COMMON SENSE AND COMMON LAW: DEFINING "PROPERTY" IN CEDAR POINT V. HASSID

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Take off your lawyer hat for a minute and think back to your days before law school. (You remember, don't you?) If you could go back in time and ask your younger self what it means to own property, what might you have responded? I'm guessing that, like most regular people, your younger self would have replied that it meant, at heart, the owner could say "keep out," or "this is mine" (which is another way of saying keep out).

My sense after reading the 6-3 majority opinion authored by Chief Justice Roberts in *Cedar Point Nursery v. Hassid*,[1] is that the Court was fueled by the same essential thought, even though it never expressly said so. Yes, there was a lot of great technical, lawyerish stuff in the opinion about the "right to exclude," Blackstone, *Loretto v. Teleprompter Manhattan CATV Corp.*,[2] *Kaiser Aetna v. US*,[3] and all that, but now that I've digested the opinions (majority, concurrence (Kavanaugh), and dissent (Breyer, Sotomayor, and Kagan)), I have come to the conclusion that the Court was applying what it called an "intuitive approach" to defining the critical term in the case—the meaning of "private property" in the Fifth Amendment.[4] Granted, the Court never says that's what it is doing, but read along and see if you don't agree with my read of it.

The Ninth Circuit upheld California's union servitude

For a long time—indeed decades—California's Agricultural Labor Relations Board (Board) has had a regulation that requires agricultural employers to open their land to labor union organizers. The regulation is framed as protecting the rights of agricultural employees to "access by union organizers to the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support."[5] The time, place, and manner of the union entries are not unlimited but are nonetheless pretty extensive, giving the union, in the words of the regulation, a "right to take access" to an employer's property for up to three hours per day, 120 days per year.[6] Remember the phrase "right to take access" because it is going to come back and haunt the Board once the case gets to the Supreme Court.

Two separate agricultural employers (one a strawberry farm, the other a grower of grapes and citrus) filed a 42 USC section 1983 complaint against the Board in federal court. The complaint sought declaratory and injunctive relief (and not just compensation), alleging the regulation was a taking under the Fifth Amendment, and an unlawful seizure under the Fourth Amendment. The district court granted the Board's Rule 12(b)(6) motion to dismiss for failure to state a claim.

The Ninth Circuit affirmed, 2-1,[7] and later denied en banc review (over a multi-judge dissent).[8] The panel majority concluded that the allegations of the complaint did not state a plausible *Loretto* physical invasion takings claim under *Twombly/Iqbal*.[9] The Ninth Circuit rejected the claim because the invasions authorized by the regulation were not permanent, and thus the takings claim did not merit categorical

treatment under *Loretto*.[10] The complaint pointedly had not pleaded a *Penn Central* ad hoc taking claim.[11]

The 6-3 Supreme Court majority

The Supreme Court agreed to review this question presented:

> California law forces agricultural businesses to allow labor organizers onto their property three times a day for 120 days each year. The regulation provides no mechanism for compensation. A divided panel below held that, although the regulation takes an uncompensated easement, it does not effect a per se physical taking of private property because it does not allow "24 hours a day, 365 days a year" occupation. As an eight-judge dissent from denial of rehearing en banc noted, the panel "decision not only contradicts Supreme Court precedent but also causes a conflict split."
>
> The question presented is whether the uncompensated appropriation of an easement that is limited in time effects a per se physical taking under the Fifth Amendment.

Chief Justice Roberts authored the majority opinion reversing the Ninth Circuit, which Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett joined. Right off the bat, you knew where this one was going when the opinion began with "[a] California regulation grants labor organizations a 'right to take access' to an agricultural employer's property in order to solicit support for unionization."[12] If you're the government and the question is whether there's been a taking, and your regulation is phrased in terms of "taking," it's not likely going to be a good day.

And it wasn't, at least from the government side of things. The Court concluded that "[w]hen the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation."[13]

The majority noted three situations which fall within the "physical taking" category:

- Affirmative ("formal") exercises of eminent domain;
- When government takes physical possession of property without obtaining title; and
- When government action results in ("effects") an occupation of property.

When any of these occur, that results in a categorical obligation to compensate.

Restrictions on use versus inviting invasion

The Court contrasted these physical takings with what it called "restrict[ions on] an owner's ability to use his own property," noting that "a different standard applies."[14] These are what are commonly known as "regulatory takings," but the Court cautioned that the "label can mislead."[15] What I think the Court is getting at here is an essential point (and a preemptive rebuff of Justice Breyer's dissent): what we consider "physical takings" cases such as *Loretto* and *Kaiser Aetna* and *Nollan v. Cal. Coastal Comm.* do indeed fall under the general umbrella of "regulatory" takings because in those cases, the physical invasions were required by the government's exercise of its regulatory power (in *Loretto* and *Nollan,* the police power, and in *Kaiser Aetna*, the federal government's commerce power). That may be so, the *Cedar Point* opinion reminded, but the "regulatory" aspect of it should not distract from the essential point: what matters is "whether the government has physically taken property for itself or someone else."[16] The means isn't as important as the result. A physical invasion is a physical invasion, "by whatever means."[17]

Having taken the steam out of the dissent's main argument, the majority then explained why California's regulation qualified as a physical invasion. That might seem obvious. Union organizers, under the regulation, have the ability to enter Cedar Point's property 120 days per year for up to three hours per entry, and had exercised that right as the Court described in the opinion.[18] But the Ninth Circuit's main sticking point—that the entries the regulations require are not "permanent" ("24/7" as the Ninth Circuit put it)—seemed to be supported by

the language of *Loretto,* which spoke of *permanent* physical invasions being categorical takings. The question after *Loretto* was whether *non-permanent* invasions were also to be treated as categorical ("per se") takings or whether they should be subject to the *Penn Central* ad hoc takings test (in which the nature of the government action as either requiring a physical invasion or simply adjusting the benefits and burdens of society was just one of the things a court would look at, as opposed to the sole factor to consider before calculating the compensation owing.) The *Cedar Point* majority came down squarely on the side of nonpermanent invasions being categorical takings.

The reason why is the sanctity of the right to exclude. In other words, "keep out." Relying on the classic canon of physical invasion cases—*US v. Causby* (Air Corps B-25s),[19] *Portsmouth Co. v. US* (naval cannon fire),[20] *Kaiser Aetna* (uninvited boaters),[21] *Loretto* (that famous cable TV box),[22] *Nollan*.[23] (surfers and beachcombers) and *Horne v. Dept. of Agriculture* (segregating raisins into private raisins and government raisins categories)[24]—the Court emphasized the fundamental nature of the right to exclude. Limiting that right, the majority concluded, deprives the word "property" of its essential meaning:

> The upshot of this line of precedent is that government-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation. As in those cases, the government here has appropriated a right of access to the growers' property, allowing union organizers to traverse it at will for three hours a day, 120 days a year. The regulation appropriates a right to physically invade the growers' property—to literally "take access," as the regulation provides.[25] It is therefore a per se physical taking under our precedents. Accordingly, the growers' complaint states a claim for an uncompensated taking in violation of the Fifth and Fourteenth Amendments.[26]

The Court next took down the Ninth Circuit's reasoning that only "24/7" occupations are categorical takings. Permanent or temporary, what matters from a "common sense" point of view[27] is that there's been an invasion, not its duration. And in what should be seen as a key point, the majority concluded that the question of the duration of the invasion "bears only on the amount of compensation."[28] The Court clarified the footnote in *Loretto* on which the Ninth Circuit relied, reemphasizing that the focus is on the invasion itself, not the duration or the physical size.[29]

Although the Court called this an "intuitive approach,"[30] I suggest you read this part of the opinion in detail. There's a lot there, especially for property advocates. It's an ode—or maybe even a love letter—to the right to exclude, and its role as a (or maybe *the*) central stick in the bundle of sticks analogy we frequently employ when describing "property" rights. "Keep out" indeed!

Why categorical treatment? ("common sense," that's why)

The majority distinguished regulations that require or result in physical invasions of private property from regulations that (without requiring an invasion) merely "restrict an owner's ability to use his own property."[31] A majority of the latter cases are analyzed under *Penn Central* (or, in cases where the regulation results in a significant diminution of beneficial use or value, under *Lucas*), while the former, the majority concluded, result in a categorical obligation to compensate without balancing the *Penn Central* factors:

> 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.[32]

In the core of the opinion, the Court rejected the argument (based on language in *Loretto*) that categorical treatment is only appropriate for "permanent" invasions, and anything less than a 24/7/365 intrusion is simply a regulation on use, and merely one of the *Penn Central* factors to consider. Not so,

held the Court; infringing on the right to exclude inflicts a special form of constitutional wrong, and a "different standard applies" to analysis of any regulation that allows a physical invasion, than to other regulations that merely regulate use.

Leaning heavily on *Kaiser Aetna*'s view of the right to exclude as the stick in the property rights bundle "universally held to be a fundamental element of the property right" and "one of the most essential sticks," the Court held that physical invasions at the invitation of the government undermine the "central importance" of property's exclusive use.[33] The majority labeled this an "intuitive approach" based as much on "common sense" as precedent.[34] In short, if you don't have the ability to control who can come on your property—with the law backing you up—you don't really possess what most people would think is "property," do you?

Burning down Loretto to save the Loretto rule

The Court addressed the "permanent" language in *Loretto* and clarified that when it used the phrase there, it was being more descriptive than normative, because the occupation by the cable TV box in *that case* was indeed "permanent" (even though in reality, very little is really *permanent* as my amicus brief[35] pointed out). But permanent occupations didn't close out the field of per se takings, the *Cedar Point* majority clarified. It merely set the ceiling—intrusions of a lesser duration are also categorical takings. If you took us at our word in *Loretto* that "permanent" was a hard-and-fast requirement for categorical treatment, you apparently missed *Nollan* where were told you that wasn't really the rule:

> To be sure, *Loretto* emphasized the heightened concerns associated with "[t]he permanence and absolute exclusivity of a physical occupation" in contrast to "temporary limitations on the right to exclude," and stated that "[n]ot every physical invasion is a taking." 458 U. S., at 435, n. 12; see also id., at 432–435. The latter point is well taken, as we will explain. But *Nollan* clarified that appropriation of a right to physically invade property may constitute a taking "even though no particular individual is permitted to station himself permanently upon the premises."[36]

So "permanence," vel non, is not where the line is. Nor are the purpose and scope of the access regulation particularly relevant. (The majority rejected the Board's argument that California's regulations are more limited than the easement in *Nollan* because they are designed only to allow a limited class of union organizers and not the general public to access property.)[37] That does not change the essential character of the regulation from one requiring access to one regulating use. The *Cedar Point* opinion reemphasized the nature of the imposition: three hours per day, up to 120 days per year, with the union organizers in the event that triggered the lawsuit showing up unannounced at 5:00 a.m.

Nor is the label put on the access terribly important. The Court rejected the argument that California's regulation does not impose an actual easement because it is neither labeled an easement nor has all of the usual attributes of an easement (a burden on a specific parcel is not recordable, for example).[38] Yes, state law is the source of most of the sticks in property, but California law otherwise would recognize Cedar Point's right to control who comes onto its property, and most importantly, state law has never been the be-all-end-all of what counts as "property" under the US Constitution.

Is state or federal law the source of "property?" (It's complicated)

In that regard, the Court has traditionally been most protective of the right to exclude (and a few other sticks), and it is one of the areas in which the Court has exhibited some "anti-federalism" leanings—by concluding that there are certain "fundamental" or "core" notions of private property in which state law may not intrude, even if state law for the most part defines and shapes property law.

Justice Thurgood Marshall said it best in *PruneYard Shopping Center v. Robins*,[39] where the Court considered whether a shopping center open to the public was a forum for public speech. The California

Supreme Court had expressly changed its prior view of the California Constitution's free speech provision, overruled an earlier decision holding that it did not protect speech on shopping center property, and held that shopping centers therefore were fora for public speech. The shopping center owner appealed to the US Supreme Court, asserting what later became known as a judicial taking: the owner argued that when the California Supreme Court altered its speech jurisprudence to allow a physical invasion of its property by handbillers the owner wished to exclude, a taking resulted.

The US Supreme Court held that the California Supreme Court's decision was not a taking, even though the California court acknowledged it had changed California law. The change in law did not interfere with the shopping center owner's right to exclude because it had *voluntarily opened* its property to the public for shopping for the owner's commercial gain, and thus possessed only a limited right to exclude; the shopping center failed to demonstrate that allowing both handbillers and shoppers would interfere with whatever right to exclude remained. Having invited the public in to shop, the owner could not be heard to complain that others entered as well. In short, the shopping center owner "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.'"[40] Despite that holding, however, the Justices did not seem at all bothered by the notion that the takings doctrine might require them to make qualitative judgments about state property law.

Justice Marshall concurred in a separate opinion setting forth his view that property has a "normative dimension" which the US Constitution protects from state court redefinition:

> I do not understand the Court to suggest that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the abrogation of common law rights by Congress or a state government. The constitutional terms "life, liberty, and property" do not derive their meaning solely from the provisions of positive law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect.[41]

Justice Marshall continued:

> Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.[42]

Justice Marshall noted that in *Ingraham v. Wright*,[43] the Court determined the Due Process Clause prohibits abolishment of "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[44] Much later, in *Stop the Beach Renourishment v. Fla. Dep't of Envt'l Protection*,[45]six Justices agreed that "private property" is not a completely malleable concept that may be redefined at will by state courts. The plurality noted that in *Lucas,* the Court had reserved for itself the determination whether the restriction in the regulation that was claimed to be a taking was inherent in title and a preexisting limitation on land ownership.

The "core" common law property rights referenced by Justice Marshall include aspects of property such as:

- Interest following principal;[46]
- Obtaining ownership of accretion;[47]
- The ability to transfer property;[48]
- Importantly, making reasonable use and development of land;[49]
- And, of course, the right to exclude others.

When these core rights are threatened, the Justices now in the majority have had little difficulty finding them to be fundamental property rights that transcend a state's ability to redefine them by regulating

them out of existence without just compensation, and without detailed reliance on state law.[50] But what about *Murr v. Wisconsin*,[51] you ask? In that case the tables were turned, with the Chief Justice's dissent arguing that Wisconsin law should define (or at least be the presumptive controlling law) for the "larger parcel" issue. There's no direct mention of *Murr* in the *Cedar Point* majority opinion, but we're guessing that the Chief reconciled what might be viewed as his contrary dissent that state law should define the parcel, but not the property right: "I think the answer is far more straightforward: State laws define the *boundaries* of distinct units of land, and those boundaries should, in all but the most exceptional circumstances, determine the *parcel at issue*."[52]

In what's been a long time coming, the Court definitively clarified *PruneYard*. That case merely stands for the proposition that by opening its property to the public for some purpose, the owner can't really say it has some absolute right to keep the public out: "Limitations on how a business is generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public."[53] There's some nuance in *PruneYard,* naturally. Opening up your property to A, doesn't necessarily mean you think it is just fine for B to come on and shout political slogans at you and others who might just want to shop or work in peace, and there may be limitations on how deeply the government may dictate what members of the public do once they are on the property.

So is *everything* a taking?

In sum, the *Cedar Point* majority accepted the notion that by inviting the agricultural workers on its property, the property owners did not also open up the property to others who might be, let's say, "appurtenant" to those workers. Absent some *PruneYard*-like facts, the choice remains with the property owner.

So here's the short story about what will *not* automatically get a regulation requiring access to property off the takings hook after *Cedar Point*:

- Permanence;
- The number or classification of people or things doing the invading; and
- Whether the regulation or state law describes the access as an "easement."

What does this portend for regulations that impose a "lesser" level of invasion? And are there exceptions to the general rule that all invasions—whether straight-up government incursions, or regulations that throw open otherwise closed doors to third parties—are presumed to be takings? Does that mean the dissenters and commentators have a point when they claimed that the Court's ruling that all physical invasions are presumed to be categorical takings is going to result in everyday things like your postal carrier dropping off mail at your house being deemed a taking?

Well no, and the majority addressed those concerns—often raised in opposition to takings claims (e.g., Justice Brennan's dissent in *San Diego Gas & Elec*. where he noted, "After all, a policeman must know the Constitution, then why not a planner? In any event, one may wonder as an empirical matter whether the threat of just compensation will greatly impede the efforts of planners")—and laid out three general exceptions to the categorical presumption:

- Some entries are takings, others are torts;[54]
- Some entries are not takings, as long as they are "consistent with longstanding background restrictions on property rights" (*Lucas*);[55] and
- Some entries may be exacted by the government as a condition of government benefits.[56]

Let's take a look at each of these in turn.

Takings versus torts

The majority dismissed minor intrusions, concluding that things like "[i]solated physical invasions, not undertaken pursuant to a granted right of access" should be analyzed under tort law, not as takings. One-time, casual, unofficial intrusions are not going to get you to the promised land of takings. The city's Public Works truck parking on your lawn one time isn't going to require just compensation. Okay,

those kind of things are the easy cases when viewed as single events. But the more they occur, and the more severe the intrusion, the more you depart Tortyburg and head for Takingsville. ("[W]hile a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove [the intent to take property]. Every successive trespass adds to the force of the evidence."[57]).

Thus, even though the Court did not apply a categorical takings approach to temporary government-caused flooding in *Arkansas Game & Fish Comm'n v. US*,[58] the Court still approached it as a taking, not a tort, and that distinction was the only question the Court addressed in that case. *Cedar Point* clarified that *Arkansas Game*'s strict holding that "government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection" simply confirmed that "temporary" isn't an automatic get-out-of-jail-free card for a physical invasion, and expressly did not address the question whether temporary invasion takings are subject to categorical treatment.

In his fantastic law review article analyzing *Arkansas Game*, our colleague Brian Hodges presaged the analysis in *Cedar Point*, when he wrote that "[t]here is real danger that the Supreme Court's overview in *Arkansas Game & Fish Commission v. United States* of various takings tests in which questions of duration may be relevant will be read as establishing a new, multi-factor test applicable to temporary physical takings."[59] As *Cedar Point* now tells us, no *Penn Central* style approach.

One caution: the tort/takings distinction isn't as clear cut as the *Cedar Point* opinion makes out. For example, what about stuff like flooding where government action or inaction is the cause of all or part of the invasion?[60] Should these cases be examined under a tort or takings lens? The lower courts are not settled on this issue, with some, like the Federal Circuit,[61] the Fourth Circuit,[62] and the Montana Supreme Court[63] thinking these are just torts, where the issue is whether the damage to property was foreseeable and whether the sovereign has waived immunity, while others are not so limited in their approach and look at it as a self-executing claim for just compensation.[64] But, the *Cedar Point* majority cautioned, you should instead look at *causation*, not foreseeability (an approach consistent with the takings lens some lower courts look at these situations through[65]).

Prediction: the tort vs. taking sparring match is not yet over.

Background principles

Next, the Court noted that if an invasion of property is part and parcel of "longstanding background restrictions on property rights," there is no categorical taking.[66] What can we say about the *Lucas* exception, except that we think it is one of the most overbroad-as-applied concepts, and gets stretched way beyond the bounds intended by the *Lucas* case itself.

First, think nuisance prevention. Now that's a background principle of property law that the Court can wrap its head around. You can't make a noxious use of your property so there's no taking when a regulation merely codifies nuisance-prevention.[67] Second, think what the majority calls "privileges to access private property."[68] Things that fall under the umbrella of necessity (as Professor Shelley Saxer recently wrote about[69]). Think your letter carrier and constable, for example (unless they are blowing up your house, that is; in that case no problem at least to the Tenth Circuit[70]).

The *Cedar Point* opinion's reference to background principles as a limitation on categorical takings must be read in light of the opinion's earlier references to the right to exclude as one of those "fundamental" rights that cannot be casually or easily tweaked by state legislatures and courts to shape state property law to avoid the Fifth and Fourteenth Amendment's compensation requirements.[71] *Cedar Point* does suggest that a state's ability to redefine background principles to avoid takings has its limits on those sticks the court deems fundamental.

By "fundamental" (also referred to as "core") property rights, we're talking about aspects of property

such as interest following principal, obtaining ownership of accretion, the ability to transfer property, and making reasonable use and development of land. And, of course, the right to exclude others. When these core rights are threatened, the Court has had little difficulty finding them to be fundamental property rights that transcend a state's ability to redefine them by regulating them out of existence without just compensation.

Does *Cedar Point*'s reemphasis of "background principles" continue to insulate state legislatures and courts from federal takings jeopardy when they try and bake in a background principle to a change in property law? We don't think so because *Cedar Point* rejected the argument that state law alone defines "property," and with the stroke of a pen—whether by amending a state's positive law, or by changing a state's common law—can "manipulate" certain concepts inherent in the notion of the Court's conception of what it means to own property. As we noted earlier,[72] the Court noted that this conclusion is an "intuitive" one, the product of "common sense" as much as Blackstone. This reemphasized Justice Marshall's concurring opinion in *PruneYard*, which asserted that "serious constitutional questions" would result if the "legislature attempted to abolish certain categories of common-law rights in some general way," and that "'core' common-law rights, including rights against trespass," cannot simply be abandoned.

Prediction: if that right/stick you claim was taken is one that looks like what the common folks think of when they think "property,"[73] you're going to do a lot better on the takings front.

Exacted access

Finally, the *Cedar Point* opinion ventured into exactions territory: "*Third,* the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking."[74] This covers things like "health and safety inspection regimes."[75] So what you are saying, Court, is that even though the government can't straight-up require access to property without running afoul of the Takings Clause, it can adopt regimes where, in return for a permit, the government can ask the property owner to surrender the absolute right to exclude? Kind of. Like the background principles exception, we caution against reading this one too broadly.

First, the Court noted that this was for government "benefits." Exercising your fundamental or core property rights are not government "benefits," and thus the *Nollan/Dolan/Koontz* (your money or your life) unconstitutional conditions doctrines are a formidable bulwark against overactive leveraging of regulatory authority in those situations.

Take, for example, *Kaiser Aetna*, in which the Court rejected the government's argument that by breaking through the "existing barrier beach" and connecting the dredged Marina to the Pacific Ocean, the owner had thrown open the doors to the waterway and abandoned its right to exclude, much as the shopping center owner in *PruneYard* had. As the Court put it:

> The Government contends that as a result of one of these improvements, the pond's connection to the navigable water in a manner approved by the Corps of Engineers, the owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others.[76]

In follow-on dicta, the Court foreshadowed *Nollan,* when it noted that "[w]e have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation in the bay, or could have conditioned its approval of the dredging on petitioners' agreement to comply with various measures that it deemed appropriate for the promotion of navigation."[77] But critically, the Court also noted that the right to exclude was not one of those things that an owner can be asked to surrender, at least without compensation:

> [W]hat petitioners now have is a body of water that was private property under Hawaiian law, linked to navigable water by a channel dredged by them with the consent of the Government. While the consent of individual

> officials representing the United States cannot "estop" the United States, it can lead to the fruition of a number of expectancies embodied in the concept of "property"—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property. In this case, we hold 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 compensation.[78]

Prediction: in spite of the Court saying in essence, "don't get too carried away with this exaction stuff, governments," we'll probably see a lot of lower court developments in this area.

Will the sky fall?

What to make of these "exceptions?" Unlike some others, they don't seem to us to be ones that will swallow up the main rule. The majority opinion ended by pooh-poohing the dissent's view of the sky now set to fall:

> None of these considerations undermine our determination that the access regulation here gives rise to a per se physical taking. Unlike a mere trespass, the regulation grants a formal entitlement to physically invade the growers' land. Unlike a law enforcement search, no traditional background principle of property law requires the growers to admit union organizers onto their premises. And unlike standard health and safety inspections, the access regulation is not germane to any benefit provided to agricultural employers or any risk posed to the public. See *Horne*, 576 US, at 366 ("basic and familiar uses of property" are not a special benefit that "the Government may hold hostage, to be ransomed by the waiver of constitutional protection"). The access regulation amounts to simple appropriation of private property.[79]

So, fellow dirt lawyers, put on your intuitive, common-sense hats and strap in: get ready to try and figure out the nature of fundamental, core property rights—what it means to "own" something.[80] That, in my view, is where the action is going to be.

Justice Kavanaugh: Only truly necessary intrusions allowed (and this one wasn't)

Along with joining the majority's opinion in full, Justice Kavanaugh wrote a short concurring opinion to explain why an existing precedent—about which he pointedly asked at oral argument[81]—also supported the outcome. The case: *NLRB v. Babcock & Wilcox, Co.*[82] This is the one which got several people asking, "Hasn't the Court already ruled that a union-access easement is constitutional?" That case upheld the federal National Labor Relations Act's requirement that certain employers open their properties to union organizers. Sounds like *Cedar Point*, no?

Yes, but you have to read that decision carefully, Justice Kavanaugh cautioned, because the Court there *avoided* the takings question by interpreting the NLRB's requirement narrowly. The canon of construction that counsels to avoid reading statutes to create constitutional problems applied, and resulted in the Court upholding the requirement by avoiding the takings problem lurking in the statute:

> Against the backdrop of the Constitution's strong protection of property rights, the court interpreted the Act to afford access to union organizers only when "needed," ibid.—that is, when the employees live on company property and union organizers have no other reasonable means of communicating with the employees.[83]

This looks like a form of necessity referenced in the majority opinion,[84] although here, too, some caution is in order. As we noted in this piece,[85] necessity should only be an exception to the general rule of compensation when the action undertaken by the government really is among the least imposing alternatives to avoid a genuinely drastic result. *Babcock* certainly can be read through that lens, as Justice Kavanaugh pointed out when he noted that absent entry onto private property, there'd be no other way for the government to ensure that employees had access to information about unions (other than, you know, *taking an access easement by eminent domain*).

In *Babcock*, the workers apparently could not be accessed readily off-premises because they lived on the employer's property. In *Cedar Point* by contrast, the workers did not live on the nursery's property, and union organizers were free to proselytize to the workers elsewhere. Yes, private property might be the most *convenient* venue for such activities, but that's a pretty far cry from being *necessary* due to no other alternatives, Justice Kavanaugh argued.

The three-justice dissent: The Appropriations Clause

Justice Breyer, joined by Justices Sotomayor and Kagan—in what the majority opinion made a point to call a "thoughtful opinion"—dissented. Their basic point was what you would expect: regulations that impose a temporary or non-permanent physical invasion are not treated categorically, but instead are analyzed as plain old regulatory takings under *Penn Central*'s three-part ad hoc test. What is interesting is the way the dissenters got there. They first characterized the Takings Clause as the *Appropriations Clause*:

> The question before us is how to characterize this regulation for the purpose of the Constitution's Takings Clause.
>
> Does the regulation *physically appropriate* the employer's property? If so, there is no need to look further; the Government must pay the employers "just compensation."[86]

The regulatory "hook"

That phrasing of the question ("does the regulation physically appropriate the employer's property?") telegraphed the dissenters' analysis in a couple of ways.

First, it set up a truism: the applicable test is the default "regulatory takings" analysis because these physical invasions are required *by regulations* (in contrast, we suppose, to invasions such as flooding). And since these are "regulatory takings" shouldn't the default *Penn Central* test apply? But that seems like a straw argument. After all, aren't all of these types of invasions the result of regulations, and therefore a species of "regulatory takings?" Nearly any invasion that is not the result of an affirmative exercise of eminent domain can be classified as a "regulatory" taking because it is incident to an exercise of some government regulatory power. Most non-eminent domain physical and categorical takings cases fall in this category: *Loretto* (police power), *Kaiser Aetna* (commerce power), *Nollan* (police power), *Lucas* (police power), etc., etc. But the regulatory enablement of the invasion has never alone mandated we analyze it under *Penn Central* simply because it's a "regulatory" taking.

Yes, you could look at every regulation-enabled invasion through a *Penn Central* lens (as we did as an academic exercise[87]), with physical invasions being analyzed under the "character of the government action" factor and being so contrary to common notions of what it means to own property (there's that "keep out" vibe again[88]) that both the magnitude (*Loretto*) and the duration (*Cedar Point*) of the invasion are irrelevant, and looking at the other two *Penn Central* factors is unnecessary. Remember that the central question in regulatory takings is "how much does this look like a classic exercise of eminent domain":

> Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in *Loretto, Lucas,* and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.[89]

Thus, it seems you get to the same result whether you treat the invasion as the deciding *Penn Central* factor or simply as a separate species of taking, and the debate may be a mostly academic exercise because the *Cedar Point* invasion looks an awful lot like an exercise of eminent domain from the owner's point of view. In short, in our view the dissent's building its analysis on the framing of the case as a "regulatory

taking" doesn't get it very far, and avoids the central question: what is the dissent's concept of "property?"

As I noted earlier, the majority pretty clearly told us what they think it means to own property, or at least a big part of it (this is the majority's "intuitive" and "common sense" approach to defining private property under the Fifth and Fourteenth Amendments). My read of the dissent, by contrast, is that it talks around the issue, but never explicitly lays out its property theory.

This leads into what I think is the second dissent "telegraph"—the way it employed semantics to make its main point. The dissent asserted, "[t]he Court holds that the provision's 'access to organizers' requirement amounts to a physical appropriation of property. In its view, virtually every government-authored invasion is an 'appropriation.'"[90] But this regulation does no such thing, they argued, it merely *regulates* the right to exclude because the permitted invasion is not a permanent occupation. Having set up another straw argument (appropriations are permanent, anything less is a regulation), the dissent asserted that a regulation requiring an owner open their property to others does not result in an "appropriation" of the right to exclude, merely a regulatory limitation of that right.

The dissent defended its "characterization" in several ways:

- California's regulations do not require agricultural property owners to convey an easement to the government or to the public. Whatever the regulation imposed, it was not "any traditional property interest in land."[91] It may be a winged waterfowl that makes quacking noises when you call out "Donald" or "Daffy," but it's not really, you know, *a duck*.
- Second, the regulation doesn't literally transfer the nursery's right to exclude to the union organizers. ("It is important to understand, however, that technically speaking, the majority is wrong. The regulation does not appropriate anything. It does not take from the owners a right to invade (whatever that might mean). It does not give the union organizations the right to exclude anyone. It does not give the government the right to exclude anyone.").[92] This to us illustrates the sleight-of-word that the dissenters are playing, because if the regulation indeed actually appropriated and transferred a traditional interest in property from the nursery to the union organizations, we wouldn't be having this discussion, would we? We'd be talking eminent domain and compensation.
- Ah, but we're not saying that California's regulations cannot be a taking, the dissent argued, we're only saying that the regs should not be automatically considered a taking. ("The issue is whether a regulation that *temporarily* limits an owner's right to exclude others from property *automatically* amounts to a Fifth Amendment taking.").[93] Prove up the other two *Penn Central* factors, and you get your compensation!

What about Loretto?

In what may be the dissent's strongest point (the majority conceded the "point is well taken"), it noted that in *Loretto,* the Court concluded that "[n]ot every physical invasion is a taking."[94] Indeed, the occupation in *Loretto* was more-or-less permanent[95] (or, more accurately, *indefinite*—since very little is truly *permanent*), and the consequences of permanent action were the only things we were worried about in that case. Read the dissent pages 6-7 for why the dissenters think that permanent occupations always undermine the concept of private property, while less-than-permanent occupations do not. For example, a permanent occupation prevents the owner from using that space, controlling it, and wiping out every right associated with that space. As the dissent noted, quoting *Loretto,* "a permanent physical occupation 'is perhaps the most serious form of invasion of an owner's property interests.'"[96]

Cedar Point does not disturb that reasoning. But whether you want to say that the majority sub silentio overruled *Loretto* or merely clarified its dicta or cleaned up the misunderstandings it created, did anyone accurately predict that the Court would have

to burn a common reading of the *Loretto* opinion in order to save the common reading of the *Loretto* rule?

PruneYard distinguished

The dissenters pointed to *PruneYard,* [97]asserting that case "fits this case almost perfectly."[98] The invasion was not round-the-clock, was limited in purpose, and was subject to government regulation of time, place, and manner. In *Cedar Point*, the scope of entry was *narrower*: instead of allowing access to the general public, the regulation required only that union organizers are allowed. Ah-ha, if that's the case, we're in "regulatory-balancing" territory, the dissenters argued.[99]

What I think that overlooks is the critical fact in *PruneYard*: the shopping center owner had already thrown open its doors to the public, inviting *everyone* to come on in to patronize PruneYard's tenants. Having acknowledged that it had invited the public onto its premises, the shopping center had not shown that allowing handbilling would interfere with whatever right to exclude remained. ("The PruneYard is open to the public for the purpose of encouraging the patronizing of its commercial establishments.").[100] In short, the shopping center owner "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.'"[101] Here, Cedar Point Nursery had not thrown its doors open to the public, but only to what we might call "invitees"—employees there for a limited time, and limited purpose, and the property owner's complaint alleged that the union's intrusions interfered with the owner's quiet enjoyment.

We want to regulate, but can't afford to pay

Next, the dissenters employed a revised form of the "sky will fall"[102] argument that is frequently employed to object to takings arguments. Here, the dissent didn't so much focus on "this will tie the government's hands by making every intrusion a taking" (the most-oft deployed argument), but rather on one that is more straightforward: "And it is impractical to compensate every property owner for any brief use of their land."[103] In other words, we can't afford to pay, you know, for everything we take. The dissent employs the second most famous Justice Holmes quote from *Pennsylvania Coal*: "[a]s we have frequently said, '[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.'"[104] That seems to be mixing the apples of invasion takings with the oranges of regulatory takings. The nursery isn't only claiming that the impact of California's regulations incidentally diminishes the value of its property, but also that the regulations interfere with an essential attribute of property.

Who keeps the gates?

And here is where we get to the essence of the disagreement between the majority and the dissent (hint: it's not about the metaphysical distinction between permanent or temporary)—their fundamentally different world views of what it means to possess private property. As I noted earlier, the majority opinion is based on a view of property that maybe comes more from the heart than from the head. Private property means "keep out." Or maybe "if you can't say 'keep out,' you really don't own 'private' property." More Locke (or Grotius[105]), less Hobbes.[106]

The dissent didn't see it that way, at least as I read between the lines. Your right to say "keep out" only applies to keeping *everyone* out, *always*. And we don't live in a world where you can do that. After all, "[w]e live together in communities."[107] We live in a world where Leviathan, not private owners, determines who can come and go. All in the name of the public good, naturally (e.g., regulations that require access to private property for food safety inspections, mobile home construction inspections, coastal wetland inspections, family care inspections, school inspections, elderly care facility inspections, waste management facility inspections, and "owl surveys").[108] All of this based on the "regulatory" hook we mentioned earlier, without which none of this would be okay. After all, if government officials simply barged in someone's property without regulatory authorization, unannounced at 5:00 a.m. and

stayed for three hours, 120 days per year, I'd hope dissenters would agree that this would be categorically contrary to the notion of private property.

WHAT NEXT?

What to make of *Cedar Point* beyond its narrowest holding that absent a few exceptional circumstances, any regulation that gives a right of access to someone's property is a categorical taking regardless of the duration of the access granted, and that the only issue in these cases is the amount of compensation owed? On one hand, you might see this case simply and only as clarifying or slightly extending the physical takings rule of *Loretto,* which was read as limiting categorical treatment to permanent occupations, leaving less-than-permanent physical access regulations to *Penn Central* analysis. Or you might see *Cedar Point* as the Court reemphasizing the distinction between physical invasion takings and plain, old regulatory takings. Here are four main lessons we're taking from the case.

First, the biggest point we read between the lines of Chief Justice Roberts' opinion was this: the Chief is solidly the "property guy" on the Court. In addition to *Cedar Point,* how many of the Court's property or property-related opinions has he authored? *Knick*. *Penn East*. *Horne II*. *Winter*. The *Murr* dissent. Those opinions he didn't author he played a big part in: the fifth vote in *Koontz*; presumably employing his role as Chief to organize unanimous or nearly unanimous decisions in *Arkansas Game, Horne I, Brandt, Hawkes,* and *Sackett*; and joining in property rights pluralities when there wasn't a majority. Yes, he was counsel for the government in *Tahoe-Sierra* (which held that a long-term moratorium on development is not a categorical taking), but that was in his role as advocate. And as we know, a lawyer's position when serving as counsel may not necessarily be the lawyer's own views. We read the *Cedar Point* majority opinion's nine positive *Tahoe-Sierra* citations not as a sign that Chief Justice Roberts doesn't understand his own earlier handiwork, but more as a signal that we shouldn't hold out his role as the advocate in that case as a sign he's a police power hawk or a takings dove. Indeed, if you were to not already know that *Tahoe-Sierra* was decided against the property owner, the *Cedar Point* majority opinion would not clue you in to that fact because it cites the case very positively.

Second, we are also taking as a sign that six Justices signed on to the *Cedar Point* opinion although a couple of them have been property rights ciphers so far. We have little doubt that *Cedar Point* takes a bold, confident stance on property rights at a time that the Court and its members are under extreme scrutiny and could just have easily adopted a *Tahoe-Sierra*-ish analysis of less-than-permanent invasions. But they didn't, and instead went big. So even though *Cedar Point* may be a good example of Chief Justice Roberts' usual incremental approach, we're taking it as a big hint that the Court wouldn't mind the opportunity to look at a lot of takings issues with fresh eyes.

Third, *Cedar Point* confirmed something we've contended for a long time: that the Fifth Amendment is not simply the "Just Compensation" clause, and that declaratory and injunctive relief are available remedies for takings issues in some circumstances. In *Cedar Point*, the property owner did not ask for just compensation, but only "declaratory and injunctive relief prohibiting the Board from enforcing the regulation against them." Just compensation may be the usual remedy in these cases, but it isn't the only remedy.

Finally, in light of the Court's "common sense" and "intuitive" approach to defining private property in the Fifth and Fourteenth Amendments, and the reemphasis of background principles of nuisance law, we think that there's going to be a renewed focus on what it means to own property, and more fundamentally, where that debate takes place (in state courts, state legislatures, or elsewhere). *Cedar Point* rejected the argument that state law alone defines "property," and can with the stroke of a pen manipulate certain concepts inherent in the notion of the Court's conception of what it means to own private property. Formalities may count for a lot in the law (and in property law specifically), but the Court isn't going to be hidebound to how a state defines or redefines property if doing so undermines traditional "sticks" the majority view as fundamental.

Notes

1 141 S.Ct. 2063 (2021).

2 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

3 Kaiser Aetna v. United States, 444 U.S. 164, 100 S. Ct. 383 (1979)

4 Cedar Point, 141 S.Ct. at 2076.

5 Cal. Code Regs., tit. 8, § 20900(e).

6 Id. § 20900(e)(1)(C).

7 Cedar Point Nursery v. Shiroma, 923 F.3d 524 (9th Cir. 2019). See also, PruneYard Undone: California's Union Easement-Which Invites Labor Organizers To Enter Private Property-Isn't A Physical Taking. Inversecondemnation.com, available at https://www.inversecondemnation.com/inversecondemnation/2019/05/californias-union-easement-which-invites-labor-organizers-onto-private-property-isnt-a-penn-central-.html.

8 Cedar Point, 956 F.3d 1162. See also, Your Takings Cert Petition Checklist: Ninth Circuit, En Banc Denial, Concurral, Dissental, Circuit Split, PLF, inversecondemnation.com, available at https://www.inversecondemnation.com/inversecondemnation/2020/04/your-takings-cert-petition-checklist-ninth-circuit-en-banc-denial-concurral-dissental-circuit-split-.html.

9 Cedar Point, 923 F.3d at 530.

10 Id. at 532.

11 Id. at 533-34.

12 Cedar Point, 141 S. Ct. at 2066.

13 Id. (citing Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 321 (2002)).

14 Id. at 2071.

15 Id. at 2072.

16 Id. at 2070.

17 Id. at 2072.

18 Id. at 2069-2070 (noting the complaint alleged an unannounced 5:00 a.m. entry, without prior notice, with blaring bullhorns).

19 United States v. Causby, 328 U.S. 256 (1946).

20 Portsmouth Co. v. United States, 260 U.S. 327 (1922).

21 Kaiser Aetna v. US, 444 U.S. 164 (1979). See also More on the Thirtieth Anniversary of Kaiser Aetna, inversecondemnation.com, available at https://www.inversecondemnation.com/inversecondemnation/2010/02/more-on-the-thirtieth-anniversary-of-kaiser-aetna.html.

22 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). See also Takings Pilgrimage, Upper West Side Edition, inversecondemnation.com, available at https://www.inversecondemnation.com/inversecondemnation/2017/01/takings-pilgrimage-upper-west-side-edition.html.

23 Nollan v. California Coastal Commission, 483 U.S. 825 (1987). See also Another Takings Pilgrimage (Unconstitutional Conditions Technically, but Not Close Enough, inversecondemnation.com, available at https://www.inversecondemnation.com/inversecondemnation/2016/03/another-takings-pilgrimage-unconstitutional-conditions-technically-but-close-enough-.html.

24 Horne v. Department of Agriculture, 569 U.S. 513 (2013). See also Horne v. USDA: More than Silly Raisin Jokes, inversecondemnation.com, available at https://www.inversecondemnation.com/inversecondemnation/2015/07/horne-v-usda-more-than-silly-raisin-puns.html.

25 Cal. Code Regs., tit. 8, § 20900(e)(1)(C).

26 Cedar Point, 141 S.Ct. at 2072-74.

27 Id. at 2074.

28 Id.

29 Id.

30 Id. at 2075.

31 Id. at 2071.

32 Id. at 2072.

33 Id. at 2073 (citing Thomas W. Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730 (1998) (noting the right to exclude is the "sine qua non" of property)). Although not cited in the opinion, you may also want to read Professor Merrill's follow up, Property and the Right to Exclude II, available at https://law.wm.edu/academics/intellectuallife/researchcenters/property-rights-project/b-k-journal/2014journal/1-merrill/7-merrill.pdf.

34 Id. at 2074.

35 See New SCOTUS Amicus: In Physical Invasion Takings, The Duration of the Occupation Is Less Important than Interference with the Right to Exclude (John Maynard Keynes Alert!), inversecondemnation.com, available at https://www.inversecondemnation.com/inversecondemnation/2020/09/new-scotus-cert-petition-in-physical-invasion-takings-the-duration-of-the-occupation-is-less-importa.html.

36 Cedar Point, 141 S.Ct. at 2074.

37 Id.

38 Id.

39 447 U.S. 74 (1980).

40 Id. at 84.

41 Id. at 93.

42 Id. at 93–94.

43 430 U.S. 651 (1977).

44 Id. at 94 n.3 (quoting Ingraham, 430 U.S. at 672–73).

45 560 U.S. 702 (2010).

46 Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 162 (1980) (legislature may not simply declare that interest on principal is state-owned property); see also Phillips v. Wash. Legal Found., 524 U.S. 156, 172 (1998) (interest on lawyers' trust accounts is "property").

47 Cnty. of St. Clair v. Lovingston, 90 U.S. 46, 68–69 (1874) (right to future accretions is a vested right and "rests in the law of nature").

48 Hodel v. Irving, 481 U.S. 704, 716 (1987) (passing property by inheritance is a fundamental attribute of property).

49 Lucas v. S.C. Coastal Council. 505 U.S. 1003, 1019 (1992).

50 Id. at 1014 ("[T]he government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits.") (citation omitted).

51 137 S. Ct. 1933, 1953 (2017).

52 Id. (Roberts, CJ, dissenting) (emphasis added).

53 Cedar Point, 141 S.Ct. at 2077.

54 Cedar Point, 141 S.Ct. at 2078.

55 Id. at 2079.

56 Id.

57 Id. at 2078.

58 Arkansas Game & Fish Commission v. United States 568 U.S. 23 (2012). See also, More Thoughts on Flooding, Takings, and How To Read A Supreme Court Opinion, inversecondemnation.com, available at https://www.inversecondemnation.com/inversecondemnation/2012/12/more-thoughts-on-flooding-takings-and-how-to-read-a-supreme-court-opinion.html

59 Brian Hodges, Will Arkansas Game & Fish Commission v. United States Provide a Permanent Fix for Temporary Takings?, 41 B.C. Envtl. Aff. L. Rev. 365, 385 (2014).

60 See New Cert Petition (MR-GO Katrina Case): Can Government *Inaction* Lead to a Taking?, inversecondemnation.com, available at https://www.inversecondemnation.com/inversecondemnation/2018/09/new-cert-petition-mr-go-katrina-case-can-government-inaction-lead-to-a-taking.html.

61 See Federal Circuit: No Taking for Forest Fire, inversecondemnation.com, available at https://www.inversecondemnation.com/inversecondemnation/2009/01/federal-circuit-no-taking-for-forest-fire.html

62 See CA4: No Taking When Aerial Pesticide Spray Killed Bees ... But Not Why You Think, available at https://www.inversecondemnation.com/inversecondemnation/2021/06/ca4-no-taking-when-aerial-pesticide-spray-killed-bees-but-not-why-you-think.html.

63 See Say What? Gov't Occupying Property under Claim of Right Is Only a Tort, Not a Taking, available at https://www.inversecondemnation.com/inversecondemnation/2019/02/say-what-govt-occupying-property-under-claim-of-right-is-only-a-tort-not-a-taking.html.

64 See "We're here from the Government, and We're here To ... Do Nothing" - Gov't Inaction Gives Rise To Inverse Condemnation, available at https://www.inversecondemnation.com/inversecondemnation/2016/01/were-here-from-the-government-and-were-here-to-do-nothing-govt-inaction-gives-rise-to-inverse-condem.html.

65 See Cal Supreme Court: Stop Saying Inverse Condemnation Is "Strict Liability," available at https://www.inversecondemnation.com/inversecondemnation/2019/08/cal-supreme-court-stop-saying-inverse-condemnation-is-strict-liability.html.

66 Cedar Point, 141 S.Ct. at 2079.

67 Id.

68 Id.

69 See Must Read: "Necessity Exceptions to Takings" (Shelley Ross Saxer), inversecondemnation.com, available at https://www.inversecondemnation.com/inversecondemnation/2021/04/must-read-necessity-exceptions-to-takings-shelley-ross-saxer.html.

70 See Cert Denied in Police Power Takings Case (Lech v. Greenwood Village), inversecondemnation.com, available at https://www.inversecondemnation.com/inversecondemnation/2020/06/cert-denied-in-police-power-takings-case-lech-v-greenwood-village.html.

71 Id.

72 See Cedar Point Part I: SCOTUS's Strawberry Letter 23 To Property Rights, inversecondemnation.com, available at https://www.inversecondemnation.com/inversecondemnation/2021/06/cedar-point-part-ii-.html.

73 See Property Nerd Book Club: This Spring's Directed Reading - "The Property Species: Mine, Yours, and the Human Mind" (Come, Join In!), inversecondemnation.com, available at https://www.inversecondemnation.com/inversecondemnation/2020/12/this-springs-directed-reading-the-property-species-mine-yours-and-the-human-mind-come-join-in.html.

74 Cedar Point, 141 S.Ct. at 2079.

75 Id.

76 Kaiser Aetna, 444 U.S. at 176.

77 Id. at 179.

78 Id.

79 Cedar Point, 141 S.Ct. at 2080.

80 See Property Nerd Book Club: This Spring's Directed Reading –"The Property Species: Mine, Yours, and the Human Mind" (Come, Join In!), inverse condemnation .com, available at https://www.inversecondemnation.com/inversecondemnation/2020/12/this-springs-directed-reading-the-property-species-mine-yours-and-the-human-mind-come-join-in.html.

81 See Cedar Point Oral Arguments Round-Up, inversecondemnation.com, available at https://www.inversecondemnation.com/inversecondemnation/2021/03/cedar-point-oral-arguments-round-up.html.

82 351 U.S. 105 (1956).

83 Cedar Point, 141 S.Ct. at 2080.

84 See Cedar Point Part III: No, Chicken Little, The Sky Isn't Falling, inversecondemnation.com, available at https://www.inversecondemnation.com/inversecondemnation/2021/07/cedar-point-part-iii-no-chicken-little.html.

85 See New Law Review Article (Ours)—"Evaluating Emergency Takings: Flattening the Economic Curve," 29 Wm. & Mary Bill of Rights J. 1145 (2021), inversecondemnation.com, available at https://www.inversecondemnation.com/inversecondemnation/2021/06/new-law-review-article-ours-evaluating-emergency-takings-flattening-the-economic-curve-29-wm-mary-bi.html.

86 Cedar Point, 141 S.Ct. at 2081.

87 See Babcock, 351 U.S. 105 .

88 See Cedar Point Oral Arguments Round-Up, supra note 81.

89 Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).

90 Cedar Point, 141 S.Ct. at 2081.

91 Id. at 2082.

92 Id. at 2083.

93 Id.

94 Id. (citing Loretto, 458 U.S. at 435 n.12).

95 See More on the Thirtieth Anniversary of Kaiser Aetna , supra note 21.

96 Cedar Point, 141 S.Ct. at 2083 (quoting Loretto, 458 U.S at 435).

97 See Went to the PruneYard Yesterday, inversecondemnation.com, available at https://www.inversecondemnation.com/inversecondemnation/2011/09/went-to-the-pruneyard-yesterday.html.

98 Cedar Point, 141 S.Ct. at 2085.

99 Id. at 2089.

100 PruneYard, 447 U.S. at 77.

101 Id. at 84.

102 See Cedar Point Oral Arguments Round-Up, supra note 81.

103 Cedar Point, 141 S.Ct. at 2087.

104 Id. (quoting Pennsylvania Coal, 260 U.S. at 413).

105 See What's in the Box? Hugo Grotius!, inversecondemnation/.com, available at https://www.inversecondemnation.com/inversecondemnation/2016/11/whats-in-the-box-hugo-grotius.html.

106 See Movie Review: Leviathan - "The Castle" Gone Bad, inversecondemnation.com, available at https://www.inversecondemnation.com/inversecondemnation/2015/03/movie-review-leviathan-the-castle-gone-bad.html

107 Cedar Point, 141 S.Ct. at 2087.

108 Id.