Missouri Law Review

Volume 88
Issue 1 *Winter 2023*

Article 9

Winter 2023

Temporary Access and Permanent Consequences: The Misapplication of Takings Jurisprudence to State Regulations That Benefit the Public Welfare

Maria Ceriotti

NOTE

Temporary Access and Permanent Consequences: The Misapplication of Takings Jurisprudence to State Regulations That Benefit the Public Welfare

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

Maria Ceriotti[*]

I. INTRODUCTION

In 1975, California enacted the Agricultural Labor Relations Act.[1] The Act, along with many regulations to aid in its enforcement, came after years of infighting between property owners and agriculture workers for fair pay and better treatment.[2] Deplorable conditions included hourly wages at $0.90/hour, inadequate working standards such as a lack of toilets and segregated housing, and poor treatment from the growers.[3] Cesar Chavez organized what is now the United Farm Workers labor organization, which helps agriculture workers across the country collectively bargain and secure their rights, fair pay, and adequate working conditions.[4]

In order to ensure agriculture employees were aware of their rights following the Agricultural Labor Relations Act, the state created the

---

[*]B.A., University of Missouri-Columbia, 2020; J.D. Candidate, University of Missouri School of Law, 2023. Associate Editor, *Missouri Law Review*; 2022–2023; Associate Member, *Missouri Law Review*, 2021–2022. Professor Don Seitz provided valuable insight into the development of this Note, and I am grateful for his contribution. I am also grateful to the *Missouri Law Review* staff for their help in the editing process of this Note.

[1] Erin M. Adams, *The Supreme Court struck down a key United Farm Workers win. The decision has some famous echoes.*, WASH. POST (Jul. 2, 2021, 7:45AM), https://www.washingtonpost.com/politics/2021/07/02/supreme-court-struck-down-key-united-farm-workers-win-decision-has-some-infamous-echoes/ [https://perma.cc/T86A-3M34].

[2] *UFW History*, UNITED FARM WORKERS, https://ufw.org/research/history/ufw-history/ [https://perma.cc/EUE9-3XT5] (last visited Apr. 16, 2022).

[3] *Id.*

[4] *Id.*

Agricultural Relations Board.[5] The Board developed a set of regulations that allowed labor organizations to enter the employer's property to solicit the employees to join the union, educate the workers on their rights, and give resources on how to communicate with labor personnel.[6] While the 1975 Act was a win for agriculture workers and labor organizations, the rate of union membership among agriculture employees today is around only one percent.[7] According to the former head of the United Farm Workers, the low membership is due to a lack of knowledge of the rights and provisions contained in the law, as well as employer intimidation and high worker turnover as the employees seek better work with less harsh conditions.[8] In *Cedar Point Nursery v. Hassid*, the Supreme Court of the United States held that the provision of the 1975 Act which allowed union members onto farm owners' land was an unconstitutional physical taking under the Fifth Amendment, prohibiting further implementation of this provision unless just compensation is paid to the landowner.[9] The *Cedar Point* holding is another obstacle to accomplishing a sustainable pro-union labor law and protecting agriculture workers specifically. However, the precedent set by the Court will impact more than just union workers. Other regulations put in place by state and local legislatures to protect vulnerable populations in similar ways may soon be called into question in the wake of *Cedar Point*.

The Court's misapplication of takings jurisprudence in *Cedar Point* serves as a win for admirers of strict individual property rights at the expense of the common good and general welfare of the citizenry. By implying that a "right to exclude" restriction is a physical appropriation of a property interest in land to another, the Court's decision will cause state and local governments to scramble to perform basic functions that their populations have come to rely upon for support and safety. In its most basic form, the Court has now divested the legislature of its ability to govern in the best interests of the people and appropriated to itself the judgment on legislative benefits under the cover of property rights.

---

[5] Cal. Lab. Code § 1141 (West 2020).

[6] Cal. Code Regs. tit. 8, § 20900 (West 2020).

[7] Gosia Wozniacka, *Less than 1 Percent of US Farmworkers Belong to a Union. Here's Why.*, CIVIL EATS (May 7, 2019), https://civileats.com/2019/05/07/less-than-1-percent-of-us-farmworkers-belong-to-a-union-heres-why/ [https://perma.cc/3VWL-D958]. These rates of membership have always been low, with its highest membership rate being around two percent in the 1970s. Melissa Montalvo & Nigel Duara, *In familiar refrain, United Farm Workers grapples with how to grow*, CAL MATTERS (Jan. 18, 2022), https://calmatters.org/projects/united-farm-workers-union/ [https://perma.cc/H2BV-UNM3].

[8] *Id.* ("For the most part, [workers] are not aware of the provisions, procedures, and rights contained in the law.").

[9] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2080 (2021).

Part II of this Note discusses the relevant factual and procedural background of *Cedar Point*. Part III briefly provides the legal history of the Takings Clause. Part IV examines both the majority and dissenting opinions in *Cedar Point*. And finally, Part V argues that, due to the Court's misguided interpretation of takings jurisprudence, state and local governments will be unduly hindered in their ability to create laws that aid in the promotion of the public welfare.

II. FACTS AND HOLDING

On an early morning in October 2015, members of United Farm Workers ("UFW") entered the property of Cedar Point Nursey ("Cedar Point") to inform Cedar Point employees of their rights.[10] Cedar Point is a strawberry grower in California and, at the time, employed roughly 100 full-time employees and 400 seasonal employees.[11] None of those employees lived on Cedar Point's property.[12] UFW is a farm workers' union founded by Cesar Chavez and others in the 1960s.[13] It is the largest farm workers' union in the United States, with the majority of its members working and living in California.[14] When UFW members entered Cedar Point's property, they entered the trim shed where workers were harvesting strawberry plants.[15] According to Cedar Point, UFW members came without notice, used bullhorns and other tactics to disturb the operations of the farm, and encouraged some of Cedar Point's workers to join in on their protest.[16]

Similarly, in July 2015, UFW members attempted to enter the property of Fowler Packing Company ("Fowler").[17] Fowler grows and ships grapes and citrus fruits.[18] It employed around 1,800–2,500 employees in its field operations and roughly 500 employees in its packing facility at the time.[19] Similar to Cedar Point, none of Fowler's employees lived on the farm's property.[20] Fowler blocked UFW's entry to the property.[21]

---

[10] *Id.* at 2069.

[11] *Id.*

[12] *Id.*

[13] *Our Vision*, UNITED FARM WORKERS, https://ufw.org/about-us/our-vision/ [https://perma.cc/LJ6M-Y8E5] (last visited Mar. 12, 2022).

[14] *Id.*

[15] *Cedar Point Nursery*, 141 S. Ct. at 2069–70.

[16] *Id.* at 2070.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

Both of these situations resulted in a claim involving a California regulation that allows labor organizations to enter an agriculture employer's property in order to solicit support for unionization.[22] The regulation serves as a practical response to the California Labor Relations Act of 1975, which gives agricultural employees the right to self-organize and makes it an unfair labor practice for the employer to interfere with that right.[23] Under the regulation, a labor organization may "take access" to meet and talk with agriculture employees subject to certain conditions.[24] These conditions include: (1) organizations may enter no more than four, thirty-day periods in a calendar year; (2) written notice must be provided to the Agricultural Labor Relations Board ("the Board"); (3) a copy of that notice must be served to the employer; and (4) the labor organization may enter up to only one hour before work, one hour during the lunch break, and one hour after work.[25] Additionally, the labor organizers cannot take part in conduct that disrupts the employer's operation.[26]

Cedar Point filed a charge before the Board against UFW for taking access to its property without giving notice as required by the regulation.[27] UFW responded with a charge of its own, claiming that Cedar Point had committed an unfair labor practice.[28] After Fowler prohibited UFW members from entering the property, UFW filed an additional unfair labor practice charge, but later withdrew the claim.[29] Under the belief that UFW would attempt to enter their land again, both growers filed suit in the federal district court to obtain declaratory and injunctive relief to prevent the Board from enforcing its regulation against them.[30] Cedar Point and Fowler both believed the regulation constituted a per se physical taking of their land—a violation of the Takings Clause of the Fifth Amendment of the United States Constitution.[31] Primarily, they argued that granting access was equivalent to granting an easement to the property without

[22] *Id.* at 2069; Cal. Code Regs., tit. 8, § 20900(e) (West 2020). An "unfair labor practice" in this regulation includes a list of actions that would interfere or restrain an employee from exercising her rights, joining a union to enforce her rights, or discriminating against an employee based on an assertion of her rights under the regulation. Cal. Lab. Code § 1153 (West 2020).

[23] *Cedar Point Nursery*, 141 S. Ct. at 2069; Cal. Lab. Code §§ 1152, 1153(a) (West 2020).

[24] *Cedar Point Nursery*, 141 S. Ct. at 2069; Cal. Code Regs., tit. 8, § 20900(e) (West 2020).

[25] Cal. Code Regs., tit. 8, § 20900(e)(1)(A), (B), (3)(A) (West 2020).

[26] Cal. Code Regs., tit. 8, § 20900(e)(4)(C) (West 2020).

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

[28] *Id.*

[29] *Id.* at 2070.

[30] *Id.*

[31] *Id.*

giving the growers just compensation as required under the Fifth and Fourteenth Amendments.[32]

The district court denied the preliminary injunction and granted the Board's motion to dismiss.[33] The district court found that the access regulation was not a physical per se taking because it did not grant access in a "permanent and continuous manner."[34] Instead, the court believed the challenge should have been analyzed under the *Penn Central* multifactor balancing test—which considers economic impact, extent of interference in investment-backed expectations, and the character of the government involvement in a regulatory taking—and concluded that the growers made no attempt to satisfy that test.[35]

The Court of Appeals for the Ninth Circuit affirmed.[36] The court identified three categories of takings: "regulations that impose permanent physical invasions, regulations that deprive an owner of all economically beneficial use of his property, and the remainder of regulatory actions."[37] The court further explained that the first two categories constituted a per se physical taking, but the third required analysis under the *Penn Central* test.[38] Because the access was not to the public at large and was not continuous or permanent, the court reasoned it did not fit into the first category.[39] Additionally, Cedar Point and Fowler did not make a claim that the regulation deprived them of all economically beneficial use of their land, so the alleged taking also did not fall under the second category.[40] Therefore, the Ninth Circuit found it was not a per se taking.[41] The Ninth Circuit did not rule on whether it was a regulatory taking under the *Penn Central* test because neither Cedar Point nor Fowler made a claim that the regulation was a taking under that test.[42] Cedar Point then petitioned the Supreme Court, which granted certiorari.[43]

The Supreme Court ultimately reversed the lower courts' holding.[44] While the Court agreed that a use restriction is to be analyzed under the balancing test of *Penn Central* to determine whether it is a taking, it disagreed that the regulation at issue was merely a use restriction.[45]

---

[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.* (citing Penn Central Trans. Co. v. New York City, 438 U.S. 104 (1978)).
[36] *Cedar Point Nursery*, 141 S. Ct. at 2070.
[37] *Id.* (citing Cedar Point Nursery v. Shiroma, 923 F.3d 524, 530–31 (2019)).
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] Cedar Point Nursery v. Shiroma, 923 F.3d 524, 536 (9th Cir. 2019).
[42] *Id.* at 533–34.
[43] *Cedar Point Nursery*, 141 S. Ct. at 2071.
[44] *Id.* at 2080.
[45] *Id.* at 2072.

Rather, the Court concluded that the regulation provided a physical appropriation of the property.[46] According to the Court, the regulation permitted a physical appropriation of an owner's right to exclude others from her property.[47] Under the Court's theory of takings law, UFW's conduct constituted a per se physical taking that required just compensation under the Fifth Amendment.[48]

III. LEGAL BACKGROUND

To fully appreciate the effect this decision has on the future of property rights and the government's ability to regulate the use of private property, an analysis of the following is imperative: (1) a history of categorical takings under the Fifth Amendment, and (2) the government's ability to regulate the use of land without violating the Takings Clause.

A. The Takings Clause & Per Se Physical Takings

The Fifth Amendment provides that private property shall not "be taken for public use, without just compensation."[49] The Court has interpreted this Amendment to apply to government actions that "go too far" in their regulation of the landowner's ability to use the land.[50] In two specific areas of regulation, the Court has applied per se rules which denounce regulations and designate them as a taking that requires just compensation.[51] First, in its most basic form, the Court has routinely interpreted that all permanent physical occupations of land require compensation.[52] Second, the Court has found a taking where a regulation deprives the land of all economic benefit.[53]

1. Permanent Physical Invasions

The Court has held that a regulation constitutes a taking and requires just compensation to the landowner where it permits a permanent physical

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] U.S. CONST. amend. V.

[50] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[51] In this content, "per se" takings are ones which by their very nature violate the Takings Clause, as opposed to later discussed regulatory takings which only violate the Takings Clause through an analysis of their effect on the landowner. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 322 (2002).

[52] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 423, 426 (1982).

[53] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).

invasion of the land.[54] In *Loretto v. Teleprompter Manhattan CATV Corp.*, a New York statute allowed for the installation of a cable box on a landlord's property for service to tenants.[55] The Court determined that such installation was a per se physical taking.[56] Specifically, the Court noted that the statute was intended to serve the public interest—here, the access to cable as a tenant in a rental building—which traditionally was within the government's police power to regulate.[57] However, the Court distinguished this case and held that the cable box was a *permanent* physical occupation of the land.[58] Because the statute did not provide the owner of the property with just compensation, it violated the Takings Clause.[59]

The permanent and physical requirement is met when the government takes a possessory interest in the land, usually in the form of an easement.[60] While such property interests do not require the owner of the easement to use it on a continuous or consistent basis, the Court has established that these types of takings are permanent in nature as to that specific part of the land.[61] In *United States v. Causby*, the Court concluded there was a taking where planes flew in the low airspace over a property.[62] The Court relied on the lower court's finding that the invasion was permanent in nature, as the government could make use of the airspace for flights "whenever it had occasion to do so," and ultimately determined that the use constituted an easement over the airspace of the property that required just compensation.[63] Similarly, in *Kaiser Aetna v. United States*, the Court found a per se physical taking where a regulation required a landowner to permit public access to a pond that had become a navigable water of the United States.[64] The *Kaiser* Court implied a permanent easement on part

[54] *See e.g.*, *Loretto*, 458 U.S. at 441; Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831–32 (1987).

[55] *Loretto*, 458 U.S. at 423.

[56] *Id.* at 422–24, 426.

[57] *See id.* at 425–26; *see also* Mugler v. Kansas, 123 U.S. 623 (1887).

[58] *Loretto*, 458 U.S. at 439.

[59] *Id.* at 441.

[60] *See e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 832 (1987); United States v. Causby, 328 U.S. 256, 261–62 (1946).

[61] RESTATEMENT (FIRST) OF PROPERTY § 507 (1944); *Kaiser Aetna*, 444 U.S. at 180; *Causby*, 328 U.S. at 261–62; *Nollan*, 483 U.S. at 832.

[62] *Causby*, 328 U.S. at 266.

[63] *Id.* at 267–68. However, it should be noted that the Court itself denied holding whether or not it was a permanent or temporary easement for purposes of determining the amount of the compensation only, since it determined the lower court did not base its opinion to that question in the material facts.

[64] *Kaiser Aetna*, 444 U.S. at 168, 180.

of the property for public use and held that the easement constituted a taking requiring just compensation.[65]

Finally, in *Nollan v. California Coastal Commission*, the Court found a physical taking where a family's permit to build a beach house included a condition that required a public easement for beach access.[66] Similar to *Kaiser*, the easement for public access as a condition to building a house on the property was a physical taking due to the permanent interest in the family's land that was taken by the condition.[67] Additionally, the desired access was based on the loss of view and the conditioned easement was not reasonably related to that issue as it granted physical access rather than a view easement.[68] In all of these cases, the Court established that the permanent physical access to land—either by the government itself as in *Causby* or through a grant to third parties as in *Kaiser* and *Nollan*—will itself usually constitute a per se physical taking that requires just compensation under the Fifth Amendment.[69]

2. Deprivation of All Economic Value

In addition to a permanent physical occupation, the Court has also recognized that a regulation which removes all the value of a property is a per se taking.[70] Deemed a "categorical taking," if a regulation "removes all economically beneficial use of the property," it is the functional equivalent of taking the property by physical occupation and requires just compensation.[71] This rule is known as the *Lucas* Rule. In *Lucas v. South Carolina Coastal Council*, the Court found that the state's action in barring the plaintiff from building a permanent habitable structure on his land was a physical taking because it denied him all "economically viable use of his land."[72] The beachfront property bought prior to the government regulation was good only for use as a single-family home and was otherwise undevelopable.[73] Thus, the Court described this situation as the "functional equivalent" of those cases involving permanent physical occupations, citing *Loretto* and *Kaiser* in its opinion.[74]

---

[65] *Id.* at 180.

[66] *Nollan*, 483 U.S. at 828.

[67] *Id.* at 831–32.

[68] *Id.* at 838.

[69] *Kaiser Aetna*, 444 U.S. at 180; United States v. Causby, 328 U.S. 256, 267 (1946); *Nollan*, 483 U.S. at 832 (1987).

[70] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

[71] *Id.*; Andrew S. Gold, *The Diminishing Equivalence Between Regulatory Takings and Physical Takings*, 107 DICK. L. REV. 571, 573 (2003).

[72] *Lucas*, 505 U.S. at 1003–04 (1992).

[73] *Id.* at 1009.

[74] *Id.* at 1014–15.

These two tests—permanent physical occupations and the *Lucas* Rule—are the same first two categories applied by the Ninth Circuit in *Cedar Point*.[75] The third category of the *Cedar Point* framework encompasses takings that are not as easily identifiable because they are more regulatory in nature and do not fit into the first two categories.[76] Because many seek to *regulate use* rather than take property outright, the standard applied for the third category comes from a separate test—the *Penn Central* analysis.[77]

B. Penn Central *Takings*

Regulatory takings analyzed under *Penn Central* are different in nature from physical takings.[78] These regulatory takings are analyzed by courts as "essentially ad hoc factual inquiries" rather than the more straightforward application of per se rules of physical and categorical takings as described above.[79] When a regulation is enacted that seeks to regulate the use of land owned by a private individual, the regulation is deemed a taking only if it "goes too far."[80] This view, expressed by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, has become the backbone of regulatory takings jurisprudence.[81] In an attempt to explain its meaning and apply it on a case-by-case basis, the Court created a multifactor balancing test.[82] This test is applicable only when there is a regulation at issue that restricts the use of land and where the facts of a case do not lend themselves to the per se rules.[83]

Penn Central laid out the balancing test to determine when a regulatory restriction on use becomes so obstructive as to act like a taking of the property.[84] The *Penn Central* factors are: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation interferes with distinct investment-backed expectations; and (3)

---

[75] *See generally* David Crump, *Takings By Regulation: How Should Courts Weigh The Balancing Factors?*, 52 SANTA CLARA L. REV. 1, 6–10 (2012).

[76] *Id.* at 11.

[77] *Id.*; Penn Cent. Transp. Co. v. N.Y., 438 U.S. 104, 124–25 (1978).

[78] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 525 U.S. 302, 302–03 (2002).

[79] *Penn Central*, 438 U.S. at 124; *Tahoe-Sierra Preserv. Council, Inc*., 535 U.S. at 302–03.

[80] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[81] Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far*," 49 AM. U. L. REV. 181, 183–84 (1999).

[82] *Penn Central*, 438 U.S. at 124.

[83] Murr v. Wis., 137 S. Ct. 1933, 1943 (2017) (citing Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001)).

[84] *Penn Central*, 438 U.S. at 124.

the character of the government action.[85] In *Penn Central*, the Court applied these factors and determined that a state law which prohibited development of historic properties in various aspects did not constitute a "taking."[86] Rather, the Court held that the restrictions imposed were substantially related to the promotion of the general welfare and lacked a denial of all beneficial uses of the property.[87]

Moreover, although the *Penn Central* analysis was initially applied only to zoning restrictions or use regulations, the Court has extended the analysis to situations where there is *physical entry* onto some land that does not rise to the level of a per se physical taking.[88] In *PruneYard Shopping Center v. Robins*, for example, the Court held that a state regulation did not amount to a taking where it allowed the public to enter a shopping center to exercise free speech rights.[89] The landowner argued that its "right to exclude" was limited by the regulation, but the Court determined that the limitation could not constitute a taking without proof that it impacted the use or economic value of the property.[90] Allowing someone to exercise her state-protected rights of free expression and petition on the shopping center grounds was not an unconstitutional infringement of rights afforded by the Fifth Amendment.[91]

Finally, the Court had, until the present case, distinguished between permanent physical occupations and temporary ones.[92] Since *Loretto*, the Court has held that "temporary limitations on the right to exclude" are to be analyzed under a "more complex balancing process to determine whether they are a taking."[93] In doing so, the Court has recognized that *not every physical invasion* is a taking.[94] However, the Court has also noted that, in the context of land-use restrictions, a temporary restriction does not preclude a finding of a taking but is merely one factor in the overall analysis.[95] For example, the *Tahoe-Sierra* Court concluded that a moratorium, which was temporary in nature, was not a taking.[96] The Court

---

[85] *Id.*

[86] *Id.* at 138.

[87] *Id.* at 137–38.

[88] *See id.*; Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 78–79.

[89] *Id.* at 88.

[90] *Id.* at 82–83.

[91] *Id.* at 83–84 (distinguishing from *Kaiser* by demonstrating that here, there was nothing to show that the value or use of their property was being unreasonably impaired).

[92] Ark. Game & Fish Comm'n. v. United States, 568 U.S. 23, 36 (2012).

[93] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 423, 435 n.12 (1982).

[94] *Id.*

[95] Tahoe Sierra Preserv. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 337 (2002).

[96] *Id.* at 320–21.

implicitly reasoned that the state's purpose in limiting development of land in the region was based on reasonable public benefits.[97] Additionally, the state provided sufficient notice of the relevant time limitations to the effected landowners.[98] Thus, the Court implied that a restriction with a temporary nature should be examined under a factor analysis and does not constitute a per se physical taking at the outset.[99]

IV. INSTANT DECISION

In *Cedar Point*, the majority provided that the right to exclude serves as a defining factor in determining whether the regulation imposes a per se physical taking rather than one to be analyzed under the *Penn Central* factors.[100] According to the Court, a physical intrusion, coupled with a limitation of the right to exclude, fits the definition of a per se taking.[101] In contrast, the dissent argued that the restriction at issue did not amount to a taking.[102] The dissent believed that this case was more consistent with *Penn Central* doctrine than with per se taking precedent.[103] Additionally, the dissent noted the important policy implications this case will have on important future regulations, despite the majority's attempt to limit its breadth.[104]

A. Majority Opinion

The majority acknowledged that a regulation that results in the physical appropriation of property creates a per se physical taking.[105] According to the majority, the physical appropriation in this case is the right of labor organizations to invade a grower's property.[106] The Court argued that the regulation was more than a mere use restriction because the landowners' right to exclude had been given to third parties.[107] Therefore, the Court concluded that government-authorized physical invasions of land are takings, often in the form of servitudes or easements, that require just compensation.[108]

---

[97] *Id.* at 341.

[98] *Id.* at 315 (finding that there were no "reasonable, investment-backed expectations" for the temporary moratoria).

[99] *Id.* at 337.

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

[101] *Id.*

[102] *Id.* at 2083–84 (Breyer, J., dissenting).

[103] *Id.* at 2089–90 (Breyer, J., dissenting).

[104] *Id.* at 2087–88 (Breyer, J., dissenting).

[105] *Id.* at 2072.

[106] *Id.*

[107] *Id.*

[108] *Id*. at 2073.

To justify its conclusion, the Court cited *Causby*, *Kaiser*, and *Nollan* as examples of easements imposed by the government through the physical intrusion of the land or deemed mandatory to the owner's use of the land.[109] It noted that when a leasehold is taken—i.e., some servitude or easement is given to a third party without compensation to the landowner—the action is a per se taking, regardless of whether it is temporary in nature.[110] The Court found the durational element of the alleged taking inconsequential to the determination of taking.[111] For example, the Court analogized to *Causby*, where the flights were intermittent as opposed to continuous, and *Nollan*, where the Court predicted a taking would have existed even if the mandatory easement for public beach access across the family's home was for less than 365 days out of the year.[112] However, the Court noted that because the right to exclude had been taken in this case, it did not matter that no easement was created for the government under state law.[113] The Court also found cases such as *PruneYard* to contain subtle differences which allowed the access regulation to proceed without finding that a taking had occurred.[114]

Lastly, in response to the dissent's forewarning of government regulations that may cease to be valid following this holding, the majority expressed three limitations of the holding's future application.[115] First, the Court noted that the distinction between trespass and takings will remain untouched.[116] Thus, just because someone has committed a trespass does not mean she has appropriated the right to exclude; the analysis of trespass and takings will remain distinct.[117] Second, the Court reemphasized that government-imposed limitations on property, which are consistent with longstanding restrictions on property, will not be affected by the holding in this case.[118] Such restrictions include qualified nuisances, land entry out of necessity, and officers who are carrying out legal duties, such as

---

[109] *Id.*

[110] *Id.* at 2074 (citing Tahoe Sierra Preserv. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002)).

[111] *Id.* at 2075.

[112] *Id.*

[113] *Id.* at 2075–76.

[114] *Id.* at 2076–77 ("Unlike the grower's properties, the PruneYard was open to the public, welcoming some 25,000 patrons a day. Limitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public.").

[115] *Id.* at 2078.

[116] *Id.*

[117] *Id.* at 2078–79. The Court uses *Arkansas Game & Fish* to illustrate how the nuisance of trespass and takings is still distinguishable. Ark. Game & Fish Comm'n v. United States, 568 U.S. 23 (2012).

[118] *Id.* at 2079.

arrests.[119] Finally, the Court said that property owners may have to give up their right to exclude as a condition of receiving certain benefits.[120] Using *Nollan* as an example, the Court equated the "nexus" test required for conditional use permits in zoning restrictions to illustrate when government access may be allowed.[121] Another example, and one more closely aligned with the present case, is health and safety inspections, which are conditioned on permits, licenses, and registrations to provide the benefit of public safety.[122] The Court concluded that none of these limited categories would provide refuge to the current case's regulation and held it is a taking that required just compensation.[123]

B. Justice Breyer's Dissent

Joined by Justices Sotomayor and Kagan, Justice Breyer disagreed that the California regulation constituted a per se physical taking of property.[124] Instead, the dissenters concluded it was a mere use restriction—i.e., a restriction on the right to exclude rather than an appropriation of a right of access to the property.[125] The dissent argued that the prior caselaw was instructive and, therefore, this case should have been evaluated under the *Penn Central* factors.[126] According to the dissent, by refusing to conduct such analysis, the majority threatened to make the most basic forms of government regulation either overly complex or impractical.[127]

The dissent contended that there is a per se taking only where the government directly appropriates land for its own use or creates a permanent invasion of the property.[128] In this case, the dissent argued that the government did not take for itself any interest in property.[129] Unlike prior examples of per se takings in the Court's jurisprudence, where the government creates an easement for itself or a third party or takes some

---

[119] *Id.*

[120] *Id.*

[121] *Id.* The nexus test the Court described is one used under zoning law to decide if a condition imposed on a conditional use permit has some relation to the use sought via the permit. In the *Nollan* case, the Court implied that an easement restriction could have been a condition if it met that relational nexus. The test itself is specific to zoning ordinances and use restrictions. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 836 (1987).

[122] *Cedar Point Nursery*, 121 U.S. at 2079.

[123] *Id.* at 2079–80.

[124] *Id.* at 2081 (J. Breyer, dissenting).

[125] *Id.* at 2083 (J. Breyer, dissenting).

[126] *Id.* at 2082 (J. Breyer, dissenting).

[127] *Id.* at 2081 (J. Breyer, dissenting).

[128] *Id.* at 2082 (J. Breyer, dissenting).

[129] *Id.* at 2083 (J. Breyer, dissenting).

other leasehold interest, there had been no easement here.[130] Additionally, the dissent noted that, contrary to the majority's analysis, there was no appropriation of a right to exclude from the property owner to labor organizations.[131] Rather, there was a restriction merely on the *use* of the property owner's right to exclude when the regulation allowed a labor organization to temporarily invade the property.[132]

As for a permanent invasion, the dissent contended that the permanence element of per se takings is *necessary* under the Court's takings doctrine.[133] For example, in *Loretto*, the Court specifically ruled that "not every physical invasion is a taking," and the dissent noted the only difference in justifying it as a taking was the permanence element at issue in that case.[134] Additionally, *PruneYard* dealt with similar facts and was not found as a taking because, even though the government physically invaded the property to give access to third parties, the invasion was limited and temporary in nature and was therefore evaluated under the *Penn Central* factors.[135] The dissent saw these cases as direct precedent for evaluating the current case under *Penn Central* rather than a per se analysis.[136]

Lastly, the dissent discussed concerns over the holding's broad application. Specifically, the dissent pointed out that local governments occasionally grant temporary access to land for a multitude of policy reasons.[137] According to the dissent, however, these regulations may now be unconstitutional.[138] The dissent focused its concerns on the majority's third proposed limitation—that a landowner may be required to give up her right to exclude in exchange for certain public benefits.[139] The dissent questioned what benefits are included and whether the expansive "health and safety" category laid out by the majority actually fits within the category of benefits provided.[140] In its conclusion, the dissent credited the merit of the third limitation and argued that the current regulation fit squarely within the limitation's scope due to the benefits of labor peace, greater community health and education, and higher standards of living for the public.[141] For reasons relating mostly to the practical application

---

[130] *Id.* at 2082 (J. Breyer, dissenting).

[131] *Id.* (J. Breyer, dissenting).

[132] *Id.* (J. Breyer, dissenting).

[133] *Id.* at 2082 (J. Breyer, dissenting).

[134] *Id.* (J. Breyer, dissenting); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982); *see supra* Section III, Part A.

[135] *Cedar Point Nursery*, 141 S. Ct. at 2084 (J. Breyer, dissenting).

[136] *Id.* at 2083 (J. Breyer, dissenting).

[137] *Id*. at 2087.

[138] *Id.* at 2087–88 (J. Breyer, dissenting).

[139] *Id.* at 2089 (J. Breyer, dissenting).

[140] *Id.* (J. Breyer, dissenting).

[141] *Id.* (J. Breyer, dissenting).

and consequences of the majority's holding, the dissent found the regulation should have been analyzed under *Penn Central*, which would have allowed for greater flexibility in its analysis, rather than as a per se physical taking.[142]

V. COMMENT

The Court, through clever wordsmithing and an overemphasis on minor snippets of takings caselaw, mischaracterized the Board's regulation as a physical appropriation of land to reach an outcome desirable to certain members of the Court. The majority accurately acknowledged that some physical appropriations of property are per se takings and that not all physical intrusions will inherently constitute a physical taking.[143] However, in *Cedar Point*, the Court cherry-picked from its precedent rather than reading the body of law as a whole. Missing from the Court's takings jurisprudence is a claim that temporary physical access to a property constitutes a per se physical taking with no *Penn Central* analysis required. The Court's rationale to reach this new rule is a misleading depiction of takings law.[144] The consequences will be felt most by other government regulations seeking to take temporary action for the public welfare.

Despite the majority's misguided application of previous decisions, the carveouts presented by the Court should have provided a pathway to a different holding in *Cedar Point*. Under the majority's third limitation—which included owners who give up their right to exclude as a condition of receiving general benefits for the common good—the dissent argued that the regulation at issue in *Cedar Point* was one that sought to impose a temporary restriction in exchange for common benefits.[145] These benefits apply to both the employer and the public more generally.[146] As the dissent pointed out, the California legislature identified benefits when it created the Agriculture Labor Relations Act and the Board established regulations to further those benefits.[147] Whether these benefits are enough to justify the regulation, or whether the regulation effectively "goes too far," is another matter—one which is directly considered under the "government action" prong of the *Penn Central* analysis.[148] This regulation should have been analyzed under *Penn Central*'s factors to

---

[142] *Id.* at 2089–90 (J. Breyer, dissenting).

[143] *Id.* at 2074 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435, n.12 (1982)).

[144] *See supra* Section III.

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

[146] *Id.* (J. Breyer, dissenting).

[147] *Id.* (J. Breyer, dissenting).

[148] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

clarify the bounds of future government regulations and permit government action that is beneficial but could intrude on some private property interests in a temporary way. However, the *Cedar Point* Court ignored *Penn Central* and its analysis altogether—a decision that will affect many important government regulations.

Additionally, legislatures are typically tasked with promoting the public welfare. They are in charge of identifying benefits for the common good and creating laws and regulations to carry out those benefits.[149] Under the majority's reading, that discretion has now moved from the legislature to the judicial branch. Courts must now decide from the outset whether a regulation has some benefit to the public welfare with no balancing of other factors which *Penn Central*'s test afforded previous regulations.[150] This expansion of judicial power will only increase the difficulty for legislatures to perform their duties. A power usually reserved to elected officials will now be subjected to an unelected judge's discretion. This decision will ultimately add traffic to the court system with claims over various regulations in nearly every state in the country as judges determine which benefits promote the public welfare under an unarticulated standard seemingly set forth in *Cedar Point*.

In its wake, *Cedar Point* calls into question many forms of government regulation of property, several of which are necessary to operate as a more closely connected society with a wide range of industries that affect various populations. There are valid concerns from the states themselves that current and future government regulations that allow temporary access to private property to promote the public welfare will be undermined by this precedent.[151] For example, a Nebraska statute

[149] The Supreme Court has explicitly stated this idea when discussing the spending powers of Congress. The Court decided that what constituted the needs of the general welfare was for the legislature and not for the courts. *See* Helvering v. Davis, 301 U.S. 619, 644 (1937). Additionally, the Court has noted that the police power of a state extends beyond just health and safety but is also "to protect the well-being and tranquility of a community." Kovacs v. Cooper, 336 U.S. 77, 83 (1949).

[150] *Cedar Point Nursery*, 141 S. Ct. at 2080. Because this case included information where a legislature had stated a beneficial purpose for the regulation to the public and those to whom the regulation targets, it may be assumed that the Court does not give deference to the legislature's findings, but rather decides it for itself. *Cedar Point Nursery*, 141 S. Ct. at 2089 (J. Breyer, dissenting).

[151] Amicus briefs were filed by both states and local governments that were concerned over the future application of a rule now found in the majority's holding. *See* Brief Amici Curiae of Virginia, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, And Washington in Support of Respondents, at 2, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (No. 20-107); Brief of Local Governments as Amicus Curiae in Support of Respondents, at 3, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (No. 20-

authorizes officials to enter private homes to observe and visit with foster care families.[152] Similarly, an Ohio statute allows access to nursing homes at any time by officials to ensure compliance with various laws and standards relating to the care of the elderly population.[153] Both of these statutes, among others, may now be called into question in the courts and found unconstitutional under the Fifth Amendment, dependent only on a court's discretion as to what constitutes a health and safety inspection for the public good as required by the majority's limitation.[154] Additionally, as some amici pointed out in their briefs, governments regularly restrict the right to exclude through local housing and public accommodations laws and specifically through anti-discrimination laws.[155]

As for the agriculture workers in this case and other unionized workers across the country, *Cedar Point* has decreased access to information about labor organizations and limited workers' ability to exercise their rights. Access to information is one of the most important factors in increasing union membership.[156] Agriculture workers who have access to union resources are more likely to have better working conditions and fairer pay.[157] When the California legislature sought to improve the general welfare, it found that the benefit of better working and living conditions for its agriculture workers would increase public welfare at large.[158] Research supports the finding that access to labor organizations increases living and working standards for *everyone*, not just the

107). *See e.g.*, NEB. REV. STAT. §§ 43–1303(5), 43–1301(3) (2018); OHIO REV. CODE § 3721.02(B)(1) (2021).

[152] NEB. REV. STAT. §§ 43–1303(5), 43–1301(3) (2018).

[153] OHIO REV. CODE § 3721.02(B)(1) (2021).

[154] *Cedar Point Nursery*, 141 S. Ct. at 2079.

[155] Brief of Local Governments as Amicus Curiae in Support of Respondents, at 13, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (No. 20-107). *See* Heart of Atlanta Motel v. United States 379 U.S. 241, 258–59 (1964).

[156] *See* Gosia Wozniacka, *Less than 1 Percent of US Farmworkers Belong to a Union. Here's Why.*, CIVIL EATS (May 7, 2019), https://civileats.com/2019/05/07/less-than-1-percent-of-us-farmworkers-belong-to-a-union-heres-why/ [https://perma.cc/JZB3-PQFN].

[157] A 2021 study from the Bureau of Labor Statistics found that the median full-time weekly earnings of union members was $1,169 as opposed to their non-union counterparts who earned a median of $975. *News Release, Union Members—2021*, BUREAU OF LAB. STAT., U.S. DEP'T OF LAB. (Jan. 20, 2022, 10:00AM), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/52UH-SV8U]; Josh Bivens et al., *How today's unions help working people*, ECON. POL'Y INST., (Aug. 24, 2017), https://www.epi.org/publication/how-todays-unions-help-working-people-giving-workers-the-power-to-improve-their-jobs-and-unrig-the-economy/ [https://perma.cc/WT5D-KWUP] (last visited Apr. 18, 2022).

[158] The dissent and Act both found that the intention of the regulation at issue was to benefit the public welfare more generally, as well as the agriculture worker population more specifically. *Cedar Point Nursery*, 141 S. Ct. at 2089 (J. Breyer, dissenting).

population the organization is intended to serve.[159] The Court, through its devotion to overly broad property rights, has denied labor workers a fair opportunity to engage in unionized work. More consequentially, the Court has denied the state an ability to promote the welfare of its most vulnerable populations as its elected officials see fit, instead providing the bench with ultimate authority.

VI. CONCLUSION

Overall, the majority's opinion puts important state regulations at risk and increases the complexity of an already difficult area of the law, making a practical and consistent application near impossible. The Court's change in takings jurisprudence is a sharp deviation from the existing caselaw that leaves negative consequences to important state regulations. The effects of the Court's holding will not only endanger important government functions but will also have a negative impact on the vulnerable populations that many similar regulations aim to protect. Additionally, the Court has expanded its power by appropriating legislative functions to itself in determining what constitutes an acceptable benefit to the general welfare. The Court's misinterpretation of decades of takings jurisprudence strengthens territorial property rights but does so at the expense of government functions instituted to protect the safety and welfare of the people.

[159] *Unions help reduce disparities and strengthen our democracy*, ECON. POL'Y INST. (Apr. 23, 2021), https://www.epi.org/publication/unions-help-reduce-disparities-and-strengthen-our-democracy/ [https://perma.cc/S4QU-ARLC].