare but not unheard of. In *Knick v. Township of Scott*, for example, the Court considered whether a township's ordinance that allowed private citizens to enter private property, if necessary to access a cemetery, constituted a taking.[362] The Supreme Court remanded on procedural grounds, but after *Cedar Point*, it is almost certainly a compensable taking.[363] Both cases involve a government regulation that permits third parties to physically "invade" private property.[364]

The post-*Cedar Point* cases brought by eager petitioners have generally failed to bear Fifth Amendment takings compensation fruit.[365] Those cases seek to move the temporary per se takings line to include (generally) landlord-tenant activities.[366] Although difficult to reconcile, courts have—thus far—failed to find that *Cedar Point* has overturned prior inconsistent case law, particularly *Yee*. But the Supreme Court will likely have to revisit the temporary takings issue in light of *Cedar Point*'s departure from established precedent.

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360 *See id.*

361 *See id.* at 2081 (Breyer, J., dissenting).

362 Knick v. Township of Scott, 139 S. Ct. 2162, 2168 (2019).

363 *Id.* at 2179; *see Cedar Point*, 141 S. Ct. at 2080 (finding a temporary invasion to be a per se taking).

364 *See Knick*, 139 S. Ct. at 2164; *see Cedar Point*, 141 S. Ct. at 2066.

365 *See* Houghton, *supra* note 335.

366 *See id.* (explaining how lower courts have been reluctant to agree with petitioners that eviction moratoriums are per physical takings).