"BACKGROUND PRINCIPLES" IN THE LAW OF TAKINGS

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The Supreme Court appears to be on a mission to enhance the scope of liability under the Takings Clause, the result of which could be the chilling of federal, state, and local regulation. However, the Court has acknowledged that there is no takings liability when, under "background principles," the property owner lacked the very right she is claiming the government has taken via regulation. The rationale for, and hence proper scope of, the background principles exception to takings liability is opaque in the case law. This Article offers three possible rationales for the background principles exception that could guide courts and help them to make more tenable decisions: an originalist rationale, a cultural consensus rationale, and an actual notice rationale. The arguments for and against these rationales are explored using contemporary property rights debates involving public access to beaches, evictions of tenants, and preservation of wildlife habitat on private land. The courts cannot be expected to clearly and consistently demarcate the public/private divide in property law in an unimpeachably rigorous manner, but they can and should do better.

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INTRODUCTION

What is the public claim on private property? In the U.S. legal tradition, this question is often addressed, if only obliquely, in the context of Takings Clause decisions addressing "background principles" or "background limitations" on title to private property.[1]

In three of the most important Takings Clause decisions of the last fifty years—*Lucas v. South Carolina Coastal Council*,[2] *Murr v. Wisconsin*,[3] and *Cedar Point Nursery v. Hassid*[4]—the majority opinions invoke the proposition that there are "background limitations" or "background principles" in property law that are essential to the correct interpretation and implementation of the Takings Clause.[5] According to the Supreme Court, there is no taking if "background limitations" apply even when a law or other government action otherwise would have automatically constituted a taking.[6] Following suit, lower courts have also cited background limitations in deciding whether or not there has been a taking.[7] But neither the Supreme Court nor the lower

1. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992).
2. 505 U.S. 1003 (1992).
3. 137 S. Ct. 1933 (2017).
4. 141 S. Ct. 2063 (2021).
5. *See* discussion *infra* Section I.B.
6. *See* discussion *infra* Section I.B.
7. *See* discussion *infra* Section I.B.

federal and state courts have done much more than trot out the words "background limitations," without any real explanation.[8]

Background limitations deserve attention now more than ever because the U.S. Supreme Court has been setting precedent aside and expanding the scope of per se or automatic compensation doctrines.[9] Under these per se doctrines, the government must pay compensation no matter the factual circumstances or the relative weights of the burden on the property owner and the public need for regulation.[10] For example, under one of the per se doctrines, even a momentary, routine government inspection of private property may be an

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8. This Article builds on previous illuminating scholarly work on background principles. *See* Timothy M. Mulvaney, *Foreground Principles*, 20 GEO. MASON L. REV. 837, 839–40 (2013) (arguing that "a focus on connecting or disconnecting challenged regulations to what are, at times, antiquated background common law principles can come at the expense of a more direct and transparent consideration of what is in the foreground: the public and private interests implicated by the challenged regulations"); Michael C. Blumm & Rachel G. Wolfard, *Revisiting Background Principles in Takings Litigation*, 74 FLA. L. REV. 1165, 1165–80 (2019) (providing an account of how lower courts have implemented the background principles principle); Michael C. Blumm & Lucus Ritchie, Lucas*'s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENV'T. L. REV. 321, 325–26 (2005) (describing the potentially expansive scope of the background principles defense); Michael C. Blumm & J.B. Ruhl, *Background Principles, Takings, and Libertarian Property: A Reply to Professor Huffman*, 37 ECOLOGY L.Q. 805, 806–07, 812 (2010) (arguing for the continuing importance of the background principles defense); John D. Echeverria & Julie Lurman, *"Perfectly Astounding" Public Rights: Wildlife Protection and the Takings Clause*, 16 TUL. ENV'T. L.J. 331, 376–81 (2003) (explaining the scope and potential of background principles as a defense in relation to wildlife protection); Lee Anne Fennell, *Escape Room: Implicit Takings After* Cedar Point Nursery, 17 DUKE J. CONST. L. & PUB. POL'Y 1, 54–55 (2022) (arguing that the background principles doctrine may allow the Court to raise the costs of only government measures but allow others it likes to be protected from takings liability).

9. *See* Timothy M. Mulvaney, *Exactions for the Future*, 64 BAYLOR L. REV. 511, 516–18 (2012) (discussing the historical development and evolution of land use regulation laws, in particular, the shift from generally deferential state judicial scrutiny of land use exactions towards the stringent judicial scrutiny reflected in the U.S. Supreme Court's exaction takings jurisprudence).

10. *See* Adam Smith, *Inspections, Exceptions, and Expectations:* Cedar Point *and its Expansion of Regulatory Takings*, LEWIS & CLARK L. SCH. (Jan. 24, 2022), https://law.lclark.edu/live/blogs/180-inspections-exceptions-and-expectations-cedar [https://perma.cc/ZEM3-ZUKL].

automatic taking, requiring the government to compensate the private property owner.[11]

This Article fills the current hole in legal discourse and scholarship, interrogating the concept of background limitations. After reviewing what can be gleaned from the case law itself, the Article poses a foundational question: what possible frameworks are there for understanding the content and purpose of background limitations as a constraint on takings liability? Or, more simply, what theory or theories justify calling something a "background limitation"? Despite the formal centrality background limitations play in contemporary takings doctrine, this question simply has not been asked, let alone answered.[12]

This Article argues that background limitations can be understood from three distinct vantages: originalism; cultural consensus; and fair notice. The originalism approach is perhaps the easiest to articulate because originalism has assumed such a prominent (if confusing) role in American constitutional law.[13] From an originalist approach, the state of legal entitlements and obligations in place in either 1789 (when the U.S. Constitution was ratified) or 1866 (when the Fourteenth Amendment was adopted) is deemed to provide a guide to what constitutional rights mean even today.[14] Background limitations

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11. *See id.* (arguing that the *Cedar* decision and its per se rule "provides flimsy protection to existing government inspection regimes . . . and the majority's decision sends clear signals . . . on how to further narrow the exception's already limited scope. Future challenges to inspections regimes and a continuing expansion of the Court's interpretation of regulatory takings should surprise no one").

12. The most comprehensive academic treatment of the concept of background principles, and the *Cedar* decision itself, concludes that *Cedar* is contrary to the rule of law; the article argues that background principles are nothing more than cover for judicial fiat. Aziz Z. Huq, *Property Against Legality: Takings after* Cedar Point, 109 VA. L. REV. 233, 268–70 (2023). While I am not unsympathetic to this critique, the goal of this Article is to draw what coherent ideas one can from the case law (including *Cedar*) and offer a framework with which the courts could, in a more transparent and principled way, address the background public claims on private property and their implications of Takings Clause liability. This Article's project is thus in the Dworkinian tradition of attempts to bring both descriptive and normative coherence to our evolving constitutional law. *See* Andrei Marmor, *Coherence, Holism, and Interpretation: The Epistemic Foundations of Dworkin's Legal Theory*, 10 L. & PHIL. 383, 383–412 (1991) (describing Dworkin's approach).

13. *See* Adam Liptak, *Justice Jackson Joins the Supreme Court, and the Debate Over Originalism*, N.Y. TIMES (Oct. 10, 2022), https://www.nytimes.com/2022/10/10/us/politics/jackson-alito-kagan-supreme-court-originalism.html (describing the nominal adherence to originalism on the part of all Justices of the Supreme Court, across ideological lines).

14. *Id.*

in the originalist approach would be limitations on private property rights that were explicitly or implicitly recognized in either 1789 or 1866.[15]

The cultural consensus approach builds on the idea that there are principles that are so deeply rooted and widely accepted as consensus principles in the United States even if those principles were not explicitly or implicitly recognized in either 1789 or 1866.[16] Background limitations in the cultural consensus framework are limitations that—at least according to the judge hearing the case—are so entrenched as to be uncontroversial.[17]

The notice approach focuses on the actual notice of a positive law restriction on property use.[18] Even when would-be limitations in title lack originalist provenance or do not reflect anything like a clear cultural consensus, a property purchaser can be notified of the limitations in their rights by, for example, being given a deed that references those limitations.[19] In such cases, according to the notice framework, those deed limitations qualify as background limitations that negate takings liability.[20]

This Article's claims regarding these three approaches are, in part, descriptive. As a descriptive matter, these three approaches make some sense of when and how courts have deployed the concept of background limitations.[21] But this Article is also claiming that the analysis of background limitations through these three distinct approaches would lead to better-reasoned, more cogent judicial decisions. Indeed, over time, a discourse that addresses background limitations through the careful use of these three approaches could help the courts clarify which approach is most important and under what circumstances.

The three-approaches framework also might assist legal advocates (and legislatures) who want to have some say as to what courts will deem background limitations. As explained below, in the context of the cultural consensus framework, legislators who enact statutes that articulate broad principles supporting a public claim on private property can lay the groundwork for a background limitation that

15. *See* discussion *infra* Section II.A.
16. *See* discussion *infra* Section II.B.
17. *See* discussion *infra* Section II.B.
18. *See* discussion *infra* Section II.C.
19. *See* discussion *infra* Section II.C.
20. *See* discussion *infra* Section II.C.
21. *See* discussion *infra* Part II.

courts may later recognize.[22] For example, a state statute (or state constitutional amendment) that articulated that employees have a right to effectively organize at their place of employment could lay the groundwork for a court holding that state law limits the right of employees to exclude union organizers and hence mandated access does not trigger a per se compensation rule.[23]

Part I briefly surveys contemporary takings doctrine, including the under-theorized concept of background limitations. Part II explicates the three approaches, using a range of examples that have been at the core of many takings disputes, including public access to private beaches, eviction and foreclosure moratoria, and requirements for wildlife habitat protection on private land. Part III considers the implications of the three-approaches framework for the U.S. Supreme Court, lower federal courts, state courts, and legislatures.

The stakes in the area of takings are higher now than ever because the federal courts appear to be on a mission to greatly broaden the scope of private property rights protection. Given that, we need to understand what the meanings of background limitations are and could be.

I. TAKINGS DOCTRINE, THE RISE OF THE PER SE RULES, AND BACKGROUND LIMITATIONS

A. Takings Doctrine and the Rise of the Per Se Rules

The U.S. Constitution and the state analogs all guarantee something to the effect that private property shall not be "taken" without just compensation.[24] The Takings Clause has always been understood to mean that if the government physically appropriates your property and keeps it—takes your factory and declares it a government factory, for example—just compensation must be paid.[25] But, what if the

22. *See* discussion *infra* Section III.C.

23. *See* discussion *infra* Section III.C.

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

25. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005) ("[U]ntil the Court's watershed decision in *Pennsylvania Coal Co. v. Mahon*, 'it was generally thought that the Takings Clause reached *only* a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'") (second alteration in original) (citation omitted) (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992)); *see also Lucas*, 505 U.S. at 1028 n.15 ("[E]arly constitutional

government regulates your factory but does not appropriate it—by, for example, limiting what you can produce there, limiting the noise the factory can lawfully make, or requiring that the factory be open to inspection for health, safety, and labor conditions? Broadly speaking, everything other than direct, permanent, complete physical appropriation akin to the actual exercise of eminent domain falls into the amorphous, expansive category of property regulation.[26]

As Justice Holmes opined over a century ago, government could hardly go on if it were required to provide just compensation every time a government regulation in some way affected property value.[27] The Supreme Court has struggled to distinguish when property-related regulation is a taking and when it is, rather, simply regulation that property owners must accept as part of ordinary life in a civilized society. There certainly seems to be a correlation between judges' and legal commentators' normative posture toward regulation and the administrative state on the one hand and their posture toward regulatory takings on the other hand.[28] Broadly speaking, those who see regulation and the administrative state as basically good phenomena that serve the public interest are skeptical of regulatory takings, at least in part, because they think compensation requirements will chill needed regulation.[29] Conversely, and again broadly speaking, those who see regulation and the administrative

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theorists did not believe the Takings Clause embraced regulations of property at all . . . ."); Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1, 9 (2008) ("The Takings Clause has long applied to regulations that, without actually transferring title, involve governmental actions that destroy property or physically oust an owner, or authorize similar forms of physical interference with tangible property.").

26. Matthew P. Harrington, *Regulatory Takings and the Original Understanding of the Takings Clause*, 45 WM. & MARY L. REV. 2053, 2079–80 (2004).

27. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power.").

28. *See* Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 STAN. ENV'T L.J. 525, 576 (2009) (explaining how if "regulatory takings is viewed instead as a post-realist and post-New Deal compromise between the judicial protection of property rights and judicial deference to the administrative state" then the doctrine "appears understandable and perhaps inevitable").

29. *See* William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of "Just Compensation" Law*, 17 J. LEGAL STUD. 269, 273 (1988) (arguing that compensation for government takings can have adverse effects).

state as often advancing the interest of favored, "rent-seeking" interest groups and/or as a mask for naked wealth redistribution tend to be more open to regulatory takings, precisely because they think compensation requirements will chill what they see as unjustifiable, wrongful regulation.[30] In other words, the battle over regulatory takings doctrine is a kind of proxy for the battle over the legitimacy and value of the administrative state.[31]

Until recently, Supreme Court doctrine largely favored a hands-off approach to the administrative state, in which very few regulations could qualify as a taking.[32] Until recently, takings doctrine called for almost all regulatory takings claims to be evaluated under the test established in *Penn Central Transportation Co. v. City of New York*.[33] In *Penn Central*, the Supreme Court held that a landmark designation regulation that prevented the construction of a skyscraper on top of the historic Penn Station did not constitute a taking.[34]

The *Penn Central* majority referenced a number of factors that are relevant to determining whether a taking occurred, including: how much the property interest was diminished in value due to the government action or restriction; the extent to which the owner had reasonable investment-backed expectations in the activity or investment it now cannot engage in; the character of the government action (including the extent to which it has a physical dimension); the rationale for and importance of the government regulation; and the average reciprocity of advantage between the burdens imposed by regulation and the benefits it confers on the property owner and society generally.[35] In short, almost anything that pertains to the

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30. *See* Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1633–34 (2006) ("Compensation's deterrent effect on the government's regulatory appetite has become increasingly important in recent years, with the property rights movement pitted against environmental and progressive land use interests. Underlying this dispute is an assumption that the more the government has to pay for its actions, the less willing it will be to act . . . On this view, then, compensation serves the laudatory purpose of helping to create efficient regulatory incentives by forcing the government to internalize the costs it imposes.").

31. *Id.*

32. *See* James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 63 (2016) (discussing that regulatory actions rarely ever amount to a taking).

33. 438 U.S. 104 (1978).

34. *Id.* at 107, 138.

35. *Id.* at 124–28; *see* DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 127–28, 131 (2002) (explicating versions of the *Penn Central* test).

burden on the owner and the needs of society is relevant to the far-ranging, fact-based, highly contextualized, ad-hoc *Penn Central* inquiry.[36]

The clear argument for the *Penn Central* approach is its high degree of flexibility, as it allows courts to consider the competing considerations in any takings case and does not bind them to inflexible rules that preclude consideration of particular facts supporting either the award of compensation or a finding of no taking.[37] In practice, it does seem difficult for a property owner to prevail within the *Penn Central* framework.[38]

The lack of property-owner wins under *Penn Central* is open to various interpretations. In one view, political considerations generally lead governments to compensate whenever there is a plausibly sound argument under the law to do so, and even sometimes when there is not.[39] Thus, when the government refuses to compensate, it often may have good arguments about why compensation is not appropriate, let alone compelling.[40] The fact that the government almost always wins

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36. DANA & MERRILL, *supra* note 35, at 121–23, 127–28, 131.

37. *See* Miriam Seifter, *Opinion Analysis: In Regulatory Takings Case, Court Announces a New Test*, SCOTUSBLOG (June 23, 2017), https://www.scotusblog.com/2017/06/opinion-analysis-regulatory-takings-case-court-announces-new-test [https://perma.cc/5SFA-WF4R] ("[T]he *Penn Central* test, the usual test in regulatory-takings cases, is famous for the broad discretion it affords courts.").

38. The long litigation in the wetlands-preservation case of *Florida Rock Industries, Inc. v. United States* arguably shows how hard it is to prevail within the *Penn Central* framework, and the extreme lengths litigant-property owners will go to argue that their case falls outside the *Penn Central* framework. *See* Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560, 1560–63 (Fed. Cir. 1994) (outlining the multi-year, multi-court-decision battle a landowner/developer waged to avoid application of the *Penn Central* test and then, when that failed, to prevail under that test).

39. *See* Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 125, 130–31 (1992) ("If public choice theory has any one key finding, it is that small groups with high stakes have a disproportionately great influence on the political process. Thus, landowners have some political advantages in seeking compensation. Notably, even in the absence of constitutional requirements, compensation is often offered—which strongly suggests that there are substantial political reasons for compensation. For example, prior to the adoption of the takings clause, state legislatures regularly provided landowners with compensation for takings, as did Parliament.").

40. *Id.*; *see also* F. Patrick Hubbard, Shawn Deery, Sally Peace & John P. Fougerhouse, *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of* Penn Central Transportation Company*?*, 14 DUKE ENV'T L. & POL'Y F. 121, 148–49 (2003) (concluding that the *Penn Central* test is not obviously unfair to

under *Penn Central* does not suggest that the *Penn Central* framework is unfair to property rights concerns, but rather reveals that the balance of public and private considerations supports the government's refusal to compensate. An alternative view, espoused by some conservative, property-rights-oriented commentators, is that *Penn Central* sets up a near-impossible test for property owners, and thus deprives the Takings Clause of any real meaning in the non-eminent domain, regulatory takings context.[41]

This perception of *Penn Central* as fundamentally unfair to property owners helps to explain the rise of two non-*Penn Central*, more pro-property owner tests, under which property owners are much better positioned to win in takings challenges based on regulations.[42] Indeed, these two tests, or rules, are referred to as "per se" compensation rules, rules according to which property owners are automatically entitled to compensation.[43] In truth, these per se rules are not really per se rules at all because they have exceptions. The most important and pertinent exception is the background limitations exception.[44] But the per se rules, especially the physical takings per se rule, could open up a large swath of ordinary regulation to successful takings suits.[45]

The first non-*Penn Central* per se rule is the total wipeout rule, which states that if the property owner loses 100% of their investment or

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property owners). But see Farber, *supra* note 39, at 131–32, where Farber himself notes that the absence of compensation can indicate the particular political powerlessness of the group to which the property owners at issue belonged.

41. For a characteristic statement of this argument, see James Burling, *How a Legal Precedent Stacks the Deck Against Property Owners*, PAC. LEGAL FOUND. (Mar. 31, 2021), https://pacificlegal.org/how-a-legal-precedent-stacks-the-deck-against-property-owners [https://perma.cc/K8FC-S8ES]. *See also* Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective of* Penn Central Transportation Co. v. City of New York, 13 WM. & MARY BILL RTS. J. 679, 681 (2005) ("The vagueness and unpredictability of [*Penn Central*'s] rules, or more accurately the 'factors' deemed significant by the Court which declined to formulate rules, have encouraged regulators to pursue policies that have sharply reduced the supply of housing and are implicated in the ongoing, mind-boggling escalation in home prices—a process that favors the well-housed rich and increasingly disfavors the middle class, to say nothing of those lower on the economic scale who are still climbing the rungs of the socioeconomic ladder.").

42. *Id.*

43. Blumm & Ritchie, *supra* note 8, at 324.

44. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2081–82 (2021) (Breyer, J., dissenting).

45. *See id.*

property, they are entitled to 100% compensation.[46] The second non-*Penn Central* rule is the physical takings rule, which is that if a regulation entails, allows, or requires any sort of physical occupation of or seizure of private property, the government must compensate the property owner.[47] Because these rules potentially create sweeping takings liability, but are explicitly subject to the exception for background limitations, there is a pressing need to understand what are and are not background limitations.

1. The total wipeout per se rule

In *Lucas v. South Carolina Coastal Council*, the Court enunciated, for the first time, a rule that if the government action deprives a landowner of 100% of the market value (or possible use value) of the relevant "property," the owner is automatically entitled to compensation (subject to the background limitations qualification, discussed below).[48] In that case, the definition of the property was relatively straightforward: David Lucas owned two adjacent beachfront lots, on which, at least according to the *Lucas* majority's account, a post-acquisition law barred any building and rendered the lot entirely devoid of market value.[49] The *Lucas* majority opinion suggests that few situations will fall under the total wipeout rule, and, in fact, the number of instances in which a court has found that the *Lucas* per se rule applies has been relatively few to date.[50]

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46. *See* discussion *infra* Section I.A.1. For academic treatments of this total wipeout rule, see Luke A. Wake, *The Enduring (Muted) Legacy of* Lucas v. South Carolina Coastal Council*: A Quarter Century Retrospective*, 28 GEO. MASON U. C.R. L.J. 1, 13, 28 (2017); Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of* Lucas*: Making or Breaking the Takings Claim*, 102 IOWA L. REV. 1847, 1851–52, 1856 (2017).

47. *See* discussion *infra* Section I.A.2. For academic treatments of this rule, see Jessica L. Asbridge, *Redefining the Boundary Between Appropriation and Regulation*, 47 BYU L. REV. 809, 811–12 (2022); Sarah Haddon, *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*, 71 AM. U. L. REV. 349, 350–56 (2021).

48. This rule is sometimes formulated as applicable to the total deprivation of market value *or* use of property. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015–17 (1992); *see also infra* Section I.B. *But see* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 334 (2002) (apparently limiting the wipeout rule to total losses of market value).

49. *Lucas*, 505 U.S. at 1009.

50. *See id.* at 1018 (noting that it is relatively rare to encounter a situation in which the government deprives a landowner of all economically beneficial uses of the property); Blumm & Ritchie, *supra* note 8, at 322, 325–26 ("[The rule established in

However, that may not be true in the future, as the Supreme Court may be poised to give landowners more control over how "property" is defined for purposes of determining whether there has been a total wipeout of the value of the property. In his dissent in *Lucas*, Justice Stevens warned against the possibility of this sort of manipulation and the consequent broad application of the per se rule: "developers and investors may market specialized estates to take advantage of the Court's new rule. The smaller the estate, the more likely that a regulatory change will effect a total taking."[51] Similarly, Justice Kennedy's majority decision in *Murr*, rejecting a formalistic test for the "property" that would allow for manipulation, echoed Justice Stevens' point: "[t]he ease of modifying lot lines also creates the risk of gamesmanship by landowners, who might seek to alter the lines in anticipation of regulation that seems likely to affect only part of their property."[52]

The dissent in *Murr* may well become a majority opinion in the coming years. In his dissent, Justice Roberts endorsed a definition of "property" for takings rule purposes that would automatically and unwaveringly track legal boundaries under State law, and hence, that would be subject to ready manipulation of the sort Justice Stevens (in dissent, in *Lucas*) and Justice Kennedy (in majority, in *Murr*) described and against which they both warned.[53] There is a sound basis for supposing that, on the current Court, Justice Roberts' property definition in *Murr* would carry the day in any relevant future case in which certiorari was granted.[54]

Consider the composition of the *Murr* majority: Justice Kennedy, who is no longer on the Court, was joined by Justices Ginsburg and Breyer, who are also no longer on the Court.[55] In dissent, Justice Roberts was joined by Justices Thomas and Alito, both still on the

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Lucas] turned out to apply only to a very narrow class of takings cases . . . "). There are, however, notable cases in which lower courts seem to strain the case facts to find *Lucas* applicable, in what Professor Blais has called a *Lucas* shadow docket. *See* Lynn E. Blais, *The Total Takings Myth*, 86 FORDHAM L. REV. 47, 72 (2017). In addition, legislators and regulators may have been led by the possibility of *Lucas*-type takings to change their behavior, such that the *Lucas* wipeout rule may have had a substantial impact even in the absence of many court decisions finding *Lucas*-type takings.

51. *Lucas*, 505 U.S. at 1065 (Stevens, J., dissenting).
52. Murr v. Wisconsin, 137 S. Ct. 1933, 1948 (2017).
53. *Id.* at 1950 (Roberts, J., dissenting).
54. *Id.*
55. *Id.* at 1939 (majority opinion).

Court.[56] Justice Gorsuch did not participate in the *Murr* decision, as he had just joined the Court, but one might think he would take the more property-rights-protective view of Justice Roberts.[57] The replacements for Justices Kennedy and Ginsburg are very conservative Justices—Justices Kavanaugh and Barrett—who, like Justice Gorsuch, would be inclined to the Roberts view.[58] Thus, it seems that there would be as many six Justices (Roberts, Alito, Thomas, Gorsuch, Kavanaugh, Barrett) who would now endorse Roberts' view in *Murr*.

If Roberts' view becomes the law of the land, then it will be far easier for landowners to use state law to engineer a total wipeout, and hence, a per se taking.[59] For example, landowners might segment their land holdings to set up separate lots for areas they think might be subject to future environmental law restrictions.[60] In such cases, background limitations would be important because they might be the only means

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56. *Id.* at 1950 (Roberts, J., dissenting).

57. Justice Gorsuch has sided with the property-rights, pro-takings members of the Court in every takings decision since he joined the Court. *See, e.g.*, Tyler v. Hennepin Cnty., 143 S. Ct. 1369 (2023); Pakdel v. City & Cnty. of S.F., 141 S. Ct. 2226 (2021); Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021); Knick v. Twp. of Scott, 139 S. Ct. 2162 (2019).

58. In the Martin-Quinn scoring of Justices as to how "conservative" they are, Justices Kavanaugh, Barrett, and Gorsuch all rank as more conservative than Justice Roberts. *See* Oriana Gonzalez & Danielle Alberti, *The Political Leanings of the Supreme Court Justices*, AXIOS, https://www.axios.com/2019/06/01/supreme-court-justices-ideology (July 3, 2023); *see also* Alicia Parlapiano & Jugal K. Patel, *With Kennedy's Retirement, the Supreme Court Loses Its Center*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/interactive/2018/06/27/us/politics/kennedy-retirement-supreme-court-median.html [https://perma.cc/9JVA-QCZZ].

59. *See* Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1450–51 (1990) (discussing whether federal courts can review decisions of state courts to ensure they are acting constitutionally).

60. As the Congressional Research Service has noted, concerns about strategic behavior have played a role in wetlands/takings cases. *See* Robert Meltz, *Wetlands Regulation and the Law of Regulatory Takings*, 30 ENV'T L. REP. 10468, 10481 (2000). The United States raised strategic behavior concerns in *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994). Other wetlands/takings decisions noting strategic behavior concerns include *Palm Beach Isles Assocs. v. United States*, 42 Fed. Cl. 340, 363 (1998), *vacated*, 208 F.3d 1374 (Fed. Cir. 2000), *aff'd on reh'g*, 231 F.3d 1354 (Fed. Cir. 2000); *Forest Props., Inc. v. United States*, 39 Fed. Cl. 56, 73 (1997), *aff'd*, 177 F.3d 1360 (Fed. Cir. 1999); *Broadwater Farms Joint Venture v. United States*, 35 Fed. Cl. 232, 240 (1996), *vacated and remanded*, 121 F.3d 727 (Fed. Cir. 1997) (unpublished decision affirming Court of Federal Claim's discussion of relevant parcel); and *K&K Constr., Inc. v. Dep't of Nat. Res.*, 584 N.W.2d 531 (Mich. 1998).

to prevent a range of regulations from being deemed per se takings under *Lucas*' total wipeout rule.[61]

2. The physical occupation or seizure per se rule

The second per se rule—the physical occupation or seizure rule—has nothing to do with the subject of the *Lucas* total wipeout rule, the extent of loss of market value.[62] Indeed, as we will see, this per se ruling can apply even when the owner has lost little economic value.

The Supreme Court has identified two distinct categories of takings: "physical takings" and "regulatory takings."[63] But, in truth, almost all regulation involves some physical aspect. Regulations routinely require an owner to do or permit something physical on their land, and/or require the owner to do something physical when there is a regulatory violation.[64] Indeed, in the *Penn Central* decision, the Court acknowledged the common physical element in regulation by identifying the extent of the physicality of a regulation as a relevant factor in determining whether there had been a regulatory taking under the ad-hoc, balancing test for regulatory takings.[65] Much regulation has a physical aspect, yet there are (according to the Court) separate categories for regulatory takings and physical takings. Consequently, there is room for the court to choose whether to characterize a given takings claim/lawsuit as implicating either physical takings or regulatory takings.[66]

But while the line between a regulatory takings case and a physical takings case is unclear and manipulable, the category choice has very clear consequences. Specifically, regulatory takings challenges are usually subject to the *Penn Central* fact-specific, balancing test that tends to favor the government, whereas physical takings challenges automatically result in an award of compensation (with a few

61. *See* Meltz, *supra* note 60, at 10479.

62. *Cedar*, 141 S. Ct. at 2071–72.

63. *See id.* at 2071 ("[P]hysical appropriations constitute the 'clearest sort of taking,' and we assess them using a simple, *per se* rule . . . . When the government, rather than appropriating private property for itself or a third party, instead imposes regulations that restrict an owner's ability to use his own property, a different standard applies.").

64. *Id.*

65. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

66. *See Cedar*, 141 S, Ct, at 2072 (2021).

exceptions, including, notably, that of background limitations in title).[67]

For example, in the *Horne* case involving a complicated regulatory scheme to stabilize the market price of raisins, the majority characterized the case as a physical takings case because one of the regulatory requirements was that growers set aside a certain amount of raisins for a government reserve or otherwise pay a monetary penalty.[68] But, in her dissent, Justice Sotomayor argued that the case fell in the regulatory rather than physical takings category because, among other things: the reserve requirement was part of a larger crop price stabilization program, the government never actually seized any raisins, and had the government taken possession of any raisins, the growers would have retained a right to the sale proceeds.[69] Applying a per se takings rule for physical takings, rather than the *Penn Central* test for regulatory takings, the majority held that a taking had occurred.[70] As Justice Sotomayor suggested, under the *Penn Central* regulatory takings test, the case almost certainly would have come out the other way.[71]

Many regulations have a physical element and hence many regulatory schemes can be characterized as physical takings.[72] This opens up a wide swath of even routine regulations to successful takings challenges under the per se physical takings rule.[73] But, until recently, the power of the per se physical takings rule to destabilize regulatory schemes was very limited because the Supreme Court applied the physical takings category only when the government *permanently* occupied land owned by the plaintiff.[74] In *Loretto*, the Court could not have been clearer that the per se physical takings rule only applied to permanent physical occupations of land by the government or an

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67. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 798–805 (1995) (addressing that originalist interpretations and the underlying rationale of the Takings Clause, to protect property against physical seizures but not against regulations affecting value, dramatically departs from the Supreme Court's current takings jurisprudence).

68. Horne v. Dep't of Agric., 576 U.S. 350, 361 (2015).

69. *Id.* at 377–81 (Sotomayor, J., dissenting).

70. *Id.* at 361–62 (majority opinion).

71. *Id.* at 381 (Sotomayor, J., dissenting).

72. Lynda L. Butler, *The* Horne *Dilemma: Protecting Property's Richness and Frontiers*, 75 MD. L. REV. 787, 796 (2016).

73. *Id.*

74. *Horne*, 576 U.S. at 378 (Sotomayor, J., dissenting).

agent of the government: "[o]ur holding today is very narrow. . . . a permanent physical occupation of property is a taking."[75]

Decades after *Loretto*, the Supreme Court in *Horne* extended the *Loretto* per se physical takings rule to personal property; in that instance, personal property in the raisins.[76] After *Horne*, the per se physical takings rule applies to both the government's permanent physical occupation of land and its permanent physical seizure of personal property.[77]

In 2019, the Supreme Court extended the per se takings rule by way of dicta in *Knick*. Shortly thereafter, the 2021 *Cedar* opinion officially extended the rule to all occupations of land and (arguably) all seizures of personal property however temporary or transitory the government action.[78] In *Cedar*, Justice Roberts, writing for the majority, insisted that the per se physical takings rule applies without regard to how long the government's physical action continues: "a physical appropriation is a taking whether it is permanent or temporary. . . . the duration of the appropriation . . . bears only on the amount of compensation. . . . [P]hysical invasions constitute takings even if they are intermittent as opposed to continuous."[79]

Justice Breyer, dissenting in *Cedar*, rightly understood that the majority opinion had turned the once-modest physical takings rule into a bludgeon against the kinds of regulation that are part and parcel of modern life in the United States.[80] Justice Breyer explained that many forms of regulation require that government officials or others have temporary access to private property, that "[m]ost such temporary-entry regulations do not go 'too far" in any meaningful sense, and it would be "impractical to compensate every property owner for any brief use of their land."[81]

Moreover, as Nikolas Bowie has observed, the expansive physical takings rule adopted in *Cedar* could have implications well beyond

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75. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).
76. *Horne*, 576 U.S. at 358.
77. *Id.* at 360.
78. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074, 2079–80 (2021); Knick v. Twp. of Scott, 139 S. Ct. 2162, 2171–72 (2019); *see also* David A. Dana, *Not Just a Procedural Case: The Substantive Implications of* Knick *for State Property Law and Federal Takings Doctrine*, 47 FORDHAM URB. L.J. 591, 619–20 (2020) [hereinafter Dana, *Substantive Implications*].
79. *Cedar*, 141 S. Ct. at 2074–75.
80. *Id.* at 2082–83 (Breyer, J., dissenting).
81. *Id.* at 2087.

health and safety inspections and the requirements for safety structures or other elements in buildings.[82] As Bowie explains:

> Affordable housing laws similarly require landlords to give low-income tenants "access" to their rental properties. [The *Cedar*] rule would require the government to pay landlords who would rather exclude these or any other tenants.
>
> And laws that prohibit employers from firing workers who complain of harassment also, in effect, protect these workers' "access" to the workplace. [The *Cedar*] rule would require the government to pay employers to rehire anyone they illegally fired.[83]

Some have suggested that the expansive per se physical takings rule adopted in *Cedar* may have limited impact because, in many instances, the amount of compensation due to the property owner may be quite modest: for example, according to one estimate, the damages due to the *Cedar* rule for the union organizers' temporary entrances might be no more than a few hundred dollars.[84] But even if the amount of just compensation sometimes is modest, it could be difficult for legislators and regulators to calculate ex ante and almost certainly will vary from particular owner to particular owner.[85] In some instances, there may be no readily available fair market metric to assess compensation at all.

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82. Nikolas Bowie, *Do We Have to Pay Businesses to Obey the Law?*, N.Y. TIMES (Mar. 20, 2021), https://www.nytimes.com/2021/03/20/opinion/Supreme-Court-labor-property-rights.html.

83. *Id.* For a similar view that Cedar has expansive implications, see Ian Millhiser, *The Supreme Court Will Hear a New Attack on Unions. The Implications Are Profound*, VOX (Nov. 17, 2020, 8:20 AM), https://www.vox.com/21569510/supreme-court-unions cedar-point-nursery-hassid-takings-california-fifth-amendment [https://perma.cc/4RWZ-UABN].

84. Fennell, *supra* note 8, at 59 ("The availability of an often-trivial compensation alternative to the onerous strictures of meeting heightened scrutiny or the social costs of abandoning long-established policies may make *Cedar Point* less consequential than it initially seems."). Others have suggested that the *Cedar*-type takings can be avoided where the underlying statute of limitation on bringing an ejectment or similar action has expired. *See* Rebecca Hansen & Lior Jacob Strahilevitz, *Toward Principled Background Principles in Takings Law*, 10 TEX. A&M L. REV. 427, 454, 461 (2023). But even if the statute of limitations analysis is correct—and that is unclear because the authors do not necessarily make a convincing theoretical argument—all statutes and regulations promulgated from now on could be promptly challenged as effecting physical takings without any possible statute of limitations defense.

85. *See* Serkin, *supra* note 30, at 1673 (connecting the difficulty in ex ante calculations with subsequent government risk aversion); Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 717 (2005) (discussing the difficulty and variety in measuring risk aversion).

This suggests that any blanket, pre-fixed compensation in a statute or regulation will be struck down on its face or (more plausibly) as applied in particular cases.[86] Property owners—and property rights groups like the Pacific Legal Foundation—therefore may succeed in striking down even those statutes and regulations that attempt to provide reasonably generous sums as compensation for access.[87]

The threat and reality of court orders enjoining statutory and regulatory access could result in the political will fading for access-mandating regulations.[88] California might react to repeated court orders striking down regulations allowing union access by continuing to require access and battling in court, but the politics in other jurisdictions might be such that the relevant political actors will either give up entirely or settle for far less access.[89] And, in some cases, where the regulations in effect prevent landlords from removing tenants, the actual amount of compensation constitutionally required by any measure could be so large in the aggregate as to compel cash-strapped localities to back down.[90]

Given the preceding analysis, it is clearly important to know how and how often background limitations can allow what would otherwise be per se physical takings to proceed without any constitutional objection.[91] The problem, as discussed in the next Section, is that the

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86. *See* Wallace v. United States, 566 F. Supp. 904, 910 (D. Mass. 1981) ("[C]ontroversies over valuation are not governed by fixed rules. Thus, a case cannot be decided by selecting some formula as the only correct one, then determining figures to be used in each step of the formula and proceeding through mathematical calculation to the foreordained result.").

87. *See* Jenna Greene, *Pacific Legal Foundation Snags Supreme Court Trifecta*, REUTERS (Mar. 10, 2023), https://www.reuters.com/legal/government/pacific-legal-foundation-snags-supreme-court-trifecta-2023-03-10 (identifying the Pacific Legal Foundation as a successful property rights advocate before the Supreme Court).

88. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2089 (2021) (Breyer, J., dissenting) (asserting that lower courts "should have the choice of foreclosing injunctive relief by providing compensation").

89. *See* Mark Joseph Stern, *The Supreme Court's Latest Union-Busting Decision Goes Far Beyond California Farmworkers*, SLATE (June 23, 2021), https://slate.com/news-and-politics/2021/06/supreme-court-union-busting-cedar-point-nursery.html [https://perma.cc/MR69-9KE8] (speculating that unions might "simply forgo farm access" rather than paying every individual business).

90. *See generally* Serkin, *supra* note 30, at 1630–33 (explaining that local governments are averse to potential financial obligations from takings, because they operate under strict budget constraints and often cannot rely on deficit spending).

91. *Id.* at 1629–30.

Supreme Court and other courts have done little to clarify what is and is not a valid background limitation.

B. Background Limitations

As already noted, *Lucas* and *Cedar* are among the recent cases that seem to expand the scope of per se takings and in that sense shift the takings regime away from the regulation-friendly posture of the ad-hoc, fact-specific *Penn Central* test. However, *Lucas, Cedar,* and *Murr* acknowledge a limitation in property rights that can negate a takings claim that otherwise would prevail under one of the per se rules.[92] *Lucas, Cedar,* and *Murr* employ slightly different language to describe this limitation: "background principles of the State's law of property and nuisance already place upon land ownership" (*Lucas*) "background customs and the whole of our legal tradition" (*Murr*); and "longstanding background restrictions on property rights" or "background limitations" on the private property owners' rights to exclude (*Cedar*).[93] What is consistent is the word "background."[94]

What exactly does "background" connote? At a minimum, the word "background" suggests a certain level of generality or non-specificity. "Background" seems to suggest the limitations are not expressly, singularly related to the private property at issue in a given takings dispute, but rather, that the limitations embody a broader principle that can be understood to apply to a whole set of private properties, one of which happens to be the private property at issue in the given takings dispute.[95] A background limitation in title would seem to have to be, logically, less direct and specific than a foreground limitation on title.

For example, if a city adopted a parcel-specific zoning amendment that prohibited parcel X from being used for anything other than single-family housing, and Jill then buys the parcel, the zoning amendment is not in the background of the title at all—it is a direct, straightforward, foreground limitation, not a background limitation as such in title. Unless Jill purchased the right to challenge the prior zoning as a taking from the seller as part of the deal, Jill almost

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92. *Cedar*, 141 S. Ct. at 2079 (2021); Murr v. Wisconsin, 137 S. Ct. 1933, 1955 (2017); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028–29 (1992).

93. *Cedar*, 141 S. Ct. at 2079; *Murr*, 137 S. Ct. at 1945; *Lucas*, 505 U.S. at 1029.

94. *Cedar*, 141 S. Ct. at 2079; *Murr*, 137 S. Ct. at 1945; *Lucas*, 505 U.S. at 1029.

95. *Cedar*, 141 S. Ct. at 2079–80; *Murr*, 137 S. Ct. at 1945–46; *Lucas*, 505 U.S. at 1029–31.

certainly has no standing to claim now that the zoning is a taking. From an economic or market point of view, moreover, such direct limitations on title presumably would have been priced into the market value of property, so Jill has already been compensated in a sense for the zoning restriction.[96]

The Court in *Lucas* expressly situates the common law of nuisance at the time of title in the "background." This fits the understanding of a background limitation as something general and not parcel-specific, as it is unlikely for nuisance decisions to be made prior to the title acquisition of a parcel related to regulation that later triggers a takings suit.[97] So the "background" in background limitations opens us up to law and legal principles beyond the specific parcel at issue; beyond that, though, the word "background" by itself cannot guide us.

To have a better understanding of what background limitations can and cannot be, we need some rationale as to why background limitations make it just to deny compensation, even in circumstances where a rote application of a per se compensation rule would otherwise guarantee compensation.[98] And regarding that question, *Lucas*, *Murr*, and *Cedar* are somewhat (to say the least) unhelpful.[99]

Justice Scalia's plurality opinion in *Lucas* hints at the idea that citizens' actual or constructive notice of background limitations is what makes them legitimate restrictions on private property rights: "our 'takings' jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property."[100] But then there is also language in the plurality opinion suggesting that background principles only count as such if they are rooted in one particular area of law—the law of property and nuisance—and are also in accord with our "historical compact" and "constitutional culture" concerning the extent of private property rights.[101] But the opinion does not explain why background

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96. For a discussion on how land use regulation affects land and housing prices, see William K. Jaeger, *The Effects of Land-Use Regulations on Property Values*, 36 ENV'T. L. 105, 106–07 (2006).

97. *See Lucas*, 505 U.S. at 1054–55 (Blackmun, J., dissenting) (explaining that common law nuisance principles are highly general in nature and offer little case-specific guidance).

98. *Id.* at 1016–17 n.6 (majority opinion).

99. *See infra* pp. 1815–17.

100. *Lucas*, 505 U.S. at 1027.

101. *Id.* at 1028.

principles would be limited to the common law of nuisance and property, or even definitively state that they are. And what does "historical compact" or "constitutional culture" entail? And how would we know?

In *Murr*, Justice Kennedy, writing for the majority, suggests that the background limitations inquiry should be an "objective" one, based on "background customs and the whole of our legal tradition."[102] The point of the objective inquiry, according to Justice Kennedy in *Murr*, is to protect the objectively reasonable expectations of private property owners: "The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved."[103] The language "all parties involved," while very much ambiguous, might suggest that background limitations need to be so widely credited as to be beyond all reasonable dispute. The whole of our legal tradition would seem to be more expansive than what *Lucas* focused upon—that is, the law of property and nuisance.[104] And, indeed, in his concurrence in *Lucas*, Justice Kennedy suggests that background principles should be understood to be more expansive than simply the common law at a fixed point in time.[105] But the purpose and theory of background limitations in Justice Kennedy's opinions are opaque, as are the purpose and theory in Justice Scalia's *Lucas* opinion.[106]

Cedar is the most recent Supreme Court opinion on background limitations, and thus perhaps the most important.[107] Justice Roberts in *Cedar* offers background limitations in rebuttal to the government's and the dissenters' argument that the per se rule is excessively rigid.[108] Indeed, Roberts insists that "many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights."[109] Roberts then offers some examples of what might constitute background limitations:

> For example, the government owes a landowner no compensation for requiring him to abate a nuisance on his property, because he

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102. Murr v. Wisconsin, 137 S. Ct. 1933, 1945 (2017).
103. *Id.* (quoting *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring)).
104. *Lucas*, 505 U.S. at 1004.
105. *Id.* at 1035 (Kennedy, J., concurring).
106. *Murr*, 131 S. Ct. at 1945–46.
107. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2063 (2021).
108. *Id.* at 2078–79.
109. *Id.* at 2079.

> never had a right to engage in the nuisance in the first place . . . . These background limitations also encompass traditional common law privileges to access private property . . . . Because a property owner traditionally had no right to exclude an official engaged in a reasonable search . . . government searches that are consistent with the Fourth Amendment and state law cannot be said to take any property right from landowners . . . . Unlike a law enforcement search, no traditional background principle of property law requires the growers to admit union organizers onto their premises.[110]

Note that *Cedar* does not contain any *Murr*-like language about the objective, reasonable expectations of property owners as a basis for background limitations. The use of the words "traditional" or "traditionally" in *Cedar* to refer to background limitations suggests that background limitations are valid restrictions because they are traditional, rather than because they are or should be known to everyone.[111] But "traditional" is undefined, and it is unclear how tradition or traditionality relate, if at all, to Justice Scalia in *Lucas*'s invocation of a "historical compact" and our "constitutional culture."[112]

For his part, Justice Breyer, in his *Cedar* dissent, focuses on Justice Roberts' suggestion that background limitations include, at least: public and private necessity, enforcement of criminal law, and reasonable and constitutional searches, however, those terms are to be understood.[113] With respect to those exceptions, Justice Breyer emphasizes that the Roberts majority opinion does not explain whether "only those exceptions [to the per se physical takings rule] that existed in, say, 1789 count?"[114] He poses key questions the majority opinion does not even try to address: "Should courts apply those privileges as they existed at that time, when there were no union organizers? Or do we bring some exceptions (but not others) up to date, *e.g.*, a necessity exception for preserving animal habitats?"[115] In effect, then, Breyer asks what the word "traditional" in Justice Roberts' description of background principles actually means. How old does a principle have to be to be "traditional"?

The Supreme Court case law, in sum, establishes background limitations as a constraint on per se takings rules but tells us very little

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110. *Id.* at 2079–80.
111. *Id.* at 2079.
112. *See supra* note 101 and accompanying text.
113. *Cedar*, 141 S. Ct. at 2088–89 (Breyer, J., dissenting).
114. *Id.*
115. *Id.* at 2089.

about the precise rationale for background limitations and, hence, provides us very little guidance in determining what should and should not count as a background limitation.[116] None of the Supreme Court cases offer much explication as to the purpose of background limitations.[117] To the extent that the cases do offer hints as to what background limitations' purposes are, those hints are not obviously consistent.[118]

Nor are the Supreme Court cases clear as to what are the proper sources for determining background limitations (putting aside the purposes of those background limitations). In particular, it is an open question in the Supreme Court case law whether background limitations can only be rooted in judge-made, common law, or whether they can also be rooted in other sources of law, notably constitutions, statutes, and regulations.[119] As already noted, Justice Scalia's *Lucas* opinion suggests that common law principles and decisions have a singular status as creating background principles, whereas Justice Kennedy's opinion in *Murr* (as well as his concurrence in *Lucas*) suggests that statutes and regulations also can be constitutive of background limitations.[120] Justice Roberts' opinion in *Cedar* seems to add constitutional provisions and policies to *Lucas*'s common law ones as sources of background limitations but decidedly does not address statutes and regulations as sources of background limitations.[121] For his part, Justice Kavanaugh, in a cryptic concurrence in *Cedar*, seems to suggest that a federal statute and a decision interpreting that statute

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116. *Id.* at 2079–80, 2088.

117. *See id.*; Murr v. Wisconsin, 137 S. Ct. 1933, 1945 (2017); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028–29 (1992) (discussing background limitations without mention as to why they must be followed).

118. *Cedar*, 141 S. Ct. at 2078 (using background limitations as a means to reassure that per se Takings will not "endanger a host of state and federal government activities involving entry onto private property"); *Murr*, 137 S. Ct. at 1945 (presenting background customs as the support for a reasonable expectations takings test); *Lucas*, 505 U.S. at 1027–29 (refuting the argument that land is held under an implied limitation subject to a state's police power, which would allow the government to confiscate land without requiring just compensation).

119. *See* Blumm & Wolfard, *supra* note 8, at 1165 (describing the wide range of sources, including statutes, that courts have found relevant to the background principles inquiry).

120. *See Murr*, 137 S. Ct. at 1945–46; *Lucas*, 505 U.S. at 1029; *Lucas*, 505 U.S. at 1034–35 (Kennedy, J., concurring).

121. *Cedar*, 141 S. Ct. at 2079 (establishing constitutional conditions for the application of background limitations).

could form a background limitation.[122] Finally, in a famously confusing decision, *Palazzolo v. Rhode Island*,[123] Justice Kennedy openly concedes that the Court has never directly opined on the question of the full range of possible sources of background limitations, and that his decision for the majority decision also does not do so.[124]

What to make of all these confusing, seemingly inconsistent hints from the Supreme Court about the sources of law which can constitute background limitations? To quote Lee Fennell, "[q]uestions abound."[125]

In one respect, state and lower federal courts have added some clarity (although of course they cannot speak for the Supreme Court).[126] As Blumm and Wolfard have detailed, the state and lower federal courts have been far more inclusive as to the sources of background limitations, expressly acknowledging that state constitutions, state statutes, state regulations, and even local customs can be a source of background limitations.[127] Public trust law, water law, zoning law, fishing regulation, and even state graveyard law have been successfully invoked by government cendants as background limitations.[128] Indeed, as far as one can discern, none of the state and lower federal cases either accepting or rejecting a background limitations argument suggest in any way that such limitations can only be based on judge-made, common law (which, again, was the thrust of Justice Scalia's *Lucas* opinion).[129]

At the same time, there is very little explanation in the state and lower federal cases as to why the court accepts or rejects a common law principle, statute, or other source as creating a background limitation that precludes the payment of compensation that otherwise would be due; the state and lower federal cases do not illuminate the question

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122. *Id.* at 2080 (Kavanaugh, J., concurring).
123. 533 U.S. 606 (2001).
124. *Id.* at 629–30.
125. Fennell, *supra* note 8, at 22.
126. *See infra* notes 133–35 and accompanying text.
127. Blumm & Wolfard, *supra* note 8, at 1194–96 (describing the range of sources invoked by state and lower federal courts).
128. Stevens v. City of Cannon Beach, 854 P.2d 449, 456–57 (Or. 1993) (en banc) (public trust law); Monroe Equities, LLC v. State, 43 N.Y.S.3d 103, 106 (App. Div. 2016) (water law); East First Street, L.L.C. v. Bd. of Adjustments, No. 2007 CA 0664, 2008 WL 2567080, at *4–5 (La. App. 1 Cir. 6/6/08) (zoning law); Blumm & Wolfard, *supra* note 8, at 1195 (fishing law).
129. *See supra* text accompanying notes 119–128.

as to the rationale or rationales for background limitations.[130] Rather, the decisions have a "we know it when we see it" feel to them. Indeed, quite often, the state and lower federal courts' treatment of background limitations arguments raised by the government consists of no more than a conclusory sentence or two.[131] For example, in litigation against the Corps of Engineers regarding recent flooding near a Houston reservoir, the United States argued that section 702c of Flood Control Act of 1928 created a background principle that owners of property adjacent to a reservoir took title subject to the risk of flooding from the reservoir that was permitted by the government as part of its overall flood management.[132] The court's answer to this background principle argument was simply no: "This argument is unpersuasive. The Flood Control Act of 1928 does not supersede or bar this court's jurisdiction over takings claims for flooding . . . . The court finds defendant's arguments unconvincing; therefore, plaintiffs have met their burden of establishing a valid property interest."[133]

What we are left with, then, is a doctrinal landscape in which it is true both that background limitations may have great importance now more than ever, and that no court has developed a cogent account of why a particular common law doctrine, statute, or other legal source should qualify as a background limitation.

In the next Part, this Article identifies three ideas or approaches that are gestured at in the case law as the underlying rationales for background limitations on takings liability.[134] By explicitly identifying and analyzing the three approaches as the basis for background limitations, we may at least be able to have a more coherent discussion of how courts should, in any given particular context, evaluate whether there is or is not a background limitation in title that negates the application of what otherwise would be a per se takings rule.[135]

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130. *See Stevens*, 854 P.2d at 456; *Monroe*, 43 N.Y.S.3d at 106; *East First Street, L.L.C.*, 2008 WL 2567080, at *4–5.

131. *See, e.g.*, *Stevens*, 854 P.2d at 456.

132. *See In re* Upstream Addicks & Barker (Tex.) Flood-Control Reservoirs, 138 Fed. Cl. 658, 668 (2018) ("The government further argues that the federal Flood Control Act of 1928 . . . is a background principle . . . .").

133. *In re* Upstream Addicks & Barker (Tex.) Flood-Control Reservoirs, 138 Fed. Cl. 658 (2018), *mot. denied*, 146 Fed. Cl. 219, 249 (2019).

134. *See infra* Part II.

135. Murr v. Wisconsin, 137 S. Ct. 1933, 1945 (2017) (relying on "reasonable expectations" to support background limitations). *See generally* Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755 (2011) (critiquing the consensus

II. THREE APPROACHES TO BACKGROUND PRINCIPLES

Drawing from the takings case law and the larger scope of constitutional jurisprudence, this Part explicates three main approaches to background principles, each of which holds merit and poses difficulties, both conceptual and practical. The three approaches—originalism, consensus, and notice—are addressed in turn. This Part demonstrates how these three different approaches might lead to different background limitations analyses and different conclusions with respect to some topical examples.

A. An Originalism Approach to Background Principles

One possible rationale for background limitations would be to honor original public understandings about "property" at the time of the application of the Fifth Amendment to the States.[136] Background limitations are tied to the Takings Clause, and thus are, however much they are informed by state law, unavoidably a matter of federal constitutional law and its interpretation.[137] The Supreme Court has eschewed an overtly originalist approach to the Takings Clause, perhaps because, arguably, the history only supports a very confined view of the Clause that only requires compensation for actual expropriation of private property, if any compensation at all.[138] Nonetheless, all the Justices now ascribe to some degree of originalism, engage in originalist argument, and employ originalist rhetoric.[139] A

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constitutionalist approach); Treanor, *supra* note 67 (introducing the originalist approach to the Takings Clause).

136. *See* Treanor, *supra* note 67, at 792.

137. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029–30 (1992).

138. *See* Treanor, *supra* note 67, at 783 ("[O]riginal intent . . . clearly indicates that the Takings Clause was intended to apply only to physical [T]akings."); *id.* at 858 ("even originalists such as Black and Scalia are not originalists when it comes to the Takings Clause"); John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1100–01 (2000) (arguing that there was extensive land use regulation before the adoption of the Takings Clause so "[i]f someone as articulate as Madison had wanted to restrict the regulation of land use also, he would have done so unmistakably. Instead, Madison and Congress judged that the only problem needing to be addressed constitutionally was appropriation, not regulation").

139. *See* Huq, *supra* note 12, at 268 ("The dominant modality of constitutional interpretation of the Roberts Court is originalism"); Michael J. Klarman, *The Supreme Court 2019 Term: Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 225–26 (2020) ("Liberal Justices do not purport to be originalists, but

majority of the Justices, moreover, are adamant that they are constitutional originalists.[140] This originalist majority has been extending a purportedly originalist, historical approach to arenas such as substantive due process, most notably to gun ownership in *Bruen* and to abortion in *Dobbs*.[141] This same majority might be doing or will do the same with respect to the background limitations aspect of Takings Clause doctrine.[142]

While much originalist analysis in federal constitutional law focuses on 1791, due to the ratification of the Bill of Rights, 1868 is a more appropriate date for determining an originalist understanding of background limitations with respect to takings claims against states and

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are happy to argue in such terms when originalist evidence supports their conclusions."); Judge Diarmuid F. O'Scannlain, *"We Are All Textualists Now": The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303, 306 (2017) ("[L]iberals and conservatives alike now employ the rhetoric of textualism and originalism.").

140. *See, e.g.*, *Rosenkranz Originalism Conference Features Justice Thomas '74*, YALE L. SCH. (Nov. 4, 2019), https://law.yale.edu/yls-today/news/rosenkranz-originalism-conference-features-justice-thomas-74 [https://perma.cc/MA44-QBDP]; Neil M. Gorsuch, *Justice Neil Gorsuch: Why Originalism is the Best Approach to the Constitution*, TIME (Sept. 6, 2019, 8:00 AM), https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution [https://perma.cc/5UEU-NLFT]; *Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 2, Part 2*, C-SPAN (Sept. 5, 2018) https://www.c-span.org/video/?449705-10/supreme-court-nominee-brett-kavanaugh-confirmation-hearing-day-2-part-2; Brian Naylor, *Barrett, an Originalist, Says Meaning of Constitution 'Doesn't Change Over Time'*, NPR (Oct. 13, 2020, 10:08 AM) https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923215778/barrett-an-originalist-says-meaning-of-constitution-doesn-t-change-over-time [https://perma.cc/7WB6-CJPC].

141. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 142 S. Ct. 2111, 2126 (2022) ("Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'"); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2248 (2022) ("[G]uided by the history and tradition that map the essential components of our Nation's concept of ordered liberty, we must ask what the Fourteenth Amendment means . . . . the clear answer is that the Fourteenth Amendment does not protect the right to an abortion." (emphasis omitted)). Of course, the quality of this originalist analysis is much in dispute, to say the least. *See, e.g.*, Angie Gou, *Cherry-Picked History: Reva Siegel on "Living Originalism" in* Dobbs, SCOTUSBLOG (Aug. 11, 2022, 4:57 PM), https://www.scotusblog.com/2022/08/cherry-picked-history-reva-siegel-on-living-originalism-in-dobbs [https://perma.cc/H833-7NQL] ("Justice Samuel Alito's opinion in *Dobbs* instead defines liberty in reference to laws enacted in the mid-19th century, and uses a 19th-century campaign to criminalize abortion as context. But this historical analysis, Siegel argued, discounts common law in the late 18th and early 19th centuries, when there was access to abortion.").

142. *See* Gou, *supra* note 141.

localities (which encompass virtually all such claims).[143] In 1837, in *Barron v. Mayor of Baltimore*,[144] the Supreme Court made clear the Bill of Rights, including the Fifth Amendment, was intended to apply only to the federal government.[145] In 1897, in *Chicago, Burlington, & Quincy Railroad v. City of Chicago*,[146] the Supreme Court held that the Fourteenth Amendment incorporated the Fifth Amendment's Just Compensation guarantee.[147]

An originalist rationale for background limitations in the text of the Fifth Amendment makes linguistic sense regardless of the conservative Court's interpretive preferences.[148] That text provides that "private property [shall not] be taken . . . without just compensation."[149] If a particular category of "private property" prior to 1868 included a limitation in favor of the public, that limitation presumably should be read into the words "private property" in the Fifth Amendment.[150] Nothing in the constitutional text of either the Fifth or Fourteenth Amendments suggests that the text is intended to enlarge the scope of private property under State law; nothing in the text suggests a constriction in already-established public rights over private property.[151] In this reading, the rationale of background limitations would be to honor limitations that are in the background of, or that predate, the constitutional protection of private property in a given state.[152] This rationale fits with Justice Scalia's unexplained reference to a "historical compact" in connection with the question of what is a

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143. *See, e.g.*, *Bruen*, 142 S. Ct. at 2137–38 (relying on the 1791 ratification of the Second Amendment).

144. 32 U.S. 243 (1833).

145. *Id.* at 247 ("[T]he fifth amendment must be understood as restraining the power of the general government, not as applicable to the states.").

146. 166 U.S. 226 (1897).

147. *See id.* at 233–35. To the extent that takings doctrine under *state* constitutions follows federal precedent in creating a background limitations category, however, the relevant date for originalism analysis for state constitutional takings claims arguably would be the date the state constitution was ratified.

148. *See infra* text accompanying notes 156–61.

149. U.S. CONST. amend. V.

150. *See* Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. COLO. L. REV. 1, 10–11 (2004) (explaining that originalism looks at the original meaning of the text at the time it was enacted).

151. *See* U.S. CONST. amend. V (declaring that "private property" shall not be taken "without just compensation"); U.S. CONST. amend. XIV, § 1 (stating that persons shall not be deprived of property without due process of law).

152. *See* Stack, *supra* note 150, at 23 (explaining originalism looks at the original understanding of rules at the time a provision was enacted).

background principle.[153] And, certainly, the principles of nuisance law predate 1868 (and the Founding in 1789).[154]

The originalist rationale also might be thought to answer a fundamental problem with constitutional interpretation writ large—how to make it something other than a proxy for the judges' personal preferences? One of the principal arguments of originalism as a constitutional method has long been that, whatever originalism's problems, it at least provides some discipline to courts who otherwise would have no moorings in deciding what the necessarily spare language of the Constitution actually means.[155] Perhaps most famously, Justice Scalia, in academic writing with Bryan Garner, emphasized this constraint rationale for originalism, which they touted as able to "curb—even reverse—the tendency of judges to imbue authoritative texts with their own policy preferences."[156]

The same argument can be made on behalf of an originalist approach to background principles. If background limitations can be anything, then courts could use them to, in effect, negate the Takings Clause altogether.[157] Alternatively, if background limitations can be anything, then courts can pick and choose when to acknowledge a limitation, so that they can find government actions they like to be permissible without compensation, and actions they dislike to be

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153. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028 (1992) (discussing the history of the Takings Clause in American constitutional culture).

154. *See* H. Marlow Green, Note, *Common Law, Property Rights and the Environment: A Comparative Analysis of Historical Developments in the United States and England and a Model for the Future*, 30 CORNELL INT'L L.J. 541, 546–47 (1997) (tracing early American nuisance law to Blackstone, English law, and custom); Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 YALE L.J. 702, 705–06 (2023) (same).

155. *See also* Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 716–17 (2011) ("[O]riginalists insisted that their theory, by employing an objective historical criterion that is 'exterior to the will of the Justices,' would limit the ability of judges to read their own personal policy preferences into the Constitution." (quoting Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6 (1971))); *cf.* Ernest Young, *Rediscovering Conservativism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 634 (1994) (making this claim); John O. McGinnis & Michael B. Rappaport, *Originalism and Pragmatism: A Pragmatic Defense of Originalism*, 31 HARV. J.L. & PUB. POL'Y 917, 917–18 (2008) (same).

156. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, xxviii (2006) ("Words must be given the meaning they had when the text was adopted."); *see also* Stack, *supra* note 150, at 14 ("[F]or Scalia, democracy requires a particular kind of restraint on the part of judges: an exclusive focus on the original meaning of the text.").

157. *See* Fennell, *supra* note 8, at 20 (describing background principles as a way to avoid liability for a per se physical taking).

impermissible without compensation.[158] This is, in essence, several academics' takeaway regarding background limitations after the *Cedar* decision.[159] Neither of these options is normatively attractive; after all, constitutional provisions are supposed to mean something, and judges are supposed to be guided by somewhat objective sources rather than personal preferences however much those preferences unavoidably play some role.[160] To the extent that originalism can guide and constrain courts in deciding when background limitations apply, originalism helps solve the obvious indeterminacy problem posed by such a vague concept as "background limitations."[161]

Of course, as many critics have argued, originalism's promise of determinacy is overstated, perhaps wildly.[162] An originalist argument often can be constructed for completely opposite conclusions.[163] In part, this lack of determinacy reflects the fact that the historical evidence of principles and legal practices in 1789 or 1868 is often

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158. *See id.* at 29 (explaining the Court picks and chooses the impositions on property that it tolerates).

159. *See id.* at 1 ("The Court has effectively constructed an escape room, a gratuitously convoluted analytic environment, that allows it to crack down on disfavored property regulations while giving a free pass to favored ones such as zoning."); Huq, *supra* note 12, at 234 ("*Cedar Point*'s vindication of property rights hence comes at the paradoxical cost of dramatically increasing the space for decisions unguided by law by one group of officials in the judiciary.").

160. *See* Colby, *supra* note 155, at 714 (explaining that originalism arose out of a desire to "purge the personal values of judges").

161. *See* McGinnis & Rappaport, *supra* note 155, at 918 ("[O]riginalism offers clearer rules to constrain judges.").

162. *See* Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 464 (2016) ("[A] fundamental problem with much originalist work is its insistence on discerning single correct definitions for constitutional provisions, even though many provisions' meanings were deeply contested at the time of the founding. New originalists assume that a single original meaning can be isolated for each constitutional provision, even as they acknowledge that some of those meanings are too thin to resolve all constitutional questions."); Colby, *supra* note 155, at 714 (arguing that originalist legal scholars themselves in practice have given up on originalism's "pretense of a power to constrain judges to a meaningful degree"); Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL. 809, 826 (1997) (discussing the critique that "conservatives were advocating a 'facile historicism' that was impossible to apply due to the ambiguities inherent in the historical record").

163. *See* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 246 (2009) ("[T]he proliferation of competing models of originalism suggests that . . . [t]he very notion of originalism itself has become indeterminate."); *id.* at 264 ("[O]riginalists generally are in agreement only on certain very broad precepts . . . "); *see id.* ("[T]he core principles upon which originalists agree are broad enough that one can fashion from them a stunning variety of constitutional theories.").

murky and inconsistent, and, in part, this lack of determinacy reflects differences among judges as to what extent (if any) they are willing to read new societal values, realities, and scientific understandings into principles established before 1789 or 1868.[164] Since cases simply do not, and indeed cannot, arise in the exact same circumstances as 1789 or 1868, some updating is inevitable, although how much and in what respects remains highly contested in originalist discourse.[165]

This general point is also true when using an originalist approach to determine whether a proffered background limitation on property rights should be deemed valid. Sometimes, there is conflicting historical evidence regarding the balance between public and private rights before 1868, and conflicting views regarding how that evidence should be interpreted in light of social values and scientific facts that postdate 1868.[166]

For all its potential problems, an originalist approach does provide a starting point and a focus for background limitations analysis. And (as discussed) while there is inherent indeterminacy to an originalist approach, some background limitation claims will be easier to defend than others on originalist grounds.[167] This point can be illustrated in

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164. *See id.* at 248 ("[I]t is nearly impossible to ascertain a single collective intent of a large group of individuals, each of whom may have had different intentions."); *id.* at 257 ("[B]ecause the Constitution is so textually vague and open-ended," judges can "choose between many plausible original meanings, at varying levels of generality.").

165. Even Justice Scalia in *Lucas* implicitly concedes as much. On the one hand, Justice Scalia's opinion emphasizes the fixedness of nuisance law as a background principle, and, hence, its merits as a check on legislative overreaching. On the other hand, his opinion approvingly cites a Restatement provision that calls for scientific updating as part of nuisance law. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031 (1992) ("[C]hanged circumstances or new knowledge may make what was previously permissible no longer so." (citing RESTATEMENT (SECOND) OF TORTS § 827, cmt. g (Am. L. Inst. 1977))).

166. In the case of background limitations, there is the additional problem that the state courts and state legislatures have the power to limit or constrain the reach of pre-1868 public rights. The Fifth and Fourteenth Amendments of the U.S. Constitution (let alone the state constitutions) do not preclude judicial or legislative "givings"—that is, the giving of what were previously public rights to private parties in the form of expanded property rights. *See* Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 551 (2001) (noting that government "givings" of property rights are "importan[t] and ubiquit[ous]" but "there is no 'Givings Clause.'"). Since property law is largely understood as the creation of state law, and state courts and legislatures create state law, an originalist approach to background limitations cannot stop at 1868. Even when the pre-1868 evidence strongly supports the recognition of a background limitation, post-1868 state courts and legislatures clearly can negate that limitation.

167. *See supra* text accompanying notes 162–66.

terms of three much-discussed takings debates: (1) the constitutionality of regulation (or other law) that provides public access to privately-owned dry beach areas; (2) regulation that restricts landlords or mortgagees/lenders from removing tenants or borrowers/mortgagors who are in default, including during times of economic and/or public health turmoil; and (3) restrictions on wildlife habitat destruction on private land.[168]

As discussed below, it is easier to make out an originalist case for a background limitation on private rights over private dry beach areas than it is to make out an originalist case for limitations on the destruction of wildlife habitat on private land or to evict tenants who are in violation with their rent obligations under their leases.[169] From an originalist perspective, there is also arguably more purchase for a background limitation in the wildlife habitat context than in the eviction context.

1. Dry beach access

Beaches—waterfront generally—have long been a touchpoint in the public-private conflict over property rights.[170] And that is true now more than ever as beachfront land becomes more economically valuable, inequalities grow, and populations increase. There is also a greater demand for public access to and use of beaches and greater resistance by private owners who want as much exclusivity as they can get for land they bought at great expense.[171]

Even before *Cedar*, government-mandated, regular public access over "private" beaches seemed to fall within the per se physical takings rules as easements, even if no background limitation exceptions applied, because mandated public access is comparable to the condemnation of a public easement.[172] *Cedar* heightens the threat of takings liability in the beachfront/waterfront context, by strongly

168. *See infra* Sections II.A.1–3.

169. *See infra* Sections II.A.1–3.

170. *See* Josh Eagle, *On the Legal Life-History of Beaches*, 2023 U. ILL. L. REV. 225, 230 (2023) (tracing the tension back to the medieval period).

171. *See id.* at 235 (explaining that conflict arises when "owner[s] and the public respectively assign high value to different and incompatible uses of the beach").

172. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841–42 (1987) (suggesting that a beach access requirement as a condition for a building permit is tantamount to condemnation of an easement).

suggesting that even government mandates for sporadic public access fall with the per se physical takings rule.[173]

Proximity to water, however, adds a distinctive historical dimension to debates about public access.[174] Some waters in the United States, including the oceans and great lakes, have an unavoidably, inalterably public dimension in the law of many states. At the same time, private ownership of land adjacent to such waters has long been allowed and protected.[175] In particular, the wet sand, and thus some access to the wet sand and the water itself, has generally been understood to be in the public domain.[176] In the contemporary era, the debate turns on how much access to wet sand the public is afforded, and, most controversially, whether the public's rights include actual use of the dry sand for recreation.[177]

In the American courts' historical account, the public trust conception originated in Rome, was incorporated into English law, and was then brought to the American colonies and later to the States.[178] The courts have often quoted this passage from the Roman

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173. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074 (2021) (stating that "a physical appropriation is a taking whether it is permanent or temporary").

174. *See* David A. Dana & Nadav Shoked, *Property's Edges*, 60 B.C. L. REV. 753, 812 (2019) (discussing the history of public access).

175. Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 49 (N.J. 1972) (recognizing the longstanding tradition of private dry-sand ownership).

176. *See* Kathryn Loncarich, *Nature's Law: The Evolutionary Origin of Property Rights*, 35 PACE L. REV. 580, 639–40 (2014) (explaining the expansion of wet sand into the public domain). There is extensive academic literature regarding the public trust doctrine in American law. *See, e.g.*, Dana & Shoked, *supra* note 174, at 822 (recognizing edges of property lines "can help legal institutions address the myriad controversies over the private-public divide"); Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in a Changing Climate*, 30 STAN. ENV'T L.J. 51, 95–98 (2011) (comparing the public trust doctrine in different states); Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 713 (1986) (explaining the academic and judicial discussion of what types of property should be public); Patrick Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13, 14 (1976) (discussing the history of the public trust doctrine).

177. *See* Loncarich, *supra* note 176, at 639–40 (explaining the expansion of beach access for recreational activities).

178. *See* Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762, 763–65 (1970) (Roman law regarding public trust is "the original foundation from which the common law developed" in England); Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 220–23 (1980) (discussing the

legal commentator Justinian: "the following things are by natural law common to all—the air, running water, the sea, and consequently the sea-shore. No one therefore is forbidden access to the sea-shore . . . ."[179] In an 1892 case involving Illinois law, a case that was close enough in time to the key originalist date of 1868 to presumptively reflect legal understandings in 1868, the U.S. Supreme Court strongly endorsed this history-based background limitation on the privatization and private control of waterfront property:

> It is a title held in trust for the people of the [s]tate that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties . . . . That trust . . . requires the government of the [s]tate to preserve such waters for the use of the public . . . . So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the [s]tate.[180]

States have taken different positions as to what this public-trust claim on private land actually means in practice, differing as to what counts as public trust assets or resources and what rights, if any, are accorded to the public over such resources.[181] Notably, the New Jersey courts have adopted an expansive view of public trust, allowing not just public access to private beachfront for use of the ocean, but also recreational use of the dry sand, so long as the use is reasonably balanced against private owners' rights.[182] While the New Jersey courts have been open about the fact that public trust access historically did not include access for recreation, they also have maintained that their holdings are simply an application of a historical limitation on private rights to current

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development of public trust in several American states and the origins of this doctrine in English common law and Roman jurisprudence); Blake Hudson, *The Public and Wildlife Trust Doctrines and the Untold Story of the* Lucas *Remand*, 34 COLUM. J. ENV'T L. 99, 105 (2009) ("These doctrines are deeply rooted in American notions of property ownership and land use.").

179. JUSTINIAN, INSTITUTES bk. II, tit. I, pt. 1 (J.B. Moyle transl., 5th ed. 1913).

180. Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 452–54 (1892).

181. *See infra* text accompanying notes 182–95.

182. *See* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984) (articulating this balancing test and emphasizing that property rights are always relative); *see also* Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 124 (N.J. 2005) (affirming *Matthews* and expanding the scope of public trust access to beachfronts).

societal realities.[183] The New Jersey courts have limited the reach of public trust rights to areas that were subject to some kind of public access claim even in the nineteenth century, and they have adhered to (what they view) as a historical balancing principle always inherent in public trust doctrine—namely, that the needs and interests of affected private owners must be balanced against the needs and interest of the public.[184] Thus, while some self-professed originalists criticize the New Jersey approach to public trust in strong terms,[185] that approach can be understood as an articulation of a background limitation on private property rights that has an originalist rationale and explanation.[186]

A similar point can be made about the Oregon courts' deployment of the doctrine of custom to allow public access to private beaches. In 1969, in *State ex rel. Thornton v. Hay*,[187] the Oregon Supreme Court held that the public has a right to access and use dry sand beaches in Oregon.[188] A 1967 Oregon statute provided as much, but the plaintiff landowners argued that that statute was a taking.[189] The *Thornton* court rooted its analysis in Oregon history: "The dry-sand area in Oregon has been enjoyed by the general public as a recreational adjunct of the wet-sand or foreshore area since the beginning of the state's political history."[190] The court invoked the doctrine of custom, rooted in English law and, hence, part of the background of both the Oregon Constitution and the Fourteenth Amendment of the U.S.

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183. *Matthews*, 471 A.2d at 363 ("In order to exercise these rights guaranteed by the public trust doctrine, the public must have access to municipally-owned dry sand areas as well as the foreshore.").

184. *Id.* at 365 ("[T]he particular circumstances must be considered and examined before arriving at a solution that will accommodate the public's right and the private interests involved."); *see also Raleigh*, 879 A.2d at 121 (endorsing "case-by-case consideration" to determine "the appropriate level of accommodation").

185. *See, e.g.*, Kristin A. Scaduto, Note, *The Erosion of Private Property Rights after* Raleigh Avenue Beach Association v. Atlantis Beach Club, 51 VILL. L. REV. 459, 498 (2006) (denouncing "[t]he abuse of the public trust doctrine" by the New Jersey courts); James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENV'T L. & POL'Y F. 1, 2 (2007) ("American public trust law . . . is founded on a New Jersey decision that misunderstood the Roman and English history and contradicted the contemporary law and practice of that state.").

186. *See supra* text accompanying notes 178–84.

187. 462 P.2d 671 (Or. 1969).

188. *Id.* at 678.

189. *Id.* at 672–73 (appealing a decree preventing them from constructing on a dry sand area); OR. REV. STAT. § 390.610 (1967).

190. *Thornton*, 462 P.2d at 673.

Constitution.[191] According to the *Thornton* court, all the historical requirements of custom—including (but not limited to) that the use be longstanding and uninterrupted—were met with respect to the Oregon dry beach areas.[192] Critics of *Thornton* argue that, at least in English law, custom was deployed as a rationale for public access only for particular localities based on particular histories.[193] But the Oregon Supreme Court addressed that point by positing that there was long and interrupted use of dry sand throughout Oregon and not only in the Cannon Beach area owned by the plaintiffs.[194] The larger point is that, in *Thornton* as in *Matthews*, a plausible, if contestable, originalist explanation was offered for a background limitation.[195]

2. Eviction restrictions

The disputes over eviction moratoria provide a contrast to the beachfront example, as originalism simply cannot ground a plausible argument for lengthy eviction moratoria.[196] Some such restrictions on eviction are "permanent" in landlord-tenant law: for example, tenants who have complained about conditions cannot be evicted even if they go into default or their lease ends.[197] However, most measures are tied to particular economic crises, such as a housing shortage following a war, an agricultural economy crisis, or a widespread financial crisis built on lax mortgage underwriting and speculation in mortgage-

191. *Id.* at 676–78; *see* Green, *supra* note 154, at 542–43 (explaining that under the English common law, "[the] judge's role was to look to custom in order to discern the law that already existed").

192. *Thornton*, 462 P.2d at 677–78.

193. *See* David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1383, 1421 (1996) [hereinafter Bederman, *The Curious Resurrection of Custom*] (discussing how highly localized customs were used in the development of English common law regarding public trust, and arguing that the rationale in *Thornton* "radically transformed the doctrine of localized community practices into a surrogate for the common law of property itself"); *see also* David J. Bederman, *The Bederman Lecture on Law and Jurisprudence: Public Law & Custom*, 61 EMORY L.J. 949, 952 (2012) (offering a similar critique of *Thornton* and its progeny).

194. *Thornton*, 462 P.2d at 677.

195. *See supra* notes 181–94 and accompanying text.

196. *See infra* note 202 and accompanying text.

197. *See, e.g.*, 765 ILL. COMP. STAT. ANN. 720/1 (West 2024) (providing that landlords cannot refuse to renew a lease on retaliatory grounds); N.Y. REAL PROP. LAW § 223-b (McKinney 2019) (same).

backed securities.[198] A wide range of restrictions on eviction and foreclosure have been justified as public health measures during the recent COVID-19 pandemic.[199]

Prior to *Cedar*, these sorts of cases involving the eviction of tenants, borrowers in default, or those otherwise without contractual rights to remain were not treated as physical takings but rather were evaluated under the regulatory takings framework of *Penn Central* or earlier cases with a similar approach.[200] Viewed in terms of the *Penn Central* framework, these restrictions on eviction should easily pass muster as non-compensable government actions: the restrictions impose an economic burden on the landlords/owners but do not deprive all value from their investment, they serve a compelling public objective, and they apply broadly, rather than singling out a few owners.[201] Moreover, as the Supreme Court held in *Yee v. City of Escondido*,[202]

198. *See, e.g.*, David A. Dana, *The Foreclosure Crisis and the Antifragmentation Principle in State Property Law*, 77 U. CHI. L. REV. 97, 100–01 (2010) [hereinafter Dana, *Foreclosure Crisis*] (explaining that moratoria on foreclosures were passed by some states during the Great Depression, a nationwide agricultural crisis in the 1980s, and the 2007-2008 financial crisis); Robert M. Lawless, Note, *The American Response to Farm Crises: Procedural Debtor Relief*, 1988 U. ILL. L. REV. 1037, 1055 (1988) (explaining that some states passed moratoriums on the enforcement of farm debt during the agricultural crisis of the 1980s).

199. *See, e.g.*, *Public Housing Agencies*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/coronavirus/public_housing_agencies [https://perma.cc/2JYT-EP26] *(*"The CDC Order is a temporary eviction moratorium to protect public health and prevent further spread of COVID-19."); *Governor Hochul Signs New Moratorium on COVID-related Residential and Commercial Evictions into Law, Effective Through January 15, 2022*, N.Y. STATE GOVERNOR (Sept. 2, 2021), https://www.governor.ny.gov/news/governor-hochul-signs-new-moratorium-covid-related-residential-and-commercial-evictions-law [https://perma.cc/H88K-LEH2] (discussing both economic and public health justifications for New York's moratorium).

200. *See* Meredith Bradshaw, Note, *Going, Going, Gone: Takings Clause Challenges to the CDC's Eviction Moratorium*, 56 GA. L. REV. 457, 481, 484 (2021) (discussing the *Penn Central* analysis for regulatory takings).

201. *See id.* at 481–92 (explaining that the *Penn Central* analysis does not support characterizing eviction restrictions as takings because landowners can "recover the property's economic value" after a moratorium, moratoriums do not make it impractical for an owner to operate their building as a whole, "decreased property value alone [is] not . . . sufficient to establish that a taking occurred," and moratoriums promote the common good).

202. 503 U.S. 519 (1992).

landlords take on obligations when they voluntarily choose to bring tenants onto their property.[203]

But those cases precede *Cedar*. To the extent that laws require a property owner to allow a tenant or borrower to physically remain on their property, they generally do not require them to remain permanently—eviction and foreclosure moratoria are always time-limited, and the presumption against retaliatory eviction does not last forever.[204] Most rent control ordinances were originally justified as responses to exceptional, not permanent, market conditions, and they do leave some "outs" that allow for eviction in any case.[205] Thus, prior to *Cedar*, these sorts of limits on evictions constituted, at most, temporary physical occupations by the government (as physically embodied in the tenant/borrower) of private property, and, under *Loretto*, non-permanent physical occupations did not constitute per se physical takings.[206] *Cedar* strongly suggests that these sort of eviction restrictions, while temporary, qualify as per se physical takings—that is, unless there is a background limitation on the landlord's or lender's eviction rights.[207]

From an original perspective, it is very difficult to find a background limitation that would make it constitutional for governments to

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203. *See id.* at 527–28 (emphasizing that "Petitioners voluntarily rented their land to mobile home owners," and that "[a]t least on the face of the regulatory scheme, neither the city nor the State compels petitioners, once they have rented their property to tenants, to continue doing so").

204. *See, e.g.*, CAL. CIV. CODE § 1942.5(a) (West 2021) (stating that California creates a presumption of retaliation lasting 180 days after a tenant complaint).

205. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 9, § 2524.4 (2023) (explaining the circumstances under which a landlord can evict a tenant in a rent-stabilized building in New York City).

206. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) (applying a per se approach only to "a permanent physical occupation of property").

207. A recent Eighth Circuit decision demonstrates *Cedar*'s potential to upend landlord-tenant law and eviction moratoria as a legal tool. *See* Heights Apartments, LLC v. Walz, 30 F.4th 720, 733 (8th Cir. 2022) (holding that the property owner had sufficiently alleged that the Governor's Executive Orders limiting evictions during the COVID-19 epidemic "[gave] rise to a plausible *per se* physical takings claim under *Cedar Point Nursery*"); *see also* Karl E. Geier, *Keep Out and Stay Out: The* Cedar Point *Decision and the Landowner's* Sine Qua Non *Right to Exclude Others (Maybe Sometimes Even a Government Official)*, MILLER & STARR REAL ESTATE NEWSALERT (Miller Starr Regalia, Cal.), Sep. 2021, at 10 (noting that "[e]viction moratoria such as those adopted during the COVID-19 pandemic, forcing private owners to allow continued occupancy without payment of rent for a prolonged period of time, also could fall to a 'physical taking' analysis under *Cedar Point*," and "just cause eviction statutes and some forms of rent control regulation might face renewed scrutiny" as well).

prevent the eviction of tenants or foreclosure of borrowers in default. While public access to the beachfront has clear historical roots, if perhaps not in the exact form the *Matthews* court recognized, there is no generally acknowledged pre-1789 or pre-1868 history of limits on eviction property rights beyond what the lease or other contracts provided.[208] There is no Justinian, or for that matter, Blackstone to quote to support a background limitation on rights to evict from private property.[209]

In the early twentieth century, in *Block v. Hirsh*,[210] the Supreme Court upheld a statutory restriction on eviction beyond what a lease provided; the Court subsequently upheld a statutory delay in foreclosure in *Blaisdell*.[211] In both instances, there were unusual, compelling circumstances that justified the statutes—in *Block*, an urban housing shortage as a result of the end of World War I, and, in *Blaisdell*, the Great Depression.[212] Neither statute at issue purported to be permanent.[213]

For our purposes, a key point is that the Supreme Court, in both cases, avoided originalism—indeed, the Court avoided historical sources altogether.[214] In *Block*, the Court simply held that the statutory restriction on eviction without first providing statutorily-required notice was a reasonable exercise of the police power in a time of

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208. *See* Dana, *Foreclosure Crisis*, *supra* note 198, at 100–01 (explaining the history of moratoriums as responses to economic crisis in the United States in the last century).

209. *See* Deveney, *supra* note 176, at 13, 23 (explaining that the seashore is in the public trust, but the banks on the land are privately held); Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021) (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1766)) (explaining the right to exclude is a historically "treasured" right expressed by Blackstone's conclusion that individuals have "sole and despotic dominion" over their property).

210. *See* 256 U.S. 135, 153–54 (1921) (upholding the constitutionality of a rent control act that conferred on tenants the right under some circumstances to continue their occupancy "notwithstanding the expiration of [the lease] term . . . so long as [the tenant] pays the rent and performs the conditions as fixed by the lease").

211. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 447 (1934) (upholding an extension on the time defaulting mortgagors may remain on their properties and redeem them).

212. *See* Dana, *Foreclosure Crisis*, *supra* note 198, at 100–01.

213. *See* 1933 Minn. Laws 514–22 (this statute, referenced in *Blaisdell*, states that the rent control act "shall remain in effect only during the continuance of the emergency and in no event beyond May 1, 1935"); The Food Control and the District of Columbia Rents Act, ch. 80, tit. II, § 122, 41 Stat. 297 (1919) (this statute, referenced in *Block*, states that "this title shall be considered temporary legislation, and . . . shall terminate on the expiration of two years from the date of the passage of this Act").

214. *See infra* text accompanying notes 215–17.

exigency.[215] And, in *Blaisdell*, the Court also justified the statutory intervention as a reasonable response to an economic crisis, and not as something rooted in any particular, original constitutional understanding or even precedents, even though it had struck down arguably analogous laws in the nineteenth century.[216] Indeed, Justice Sutherland in dissent denounced the majority as contrary to the Constitution, "when framed and adopted."[217]

In other words, *Block* and *Blaisdell* turn on what is the permissible imposition on property rights, not on what are or are not the property rights of landlords or lenders/mortgagees. While *Block* and *Blaisdell* provide some precedent for the idea that federal takings doctrine should not make state governments liable for eviction prohibitions or similar measures enacted in response to economic emergencies or crises, the decisions do not in any way suggest that there is a background limitation in any state's law whereby the owner of real property or mortgages lacks the right to evict or foreclose.[218]

There is one pre-1799/pre-1868 common law principle that might be stretched to justify some eviction moratoria, but the stretching needed would be considerable, especially if called upon to include the kinds of moratoria that were adopted during the COVID-19 pandemic.[219] "Necessity," which Justice Roberts lists as a possible background limitation in *Cedar*, is a very old common law principle that excuses from liability trespass and related property damage committed in the service of saving human life or preventing other property loss where there is no other alternative.[220] The 1821 case of

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215. *Block*, 256 U.S. at 155–56 (stating that "a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation").

216. *Blaisdell*, 290 U.S. at 432–34, 444 (citing various cases from the nineteenth century and holding that "[a]n emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the State to protect the vital interests of the community").

217. *Id.* at 449 (Sutherland, J., dissenting).

218. *See id.* at 444 (majority opinion) (explaining that certain restrictions on property rights exist due to an emergency); *Block*, 256 U.S. at 156 (holding that "public exigency" justifies restricting property rights).

219. *See infra* text accompanying notes 220–32.

220. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2079 (2021) ("These background limitations also encompass traditional common law privileges to access private property. One such privilege allowed individuals to enter property in the event of public or private necessity."); *see also* John Alan Cohan, *Private and Public Necessity and the Violation of Property Rights*, 83 N.D. L. REV. 651, 654 (2007) (examining a variety

Bowditch v. Boston,[221] in which the Supreme Court held that a Boston ordinance did not impose liability on the City for property damage committed in the course of containing a fire, is an early decision that could be read as consistent with this necessity principle as a background limitation on property rights.[222]

However, although the parameters and theoretical justifications for the public necessity exception to takings liability are certainly contestable to some degree,[223] this much is clear: the doctrine, historically, refers to necessity that is time-sensitive, where there is simply no time for government or others to devise a plausible alternative way to meet the felt necessity.[224] If necessity as a limitation on private property is unbound from those constraints, then it is very difficult to know what the outer bounds of the limitation could possibly be, both in terms of the kinds of private properties that would be covered and in the kinds of government actions that would fall under the necessity background limitation.

Time-limited eviction moratoria at the beginning of the COVID-19 pandemic might fall within the scope of common law necessity, at least until the government had time to set up and implement programs to compensate landlords for keeping tenants in default in place and to determine and mitigate the public health implications of evictions

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of situations in which trespass was justified on the basis of necessity and stating that "English and American courts have long recognized necessity as a common law principle, even in the absence of statutory law on the subject").

221. 101 U.S. 16 (1879).

222. *See id.* at 18 (relying on the principle that "[a]t the common law[,] every one had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner").

223. *See* Brian Angelo Lee, *Emergency Takings*, 114 MICH. L. REV. 391, 410–11 (2015) (exploring the emergency rationale and arguing that justifications given for the emergency rationale do not "plausibly support exempting the government from paying compensation," and arguing for partial compensation in emergency situations).

224. *See* Jeremy Patashnik, Note, *The Trolley Problem of Climate Change: Should Governments Face Takings Liability if Adaptive Strategies Cause Property Damage?*, 119 COLUM. L. REV. 1273, 1283 (2019) (explaining how the necessity defense to liability arose in emergency situations such police chases, and fires); *see also* TrinCo Inv. Co. v. United States, 722 F.3d 1375, 1378–80 (Fed. Cir. 2013) (affirming that actual time-pressure is a key aspect of the necessity defense); Brewer v. State, 341 P.3d 1107, 1118 (Alaska 2014) (stating that the necessity defense only applies if there is an "'imminent danger and an actual emergency giving rise to actual necessity'").

where payment was not feasible.[225] But COVID-19 justified (or other future-pandemic-related) moratoria where the moratoria continue for years might be very difficult to square with even an imaginative version of necessity as an originalist principle.[226] And moratoria and restrictions on eviction that are not directly tied to a contagious disease or other imminent threat to public health would seem even further from an originalist conception of necessity.[227]

Similarly, the decision in *Cedar*, although problematic on many levels, is almost certainly correct from a narrow originalist perspective on one point: originalism cannot readily ground a background principle that private employers' right to exclude is limited by unions' right to organize on site.[228] Labor unions certainly existed and mattered long before 1868, but their legal rights post-date the Fourteenth Amendment: the U.S. Department of Labor was not created until 1913, and it was the Clayton Antitrust Act of 1914[229] that allowed employees to strike and boycott their employers and perhaps implicitly recognized a right to organize.[230] One could argue that the originalist conception of "necessity" could support a right to enter private property to organize a union, but not persuasively: necessity, again, implies an imminent threat to life or property.[231] It is thus very difficult to see how an originalist conception of necessity could honestly encompass access for union organizing, unless "necessity" is read to be co-extensive with contemporary understandings of the police power, in which case the necessity background limitation would swallow the Takings Clause altogether—which presumably is not what

225. *See* Charles Kausen, *Taking One for the Team: COVID-19 Eviction Moratoria as Regulatory Takings*, 59 SAN DIEGO L. REV. 345, 372–73 (2022) (discussing whether COVID-19 is a valid interest in public health to justify necessity).

226. *See* Treanor, *supra* note 67, at 866 (discussing necessity as applied by the Supreme Court in seizure situations).

227. *Id.*

228. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2080 (2021) (Kavanaugh, J., concurring).

229. Clayton Antitrust Act of 1914, Pub. L. No. 63-212, § 20, 38 Stat. 730, 738 (1914).

230. The right of labor unions to strike was strengthened in the wake of the Great Depression. *See* William E. Forbath, *The Distributive Constitution and Workers' Rights*, 72 OHIO ST. L.J. 1115, 1129 (2011) (explaining that with the Norris-LaGuardia and Wagner Acts of 1932 and 1935, "Congress outlawed the federal antistrike decree and inscribed into federal law the constitutional freedoms labor claimed: to organize, engage in concerted action, and bargain collectively").

231. John Alan Cohan, *Private and Public Necessity and the Violation of Property Rights*, 83 N.D. L. REV. 651, 654 (2007).

Justice Roberts or the other Justices invoking the concept of background limitations intended or would countenance.[232]

3. Habitat destruction and modification on private land by private owners

The originalism case for a wildlife-related background limitation is weaker than in the beachfront context, but arguably stronger than in the eviction context. There is an originalist case to be made for a public claim over wildlife, as discussed below. Indeed, a number of thoughtful academics have argued that history justifies treating wildlife conservation as a strong background principle limiting private property ownership over wildlife, the land, and other natural resources that wildlife needs to flourish.[233] In this account, there is a wildlife trust akin to the public trust that should allow the state to impose habitat

232. For example, Justice Roberts presumably would not be open to arguments that water rights should be modified without compensation on the basis of climate "necessity." For an argument that climate should be regarded as an emergency for purposes of one category of property law, water rights, see Robin Kundis Craig, *Adapting Water Law to Public Necessity: Reframing Climate Change Adaptation As Emergency Response and Preparedness*, 11 VT. J. ENV'T L. 709 (2010).

233. *See, e.g.*, Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 UTAH L. REV. 1437, 1478 (arguing that the public trust in wildlife should be more widely recognized in the United States); Patrick A. Parenteau, *Who's Taking What? Property Rights, Endangered Species, and the Constitution*, 6 FORDHAM ENV'T L. REV. 619, 634 (1995) (examining takings claims in the context of the Endangered Species Act); Oliver A. Houck, *Why Do We Protect Endangered Species, and What Does That Say About Whether Restrictions on Private Property to Protect Them Constitute "Takings"?*, 80 IOWA L. REV. 297, 321–26 (1994-95) (discussing validity of restrictions on land use to protect endangered species); Echeverria & Lurman, *supra* note 8, at 332 (arguing that "the public's traditional sovereign ownership rights in wildlife preclude takings claims based on laws protecting wildlife."); Hope M. Babcock, *Should* Lucas v. South Carolina Coastal Council *Protect Where the Wild Things Are? Of Beavers, Bob-O-Links, and Other Things that Go Bump in the Night*, 85 IOWA L. REV. 849, 858 (2000) ("Laws protecting wildlife challenge the notion of unrestricted dominion over private property."). For contrary views, see James Huffman, *Background Principles and the Rule of Law: Fifteen Years After Lucas*, 35 ECOLOGY L.Q. 1, 29 (2008), stating that uncompensated takings are not "consistent with a serious commitment to individual liberty and the rule of law"; Autumn T. Breeden, *"Raisins Are Not Oysters":* Horne *and the Improper Synthesis of the Public and Wildlife Trusts*, 6 ARIZ. J. ENV'T L. & POL'Y 534, 535–36 (2016), arguing that "[t]he use of the term public trust and application of its principles to wildlife are both improper and extend protections that infringe on the property rights of individuals, in turn harming wildlife species"; James Huffman, *The Limits of the Public Trust Doctrine: Does the Public Trust Doctrine Apply to Wildlife Conservation?*, PROP. ENV'T RES. CTR. (June 19, 2019), https://www.perc.org/2019/06/19/the-limits-of-the-public-trust-doctrine [https://perma.cc/6FMS-9B8S], asserting that applying the public trust doctrine to wildlife "would upset long-settled expectations, result[ing] in a massive taking of private property."

preservation and other conservation measures on private land without being deemed to have impinged upon private property rights.[234] But this account ignores the fact that public claims over wildlife on private land, until very recently, have been directed toward maintaining adequate stocks for hunting and fishing, rather than for wildlife conservation in itself.[235] Moreover, there is a dearth of precedent suggesting that private landowners have a background duty to maintain habitat for wildlife on the land they want to develop.[236] Thus, originalism alone does not unproblematically immunize conservation measures (including physical intrusions and inspections) from plausible takings challenges after *Cedar*.[237]

The history is complicated and varied. Roman law identified wild animals as common property, but only until the wild animal was captured or killed.[238] English law treated wildlife, and in particular game, as under the control of the Crown and (unlike Roman law) imposed restrictions on the private killing of game, although any obligations to preserve vegetation and other conditions for wildlife were limited to lands the Crown had not parceled out to the aristocracy.[239] Like Roman law, the pre-Colonial legal tradition recognized wildlife as becoming private property when captured, killed, or harvested; indeed, the Colonial approach to wildlife was

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234. *See* Blumm & Paulsen, *supra* note 233, at 1478 (arguing that the wildlife trust is already merged with the public trust under California law and in some other jurisdictions).

235. Luke Macaulay, *How States Shape Wildlife Conservation on Private Lands: A 50-State Analysis*, Prop. & Env't Res. Center (May 2023), https://www.perc.org/2023/06/26/how-states-shape-wildlife-conservation-on-private-lands [https://perma.cc/9R7C-MHH7].

236. *Id.*

237. *Id.*

238. *See* J. Inst. 2.1.12 ("Wild beasts, birds, fish and all animals, which live either in the sea, the air, or the earth, so soon as they are taken by anyone, immediately become by the law of nations the property of the captor; for natural reason gives to the first occupant that which had no previous owner.").

239. *See* MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW (3d ed. Praeger 1997), at 8–9 ("The lands that were not parcelled out became known as 'royal forests' in which the king alone had the right to hunt and in which private landowners were 'required to retain adequate vegetation for wildlife forage and cover.'"); Huffman, *Background Principles*, *supra* note 233, at 10 n.44 ("[P]ersuasive evidence suggests that in both Roman law and English common law wildlife was held by the public only in the sense that it was owned by no one (and therefore everyone) until it was reduced to possession. The capturer of wildlife acquired an exclusive proprietary interest without any reserved or superior interest in the state or public.").

largely laissez-faire, reflecting the abundance of game in the New World.[240] As populations grew and the demand for fish and game grew, states enacted restrictions on hunting and fishing, such as licensing and hunting season requirements.[241]

Relying on these state-law restrictions, the Supreme Court, in *Geer v. Connecticut*,[242] upheld a Connecticut statute that barred the hunting of out-of-season game for export to another state, employing language that emphasized the state as the owner of wildlife within state boundaries.[243] Although *Geer* post-dates the adoption of the Fourteenth Amendment, it could be viewed as almost contemporaneous evidence of a background principle of public ownership of wildlife at the time the Fourteenth Amendment was adopted.[244] But *Geer* was subsequently overruled by the Supreme Court in *Hughes v. Oklahoma*.[245] More important, nothing in *Geer* suggested that states have the right to enter private property for the protection of wildlife or to require private landowners to take measures to protect wildlife on their land so that wildlife are never hunted or otherwise harmed.[246] Nor are there court precedents from before or the time of *Geer* suggesting that landowners lack the property right to modify their land even when doing so threatens wildlife on their land.[247] Moreover, whereas the public trust doctrine allows public access to private land to access streams and other waters in some circumstances, no state "has yet recognized a public access right across private land based solely on the presence of terrestrial wildlife."[248] In challenging statutory and regulatory

240. *See* Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENV'T L. 673, 685 (2005) ("To the common settler, the United States at the dawn of the nineteenth century was a seemingly endless landmass with an equally infinite wealth of wildlife and other natural resources.").

241. Blumm & Paulsen, *supra* note 233, at 1457–60 (discussing nineteenth-century state legislation that regulated the harvest of wildlife, such as hunting and fishing).

242. 161 U.S. 519 (1896), *overruled by* Hughes v. Oklahoma, 441 U.S. 322 (1979).

243. *See Geer*, 161 U.S. at 528–29 (upholding states' sovereign ownership of wildlife).

244. *Id.* at 529.

245. 441 U.S. 322, 335 (1979) (overturning *Geer* for reason of staying consistent in analyzing Commerce Clause challenges).

246. *Geer*, 161 U.S. at 529–30.

247. Blake Hudson, *The Public and Wildlife Trust Doctrines and the Untold Story of the* Lucas *Remand*, 34 COLUM. J. ENV'T L. 99, 113–16 (2009).

248. *See* Reed Watson, *Public Wildlife on Private Land: Unifying the Split Estate to Enhance Trust Resources*, 23 DUKE ENV'T L. & POL'Y F. 291, 297 (2013) (comparing the differences between state law addressing water rights in private property and the lack thereof addressing wildlife).

restrictions designed to protect fish and wildlife, property owners have sometimes made takings claims, and in rejecting those claims, courts have sometimes referenced a long tradition of state interest in and control over wildlife.[249] But it is difficult to import much meaning to such statements, as the dismissal of the property owners' claims has never been based on such a tradition per se (whatever its provenance, parameters, and significance), but rather on other, unrelated grounds, such as on the limited economic or physical impact of the regulation on private landowners, the legitimate police power interest justifying wildlife regulation, or the fact that wild animals that commit property damage cannot be deemed agents of the government.[250]

In his dissent in *Cedar*, Justice Breyer seems to raise the question of whether the common law doctrine of necessity could be invoked as a background limitation to preserve wildlife habitat and, hence, the wildlife itself.[251] As in the eviction context, however, there is the temporal issue: emergency wildlife habitat protection can perhaps be defended based on necessity but longer restrictions would not inherently be a necessity, as the government in theory could purchase the habitat or (perhaps) take effective measures to mitigate the habitat loss.[252] And there is the additional originalist objection that it would not have been understood to be a necessity, prior to 1868, to preserve wildlife habitat as an end in itself, unrelated to maintaining a sustainable population for hunting and fishing.[253]

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249. *See* Echevveria & Lurman, *supra* note 8, at 357–65 (outlining the case law using public ownership of wildlife as a means to reject takings claims).

250. *See id.* at 344, 384 (acknowledging that the takings and other decisions in favor of the government were not squarely based on history or a background limitations rationale). For a leading example of such a case, see Sierra Club v. Dep't of Forestry & Fire Prot., 26 Cal. Rptr. 2d 338, 347–48 (Dist. Ct. App. 1993) (noting the long history of wildlife regulation but dismissing the takings claim on ripeness grounds).

251. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2089 (2021) (Breyer, J., dissenting) ("Do only those exceptions that existed in, say, 1789 count? Should courts apply those privileges as they existed at that time, when there were no union organizers? Or do we bring some exceptions (but not others) up to date, *e.g.*, a necessity exception for preserving animal habitats?").

252. *See* John Alan Cohan, *Private and Public Necessity and the Violation of Property Rights*, 83 N.D. L. REV. 651, 654 (2007) (summarizing how the necessity doctrine is grounded in a weighing of harms in the face of extreme circumstances).

253. *Geer* itself is evidence of this, as the opinion focuses on State court decisions that focus narrowly on the value of wildlife for hunting and fishing as the basis for the exercise of state regulation. *See* Geer v. Connecticut, 161 U.S. 519, 533 (1896) (quoting the Minnesota case of *State v. Rodman*, 58 Minn. 393 (1894) for the proposition that

In sum, an originalist approach has arguments both for and against it as a rationale for background limitations. While this approach often will not straightforwardly resolve the background limitations question, it does provide more support for a background limitation in some contexts (like beaches) than others (like eviction). This approach thus can provide limited guidance.

B. Overwhelming Consensus in the State (or Federal) Legal Culture

An alternative rationale for background limitations is that the limitation reflects an overwhelming consensus within the legal culture as to what is a valid limitation on the rights of private property.[254] Where there is such an overwhelming consensus, one could argue, private property owners' reasonable, objective expectations about their property rights should be limited by such a consensus. Where such a consensus arises after the relevant cut-off date for originalism (1789, 1868) but before current private property owners took title, property owners claiming rights counter to that consensus arguably are claiming rights they never objectively had good reason to think they owned.

One obvious advantage of the overwhelming cultural consensus rationale, like its counterpart "living constitutionalism" in constitutional jurisprudence, generally, is that it does not freeze cultural understandings of property.[255] The cultural consensus approach, therefore, does not force the continuing recognition of ideas about property that seem wildly outdated, perhaps even offensive. As an originalist matter, the government's seizure of an animal because it has been abused by its lawful owner presumably is a deprivation of the owner's property rights, inasmuch as states (with the exception of New York) did not meaningfully legislate regarding animal neglect until *after* 1868 when the Fourteenth Amendment was

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"[t]he preservation of such animals as are adapted to consumption as food or to any other useful purpose is a matter of public interest; and it is within the police power of the State . . . to that end [the State] may adopt any reasonable regulations, not only as to time and manner in which such game may be taken and killed, but also imposing limitations upon the right of property in such game after it has been reduced to possession . . . because he who takes or kills game had no previous right to property in it").

254. Driver, *supra* note 135, at 757.

255. On living constitutionalism and its appeal, see Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1743 (2007); David A. Strauss, *The Living Constitution*, U. CHI. (June 12, 2023, 1:34 PM), https://www.law.uchicago.edu/news/living-constitution [https://perma.cc/5HYK-CQSC]; Driver, *supra* note 135, at 755.

adopted.[256] But now almost all states have strict anti-abuse laws that allow temporary and permanent seizure under certain circumstances, and they are uncontroversial; indeed, seizure is sometimes available even in the absence of any charge of criminal neglect against the owner.[257] It is inconceivable that a pet owner could successfully challenge a seizure of an abused pet as a taking, *Cedar*'s per se rule notwithstanding. In the current cultural consensus, dogs (or other pets) are simply not the same thing as the raisins at issue in the *Horne* case (to which the Court applied a strict per se takings rule).[258]

An overwhelming cultural consensus approach, too, can help promote better judicial reasoning by eliminating the temptation judges reasonably might have to stretch originalist principles beyond recognition to reach pragmatically sensible results.[259] Consider, in this regard, Justice Scalia's comment in *Lucas* as to what would be included within the nuisance exception to the per se total-wipe-out rule:

> Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was

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256. *See* Margit Livingston, *Desecrating the Ark: Animal Abuse and the Law's Role in Prevention*, 87 IOWA L. REV. 1, 21 (2001) ("For most of recorded history, the law hardly concerned itself with the interests of animals qua animals . . . . [In] the twentieth century . . . [a]nimals came to be regarded as being worthy of some legal protection . . . ."). *See generally* David Favre & Vivien Tsang, *The Development of the Anti-Cruelty Laws During the 1800's*, 1993 DET. COLL. L. REV. 1 (1993) (discussing the development of legislation addressing animal cruelty).

257. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 821.022(a) (West 2003) (providing for civil forfeiture of animals alleged and then proved to have been abused); N.C. § 19A-2 (2014), available at https://www.ncleg.gov/enacted legislation/statutes/html/bychapter/chapter_19a.html (providing for a civil forfeiture remedy).

258. Horne v. Dep't of Agric., 576 U.S. 351 (2015). The Oregon Supreme Court's decision in *State v. Newcomb*, 375 P.3d 434 (Or. 2016), reflects this consensus. In that case, the Court held that the legal owner of a dog had no right to demand that a warrant be obtained first before blood samples were taken from his dog. State v. Newcomb, 375 P.3d 434, 446 (Or. 2016). The dog was being examined in part in order to determine if the owner had not adequately nourished his dog. *Id.* at 442. The Court explained that Oregon law did not regard property in a pet dog the same as other property; the dog owner's constitutional rights and limits on those rights had to be assessed in the context of an "evolving landscape of social and behavioral norms" regarding the status on animals such as dogs. *Id.* at 444.

259. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

> previously permissible under relevant property and nuisance principles.[260]

If the undefined term "relevant property and nuisance principles" is what was understood as of 1868, one could argue that prevention of great physical harm was an established principle even then.[261] But of course, in 1868, the whole idea of nuclear power (and hence harm from it) would have been incomprehensible. A more straightforward explanation of why nuclear power plants clearly can be shut down for a wide range of possible safety reasons is: whatever was understood or not in 1868, the cultural consensus now is, and has been for a long time, that nuclear power is incredibly dangerous, and that private property investments in nuclear power must be subject to sweeping, virtually unlimited, limitations.[262]

Of course, the key question about this overwhelming cultural consensus rationale, even if one accepts that it has some normative appeal, is: who gets to decide there is such a consensus in place such that the private property owner's rights should be regarded as limited? On what basis can a judge decide that the owner deserves no compensation because there is a consensus that the owner never had the right she claims was taken?

If it were simply up to the judge in a given case to decide what is the consensus in the culture, using solely her idiosyncratic sense of the culture, then we are back to Justice Scalia's argument for originalism and against non-originalist constitutional interpretation: that something is needed to discipline judges so that their decisions do not simply reflect personal preferences and ideology.[263] Conservatives presumably see the cultural consensus as having different (and perhaps fewer) background limitations than liberals, but absent some agreement as to what are valid sources of such a cultural consensus, there would be no way to meaningfully debate what are the range of plausible view(s) in a particular case.

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260. *Id.* at 1029–30.

261. *Id.* at 1030.

262. *See, e.g.*, *US Nuclear Power Policy*, WORLD NUCLEAR ASSOC. (Dec. 12, 2023), https://world-nuclear.org/information-library/country-profiles/countries-t-z/usa-nuclear-power-policy.aspx [https://perma.cc/KM9H-FVRN], ("[T]he government remains more involved in commercial nuclear power than in any other industry in the USA . . . . The US government . . . is the main source of funding for advanced reactor and fuel cycle research. It also promises to provide incentives for building new plants through loan guarantees and tax credits . . . US domestic energy policy is also closely linked to foreign, trade and defence policy . . . .").

263. *Lucas*, 505 U.S. at 1029 (1992).

There is, however, a reasonable argument that some post-1789 or post-1868 sources of law are much more tenable sources of cultural consensus than are other legal sources.[264] If that is true, then a judge's decision about background limitations based on the consensus approach can be assessed as objectively well-grounded or not so well-grounded.[265]

Here, Eskridge's and Ferejohn's concept of "Super Statutes" may be useful.[266] In their conception, such statutes warrant special deference from the courts as they have attained almost constitutional status based on their normative power in the legal culture.[267] Eskridge and Ferejohn identify certain criteria for such statutes: they articulate a powerful normative principle, they are the subject of meaningful debate as part of their adoption, and they withstand post-enactment questioning and challenges over time.[268] Eskridge and Ferejohn focused on federal statutes, but the same reasoning could be applied to state statutes that satisfy their criteria. Although Eskridge and Ferejohn do not address "Super Statutes" in terms of whether they reflect a cultural consensus that would support background limitations on private property rights, their argument and reasoning suggest that Super Statutes could do just that.[269]

Another helpful concept in this context is "Super-Precedents," which have been described as court precedents that foundationally affect society, have been widely and long relied upon, and hold up

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264. Driver, *supra* note 135, at 758–60.

265. *Id.*

266. *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215 (2001) (defining a "Super Statute" as one that "successfully penetrate[s] public normative and institutional culture in a deep way").

267. *Id.* at 1216.

268. *Id.* at 1230–31.

269. State constitutional provisions and amendments adopted after the originalist cutoff date—1868—also might be thought to reflect a consensus in the legal culture. Such constitutional amendments, like Super Statutes, may announce a principle and shape the public normative discourse; they may require a more elaborate process with broader public engagement for passage than do ordinary statutes; and, when they remain in place after years despite challenges, they may show an entrenched consensus in the legal culture. Justice Brennan arguably was suggesting as much in his dissent in *Nollan*, where he cited the California constitution as one of the grounds for concluding that the Nollans took title subject to access limitations. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 857 (1987) (Brennan, J., dissenting) (citing Cal. Const., art. X, § 4) (stating that "the State Constitution explicitly states that no one possessing the 'frontage' of any 'navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose'").

against political and legal challenges.[270] The concept of Super-Precedents has been deployed to argue against the overturning of certain precedents even when new judges and justices disagree with the original reasoning of such precedents; in other words, Super-Precedents are to be afforded a heightened stare decisis presumption.[271] While the term Super-Precedents has been applied only to federal constitutional law precedents, there is no conceptual reason that it cannot encompass state property law court precedents that articulate a major principle, withstand controversy over time, and become relied upon within the state legal culture.[272] Nor is there any reason why such Super-Precedents might not be deployed as evidence of deep consensus in the legal culture.[273]

This analysis suggests that, in deciding whether a background limitation can be recognized on the basis of a consensus in legal culture, the courts should focus on federal and state statutes that have the characteristics of Super Statutes, as well as federal and state precedents that have the characteristics of Super-Precedents. Presumably, a combination of such statutes and precedents would provide the best support for a consensus in favor of recognition of a background limitation.[274] Similarly, the absence of both a relevant Super Statute or Super-Precedent would argue against recognition of a consensus.

This approach, to be sure, is subject to objections. For one thing, what counts as a Super Statute or Super-Precedent is at least somewhat subjective.[275] Second, sometimes, even in the absence of statutory or

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270. *See* Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1205 (2006) (noting that "[t]he notion of super precedent has something in common with 'super-statutes'").

271. *Id.* at 1207 ("Super precedent marks the point at which the institutional values of stability, consistency, institutional and social reliance, and predictability in constitutional law become compelling, enduring, and fixed. Super precedent reflects, in short, what may be sacred in American constitutional law."); *see also* Michael Sinclair, *Precedent, Super-precedent*, 14 GEO. MASON L. REV. 363, 363–64 (2007) ("[Super-Precedents are] so effective in defining the requirements of the law that [they] prevent[] legal disputes from arising in the first place, or, if they do arise, induce[] them to be settled without litigation.").

272. Gerhardt, *supra* note 270, at 1205.

273. Sinclair, *supra* note 271, at 364.

274. *Id.*

275. Indeed, several of the Justices who formed the *Dobbs* majority perhaps changed their mind on whether *Roe* is a Super-Precedent, as they had previously indicated that they agreed that *Roe* warranted that status. Warren Fiske, *PolitiFact VA: Supreme Court*

precedential support, there may be a strong argument that a consensus exists in support of a background limitation.[276] Consider, again, the seizure of abused household pets.[277] In that context, it is not clear one can point to any particular statute or precedents in almost any state as establishing a background limitation, but a whole array of statutes, statutory amendments, regulations, practices, and, above all, popular attitudes support recognition of that limitation.[278]

Nonetheless, the cultural consensus approach may seem more robust than an originalist approach in important settings involving the public/private property divide. With regard to beach access and use, for example, cultural consensus as a rationale may provide a stronger rationale for public access to and use of dry sand.[279] Consider, again, public access to dry beaches in Oregon. As noted, Oregon passed a statute in 1967 guaranteeing public access to dry sand, but it was the 1969 *Thornton* decision that announced a customary right to access dry beach areas.[280] Although subsequent appellate Oregon decisions have clarified that *Thornton* only applies to dry sand beaches abutting the ocean (as did the beach immediately at issue in the *Thornton* case itself), they have uniformly re-affirmed *Thornton*'s embrace of custom as a basis for public access to dry sand.[281] *Thornton*, in effect, can be considered a Super-Precedent—a precedent that announced a broad principle and that has become entrenched in the legal culture and broadly relied upon through repeated reconsideration and affirmation.[282]

Justices Acknowledged Roe as Precedent, but with Qualifications, VPM (May 5, 2022, 10:41 AM), https://www.vpm.org/news/2022-05-05/politifact-va-supreme-court-justices-acknowledged-roe-as-precedent-but-with [https://perma.cc/VZ8S-FEY5].

276. Livingston, *supra* note 256, at 7.

277. *See id.* at 38 (stating that states have enacted legislation to remedy animal abuse, such as seizure).

278. *See id.* at 38–40 (discussing differences between state legislation in remedying animal abuse).

279. Bederman, *The Curious Resurrection of Custom*, *supra* note 193, at 1376–77.

280. State *ex rel.* Thornton v. Hay, 462 P.2d 671, 676–77 (Or. 1969) ("[T]he dry-sand area . . . has been used by the public . . . as long as the land has been inhabited.").

281. *See, e.g.*, State Highway Comm'n v. Fultz, 491 P.2d 1171, 1172 (Or. 1971) (en banc) (reaffirming *Thornton*); McDonald v. Halvorson, 780 P.2d 714, 714–15 (Or. 1989) (en banc) (using the rule established in *Thornton*); Stevens v. City of Cannon Beach, 854 P.2d 449, 451 (Or. 1993) (en banc) (applying and upholding the rule in *Thornton*).

282. Sinclair, *supra* note 271, at 365.

Justice Scalia's dissent from the denial of certiorari in *Stevens v. City of Cannon Beach*[283]—an Oregon decision squarely affirming *Thornton*'s continuing validity—illustrates how an originalist and a consensus approach may differ.[284] In his dissent, Justice Scalia strongly suggested that a 1994 Oregon decision again affirming *Thornton* might have effected a taking.[285] Justice Scalia sketched two arguments.[286] The first argument was based on originalism: that the deployment of Blackstone as a source in *Thornton* was cursory and perhaps unfounded.[287] Second, Justice Scalia argued that the Oregon courts had not consistently applied and followed *Thornton*—a claim that, in my view, reflects an incorrect, unnuanced reading of the Oregon case law.[288] But for our purposes, the interesting point about Justice Scalia's second argument is that it implicitly relied upon the consensus rationale for a background limitation, a rationale that requires that the legal culture consistently embrace the background limitation.[289] This second rationale can support a background limitation to a taking, even when, as Justice Scalia suggested was true in *Thornton*, an originalism approach is unpersuasive.[290]

In the eviction moratorium context, the consensus argument, like the originalism argument, is not obviously persuasive. There have been moratoria tied to particular emergencies or crises, but none of the relevant statutes or precedents related to eviction moratoria purport to announce a broad normative principle that the right to evict is contingent on tenants being able to find adequate, decent housing.[291] The implied warranty of habitability and other basic tenant rights have become entrenched in the legal culture, and with them, time-restricted limits on landlords' right to evict in retaliation for tenants exercising

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283. 854 P.2d at 451, *cert. denied*, 510 U.S. 1207 (1994).

284. *See id.* at 454–55 (discussing differences between analyses based on customary use and degree of harm); *see also* Stevens v. City of Cannon Beach, 510 U.S. 1207, 1211 (1994) (Scalia, J., dissenting from denial of certiorari).

285. *Stevens*, 510 U.S. at 1211

286. *Id.* at 1212.

287. *Id.* at 1211.

288. *Id.* at 1212.

289. *See id.* (stating that "if it cannot fairly be said that an Oregon doctrine of custom deprived . . . property owners of their rights to exclude . . . then the decision now before us has effected an uncompensated taking").

290. *See id.* at 1208–09 (discussing the Supreme Court of Oregon's rationale for using the doctrine of custom in their analysis).

291. David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389, 391–92 (2011).

those rights.[292] By contrast, the COVID-19-related restrictions on eviction have been "largely unprecedented."[293] Perhaps over time, restrictions like these will be understood to reflect a consensus that contagious disease outbreaks justify moratoria without compensation, but, right now, there appears to be very little consensus about the legal and public policy response to COVID-19 or pandemics generally.[294]

In the wildlife habitat modification context, the consensus approach provides more support for a background limitation, at least as to endangered species. The Endangered Species Act (ESA),[295] enacted in 1973, has some of the features of a Super Statute, as Eskridge and Ferejohn themselves acknowledge.[296] The statute proclaims a large normative principle, it was enacted after substantial debate, and it has continued to be debated,[297] yet has not been repealed, and its fundamental normative principle remains broadly accepted.[298] Even Justice Scalia, in the leading recent ESA precedent, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,[299] appeared to accept the

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292. On the by now long history of the warranty of habitability, *see* Donald E. Campbell, *Forty (Plus) Years After the Revolution: Observations on the Implied Warranty of Habitability*, 35 U. ARK. LITTLE ROCK L. REV. 793, 794 (2013); Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145, 153–62 (2020); Super, *supra* note 291, at 393.

293. Emily A. Benfer, Robert Koehler, Alyx Mark, Valerie Nazzaro, Anne Kat Alexander, Peter Hepburn, et al., *COVID-19 Housing Policy: State and Federal Eviction Moratoria and Supportive Measures in the United States During the Pandemic*, 33 HOUS. POL'Y DEBATE 1390, 1391 (2023).

294. Indeed, the Supreme Court almost invalidated a CDC-prompted federal eviction moratorium, with four Justices voting to invalidate it and Justice Kavanaugh reluctantly agreeing to uphold it solely as a transition measure that would continue only for a few more weeks. *See* Ala. Ass'n of Realtors v. Health & Hum. Servs., 141 S. Ct. 2485, 2488 (2021) (Kavanaugh, J., concurring) ("[B]ecause the CDC planned to end the moratorium in only a few weeks . . . the balance of equities justif[y] leaving the stay in place."). *See generally* Kausen, *supra* note 225 (discussing the legal challenges to the moratoria).

295. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973).

296. Eskridge & Ferejohn, *supra* note 266, at 1242–43.

297. For example, in 2017 alone, there were five bills introduced in the U.S. House of Representatives that would modify, reform, or otherwise amend the ESA. *See ESA Reform Legislation*, OFF. OF CONG. & LEGIS. AFFS. (July 19, 2017), https://www.doi.gov/ocl/esa-reform-legislation [https://perma.cc/76FT-Q47W].

298. *See* Jeremy Bruskotter, *Most Americans Support Endangered Species Act Despite Increasing Efforts to Curtail It*, OHIO ST. U. (July 19, 2018), https://news.osu.edu/most-americans-support-endangered-species-act-despite-increasing-efforts-to-curtail-it [https://perma.cc/Y8H7-S77G] ("Roughly four out of five Americans support the act, and only one in 10 oppose it, found a survey of 1,287 Americans.").

299. 515 U.S. 687, 735 (1995) (Scalia, J., dissenting).

fundamental legitimacy of the Act's objective.[300] Moreover, states have adopted and long maintained mirror state endangered species statutes.[301] Thus, one could argue, anyone buying property that is not already fully developed in 2023 objectively should know that we have a legal culture in which there is a consensus in favor of some endangered species preservation limitation on their property rights.[302]

At the same time, it remains true that the ESA with respect to private land is controversial, and that as a result of that ongoing controversy, regulators have sought in various ways to introduce flexibility into the Act's prohibitions and to temper its economic impacts (as well as enhance its ecological benefits), most notably through habitat conservation plans.[303] At a minimum, however, this much is true: when one combines the originalist case for state "ownership" of wildlife with the consensus case for an ESA constraint on private property rights, it seems easier to defend background limitations on private property rights—including on habitat modification and destruction—with respect to endangered wildlife than it does with respect to non-endangered wildlife.

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300. *See id.* (describing the ESA as a "carefully considered piece of legislation that forbids all persons to hunt or harm endangered animals").

301. *See generally State Protections for Endangered Species*, NAT'L CAUCUS ENV'T LEGISLATORS BLOG (Sept. 30, 2020), https://www.ncelenviro.org/articles/state-protections-for-endangered-species [https://perma.cc/AE7C-K6EP] (describing how forty-six states have a state endangered species statute that tracks the ESA).

302. *See* Houck, *supra* note 233, at 299 (exploring the argument that the ESA provides the basis for a *Lucas*-style background limitation, but also noting that there is broader acceptance of conventional pollution regulation than regulation to prevent destruction of species habitat).

303. *See* Alejandro E. Camacho, *Visionary But Flawed Program Needs to Evolve*, 33 ENV'T FORUM 50, 50 (May/June 2016) (the Habitat Conservation Plan is a flawed program that often "merely [establishes] bilateral agreements authorizing the take of important habitat and species . . . [a] successful HCP program must ensure sufficient resources and incentives for regulators and applicants to promote meaningful participation, monitoring, and adaptive management, including the integration of interested parties in information generation and implementation"); Lindell Marsh, *The Flapping of Butterfly Wings—36 Years Later*, 33 ENV'T FORUM 52, 52 (May/June 2016) ("Today, there are some 700 HCPs completed or in process, covering millions of acres.") However, HCPs need more collaboration and more buy-in from institutional players to be viable for the future. *Habitat Conservation Plans*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/service/habitat-conservation-plans [https://perma.cc/B3SC-ASYK] ("A Habitat Conservation Plan (HCP) is a planning document designed to accommodate economic development to the extent possible by authorizing the limited and unintentional take of listed species when it occurs incidental to otherwise lawful activities.").

This consensus approach arguably has at least one adherent among the conservative majority on the Supreme Court: Justice Kavanaugh's concurrence in *Cedar* seems to be a kind of endorsement of this consensus approach to background limitations.[304] In his concurrence, Justice Kavanaugh agreed that the California regulation assuring union organizer access to the strawberry farm effected a taking, but suggested that the majority should have relied on the Supreme Court's 1956 decision in *NLRB v. Babcock & Wilcox Co.*[305]—arguably a Super-Precedent, given its durability and reaffirmance over time, which was based on arguably a Super Statute, the National Labor Relations Act.[306] Justice Kavanaugh described *Babcock* as creating a limitation on private property rights when union organizers "needed" access, as when the employees live on company property and union organizers have no other reasonable means of reaching the employees.[307] For Kavanaugh, the problem with the California regulation was that it mandated access absent the showing of need established as the benchmark in *Babcock*.[308] For Justice Roberts, perhaps implicitly rejecting a consensus approach, *Babcock* and what he acknowledged as its claimed "balancing [of] property and organizational rights" was simply irrelevant.[309] But Roberts' majority opinion, as already discussed, is so cryptic it certainly does not preclude a later opinion that would, as this Article urges, explicitly consider and embrace a consensus rationale for background limitations.

C. Specific, Actual Notice

A third possible rationale for a background limitations principle is that the private property owners had specific notice—specific enough to be reasonably presumed to be actual notice—that the government had claimed the right to use or restrict the use of their property in

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304. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2080–81 (2021) (Kavanaugh, J., concurring).

305. 351 U.S. 105 (1956); *Cedar Point*, 141 S. Ct. at 2080 (Kavanaugh, J., concurring).

306. 29 U.S.C. §§ 151–59.

307. *Cedar*, 141 S. Ct. at 2080 (Kavanaugh, J., concurring) (quoting *Babcock*, 351 U.S. at 112).

308. *Id.* ("*Babcock* strongly supports the growers' position in today's case because the California union access regulation intrudes on the growers' property rights far more than *Babcock* allows.").

309. *See id.* at 2077 (majority opinion) ("The Board contends that *Babcock's* approach of balancing property and organizational rights should guide our analysis here. But *Babcock* did not involve a takings claim.").

particular ways *before* they acquired title.[310] The Supreme Court has tied the background limitations idea to some kind of notice to landowners, but the two rationales we have explored so far—originalism and consensus—do not seem very well aimed at providing "notice," or anything like it, to property buyers in a sense the word "notice" is commonly understood.[311] Buyers of real estate often will be wholly unaware of pre-1789 or pre-1868 legal sources, and they may be similarly unaware of Super Statutes, Super-Precedents, and the like. Some legally sophisticated buyers—buyers represented by expert, proactive lawyers—may be attentive to originalist and consensus evidence that would support a background limitation before a purchase, but few buyers are sophisticated in that sense.[312] Further, even if, prior to a real estate closing, expert lawyers tried to assess applicable background limitations, they might not be able to reach any clear answer by reviewing originalist and consensus sources.[313]

Unlike originalist and consensus evidence, evidence of specific, actual notice regarding particular properties will tend to be incorporated in express terms into the documents provided directly to purchasers of certain categories of property under certain sets of circumstances.[314] Alternatively, such notice can be evinced by explicit, site-specific regulations on their face applicable to the kind of property that is being purchased.[315] Either way, this sort of evidence is tantamount to the government telling the buyer: pay attention, there is a background limitation on your title.

There is an affirmative case to be made that when an owner had specific, pre-acquisition notice, it is difficult for the owner to later

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310. *See, e.g.*, Severance v. Patterson, 370 S.W.3d 705, 740 (Tex. 2012) (Medina, J., dissenting) (arguing that the owner had been given notice of existing government easements in contracts related to her purchase of the properties).

311. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992) ("[O]ur 'takings' jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property.").

312. *See, e.g.*, *Severance*, 370 S.W.3d at 729 (asserting that a background limitation on private property in Texas would need to be grounded in custom from "time immemorial" and noting that demonstrating a custom of that nature is difficult).

313. *Id.*

314. Murr v. Wisconsin, 137 S. Ct. 1933, 1942 (2017) (explaining that the owners had knowledge of the existing zoning laws that restricted their use of the land before purchasing the property).

315. *Id.*

claim they were denied a property right they had purchased.[316] When the acquisition was for value, one might assume the market would have discounted the purchase price based on the notice, such that the buyer-then-owner, in effect, was compensated by means of a reduction in the purchase price due to the pre-acquisition restriction or requirement.[317] And, even if the market did not substantially discount the property because of a regulatory restriction or requirement, the purchaser still was free not to purchase.[318] Hence specific, presumptively actual notice arguably makes it "reasonable"—to quote Justice Kennedy in *Murr* regarding background limitations—for the buyer to believe there are limitations on its title.[319]

There are strong counterarguments, of course. As the Supreme Court in *Palazzolo* suggested, there could be property transactions where there was no price discount or acceptance on the part of the buyer to the restriction, but rather that the buyer, in effect, purchased the right to bring a post-acquisition takings claim.[320] And, of course, some property is gifted or inherited, not purchased for value.

One more general objection to the specific, actual notice approach is that, in theory, it could allow governments to erode property rights simply by fiat: if one is suspicious that governments will strategically act to avoid compensation requirements whenever possible, a specific,

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316. Hansen & Strahilevitz, *supra* note 84, at 466 (explaining how some courts have determined that a government regulation that existed at the time a buyer acquired property is a background principle and the Taking's Clause claim is no longer viable).

317. Richard A. Epstein, Comment, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1360 (1982) (arguing that a seller would need to accept a reduced purchase price to account for restrictions that limit the use and value of the land).

318. This is the essence of Richard Epstein's argument, in a different context of course, that people or entities that purchase a unit in a common interest community ("CIC") with knowledge of a CIC restriction buy with notice of the restriction and hence should be estopped from later seeking judicial relief from the restriction. *See id.* at 1368 ("[C]ontract terms shall be binding on . . . all . . . parties . . . who take land with record notice of the restrictions in question.").

319. *Murr*, 137 S. Ct. at 1945 ("The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved." (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring))).

320. Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001) (disavowing a rule that "would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation").

actual notice approach would seem to invite abuse.[321] To take this point to the extreme, in theory, a state government could enact a law requiring language in every deed stating that the rights under the deed were subject to future government regulation whenever needed without compensation, even if the regulation eliminated all market value.[322] Justice Roberts articulated this objection in a recent, unanimous takings opinion:

> [S]tate law cannot be the only source [of property rights]. Otherwise, a State could "sidestep the Takings Clause by disavowing traditional property interests" in assets it wishes to appropriate. "[T]he Takings Clause would be a dead letter if a state could simply exclude from its definition of property any interest that the state wished to take."[323]

Of course, in the United States context, there is no record of *any* government providing obviously objectionable, sweeping, actual notice of this sort. Rather, political constraints, if nothing else, prevent wild overclaiming on behalf of the public.[324] And, of course, governments must understand that specific, actual notice does not automatically and wholly preclude takings liability because that has never been the state of our takings law, either before or after *Cedar*.[325] It is reasonable to assume that usually, if not always, governments give specific, actual notice not to strategical takings—proof some government action or program—but rather, simply, to provide notice.

Another normative objection to using specific, actual notice as the rationale—or metric—for background limitations is that actual notice evidence will tend to be more asset-specific and hence case-specific than originalist or consensus evidence. Thus, while one might think that "background limitations" on property rights should be

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321. *Id.* (arguing against a per se rule where "the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable").

322. *See* Tyler v. Hennepin Cnty., 143 S. Ct. 1369, 1375 (2023) (suggesting that Minnesota law tried to circumvent the Taking's Clause to withhold property interest in a greater amount than that owed in unpaid taxes by the owner).

323. *Id.* (third alteration in original) (citations omitted) (first quoting Phillips v. Wash. Legal Found., 524 U.S. 156, 167 (1998); then quoting Hall v. Meisner, 51 F.4th 185, 190 (6th Cir. 2022)).

324. *See* Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 125, 130 (1992) (discussing the strong political disincentives against burdening property owners without compensating them).

325. *See Palazzolo*, 533 U.S. at 627 (explaining that notice itself cannot be a total shield from claims under the Takings Clause).

consistently recognized and applied, an actual notice approach invites inconsistent results involving similar kinds of government regulation and actions.[326]

Finally (in the list of possible objections), courts could disagree about exactly what facts satisfy specific, actual notice. In regard to eviction moratoria, consider something like a local license for operating as a landlord that states that, in the event of a declaration of a pandemic affecting the locality, eviction rights could be suspended by (for example) six months or a year.[327] Since such notice would be contingent on a number of variables—did a pandemic occur, what state and local authorities thought was needed in terms of eviction restrictions—one could argue that it would fall short of notice of anything more than the possibility of regulation (or, in the *Cedar* framework, the possibility of physical occupation).[328] But some courts might consider such a statement in a license tantamount to actual notice.[329] There would be similar questions about what constitutes notice in the habitat protection context—is it when the government designates a species as endangered that happens to inhabit an owner's land when the government designates that owner's land part of the "critical habitat" for the species, or only when the government specifically announces particular restrictions on the owner's use of its land?[330]

While there is arguably an inherent tension between originalist and consensus approaches to background limitations, there would seem to be no tension between the notice approach and either the originalist

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326. Inconsistency of a sort, however, is already endemic in takings law. For example, under the *Penn Central* framework, the same regulation could constitute a taking if the property owner invested specifically in the project barred by regulation by (for example) beginning construction, whereas the regulation would not constitute a taking when the property owner lacked any "investment-backed" expectations. On investment-backed expectations, see DANA & MERRILL, *supra* note 35, at 105.

327. Kausen, *supra* note 225, at 395 (addressing the likelihood of successful Takings Clause claims by landlords economically harmed by pandemic-era eviction moratoriums).

328. *See id.* at 367–69 (addressing eviction moratoriums in light of physical takings jurisprudence).

329. *See, e.g.*, Severance v. Patterson, 370 S.W.3d 705, 740 (Tex. 2012) (Medina, J., dissenting) (arguing that notice in statute and contract of the rolling nature of the easement provided sufficient notice to the owner that the easement was subject to change).

330. *See, e.g.*, *Critical Habitat*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/project/critical-habitat [https://perma.cc/EHD8-MESG] (describing the complicated listing and critical habitat designation process).

or consensus approach. In the beachfront context, an illustrative case is *Nies v. Town of Emerald Isle*.[331] Many experts believe that hard armoring is harmful to beach ecology and contributes to overall beach erosion, even if particular sea walls may protect nearby structures for a time.[332] Courts in states such as California, Oregon, and North Carolina have upheld restrictions on private owners' hard armoring against takings challenges, heavily relying on notice ideas.[333] In *Nies*, invoking an originalist (and less clearly, perhaps also consensus) conception of background limitations, the appellate court emphasized that no landowner in a beachfront area has a reasonable expectation against land loss from erosion, since land lost to erosion, as a matter of longstanding common law, is public land.[334] But the court also cited actual, site-specific notice as relevant, noting that express armoring restrictions were included in the development and building permits that were issued when the property was first built.[335]

III. IMPLICATIONS FOR COURTS AND LEGISLATURES OF THE THREE RATIONALES

This three-approach framework for addressing background principles—originalism, consensus, and notice—has distinctive implications for the U.S. Supreme Court, lower federal courts, state courts, legislatures, and reform advocates. Adoption of the framework

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331. 780 S.E.2d 187 (N.C. Ct. App. 2015) (analyzing a takings claim using both originalist ideas of background limitations and notice provided by permits).

332. *See, e.g.*, Molly L. Melius & Margaret R. Caldwell, *Managing Coastal Armoring and Climate Change Adaptation in the 21st Century*, STAN. L. SCH. ENV'T & NAT. RES. L. & POL'Y PROGRAM 3 (2015), https://law.stanford.edu/wp-content/uploads/2015/07/CalCoastArmor-FULL-REPORT-6.17.15.pdf [https://perma.cc/KY9S-VQRG]; Jessica Grannis, *Adaptation Tool Kit: Sea-Level Rise and Coastal Land Use: How Governments Can Use Land-Use Practices to Adapt to Sea-Level Rise*, GEO. CLIMATE CTR. (2011), https://www.georgetownclimate.org/files/report/Adaptation_Tool_Kit_SLR.pdf [https://perma.cc/84LU-Z2JJ].

333. *See* Lindstrom v. Cal. Coastal Comm'n, 252 Cal. Rptr. 3d 817, 841 (Ct. App. 2019); Stevens v. City of Cannon Beach, 854 P.2d 449, 456 (Or. 1993) (en banc) ("When plaintiffs took title to their land, they were on notice that exclusive use of the dry sand areas was not a part of the 'bundle of rights' that they acquired . . . ."); Shell Island Homeowners Ass'n v. Tomlinson, 517 S.E.2d 406, 416 (N.C. Ct. App. 1999) ("[B]ecause plaintiff's tract was subject to the challenged restrictions at the time the . . . hotel was constructed, there can be no claim of compensable taking . . . .").

334. *Nies*, 780 S.E.2d at 196 ("[P]ublic right of access to dry sand beaches in North Carolina is so firmly rooted in . . . custom . . . that it has become a part of the public consciousness.").

335. *Id.* at 200.

would allow for more constructive arguments and debates about the current public claim on private property. Adoption of the framework would also provide a roadmap for those who want to advocate for either a more expansive or a more constricted public claim on private property in positive law, including the federal and state law of takings.

A. The U.S. Supreme Court

As the ultimate arbiter of federal constitutional law, the Supreme Court is the most important institution for articulating federal takings law, including the background limitations component.[336] If the Court were to expressly acknowledge the three rationales for background limitations, that could prod it to explain which of these rationales "matters" in the background limitations inquiry, and how each one matters relative to the others.[337] The Court's express consideration of these rationales could help lower federal and state courts in deciding—and, above all, explaining—why a background limitation applies or does not apply.

It is, of course, possible that if the U.S. Supreme Court were to engage directly with the rationales for background limitations, they might be compelled to acknowledge that none of the rationales are normatively unproblematic.[338] None, as discussed, necessarily generates determinative answers. This could lead the Court to embrace an all-of-the-above approach, in which all three rationales are explicitly considered and weighed in reaching a kind of gestalt decision as to whether there is an applicable background limitation. Even an all-of-the-above approach would offer more precision than the non-explanation approach that the courts, including the Supreme Court, have offered so far.[339]

Alternatively, explicit analysis of the three rationales (and the problems with the rationales) could lead the Court to abandon the background limitations concept altogether as a doctrinal component

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336. *See* Dana, *Substantive Implications*, *supra* note 78, at 617 (arguing that federal courts have ultimate power over takings laws but that they should certify state law questions back to state supreme courts).

337. *See supra* notes 101–03 and accompanying text.

338. Hansen & Strahilevitz, *supra* note 84, at 442–43 (exploring how background limitations are grounded in historic understandings of property rights).

339. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1054–55 (1992) (Blackmun, J., dissenting) (describing how background principles are rooted in broad concepts and could and will be subjectively interpreted).

of takings law.[340] If that were to happen, there would be good reason for the Court—even its conservative majority—to retreat from its recent enhancement of per se takings liability: without the "wiggle room" provided by background limitations, per se takings rules might lose their appeal across the ideological spectrum on the Court.[341]

B. The Lower Federal Courts and State Courts

Of course, very few takings cases will ever reach the Supreme Court; it is the lower federal and state courts that decide, and will decide, virtually all takings cases.[342] For the lower federal courts, the three-rationale framework has implications for whether they choose to decide takings cases or instead channel those cases to the state courts.[343] In particular, if the consensus rationale is acknowledged as a valid (or, in particular, the most valid) basis for a background limitation, that would tend to argue for federal courts abstaining from cases in which the plaintiff alleges a per se federal taking.[344]

To understand why, we need to return to the Supreme Court's decision in *Knick*.[345] Before *Knick*, federal ripeness doctrine deprived federal courts of original jurisdiction in the vast majority of takings claims against state and local governments.[346] Overruling longstanding ripeness precedent, *Knick* held that federal courts had original jurisdiction over federal takings claims against states and localities, in the same way they had jurisdiction over other federal constitutional claims.[347] As a result, state courts now have no opportunity to rule upon whether there is a background limitation in state property law that

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340. *See* Fennell, *supra* note 8, at 60 (discussing the consequences of the Supreme Court's haphazard jurisprudence on Takings Clause issues and how it creates more questions than it answers about the limits of background principles).

341. As Fennell suggests, even conservatives on the Court have long embraced some kinds of intrusive land use regulation that essentially maintains the status quo wealth distribution, including zoning. *See id.* at 47–48.

342. *See* Dana, *Substantive Implications*, *supra* note 78, at 601 (explaining that the U.S. Supreme Court takes very few Takings Clause cases and thus these cases are most often determined by state and lower federal judges).

343. *See id.* at 616–17.

344. *Id.*

345. Knick v. Twp. of Scott, 139 S. Ct. 2162, 2167 (2019).

346. *See* Dana, *Substantive Implications*, *supra* note 78, at 595–96 (exploring pre-*Knick* precedent to demonstrate how impactful the *Knick*'s ruling may be on takings and state property law).

347. *See id.* at 595–97 (discussing *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985), and *Knick*'s explicit overruling of *Williamson*); *Knick*, 139 S. Ct. at 2167, 2170, 2179.

would obviate an otherwise per se takings claim—that is, except when the federal courts exercise their discretion to abstain.[348]

Federal courts, arguably, are about as well positioned as state courts to determine if the originalist and/or actual notice rationales for a background limitation would apply in a particular case, but state courts clearly would be in the best position to assess what is included or not in the state consensus legal culture.[349] State courts, after all, are definitely part of that consensus culture—certainly more so than federal courts.[350] And they should have an opportunity to prevent federal courts from misinterpreting state legal consensus.

Consistent with that view, Justice Scalia's majority opinion in *Lucas* did not decide whether a nuisance exception under South Carolina law applied to beachfront development, but rather remanded to the South Carolina Supreme Court.[351] In the same spirit, if consensus is acknowledged and accepted as a central part of the background limitation rationales, federal courts generally should abstain from hearing cases involving such claimed limitations and leave that to the state courts in the first instance, as was true before *Knick*.

If the consensus rationale is valid, then that also has implications for how state courts may want to write their opinions in cases that implicate public claims on private property under state law. An understanding that background limitations are (or could be) a function of state Super-Precedents, precedents that strongly articulate a normative principle in a way that invites debate and can gain special status if upheld over time, could motivate state courts to write their opinions broadly—even philosophically—about the public/private divide under state law and

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348. *See* Dana, *Substantive Implications*, *supra* note 78, at 617 (noting that *Knick* seems to continue to allow federal judges the discretion to determine whether to abstain from ruling on matters of state property law).

349. *See id.* at 601, 603–04 (explaining how federal courts may misunderstand substantive state law); *see also Knick*, 139 S. Ct. at 2187 (Kagan, J., dissenting) (citations omitted) (explaining that "a claim that a land-use regulation violates the Takings Clause usually turns on state-law issues . . . [A] court must typically decide whether, under state law, the plaintiff has a property interest in the thing regulated . . . Often those questions—how does pre-existing state law define the property right?; what interests does the law grant?; and conversely what interests does it deny?—are nuanced and complicated").

350. *See* Dana, *Substantive Implications*, *supra* note 78, at 593 (arguing that property law is highly localized and thus state court judges are best equipped to evaluate Takings Clause claims arising under state law).

351. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031 (1992).

how that divide fits with the facts of the particular case.[352] State courts have opportunities to do just that not only in the takings context, but also in any context that implicates the boundaries of private "property" under state law.[353]

C. State Legislatures and Legal Reform Advocates

If courts were to clearly articulate their rationales for background limitations and explain whether or to what degree they accepted each of the three rationales (originalism, consensus, notice) we have discussed, that would have two important implications for state legislatures. First, armed with a better understanding of what sources are relevant for the background limitations, a state legislature would feel more comfortable assessing when the state courts got it "wrong" and, in effect, overruling state precedents by statute. Some legislators may believe that the legislature should take a "conservative" posture regarding property law and leave property law largely to common law adjudication. But even such legislators may believe that they are protecting the legitimacy of state property law—not distorting it—by correcting a precedent that is inconsistent with the background limitations rationales the state courts themselves have explicitly endorsed.

The Texas Supreme Court's decision in *Severance v. Patterson*[354] and the Texas legislature's (as well as Texas regulators') response is a good example of the legislature and regulatory agencies correcting a mistake by a court regarding the public/private divide in state property law.[355] In 2005, Carol Severance purchased three properties on Galveston Island's West Beach.[356] Five months after her purchase,

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352. *See* Gerhardt, *supra* note 270, at 1205 (discussing how Super-Precedents are a manifestation of the values of consistency and predictability and are the kinds of judicial rulings upon which society as a whole relies). This effect could be as true for judges and courts that might want to shape the law in favor of constraining the public claim on private property as it is for those who might want to shape it in the opposite direction.

353. For example, state court decisions that implicate deprivations of property without due process of law under the U.S. Constitution and state constitutions provide an opportunity for state courts to explicate the boundaries of property interests under state law. *See, e.g.*, FLA. CONST. art. I, § 9 (referencing deprivation of property without due process); ILL. CONST. art. I, § 2 (same).

354. 370 S.W.3d 705 (Tex. 2012).

355. *See* Dana & Shoked, *supra* note 174, at 813 (discussing the *Severance* case and the Texas government's response to it).

356. *Severance*, 370 S.W.3d at 711.

Hurricane Rita struck and moved the line of vegetation landward (which, under Texas law, marks the public/private divide), such that the entirety of Severance's house is now seaward of the vegetation line.[357] The State of Texas claimed a portion of her property was located on a public beachfront easement, that the portion interfered with the public's use of the dry beach, and the structure on that portion needed to be removed.[358] And there was obvious justification: originalist, pre-1868 evidence, and consensus evidence in the form of an unbroken line of Texas case law, strongly suggested that when the sea rolled in and pushed the vegetation line landward, the public gained an easement over all the land seaward of the new vegetation line.[359] There was evidence of specific, actual notice, too: when Carol Severance bought the land at issue, she received a disclosure mandated by Texas's Open Beaches Law that explained "that the property may become located on a public beach due to natural processes such as shoreline erosion, and if that happened, the State could sue, seeking to forcibly remove any structures that come to be located on the public beach."[360]

Nonetheless, the majority opinion in *Severance* found that the intrusion on her property rights was so problematic that it required abundantly clear, unqualified, notice—notice "going back to 'time immemorial'"—which, almost by definition, was impossible.[361] The Texas legislature responded to the *Severance* decision by revising the Open Beaches Act[362] through House Bill 3459[363], which seems to give regulators greater latitude to determine where the vegetation line is in the wake of storm activity, which seems designed to allow regulators to, in effect, preserve public beaches that otherwise had been rendered

357. *Id.* at 715.

358. *Id.*

359. This case law history is well-explored in the vigorous dissents in *Severance*. *See id.* at 738–40 (Medina, J., dissenting) (describing the various ways in which this beach front property owner had notice of the rolling nature of the easement for public beach access); *id.* at 744–48 (Guzman, J., dissenting) (referencing a long history of balance in Texas between the rights of the public as easement holder and the rights of private beachfront landowners and emphasizing that allowing a rolling public easement would not eliminate the private owner's use of her land).

360. *Id.* at 720 (majority opinion); TEX. NAT. RES. CODE ANN. § 61.025 (West 2023).

361. *Severance*, 370 S.W.3d at 730.

362. TEX. NAT. RES. CODE ANN. §§ 61.011-61.026 (West 2023).

363. H.R. 3459, 83d Leg., Reg. Sess. (Tex. 2013).

private under the *Severance* decision.[364] So far, that statute has stood unchallenged.

State legislatures do not have to be limited to situations where they are *correcting* a state court's mistaken characterization of background limitations under state law. Rather, they can enact legislation that addresses background limitations questions not yet addressed by the courts, with the potential benefit that such legislation, if upheld by the courts, will itself inform judicial understandings of the public claim on private property under state law. Consider, for example, a counterfactual in which the California legislature, long before the *Cedar* decision, had enacted a workers' rights bill under the property section of the California code that provided that private employers who invite or require employees onto their private premises lack the right to deny reasonable access to visitors the workers need to see meet their personal, legal, health, and organizational rights, including the rights to select union representation. At least under a consensus rationale for background limitations, if such a statute had been enacted in (for example) 1990 and withstood any legal challenges for thirty years, then the U.S. Supreme Court in *Cedar*—again, at least under the consensus rationale approach—could not have so readily assumed there was no applicable background limitation in California law that supported the specific regulation requiring union organizer access onto the strawberry farms.[365]

Or consider an example from Illinois. Under Illinois public trust case law, it is unclear if the recreational use of non-navigable portions of otherwise navigable waters is a public right when the non-navigable area is encompassed within private land.[366] Under the clear law in a number of other states, the public has a right to recreational use of non-navigable portions of navigable waters that are located on private

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364. *See* TEX. NAT. RES. CODE ANN. § 61.001, .011, .016–.017, .0171, .0185 (West 2023); Megan McLaurin, *New Texas Open Beaches Act Amendment Explained*, SURFRIDER FOUND. (July 25, 2013), https://www.surfrider.org/coastal-blog/entry/new-texas-open-beaches-act-amendment-explained [https://perma.cc/B67C-U2L8] (explaining how the Texas statute, H.B. 3459, amends the Texas Open Beaches Act).

365. Indeed, the *Cedar* Court did not even acknowledge this possibility. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2075–76 (2021) (limiting its discussion of California property law to whether the access regulation is an interest equivalent to an easement under California law).

366. *See* Holm v. Kodat, 211 N.E.3d 310, 311 (Ill. 2022) (agreeing that Illinois common law does not grant "a riparian owner on a nonnavigable river or stream the right to use that waterway to cross the property of another riparian owner without that owner's permission").

land.[367] If the Illinois legislature enacted a law affirming public recreational rights even on non-navigable waters, and that statute remained in effect for some time, perhaps even after legal debates and challenges, then the statute could form the basis for a consensus argument that there is a background limitation under Illinois law on the private right to exclude the public from non-navigable waters when they are engaging in recreational use.[368]

CONCLUSION

The question of "background limitations" has taken on new relevance with the Supreme Court's turn to per se takings rules: once an imposition on an ostensible private right can automatically be deemed a taking, it becomes essential to know if the right in question truly is *purely* private or rather is subject to relevant background limitations serving the public interest.

This Article critiques the courts'—and especially the U.S. Supreme Court's—failure to explain how they have decided and will decide questions regarding background limitations on title. The Article develops three distinct (if in practice, somewhat overlapping) approaches to background limitations decisions—originalism, legal consensus, and notice. If the courts used these approaches to reach and explain their background limitations decisions, those decisions would be more transparent and more defensible. In addition, there is a federalism case for the framework proposed here, as embrace of these three approaches would justify more federal abstention in takings cases and would guide and empower state legislatures in their role in explicating and even in creating new background limitations. Of course, the courts cannot be expected to clearly demarcate the public/private divide in property law in a way that fits all cases and is logically unimpeachable. But they can do better, especially in the cabined doctrinal context of deciding whether a background limitation precludes takings liability.

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367. *See id.* at 321 (Neville, J., concurring) (citing the laws of Arkansas, California, Idaho, Minnesota, Mississippi, Ohio, Oregon, and Wisconsin).

368. The concurrence in *Holm* urges the Illinois legislature to do something to this effect. *See id.* at 321–22.