

## 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 PRIVATE PROPERTY RIGHTS

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## INTRODUCTION

In 1975, California’s Agricultural Labor Relations Board (the “Board”) enacted a regulation allowing union organizers to access agricultural employers’ private properties “for the purpose of meeting and talking with employees and soliciting their support” (the “access regulation”).<sup>1</sup> The access regulation does not require the union organizers to obtain consent before entering employers’ properties; instead, union organizers must only file a “written notice of intention to take access.”<sup>2</sup> The notice provides the union organizers access to an employer’s property for three hours a day up to 120 days each year during the hour before the workday, during lunch, and after the workday.<sup>3</sup>

After union organizers entered Cedar Point Nursery’s property without filing the required notice of intent to access, Cedar Point, along with Fowler Packing Company (together the “Growers”), filed a complaint seeking declaratory and injunctive relief against the Board.<sup>4</sup> Almost fifty years after the Board enacted the access regulation, the Supreme Court in *Cedar Point Nursery v. Hassid*<sup>5</sup> held that the access regulation is a per se physical taking, requiring California to compensate the Growers.<sup>6</sup> Until its decision in *Cedar Point*, the Supreme Court’s guidance on how to discern whether a case involved a regulatory or physical taking was ambiguous, leaving lower courts to

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1. CAL. CODE REGS. tit. 8, § 20900(e) (2021); *see also* CAL. LAB. CODE § 1152 (West 2021) (granting employees the right to “to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”).

2. CAL. CODE REGS. tit. 8, § 20900(e); *see* *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 527–28 (9th Cir. 2019) (quoting CAL. CODE REGS. tit. 8, § 20900(e)), *rev’d sub nom.* *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

3. *Shiroma*, 923 F.3d at 527–28.

4. *Cedar Point Nursery v. Gould*, No. 16-00185, 2016 WL 1559271, at \*1–2 (E.D. Cal. Apr. 18, 2016), *aff’d sub nom. Shiroma*, 923 F.3d 524, *rev’d sub nom. Cedar Point*, 141 S. Ct. 2063.

5. 141 S. Ct. 2063 (2021).

6. *Id.* at 2080.

decipher which standard to apply from the mountains of takings jurisprudence.<sup>7</sup> Part I of this Note provides the procedural history of *Cedar Point*, gives a brief overview of the cases the Supreme Court relied on in its opinion, and summarizes the Supreme Court's majority opinion in *Cedar Point*. Part II analyzes how the Supreme Court's opinion fits with takings jurisprudence and concludes with two unanswered questions: (1) what does compensation look like for the appropriation of the right to exclude; and (2) can a state limit private property owners' right to exclude through trespass actions?

## I. BACKGROUND

Before explaining the procedural history of *Cedar Point* and the Supreme Court's holding and reasoning, this Part gives an overview of the case law that compromises the Supreme Court's cumulative takings jurisprudence.

### A. *Supreme Court Takings Jurisprudence*

The Fifth Amendment Takings Clause limits the government's eminent domain power by requiring the government to provide just compensation for its takings.<sup>8</sup> “[C]ompensation is an indispensable attendant” of the government's power to take private property.<sup>9</sup> The just compensation requirement ensures that an owner is “paid for what is taken from him.”<sup>10</sup>

The Supreme Court currently recognizes two main categories of takings that require just compensation: physical takings and regulatory takings.<sup>11</sup> A plaintiff who is challenging a government regulation as a taking can proceed by alleging either a traditional physical taking or a

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7. See Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 PA. ST. L. REV. 601, 628 (2014) (arguing that discerning between the two “involves subtle determinations of the nature of the property involved”).

8. *Pinnacle Enters. v. City of Papillion*, 836 N.W.2d 588, 596 (Neb. 2013). The Takings Clause states: “[P]rivate property [shall not] be taken for public use, without just compensation.” U.S. CONST. amend. V.; see also *Horne v. U.S. Dep't of Agric.*, 135 S. Ct. 2419, 2427–28 (2015) (stating that the Takings Clause protects both real and personal property).

9. *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162, 167–68 (N.Y. Ch. 1816).

10. *Boston Chamber of Com. v. Boston*, 217 U.S. 189, 195 (1910) (emphasizing that the just compensation requirement “deals with persons, not with tracts of land”).

11. See, e.g., *Cedar Point Nursey v. Shiroma*, 923 F.3d 524, 531 (distinguishing between the two types of takings), *rev'd sub nom. Cedar Point*, 141 S. Ct. 2063; *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (recognizing that government regulations may be so burdensome that the effects amount to a taking).

regulatory taking.<sup>12</sup> Distinguishing physical takings from regulatory takings is critical because the Supreme Court applies different standards to each takings category.<sup>13</sup> However, in the past, the Supreme Court provided ambiguous guidance on how to discern whether a case involves a regulatory or physical taking.<sup>14</sup>

### 1. *Physical takings*

In general, a physical taking occurs when the government takes occupation of an individual's property through eminent domain and deprives the individual of his rights as a property owner.<sup>15</sup> This Note refers to physical takings—those involving the direct condemnation of land—as “traditional physical takings” to unambiguously distinguish them from takings resulting from the occupation of land pursuant to a regulation.<sup>16</sup> Traditional physical takings are per se takings, meaning that courts will find a taking requiring just compensation when the plaintiff can demonstrate that the government condemned the plaintiff's private property.<sup>17</sup>

The government must compensate private owners for a traditional physical taking despite time limitations or interrupted access.<sup>18</sup>

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12. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005).

13. *See Eagle*, *supra* note 7, at 628–29 (acknowledging the different takings standards).

14. *See id.*

15. *See generally* Daniel A. Farber, *Murr v. Wisconsin and the Future of Takings Law*, 2017 SUP. CT. REV. 115 (2018) (reviewing the background information necessary to understand takings claims).

16. *See infra* notes 93–96 and accompanying text (discussing and defining regulatory takings that cause a permanent physical occupation). A physical taking is the traditional type of taking because until the Supreme Court's decision in *Pennsylvania Coal Co. v. Mahon*, courts believed a taking could occur only if the government directly condemned land. 260 U.S. 393, 413 (1922) (holding that a regulation could effectuate a taking); *see also infra* Section I.A.2 (detailing regulatory takings).

17. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (requiring no further analysis for a traditional physical taking other than “the character of the governmental action” (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)); *see, e.g.*, *Horne v. U.S. Dep't of Agric.*, 135 S. Ct. 2419, 2427 (2015) (characterizing the appropriation of property as a per se taking). Per se means “by, of, or in itself” or “being such inherently, clearly, or as a matter of law.” *Per Se*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/perse> [https://perma.cc/Z4UA-PA95].

18. *See United States v. Gen. Motors Co.*, 323 U.S. 373, 361 (1945) (directing the government to pay the market rental value for temporarily occupying the lessee's warehouse); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 328–

Temporary versus permanent takings have caused much confusion amongst courts.<sup>19</sup> The degree and length of intrusion go to the amount of compensation; it does not go toward determining whether a physical occupation is a taking.<sup>20</sup> In *United States v. General Motors Corp.*,<sup>21</sup> the Court found that the government's use of the Second War Powers Act<sup>22</sup> to condemn General Motors's leased space for one year was a taking even though the government's possession of General Motors' warehouse was finite, and General Motors would subsequently reclaim its lease.<sup>23</sup> Similarly, in *Portsmouth Harbor Land & Hotel Co. v. United States*,<sup>24</sup> the Court recognized that the government effectuated a taking when intermittent gunfire from a nearby fort deterred the public from visiting the Portsmouth Harbor Hotel.<sup>25</sup> The Court explained that if the government erected forts intending to fire even a single shot over Portsmouth's land, the government would have directly appropriated a servitude for which it needed to give just compensation.<sup>26</sup> Second, the Court stated that the government's intent was irrelevant if there were a "sufficient number" of firings "for a sufficient time."<sup>27</sup> The Court acknowledged that a single shot might not be enough to constitute a taking without intent, but if Portsmouth could present evidence that the firing occurred over several years and at a sufficient volume, the

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29 (1922) (finding appropriation where the government set up "heavy coast defense guns" with the intent to fire across the plaintiffs' land and had done so on multiple occasions, albeit infrequently).

19. See *infra* notes 87–93 and accompanying text (noting a circuit split between the Ninth Circuit and the Federal Circuit over what it means to have a continuous or uninterrupted taking).

20. See *United States v. Gen. Motors Corp.*, 323 U.S. 373, 380 (1945) (finding a taking where the government could continuously renew the appropriation of the lease); *United States v. Petty Motor Co.*, 327 U.S. 372, 375 (1946) (finding the temporary nature of taking went to compensation); *Kimball Laundry Co. v. United States*, 388 U.S. 1, 15 (1949) (finding the scope of the taking as to the laundry business went to compensation required).

21. 323 U.S. 373 (1945).

22. Pub. L. No. 507, 56 Stat. 176, 177 (1942).

23. *Gen. Motors Corp.*, 323 U.S. at 382 (acknowledging that the time limitation on the taking does not change the fact that there was a traditional physical taking but rather the time went toward the compensation required); see also *United States v. Cress*, 243 U.S. 316, 327–28 (1917) (holding a physical taking occurred where property was continuously flooded due to the government building a dam).

24. 260 U.S. 327 (1922).

25. *Id.* at 329–30.

26. *Id.*

27. *Id.* at 329–30.

cumulative action may constitute a taking.<sup>28</sup> The Court determined that the duration and size of an appropriation “bears only on the amount of compensation.”<sup>29</sup>

The government must also compensate owners for condemning private property in order to create a public right of access.<sup>30</sup> In *United States v. Causby*,<sup>31</sup> the Causbys’ property sat next to an airport used by U.S. aircrafts.<sup>32</sup> The planes on this glide path barely cleared the tops of the trees on the Causbys’ property, caused a startling noise, and illuminated the Causbys’ property at night.<sup>33</sup> The Court found that the government’s use of the flight path was akin to possession of an easement and found a traditional physical taking because the flights were so frequent and low to the ground that it was as if the government entered the Causbys’ property and took possession of it.<sup>34</sup> The Court stated that the fact that the “enjoyment and use of the land are not completely destroyed . . . does not seem . . . to be controlling.”<sup>35</sup>

The Court expanded on *Causby* in *Kaiser Aetna v. United States*<sup>36</sup> when it added that the government might not force private property owners to allow the public free access to their property “without invoking its eminent domain power and paying just compensation.”<sup>37</sup> After Kaiser Aetna deepened the channel between Kuapa Pond and Maunaloa Bay, which increased a bridge’s clearance to allow boats to enter and leave the marina, the Army Corps of Engineers sought an injunction to force Kaiser Aetna to open the pond to the public.<sup>38</sup> The Supreme Court found that requiring Kaiser Aetna to create a public right of access

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28. *Id.*

29. *Cedar Point Nursey v. Hassid*, 141 S. Ct. 2063, 2074 (citing *United States v. Causby*, 328 U.S. 256 (1946), as an example that after a taking is found, a court must still decide how much compensation the government is required to pay).

30. *See Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (concluding that requiring the plaintiff to grant public access to the pond in question directly appropriated an easement across the property, for which compensation would be required); *Causby*, 328 U.S. at 266–67 (finding a taking where government flights over the Causbys’ farm were so low and so frequent that they diminished the value of the farm).

31. 328 U.S. 256 (1946).

32. *Id.* at 258–59.

33. *Id.* (noting that the planes required the Causbys to give up their chicken business because their chickens flew into walls as a result of the startling noise).

34. *Id.* at 256–66 (noting that it is “the owner’s loss, not the taker’s gain, which is the measure of the value of the property taken”).

35. *Id.* at 262.

36. 444 U.S. 164 (1979).

37. *Id.* at 164.

38. *Id.* at 169.

“goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking.”<sup>39</sup> Focusing on Kaiser Aetna’s right to exclude as a “fundamental element of the property right,” the Court reasoned that this type of regulation is not a use restriction or deprivation of economic benefit, but rather “an actual physical invasion” of private property.<sup>40</sup> The regulation requiring Kaiser Aetna to grant public access to the pond directly appropriated an easement across the property.<sup>41</sup>

Since a plaintiff challenging a regulation causing physical access to their property can challenge the regulation under a traditional physical taking theory or a regulatory taking theory, it is important to understand what claims a plaintiff is making and how the Court classifies a taking. Before *Cedar Point*, the Supreme Court most recently applied the traditional physical takings doctrine to determine whether a regulation requiring growers to give the government a percentage of their crops constituted a taking. In *Horne v. Department of Agriculture*,<sup>42</sup> the Secretary of Agriculture promulgated a marketing order for raisins “requir[ing] growers in certain years to give a percentage of their crop to the Government, free of charge.”<sup>43</sup> The Ninth Circuit held that the marketing order was not a taking because “the Hornes [were] not completely divested of their property rights.”<sup>44</sup> The Supreme Court reversed the Ninth Circuit and held that “[t]he reserve requirement imposed by the Raisin Committee is a clear physical taking” because the regulation directly appropriated the raisins.<sup>45</sup> The Court reasoned that

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39. *Id.* at 178.

40. *Id.* at 179–80.

41. *Id.* at 180 (requiring the government to pay just compensation even when the government invades “only an easement in property”).

42. 576 U.S. 351 (2015).

43. *Horne*, 576 U.S. at 355. In 2002, the Hornes produced raisins, but refused to give the government their reserved raisins, leading to a \$680,000 fine. *Id.* at 356 (noting that the Hornes refused on the basis that the regulation created a per se physical taking requiring just compensation).

44. *Horne v. Dep’t of Agric.*, 750 F.3d 1128, 1139, 1143 (9th Cir. 2014), *rev’d*, *Horne v. Dep’t of Agric.*, 576 U.S. 351 (2015) (stating that the Hornes could even avoid the regulation by “planting different crops”).

45. *Horne*, 576 U.S. at 357–62 (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 324 (2002)) (acknowledging that a traditional taking occurs where private property is directly appropriated for governmental use and urging the importance of the distinction between the types of takings).

when the government took possession of the raisins, it was “as if the Government held full title and ownership.”<sup>46</sup>

## 2. *Regulatory takings*

While a traditional physical taking occurs when the government directly condemns a private owner’s land,<sup>47</sup> a physical taking can also occur when a regulation “goes too far” and indirectly appropriates private property.<sup>48</sup> A regulatory taking, or a non-direct condemnation, occurs when a government regulation (1) restricts the land but does not permanently occupy the land or deprive the owner of all economic use,<sup>49</sup> (2) causes the owner to suffer a permanent physical occupation,<sup>50</sup> or (3) deprives the owner of all economic value of the property.<sup>51</sup> The distinction between types of takings is important because while the Supreme Court has recognized that regulatory takings involving a permanent physical occupation and a loss of all economic value are per se takings, a regulation that restricts land

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46. *Id.* at 362 (quoting *Loretto v. Manhattan Teleprompter CATV Corp.*, 458 U.S. 419, 431 (1982)) (adding that the Hornes’ bundle of property rights was nearly entirely lost).

47. *See, e.g., United States v. Pewee Coal Co.*, 341 U.S. 114, 115–16 (1951) (exemplifying a traditional physical taking where President Roosevelt took possession of a coal mine through an executive order). The Court found this was a traditional physical taking because the government seized Pewee Coal’s property as if it held “full title and ownership.” *Id.* at 116–17 (quoting *United States v. United Mine Workers*, 330 U.S. 258, 284–85 (1947)); Exec. Order No. 9340, 8 Fed. Reg. 5695 (May 4, 1943).

48. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (recognizing that a regulation could create a taking).

49. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 125 (1978) (creating the factors to examine when a regulation does not deprive an owner of the property’s entire economic benefit); Lynn E. Blais, *The Total Takings Myth*, 86 *FORDHAM L. REV.* 47, 50 (2017) (reinforcing the distinct third group of regulatory takings governed by *Penn Central*).

50. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (finding a taking where a regulation caused the permanent occupation of telephone wires on a building). The Supreme Court has previously recognized a regulation causing temporary invasion as a taking; however, that category is subject to a more complex balancing test, which the Court established in *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23, 36 (2012). The Growers did not argue that the regulation here was a temporary physical invasion; therefore, the category of property incursion is beyond the scope of this Note.

51. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (finding a taking where the owner’s development rights were completely negated by a regulation making the property useless).

without depriving the owner of all economic use requires a balancing test.<sup>52</sup>

*Penn Central Transportation Co. v. New York City*<sup>53</sup> and *Lucas v. South Carolina Coastal Council*<sup>54</sup> created rules for regulatory takings involving restrictions of use.<sup>55</sup> The Landmark Preservation Act<sup>56</sup> in *Penn Central* and the Beachfront Management Act<sup>57</sup> in *Lucas* prevented the property owners from building on their land in certain ways.<sup>58</sup> Although the test is different for each regulatory taking depending on how much loss the restriction causes, the government did not physically invade the owners' properties at all; thus, the Court used the regulatory takings analysis in those cases.<sup>59</sup> Under *Penn Central*, when a regulation imposes a burden that does not take all economic value away from an owner the court will examine three factors: (1) "[t]he economic impact of the regulation" on the property, (2) the degree of interference "with investment-backed expectations," and (3) "the character of the governmental action."<sup>60</sup> Under *Lucas*, a regulation that deprives an owner of all economically viable uses of his land is a taking.<sup>61</sup>

*Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>62</sup> made regulations effecting a permanent physical occupation on private property per se

52. Blais, *supra* note 49, at 49–50; *see also* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2004) (reaffirming the three types of regulatory takings and rejecting an older test based on whether a regulation substantially advanced governmental interest because it "has no proper place in . . . takings jurisprudence").

53. 438 U.S. 104 (1978).

54. 505 U.S. 1003 (1992). In *Lucas*, the South Carolina Coastal Council enacted the Beachfront Management Act prohibiting occupiable improvements within a "critical area." *Id.* at 1008–09. In 1986, Lucas purchased two residential lots zoned for residential construction with no requirement to obtain a permit before development. *Id.* at 1006, 1009. In 1988, the Coastal Council amended the Beachfront Management Act to prohibit occupiable improvements in a region, including Lucas's land. *Id.* at 1007–09.

55. *Penn Central*, 438 U.S. 104, 110–12 (1978); *Lucas*, 505 U.S. at 1008–09.

56. N.Y.C. ADMIN. CODE §§ 25-301 to 25-322 (2021).

57. S.C. CODE ANN. § 48-39-240 (2021).

58. *Penn Central*, 438 U.S. at 110–12; *Lucas*, 505 U.S. at 1008–09.

59. *Penn Central*, 438 U.S. at 110–12; *Lucas*, 505 U.S. at 1009.

60. *Penn Central*, 438 U.S. at 124.

61. *Lucas*, 505 U.S. at 1016 (finding that the regulation deprived Lucas of all the economic benefits of his property because his land was not subject to the same limitations when he purchased it). While a property owner expects his property to be regulated, a limitation as severe as taking away all of the economic value of the land must "inhere in the title itself." *Id.* at 1029.

62. 458 U.S. 419 (1982) (finding a taking where a New York regulation required landlords to allow cable companies to install their hardware on properties).

takings.<sup>63</sup> Permanent physical occupations require just compensation because they infringe on the owners' right to exclude others from using their property even though the government might not infringe on the owner's right of use.<sup>64</sup> Permanent physical occupations are per se takings that occur when an individual has suffered a permanent "physical invasion" of his property by governmental action.<sup>65</sup>

As in *Horne*, where the Supreme Court determined that a regulation caused a physical appropriation, the Federal Circuit in *Boise Cascade Corp. v. United States*,<sup>66</sup> examined a regulation that restricted Boise from logging its land without a permit to protect a spotted owl-nesting site.<sup>67</sup> In *Boise*, the Federal Circuit found that the regulation merely caused a use restriction on Boise's property.<sup>68</sup> Therefore, the Federal Circuit could not apply the traditional physical takings analysis because the regulation did not cause the government to physically invade private property.<sup>69</sup>

### B. Procedural History of Cedar Point

After the union organizers filed unfair labor practice charges against the Growers, the Growers filed suit against the Board members arguing that the access regulation effected a per se taking under the Fifth Amendment.<sup>70</sup> Categorizing the access regulation as a restriction on the use of the Growers' properties, the U.S. District Court for the Eastern District of California granted the Board's motion to dismiss, finding that the access regulation did not constitute a taking.<sup>71</sup> In *Cedar Point Nursery v.*

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63. *Id.* at 441.

64. *See United States v. Lynah*, 188 U.S. 445, 469–70 (1903) (finding a taking occurred where government action's next to the plaintiff's property caused an overflow of water making the property a "irreclaimable bog" that deprived the rice farmer of all value of his property).

65. *See Loretto*, 458 U.S. at 427 ("When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking.").

66. 296 F.3d 1339 (Fed. Cir. 2002).

67. *Id.* at 1341–42.

68. *Id.* at 1354–55 (noting that Boise lost any right it had to exclude the owls when they were listed as a threatened species).

69. *See id.* (noting that "the [government] has no control over where the spotted owls nest," and the government did not invade Boise's property, the owls did).

70. *Cedar Point Nursery v. Gould*, No. 16-00185, 2016 WL 1559271, at \*1–2 (E.D. Cal. Apr. 18, 2016), *aff'd sub nom. Cedar Point Nursery v. Shiroma*, 923 F.3d 524 (9th Cir. 2019), *rev'd sub nom. Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

71. *Id.* at \*4–6 (applying the regulatory takings factors set out in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)).

*Shiroma*,<sup>72</sup> the Ninth Circuit affirmed the district court's judgment and held that the access regulation granting the union organizers a right to access the Growers' properties was not a taking.<sup>73</sup> The Ninth Circuit examined the access regulation as a restriction on property and held that it did not constitute a permanent physical occupation under regulatory takings jurisprudence because "the regulation does not grant union organizers a 'permanent and continuous right to pass to and fro'" or the right to continuously traverse the Growers' property.<sup>74</sup>

In reaching its decision, the Ninth Circuit compared the Growers' argument to *PruneYard Shopping Center v. Robins*.<sup>75</sup> PruneYard was a privately owned shopping center composed of over sixty-five shops, ten restaurants, and a movie theatre.<sup>76</sup> After a PruneYard security guard told the students handing out pamphlets and soliciting signatures that they needed to leave, the students filed suit in the California Superior Court of Santa Clara County.<sup>77</sup> PruneYard challenged the California Supreme Court's decision that the students had a First Amendment right to free speech in privately owned shopping centers claiming that this result infringed on their property rights.<sup>78</sup> Examining the *Penn Central* factors, the U.S. Supreme Court found that allowing the students to exercise their rights of free expression was not a taking because the students' demonstration did not impair the value of PruneYard's property.<sup>79</sup>

The Court stated that much like in *PruneYard*, where granting people intermittent access to a shopping center to exercise their right to free speech was not a taking, the union organizers can only access the property for a few hours a day for a limited number of days annually; thus, the access regulation does not constitute "an unconstitutional infringement" on the Growers' property rights.<sup>80</sup> The Ninth Circuit used these same facts to distinguish *Cedar Point* from *Nollan v. California Coastal Commission*<sup>81</sup> where the Supreme Court discussed that requiring private owners to grant an

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72. 923 F.3d 524 (9th Cir. 2019), *rev'd sub nom. Cedar Point*, 141 S. Ct. 2063.

73. *Id.* at 532.

74. *Id.*

75. *Id.* at 531–32 (citing 447 U.S. 74 (1980)).

76. *PruneYard*, 447 U.S. at 77.

77. *Id.*

78. *Id.* at 78.

79. *Id.* at 79, 82–83.

80. *Id.*

81. 483 U.S. 825 (1987).

easement in their property would “no doubt” constitute a taking.<sup>82</sup> In *Nollan*, random people could “unpredictably traverse [the Nollan’s] property 24 hours a day, 365 days a year.”<sup>83</sup> The Ninth Circuit explained that the access regulation could not establish a taking because it only removed one strand from the property rights bundle—the right to exclude.<sup>84</sup> Even though the Growers alleged that access regulation directly appropriated an easement on the Growers’ properties, the Ninth Circuit only addressed the three types of regulatory takings and did not analyze the Growers’ claim under a traditional takings theory at all.<sup>85</sup>

The Ninth Circuit’s decision directly contradicted the Federal Circuit’s decision in *Hendler v. United States*,<sup>86</sup> creating a circuit split.<sup>87</sup> In *Hendler*, the plaintiffs’ property sat next to a waste disposal site that emitted toxins that threatened to contaminate drinking and agricultural water.<sup>88</sup> The Environmental Protection Agency (EPA) requested access to the Hendlers’ property to build wells to monitor the toxins.<sup>89</sup> When the Hendlers refused, the EPA issued an administrative order giving itself access to the Hendlers’ property for “locating, constructing, operating, maintaining, and repairing monitor/extraction wells.”<sup>90</sup> The EPA and the state of California constructed eighteen wells on the Hendlers’ property and had access to the property to repair and monitor the wells.<sup>91</sup> The Federal Circuit held that the EPA administrative order effected a traditional physical taking.<sup>92</sup> The court reasoned that “‘permanent’ does

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82. *Id.* at 828. The main issue in *Nollan* was whether there was an essential nexus between the Commission’s public purpose and the condition of the easement. *Id.* at 837. The public use issue is not at issue in *Cedar Point*, and therefore, this Note does not focus on it.

83. *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 532 (9th Cir. 2019) (quoting *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831–32 (1987)) (arguing the unpredictability and continuous ability for people to traverse made the physical intrusion permanent), *rev’d sub nom.* *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

84. *Id.* (citing *Murr v. Wisconsin*, 137 S. Ct. 1933, 1952 (2017) (Roberts, C.J., dissenting)).

85. *Id.* at 530–31.

86. 952 F.2d 1364 (Fed. Cir. 1991).

87. Compare *Shiroma*, 923 F.3d at 532 (finding that an access regulation was not a taking because it was not a permanent physical occupation), with *Hendler*, 952 F.2d at 1376 (ruling that an EPA order effected a taking even though it was not continuous).

88. *Hendler*, 952 F.2d at 1369.

89. *Id.*

90. *Id.* (quoting *Henry Hendler*, Order (EPA Sept. 20, 1983)).

91. *Id.* at 1369–70.

92. *Id.* at 1376–78 (recognizing the confusing jurisprudence between physical and regulatory takings).

not mean forever . . . [a] taking can be for a limited term,” and physical occupations do not have to be exclusive, continuous, or uninterrupted to amount to takings.<sup>93</sup> The Supreme Court granted certiorari in *Cedar Point*.

### C. Supreme Court Decision in Cedar Point

The Ninth Circuit's holding exacerbated the need for the Supreme Court to clarify takings jurisprudence. While the Supreme Court left two major questions unanswered, it defined the line between regulatory takings and physical takings.<sup>94</sup> The Court explored the variety of ways that the government has physically appropriated property in the past.<sup>95</sup> However, the Court added that takings occur not only when government action appropriates property for itself or a third party, but also when it enacts “regulations that restrict an owner's ability to use his property.”<sup>96</sup> The Court acknowledged that while takings jurisprudence calls the latter type “regulatory takings,” the name is extremely misleading because a “[g]overnment action that physically appropriates property is no less a physical taking because it arises from a regulation.”<sup>97</sup>

The Court clarified that the essential question to determine whether a case might fall under the regulatory takings or physical takings umbrella is “whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his property.”<sup>98</sup> Therefore, how the Court defines the property right at issue is the most important part of the decision. In this case, the majority's and dissent's definitions of the right that the access regulation interferes with differ by one word.<sup>99</sup> While the majority sees the access regulation as an *appropriation* of the

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93. *Id.* at 1376.

94. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071–72 (2021).

95. *Id.* at 2071; *see* *United States v. Pewee Coal Co.*, 341 U.S. 114, 115–17 (1951) (finding a physical taking where the government physically took over a mine, but never acquired title); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 382 (1945) (finding a physical taking where the government condemned a portion of the lease); *United States v. Cress*, 243 U.S. 316, 327–28 (1917) (holding a physical taking occurred where property was continuously flooded due to the government building a dam).

96. *Cedar Point*, 141 S. Ct. at 2071.

97. *Id.* at 2072.

98. *Id.*

99. *Compare id.* at 2072 (finding a taking because the regulation “appropriates for the enjoyment of third parties the owners' right to exclude”), *with id.* at 2087 (Breyer, J., dissenting) (emphasizing that the regulation “*regulates* (but does not *appropriate*) the owners' right to exclude”).

right to exclude, the dissent classifies it as a *regulation* on the right to exclude.<sup>100</sup>

To defeat the dissent's argument that there is merely a regulation on the right to exclude, the majority looked to the definition of appropriation and the importance of the right to exclude.<sup>101</sup> The Court defined "appropriation" as "taking as one's own."<sup>102</sup> Therefore, by granting the union organizers the "right to take access," the Court stated that the access regulation is expressly appropriating the Growers' properties.<sup>103</sup> The Court continued by highlighting that previous takings cases have established that the right to exclude is a fundamental property right.<sup>104</sup>

One challenge the Court had to face was distinguishing *Cedar Point* from *PruneYard* because, on its face, *PruneYard* included a time-limited easement much like in *Cedar Point*.<sup>105</sup> The Ninth Circuit and dissent heavily relied on the decision in *PruneYard* to find the access regulation did not constitute a taking under a regulatory takings analysis.<sup>106</sup> The Court distinguished the private property that the Growers use for their farms from the shopping center in *PruneYard* where the owner held the property open to the public.<sup>107</sup> The Court's ability to distinguish

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100. *See id.* at 2072 (holding that the regulation goes beyond restraining the owners' use of their own property by appropriating the right for the enjoyment of third parties). *But see id.* at 2087 (Breyer, J., dissenting) (noting that the regulation merely limits the landowners' right to exclude certain others by granting union organizers a temporary right to invade a portion of the property).

101. *Id.* at 2077–78.

102. *Id.* at 2077 (citing 1 OXFORD ENGLISH DICTIONARY 587 (2d ed. 1989)).

103. *Id.*

104. *Id.* at 2078; *see* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (acknowledging that when the government physically invades one's property, the government not only destroys the owner's right to exclude but also "chops through the [entire] bundle [of rights], taking a slice of every strand"); RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 63 (1985) (explaining that the right to exclude others is "implicit in the basic conception of private property" and allows owners to keep unwanted parties off their property and control how they, and maybe others, use their property).

105. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83; *Cedar Point Nursey v. Shiroma*, 923 F.3d 524, 531–32 (9th Cir. 2019), *rev'd sub nom. Cedar Point*, 141 S. Ct. 2063.

106. *See Cedar Point*, 141 S. Ct. at 2076–77 (emphasizing that "*PruneYard's* holding that the taking was 'temporary' (and hence not a per se taking) fits this case almost perfectly"); *Shiroma*, 923 F.3d at 531–33 (repeatedly citing *PruneYard* in rebutting the plaintiffs' claim that a permanent physical taking does not need to be continuous).

107. *PruneYard*, 447 U.S. at 83.

*Cedar Point* from *PruneYard* determined the Court's ability to examine the access regulation as a physical taking as opposed to a use restriction.<sup>108</sup>

The Court expanded upon its prior takings jurisprudence and clarified two other important aspects of takings jurisprudence: (1) a state-created property interest does not have to be appropriated to effectuate a physical taking, and (2) the temporary nature of an appropriation merely goes to determining compensation.<sup>109</sup> The Board argued that the access regulation did not appropriate an easement under California state law, and therefore, a *per se* taking could not have been effectuated because the access regulation does not take away a property interest as defined by state law.<sup>110</sup> The Court wrote off the Board's argument and pointed to the Growers' right to exclude.<sup>111</sup> The Court acknowledged that the "right to exclude" is not a state-recognized transferrable property interest like a lease or easement, but rather a fundamental property right.<sup>112</sup> While the Growers argued that the access regulation effectively transferred title of an easement in gross to the government by granting the union organizers physical access to the Growers' properties, the Court held that the access regulation did not need to appropriate a state-created property interest.<sup>113</sup> Regardless of whether the access regulation transferred an easement, a physical taking occurred because the Growers' right to exclude was appropriated.<sup>114</sup> The Court stressed that the Board cannot take away a property right just because there "is a slight mismatch from state easement law," and no one can argue that the Board took away the Growers' right to exclude.<sup>115</sup>

Finally, the dissent and the Board were concerned that by treating the access regulation as a *per se* physical taking, the Court has endangered

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108. See *Cedar Point*, 141 S. Ct. at 2076 (noting that "no one disputes that, without the access regulation, the growers would have had the right under California law to exclude union organizers from their property").

109. *Id.* at 2074–76.

110. Brief for Respondent at 34–35, *Cedar Point*, 141 S. Ct. 2063 (No. 20-107) (stating that the access regulation cannot be an easement because it cannot be transferred or assigned).

111. *Cedar Point*, 141 S. Ct. at 2075–76.

112. Every property owner has the right to exclude included in her "bundle" of property rights, unlike an easement or lease, which is a type of property interest one can hold. See generally Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 VT. L. REV. 247, 253–54 (2007) (defining various property rights).

113. *Cedar Point*, 141 S. Ct. at 2075–76.

114. *Id.* at 2075–76.

115. *Id.* at 2076.

other state and federal regulations that involve the government entering private property.<sup>116</sup> The majority addressed these concerns with three exceptions to the holding: (1) discerning trespasses versus takings, (2) pre-existing limitations on property rights, and (3) conditional access.<sup>117</sup> The Court further stated that its decisions in *Loretto* and *Nollan* highlight the fact that even though not every temporary limitation on the right to exclude is a taking, there does not have to be a permanent aspect to the appropriation to be a physical taking.<sup>118</sup>

The Court stated that in holding that a per se taking occurs whenever the government directly appropriates private land, it is not altering the difference between a trespass and a taking.<sup>119</sup> Relying on its decision in *Portsmouth Harbor*, the Court stated, “[i]solated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of . . . property.”<sup>120</sup> The second exception excludes government entrance on private property where there is a “longstanding background restriction” on a property right.<sup>121</sup> Some of these limitations include requirements to rid a property of a nuisance,<sup>122</sup> private and public necessity, and a law enforcement officer’s ability to enter a property to make an arrest or enforce criminal law.<sup>123</sup> The Court found the basis for the third exception in *Nollan*, which allows the government to condition certain benefits on property owners allowing the government to enter.<sup>124</sup> The Court explained that this exception will cover a variety of statutes requiring health and safety inspections that will not constitute takings.<sup>125</sup>

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116. *Id.* at 2078.

117. *Id.* at 2078–79.

118. *Id.* at 2074–75.

119. *Id.* at 2078.

120. *Id.* at 2078; see *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329–30 (1922) (acknowledging that a single shot might not be enough to constitute a taking but if firing occurred over several years and at a sufficient volume, the cumulative action may constitute a taking).

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

122. *Id.* (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028–29 (1992)).

123. *Id.*

124. *Id.* (reiterating *Nollan*’s holding that the government can refuse to issue a building permit without effectuating a taking when “the permit condition bears an ‘essential nexus’ and ‘rough proportionality’ to the impact of the proposed use of the property”).

125. *Id.* at 2079.

## II. ANALYSIS

In reversing the Ninth Circuit's holding and finding that the access regulation amounted to a per se physical taking, the Supreme Court clarified takings jurisprudence and fiercely protected private property rights. This Part will first examine how the Supreme Court's decision in *Cedar Point* is in line with precedent establishing that physical takings can be temporary or permanent and the importance of the right to exclude. This Part will then address the two questions remaining after the Court's holding: (1) what compensation does the government owe for a temporary physical taking where it directly appropriated an owner's right to exclude; and (2) can a state use trespass rules to limit a property owner's right to exclude and eliminate a taking action claiming an appropriation of the right to exclude?

### A. *The Supreme Court's Opinion Is Directly in Line with Prior Takings Case Law*

The Supreme Court's characterization of the Growers' claim as a physical taking is in line with precedent. The access regulation does not restrict the use of the Growers' properties as a regulatory taking would, but rather, the access regulation allows the union organizers to literally "take access" upon the Growers' properties.<sup>126</sup>

Analyzing the claim under the regulatory takings test, as the Board and dissent did, ignores traditional physical takings jurisprudence and allows for the government to exercise its eminent domain power to physically invade private property without just compensation.<sup>127</sup> Although the test is different for each regulatory taking depending on how much loss the restriction causes, the government does not

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126. *Id.* at 2074. Compare *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 527–28 (9th Cir. 2019) (access regulation allowed union organizers to enter the land of the plaintiffs), *rev'd sub nom. Cedar Point*, 141 S. Ct. 2063, and *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) (navigational servitude would allow the government to physically enter plaintiff's property for water traffic), with *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1354 (Fed. Cir. 2002) (regulation restricted how plaintiffs could use their property and effect was more owls on the property), and *Penn Cent. Trans. Co. v. New York City*, 438 U.S. 104, 107–10 (1978) (historical preservation act restricted how plaintiffs could modify the exterior of their property).

127. See *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (employing the Takings Clause as a means to prohibit private parties from bearing public burdens); William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 694 (1985) (articulating the main reason for the Takings Clause was to limit the government's ability to interfere with private property rights).

physically invade the owners' properties at all; thus, the Court used the regulatory takings analysis in those cases.<sup>128</sup> Unlike in *Penn Central* and *Lucas*, the government is physically claiming an interest in the Growers' land through the access regulation and physically invading the Growers' private properties; therefore, the Court was correct to analyze the Growers' claim under the physical takings analysis.<sup>129</sup>

Further, the Board's application of *Loretto's* permanent physical occupation rule is a flawed approach.<sup>130</sup> The Court in *Loretto* created a third type of regulatory taking—the permanent physical occupation—but the Growers argued that the access regulation effected a traditional physical taking.<sup>131</sup> Thus, it was wrong for the Board to even invoke *Loretto* because the traditional physical takings theory and the permanent physical occupation under a regulatory taking are distinct and different ways of proving a taking occurred. Further, the Court in *Loretto* created the permanent physical occupation rule by combining a regulatory takings case and a traditional physical takings case.<sup>132</sup> While *Loretto* failed to realize that one involved a physical invasion analysis and the other only involved a use restriction, the Supreme Court clarified in *Cedar Point* that permanency is not a requirement for a physical taking.<sup>133</sup> The Supreme Court did not discuss whether the permanent physical occupation rule is still a viable path to find a regulatory taking; however, it was irrelevant to the Growers' claim because a regulation causing a physical occupation can be challenged under a physical takings theory.<sup>134</sup>

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128. *Penn Cent.*, 438 U.S. at 110–12, 116–17 (restricting *Penn Central's* ability to build upward above the existing structure); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1009 (1992) (prohibiting occupiable improvements within a specified zone).

129. *Shiroma*, 923 F.3d at 527–28.

130. Brief in Opposition to Petition for a Writ of Certiorari at 11, *Cedar Point*, 141 S. Ct. 2063 (No. 20-107) (arguing that the Ninth Circuit properly applied *Loretto's* “very narrow” holding, which, according to the Board, did not address intermittent access to property by people).

131. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982); Petition for a Writ of Certiorari at 17–18, *Cedar Point*, 141 S. Ct. 2063 (No. 20-107).

132. Compare *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 177–78 (1872) (the flooding physically invaded the private property), with *N. Transp. Co. v. Chicago*, 99 U.S. 635, 637 (1879) (government was working on a tunnel near plaintiff's property that caused them to lose access temporarily).

133. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074 (2021).

134. *Id.*; see *Loretto*, 458 U.S. at 435 n.12 (emphasizing concerns with “[t]he permanence and absolute exclusivity of a physical occupation” in contrast to “temporary limitations on the right to exclude,” and stating that “[n]ot every physical invasion is a taking”).

When reversing the Ninth Circuit, the Supreme Court correctly emphasized the distinction between physical and regulatory takings as the difference between a use restriction and a physical appropriation.<sup>135</sup> The Federal Circuit's opinion in *Boise* exemplifies the distinction between a physical taking and a regulatory taking because the government's regulation in *Boise* did not permit the government itself to invade the plaintiff's property.<sup>136</sup> However, the access regulation in *Cedar Point* appropriated the Growers' right to exclude and allowed the union organizers to "take access" to the Growers' properties.<sup>137</sup> Therefore, the Court properly analyzed the access regulation as a physical appropriation where the Growers' right to exclude was appropriated rather than a use restriction.

The Ninth Circuit and the Board's strong reliance on the notion that the access regulation merely infringed upon the Growers' right to exclude devalued the right to exclude.<sup>138</sup> The Supreme Court's emphasis on property rights stems from when the Framers drafted the Constitution.<sup>139</sup> The Framers incorporated constitutional protections for property rights, including the Due Process Clause and the Takings Clause of the Fifth Amendment, into the Bill of Rights.<sup>140</sup> By protecting property rights, the Framers were supporting individual economic independence and "personal empowerment."<sup>141</sup> The right to exclude

135. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2422, 2427 (9th Cir. 2014) ("When it comes to physical appropriations, people do not expect their property . . . to be actually occupied or taken away.").

136. *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1355 (Fed. Cir. 2002).

137. *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 528 (9th Cir. 2019), *rev'd sub nom. Cedar Point*, 141 S. Ct. 2063; *Boise*, 296 F.3d at 1355.

138. Brief in Opposition to Petition for a Writ of Certiorari at 17–18, *Cedar Point*, 141 S. Ct. 2063 (No. 20-107).

139. See JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 42 (3d ed. 2008) ("The doctrine that property ownership was essential for the enjoyment of liberty had long been a fundamental tenet of Anglo-American constitutional thought.").

140. See *id.* at 54–55 (articulating that the Due Process and Takings Clauses provided substantial safeguards to property owners).

141. James W. Ely, Jr., *Property Rights in American History*, HILLSDALE COLL., <https://www.hillsdale.edu/educational-outreach/free-market-forum/2008-archive/property-rights-in-american-history> [<https://perma.cc/3VPC-TSXD>] (quoting Justice Field, *Appendix: Centennial Celebration of the Organization of the Federal Judiciary*, 134 U.S. 711, 745 (1890)) ("It should never be forgotten that protection to property and persons cannot be separated. Where property is insecure[,] the rights of persons are unsafe. Protection to one goes with protection to the other; and there can be neither prosperity nor progress where either is uncertain.").

is the most important and is “implicit in the basic conception of private property” because it allows owners to keep unwanted parties off their property and control how they and others may use their property.<sup>142</sup> When the government physically invades a property, the government not only destroys the owner’s right to exclude but also “chops through the bundle [of rights], taking a slice of every strand.”<sup>143</sup> Thus, by physically occupying the owners’ land, the government simultaneously takes away the owners’ right to exclude others, possess the land themselves, and use the land as they see fit.<sup>144</sup>

Additionally, the Supreme Court properly distinguished *Cedar Point* from *PruneYard*.<sup>145</sup> In *PruneYard*, the owner opened the property to the general public.<sup>146</sup> In *Cedar Point*, the Growers use their properties as private agricultural lands for growing, shipping, and packing produce.<sup>147</sup> Unlike a shopping center, where the public is invited onto the property to visit the stores, the Growers do not sell anything on their properties.<sup>148</sup> Moreover, the issue in *PruneYard* involved the right to free speech on property open to the public.<sup>149</sup> Because the owner in *PruneYard* can

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142. EPSTEIN, *supra* note 104, at 63. Owners have a desire to keep both the government and private parties from entering their private property. *See, e.g.*, Christopher M. Kieser, *This Land Is Your Land, But Malibu Won’t Let You Tell Anyone*, DAILY J. (Nov. 4, 2020) <https://www.dailyjournal.com/articles/360341-this-land-is-your-land-but-malibu-won-t-let-you-tell-anyone> [<https://perma.cc/6T7D-5WM8>] (discussing a lawsuit arising from California not allowing owners to put up “no trespassing” signs to exclude others).

143. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435–36 (1982) (acknowledging that infringing on an owner’s bundle of rights is “clearly relevant” but not always sufficient to establish a taking).

144. *See* David L. Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 WASH. U.J.L. & POL’Y 39, 42–44 (2000) (detailing the case law that emphasizes the importance of the right to exclude).

145. *See supra* notes 105–08 and accompanying text (explaining the challenge of distinguishing *Cedar Point* and *PruneYard* when both cases included a time-limited easement on their face).

146. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980); *see Loretto*, 458 U.S. at 434 (addressing the owner’s decision to open his property to the public negated the physical invasion of the solicitors); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 832 n.1 (1987) (finding *PruneYard* inapplicable where the owners did not open property to the public).

147. *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 528 (9th Cir. 2019), *rev’d sub nom.* *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

148. *See id.* at 527, 531.

149. *Id.* at 536 & n.1 (Leavy, J., dissenting); *see also* 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, 394–96 (2009) (arguing that state-sanctioned trespasses for the expression of speech needs to be reevaluated).

regulate public expression on his land, *PruneYard* is a case about a “private party regulating the expressive conduct of other private parties[,]” not “a state agency universally regulating the access of nonemployee organizers on non-public, private property.”<sup>150</sup> *PruneYard* is further distinguishable from *Cedar Point* because the owner had the power to put “time, place, and manner restrictions” on public free expression on his property, while the Growers cannot control which days the union organizers choose to use their easement to access the Growers’ properties.<sup>151</sup> Therefore, while *PruneYard*’s owner partially maintained his right to exclude, the access regulation takes away the Growers’ right to exclude completely.<sup>152</sup>

The right to exclude is a significant individual right; it is vital to social organization and indicates a successful economy.<sup>153</sup> When property owners feel secure that no one, including the government, can invade their property without paying just compensation, the owners are more likely to take care of their property and invest in it.<sup>154</sup> The access regulation not only takes away the Growers’ right to exclude, but it also takes away the Growers’ rights to possess the land, use the land, and be left alone.<sup>155</sup>

Additionally, the Court has never required traditional physical takings to be permanent or uninterrupted.<sup>156</sup> Rather, the extent of any disruption or harm is a factor that contributes only to the calculation of appropriate compensation the government must pay, not to the

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150. *Shiroma*, 923 F.3d at 537 n.2 (Leavy, J., dissenting).

151. *Id.*

152. *Id.*; *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 77 (1980).

153. *See Hendler v. United States*, 952 F.2d 1364, 1374–75 (Fed. Cir. 1991) (equating the right to exclude with the “right to be let alone”); Patrick Kelley & Michael Graglia, *Why Property Rights Matter*, NEW AM. BLOG (Mar. 10, 2017), <https://www.newamerica.org/future-land-housing/blog/why-property-rights-matter> [https://perma.cc/D5AT-KJF4] (noting that the NGC Global Witness recorded that “more than three people are killed each week defending property from encroaching industries”) (emphasis omitted).

154. *See, e.g., Kelley & Graglia, supra* note 153 (noting that farmers invest in their land, grow higher quality crops, and are more productive when they have the right to sole and exclusive possession of their property).

155. *Callies & Breemer, supra* note 144, at 45.

156. *See Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 832 (1987) (finding that an easement is a physical trespass even though it does not authorize a person to permanently “station himself” on the property); *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) (holding that a servitude on a private water way constitutes a physical invasion).

threshold determination of whether a physical taking has occurred.<sup>157</sup> Therefore, even though the flight path in *Causby* might have caused significantly more disruption than the access regulation in *Cedar Point*, the access regulation still physically took the Growers' right to exclude.<sup>158</sup> The access regulation disrupted the Growers' property rights because, once the union organizers submit the notice of intent to access, the Growers have no discretion to regulate when the union organizers may access their property.<sup>159</sup>

Similarly, in *General Motors*, the government took over General Motors's space for approximately one year, and the Court held that the condemnation, while not permanent, constituted a physical taking.<sup>160</sup> While the appropriation of property in *Cedar Point* differs from the appropriation in *General Motors* because, instead of being continuous, the access regulation limits the union organizers' access by time of day and total days per year.<sup>161</sup> However, both transfer a property right or interest to the government.<sup>162</sup> Moreover, there is no set end to the future access, and the Growers have no power to determine which 120 days the union organizers choose to physically invade their properties.<sup>163</sup>

The lack of any kind of permanency discussion in *Kaiser Aetna* shows that the Court has never considered the temporary nature of an appropriation in a takings analysis.<sup>164</sup> One might argue that the Court's discussion in *Portsmouth Harbor* requiring the gun firing to be sufficient

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157. See *United States v. Gen. Motors Corp.*, 323 U.S. 373, 380 (1945) (taking where government could continuously renew the appropriation of the lease); *United States v. Petty Motor Co.*, 327 U.S. 372, 375 (1946) (finding temporary nature of taking went to compensation); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 15 (1949) (finding scope of taking as to the laundry business went to compensation required).

158. *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 528 (9th Cir. 2019), *rev'd sub nom.* *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021); see also *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329 (1922) (finding a taking where gun shots over the plaintiff's land effected an easement); Farber, *supra* note 15, at 116 (articulating that a physical intrusion is a taking even if it causes little harm).

159. *Shiroma*, 923 F.3d at 528.

160. *Gen. Motors Corp.*, 323 U.S. at 382.

161. *Id.*; *Shiroma*, 923 F.3d at 532.

162. *Gen. Motors Corp.*, 323 U.S. at 382; *Shiroma*, 923 F.3d at 532.

163. *Shiroma*, 923 F.3d at 532.

164. *Kaiser Aetna v. United States*, 444 U.S. 164, 178–80 (1979) (looking no further than the appropriation of the easement to establish a physical taking occurred); see also *Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991) (interpreting *Kaiser Aetna* to establish that physical occupations effecting an easement do not have to be continuous or interrupted to be “permanent”).

in number and time means that the Court needed to first find that the access granted to the union organizers was sufficient in number and time as well before finding a taking.<sup>165</sup> However, the Court in *Portsmouth Harbor* also made a distinction between the government intending to fire over Portsmouth Harbor's property and unintentionally firing over their property.<sup>166</sup> The Court reasoned that had the government fired over Portsmouth Harbor's land to take it for its use, the government would have physically invaded a servitude and would have to provide just compensation.<sup>167</sup> Unlike in *Portsmouth Harbor*, where the government shot over the plaintiff's property without intending to create an easement, the Board intended for the access regulation to grant the union organizers access to the Growers' properties and rid the Growers of their right to exclude.<sup>168</sup> In addition, *Cedar Point* is an even clearer case of a physical taking than *Portsmouth Harbor* because of the higher frequency of intrusions allowed by the access regulation; therefore, the intentional appropriation of the right to exclude constitutes a taking for which the government must pay just compensation.<sup>169</sup>

By characterizing the Growers' argument as a claim that the access regulation effected a physical taking, the Supreme Court properly found that the access regulation effectuates a per se physical taking. The Fifth Amendment and takings precedent required the Supreme Court to find that the access regulation imposed a physical occupation on the Growers' private properties and created a traditional physical taking for which the government must provide just compensation. Finding otherwise would have violated the Fifth Amendment and opened the door for the government to place time restrictions on physical entrances on private property to infringe on individuals' property rights more freely and avoid providing just compensation for such incursions.<sup>170</sup>

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165. *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329 (1922).

166. *Id.* at 329–30.

167. *Id.* (requiring a sufficient number and sufficient time only where the government did not intend to take the property).

168. *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 527 (9th Cir. 2019), *rev'd sub nom.* *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

169. *Id.* at 528.

170. *See supra* notes 141–44 and accompanying text (explaining the importance of private property rights and the right to exclude).

B. *Unanswered Question #1: Compensation*

The Framers included the Takings Clause in the Fifth Amendment to prevent the “[g]overnment from forcing some people alone to bear public burdens which . . . should be borne by the public as a whole.”<sup>171</sup> Since the court in *Gardner v. Village of Newburgh*<sup>172</sup> found that compensation was indispensable, courts have been grappling with how to calculate just how much the government owes when it effects a taking.<sup>173</sup> This Section will address a question the Supreme Court left unanswered in *Cedar Point*: what is the proper compensation when the government appropriates an owner’s right to exclude?

The just compensation requirement ensures that an owner is “paid for what is taken from him.”<sup>174</sup> To calculate just compensation, courts look to “what . . . the owner lost, not what . . . the taker gained.”<sup>175</sup> Generally, just compensation is calculated using the market value of a property.<sup>176</sup> However, unlike in prior cases where the government appropriated a transferrable property interest that possessed a market value, the Court held that the access regulation in *Cedar Point* appropriated the Growers’ right to exclude.<sup>177</sup> Since the right to exclude has no “market value,”<sup>178</sup> the lower court will need to find a way to determine what the taking is “worth.”

Previously, when the market value was insufficient and the property owner experienced both a loss of the property and indirect injuries,

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171. *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (emphasizing that the Takings Clause does not prevent the government from taking private property for public good, but rather ensures that the owner is receiving just compensation for the property invasion); *see also Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536 (2005) (acknowledging that the Takings Clause applies to the states through the Fourteenth Amendment’s Due Process Clause).

172. 2 Johns. Ch. 162 (N.Y. Ch. 1816).

173. *Id.* at 167–68 (holding that “compensation is an indispensable attendant” of the government’s power to take private property).

174. *Bos. Chamber of Com. v. Boston*, 217 U.S. 189, 195 (1910) (emphasizing that the just compensation requirement “deals with persons, not with tracts of land”).

175. *Id.* *See generally* 1 JAMES C. BONBRIGHT, *VALUATION OF PROPERTY* 408–10 (1937) (providing background on economic theory of just compensation).

176. *Horne v. Dep’t of Agric.*, 576 U.S. 351, 368 (2015) (“The clear and administrable rule is that just compensation normally is to be measured by the market value of the property at the time of the taking.” (internal quotations omitted) (quoting *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984))).

177. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021).

178. *See* Jonathan Klick & Gideon Parchomovsky, *The Value of the Right to Exclude: An Empirical Assessment*, 165 U. PA. L. REV. 917, 917 (2017) (noting that the actual value of the right to exclude is still unknown).

the Court factored in consequential damages—such as destruction, damage, or depreciation—to the just compensation calculation.<sup>179</sup> Some indirect injuries have included employees' salaries during work interruptions and any costs involved in moving locations due to the taking.<sup>180</sup>

The Court has made it clear that the degree and length of intrusion in a temporary taking contribute *only* toward the amount of compensation required.<sup>181</sup> In *General Motors*, the Court rejected the government's contention that market value was proper compensation for a short-term taking.<sup>182</sup> The Court stated that a short-term taking "chops [the property interest] into bits," leaving the owner with a remaining interest that might be of little value.<sup>183</sup> Therefore, in calculating just compensation, the Court advised the lower court to look at the rental value to *General Motors* of a temporary lease, including factors such as the cost of moving, storage of goods, and any depreciation from the taking.<sup>184</sup>

While the lower court should consider the effects of the disruption and the harm to the employees' work while the union organizers are on the Growers' properties, it might not fully account for the "value" of the right to exclude. Scholars have argued for many different approaches to assess compensation for regulatory takings.<sup>185</sup> A court could adopt one or some of these approaches to determine the value of the right to exclude. One way a court might choose to value the right to exclude is to examine the harm that the Growers face because of the access regulation.<sup>186</sup> This might still be difficult to quantify; however, it would account for the owners' particular interest in excluding

179. See *United States v. Gen. Motors Corp.*, 323 U.S. 373, 382, 384 (1945) (considering moving costs, storage, and any damage to the property for a short term sublease the government took over).

180. *Id.* at 376.

181. See *id.* at 380 (taking where government could continuously renew the appropriation of the lease); *United States v. Petty Motor Co.*, 327 U.S. 372, 375 (1946) (finding temporary nature of taking went to compensation); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 15 (1949) (finding scope of taking as to the laundry business went to compensation required).

182. *Gen. Motors Corp.*, 323 U.S. at 381.

183. *Id.* at 381–83.

184. *Id.*; see, e.g., *Kimball Laundry*, 338 U.S. at 15 (finding both the length of the taking and the financial harm it causes factor into the compensation required).

185. See Christopher Serkin, *The Meaning of Value: Assessing Compensation for Regulatory Takings*, 99 NW U. L. REV. 677, 682–703 (2005) (describing various valuation mechanisms for calculating compensation for takings under the Fifth Amendment).

186. *Id.* at 687.

others.<sup>187</sup> This might include the wages for the workers while they are meeting with the union organizers or the time the Growers lose farming fruit while the union organizers are on their properties.

Another way to quantify the right to exclude may be to examine what would happen to the property's value if union organizers had a "right to roam" over the Growers' lands.<sup>188</sup> While the United States does not recognize the right to roam, many European countries do.<sup>189</sup> Social benefits of the right to roam include "empower[ing] the general public to hike and engage in minimally intrusive recreational activities on qualifying private properties."<sup>190</sup> Jonathan Klick and Gideon Parchomovsky, professors at the University of Pennsylvania Law School, state that the right to roam generally harms real estate prices.<sup>191</sup> Therefore, this potential decrease in market value could serve as another measuring tool for courts to determine the value of the right to exclude.<sup>192</sup>

### C. Unanswered Question #2: *Trespass v. Taking*

The dissent and the Board both argued that if the Court were to find that the access regulation was a taking, other government activities would be subject to takings claims.<sup>193</sup> One way the Court countered this argument was by clarifying that its holding does not diminish the distinction between a trespass and a taking.<sup>194</sup> The Court's holding in *Cedar Point* relied on the fact that the access regulation appropriated the Growers' right to exclude.<sup>195</sup> But what if the Growers did not have the right to exclude in the first place based on California common law trespass? While this topic lends itself to an entire piece alone, this

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187. *Id.* at 687–88 (explaining that harm-based compensation can give higher awards as opposed to government gain assessments because owners have particular uses for the property that are "not reflected in . . . fair market value").

188. See Klick & Parchomovsky, *supra* note 178, at 937–38 (explaining the relationship between the right to roam and exclusion in terms of efficiency and distributive justice).

189. *Id.* at 940.

190. *Id.* at 935.

191. *Id.* at 963 ("This effect must be taken into account whenever the government considers land use policies that compromise owners' right to exclude.").

192. *Id.*

193. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2078 (2021).

194. *Id.* (citing *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329–30 (1922)) ("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.").

195. *Id.* at 20–76.

Section will consider the implications of state-created trespass laws by comparing the outcome of a trespass case with the outcome in *Cedar Point* and attempt to answer the question of whether a state can limit a property owner's right to exclude as to ensure it does not have to pay just compensation for a regulation similar to the access regulation.

While a property owner's right to exclude is a fundamental property right,<sup>196</sup> it is not absolute.<sup>197</sup> In *State v. Shack*,<sup>198</sup> the New Jersey Supreme Court limited a farm owner's right to exclude attorneys and medical professionals attempting to aid migrant workers through government services.<sup>199</sup> The plaintiff in *Shack* was a farmer who employed and housed migrant workers on his property.<sup>200</sup> At the time, government regulations provided that migrant workers shall have access to health and legal services.<sup>201</sup> The defendants, an attorney and field worker, attempted to reach an injured migrant worker and one in need of legal services on the farmer's land; however, the farmer had them removed from his property and brought a trespass action.<sup>202</sup>

The Court found the farmer had no right to exclude migrant workers' aids.<sup>203</sup> The Court reasoned that there was no need for the farmer to stop the migrant workers from receiving the services the government made available to them.<sup>204</sup> If the farmer does not have a right to exclude the aids under New Jersey law, then he also does not have an actionable takings claim that the regulations appropriated his right to exclude like the access regulation in *Cedar Point*.

Therefore, after the Court's decision in *Cedar Point*, could California limit private property owner's right to exclude union organizers to protect labor and union First Amendment rights? It appears the California Supreme Court might have already done just that. Prior to *Cedar Point*'s takings claim, the access regulation held up against trespass actions, seeming to confirm the notion that the Growers would

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196. Callies & Breemer, *supra* note 144 at 39–41 (arguing that protecting an owner's right to exclude is fundamental to the overall protection of private property rights).

197. Thomas W. Merrill, *Property and the Right to Exclude II*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 1, 8 (2014) ("The common law recognized exceptions to the right to exclude, such as the defense of necessity . . .").

198. 277 A.2d 369 (N.J. 1971).

199. *Id.* at 371–72.

200. *Id.* at 370.

201. *Id.*

202. *Id.* at 370–71.

203. *Id.* at 374.

204. *Id.*

not have a right to exclude union organizers.<sup>205</sup> If there is no right to exclude, how can that right be appropriated? The Supreme Court in *Cedar Point* even emphasized that there can be no taking where there is already a restriction on property rights.<sup>206</sup> So how is this different from *Shack*?

Perhaps it is the nature of the regulation at issue. In *Shack*, the migrant workers lived on the farmer's property, therefore, giving them a right to have visitors also.<sup>207</sup> In *Cedar Point*, the workers did not live on the Growers' properties, therefore, the union organizers could reach the workers when they were at their own homes.<sup>208</sup> However, similar to both *Cedar Point* and *Shack*, the regulations at issue are meant to ensure the rights of migrant workers and farmworkers.<sup>209</sup> The Supreme Court has not heard a case involving a physical takings claim where the state has limited a property owner's right to exclude like in *Shack*. It remains to be seen how the Court might respond if it is presented with a physical takings challenge to a trespass rule like New Jersey's.

#### CONCLUSION

The Supreme Court's holding in *Cedar Point* follows precedent by stating that physical appropriations are per se takings. The Supreme Court not only clarified the distinction between regulatory takings and physical takings but also noted that there is no permanency requirement for a physical taking to be a per se taking. This holding reaffirmed the Court's continuous efforts to protect private property rights and raises questions regarding what the compensation for the appropriation of the right to exclude might look like.

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205. *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 528 (9th Cir. 2019) (detailing the trespass suit previously brought), *rev'd sub nom.* *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

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

207. *Shack*, 277 A.2d at 374.

208. *Id.* at 2069-70.

209. *See Shack*, 277 A.2d at 372 (emphasizing that migrant workers have little economic or political power and need aid in improving working and living conditions); Robert K. Carrol & Paul R. Lynd, *Supreme Court: California Can't Require Union Access to Employer's Premises for Organizing*, ARENT FOX (July 2, 2021), <https://www.arentfox.com/perspectives/alerts/supreme-court-california-cant-require-union-access-employers-premises> [https://perma.cc/6HT5-JAEM] (noting the access regulation sought to improve peace and conditions of farmworkers where the condition was extremely poor in the state).